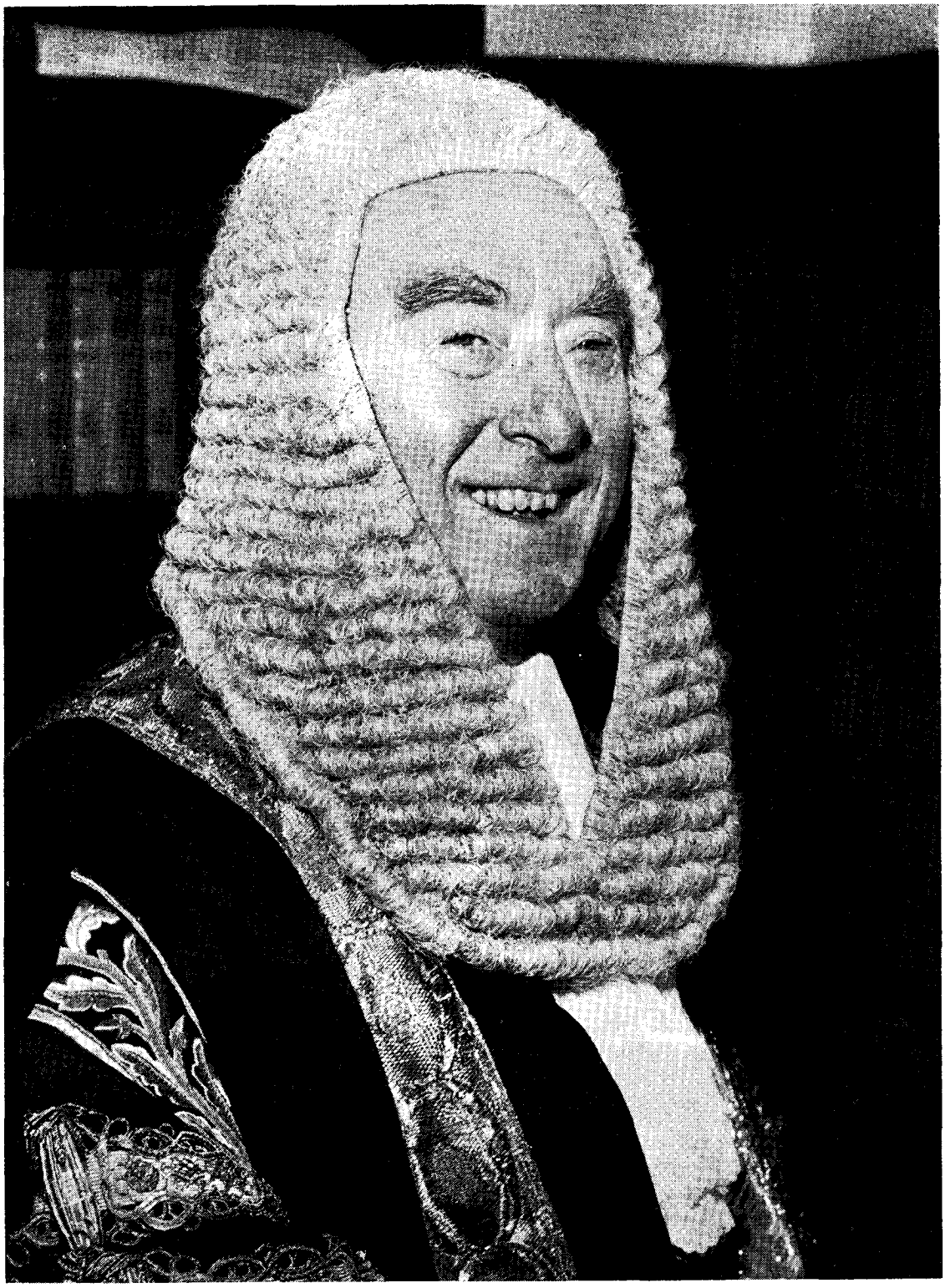
16th Triennial Conference
New Zealand
Law Society

Wellington 3-8 April, 1975



THE RIGHT HON LORD ELWYN-JONES, LORD CHANCELLOR OF GREAT BRITAIN

The New Zealand
LAW JOURNAL

5 AUGUST 1975 No. 14

THE CONFERENCE OPENS

The 1975 New Zealand Law Society 16th Triennial Conference was held from 3 to 8 April in Wellington. The Opening Ceremony took place in the Town Hall, attended by over 1,300 delegates and guests who were entertained as they gathered with music by Mr Maxwell Fernie OBE, the City Organist, by massive banks of floral decorations and by huge polythyrene mobiles that showed how susceptible the scales of justice really are to a small shift of their point of balance.

The platform party comprised their Excellencies the Governor-General and Lady Blundell, his Worship the Mayor of Wellington and Mrs Fowler, the Lord High Chancellor of Great Britain, the Right Honourable the Chief Justice and Lady Wild, the Honourable the the Attorney-General and Mrs Finlay, Judge G A Gesell and Mrs Gesell, the President of Lawasia (Mr Soelistio), the President of the Law Society of England and Wales (Mr E H S Singleton) and Mrs Singleton, the President of the Incorporated Law Society of Ireland (Mr W A Osborne) and Mrs Osborne, the President of the Canadian Bar Association (Mr W L N Somerville QC) and Mrs Somerville, the President of the Law Council of Australia (Mr K F O'Leary) and Mrs O'Leary, the President of the Law Society of Fiji (the Hon Karam Ramrakha), and Mrs Ramrakha, Miss F Namazie (representing the Law Society of Singapore), the President of the New Zealand Law Society (Mr L J Castle) and Mrs Castle, the President of the Wellington District Law Society (Mr M J O'Brien QC) and Mrs O'Brien.

THE MAYOR OF WELLINGTON, MR MICHAEL FOWLER: "Your Excellencies, Lord Chancellor, Mr Minister and Mrs Finlay, the Rt Hon Sir Richard Wild and other distinguished guests and ladies and gentlemen:

"It is my privilege on behalf of the City of Wellington to welcome you, and I do so sincerely, as does my wife Barbara, and I welcome particularly those persons who are attending this legal conference from foreign places such as the Pacific Basin, the Americas, Europe and . . . Auckland. With great respect to our Auckland friends, I should explain that we in Wellington have smarted for 135 years, because we set up a fairly good town council here in 1840, and Governor Hobson acting upon Auckland legal advice, closed us up.

"I am humbled of course by the eminent persons who are attending this conference, who even exceed in stature and number those who graced your last conference here in 1960, and of course also the preparations which have gone into the organisation of this gathering. I might also say I was humbled to be given a copy of the Law Journal which accurately recorded your 1960 conference in Wellington, and the speech which was given at the opening by my predecessor in office, Sir Francis Kitts, who gave a most learned address and I do not attempt to emulate him.

"I am however less humbled on two counts today. Firstly I always feel incognito in this splendid garb, and further I have arranged three things in your honour. Firstly I am about to speak to the Town Clerk concerning granting of the freedom of the city to all the people who are attending the legal conference, and secondly I, personally, and the Council are arranging enormous publicity for you, and thirdly I have personally arranged that there will not be an earthquake while you are in this building.

"Turning to the last point first, as is so often

your own wont, and dealing with an earthquake; were I to arrange a conference of my own profession, which is the Institute of Architects, I sense that I would not be able to put off an earthquake in this building and we would hold it in the car park opposite.

"Incidentally, on this point I should say that in the public esteem there is a very big difference, quite obviously, between the professions of architecture and the law. We have at Victoria University a magnificent building called the Hunter Building. My elder son is an undergraduate in the Law Faculty, and the Law Faculty at the end of last year were removed hastily from the Hunter Building because of its earthquake risk. My younger son is in the Faculty of Architecture, and that faculty has been hastily moved in to the Hunter Building.

"Turning now to the first point second, namely the freedom of the city, I do want to commend to you the very wonderful decorations that are gracing this hall and its entrance, for which I know the Law Society has made a small contribution, but I am aware, as no doubt you are, that it is very good value for money. I recall the last investiture when her Majesty the Queen was on this stage, and in my opinion and those of the officers and councillors, the hall is even more beautifully decorated than on that occasion.

"While you are with us, we also have arranged for four days of splendid weather, which we guarantee, and I also want to say while you are here I hope you enjoy amongst the many freedoms of the city, the opportunity to look at the parks which are designed and maintained by the same gentlemen who have decorated this hall.

"You might indeed have time—at least some of the wives—to look at our Art Gallery, which we rather grandiloquently call "our" art gallery. It is the *'National* Art Gallery' (we sold our birthright some years ago to that gallery) but nevertheless it is worth a look.

"While you are with us you will enjoy, apart from the freedom, some of the responsibilities which devolve upon Wellingtonians, principally the complete unconcern of central Government for the Wellington City Council.

"The final point which we as citizens of Wellington have arranged for you, is publicity. I must tell you that informed members of the citizenry of Wellington still recall and talk about some of the papers of the 1960 Conference here, and we await with great interest the full publication of the papers to which you are addressing yourselves shortly; principally those ones involved with social concern, and I note with great interest that Mr Colin Patterson will be talking on 'Private Right and Public Interest', Mr Ludbrook on 'Law and the Polynesion' and Mr Justice Beattie on 'The Right to Life'. These subjects are of great major general interest, because in the Wellington situation we find that it is not so much the winds of change that are assessing or affecting the Wellington City Council, but virtually a blast of concern about the social rights of citizenry throughout this region, and we look as always to the Law Society to define as accurately as it can these concerns, which are now of major concern throughout New Zealand.

"The Wellington City Council has long held the Law Society in high repute. It has had amongst its members many eminent members of your Society. We have now a deputy mayor and two other councillors whose advice and wisdom is greatly respected upon the Council, and even in our last triem we had four people, including our Deputy Mayor, Mr John Jeffries, who was one of our great councillors.

"So, gentlemen and ladies, and honoured guests, I do welcome you all on behalf of the city of Wellington, and wish you well for your conference."

MR M J O'BRIEN QC (Chairman of the Conference Committee): "Your Excellencies, your Worship and Mrs Fowler, Lord Chancellor, Mr Attorney and Mrs Finlay, Chief Justice and Lady Wild, other distinguished guests, ladies and gentlemen:

"I wish first to thank your Worship for the very kind words of welcome which you have spoken on behalf of the city of Wellington. As my predecessor, Mr H R C Wild QC (as he then was) said in this hall 14 years and 351 days ago (allowing for leap years), there is here today the greatest assembly of lawyers that has ever met in New Zealand. Moreover, it is the most representative and most distinguished assembly yet to meet in this country. The flags of 11 nations fly above this hall today. It is fitting, Mr Mayor, that such a gathering takes place in the capital city of our country; and gratifying that you, as its first citizen, together with Mrs Fowler, should find time from your busy round to be with us, and to welcome our guests.

"From the outset, we have had the utmost co-operation from your predecessor Sir Francis Kitts, and latterly from your good self, down through the various departments of the City administration. Foremost among them, I mention the Parks and Reserves Department. Its



Ronald D Woolf

The Chairman of the Conference Organising Committee, and Wellington District Law Society President, Mr M J O'Brien QC (standing) welcomes guests and delegates. Also pictured are (back row, from left) Mrs E H T Singleton (England); Judge G A and Mrs Gesell (USA); aides-de-camp; Mr I A McCutcheon (Town Clerk, Wellington); Miss Ross (lady-in-waiting); Mr S H Soelistio (Indonesia); Mrs W A Osborne, Mr W A Osborne (Ireland); Mrs N Naritomi, Dr N Naritomi (Japan); Mrs K F O'Leary, Mr K F O'Leary (Australia); (front row, from left) Mrs L J Castle; Lady Wild, the Rt Hon, The Chief Justice of New Zealand, Sir Richard Wild; Mrs W Fowler; His Excellency, the Governor-General of New Zealand, Sir Denis Blundell; Mr O'Brien; Mr Michael Fowler (Mayor of Wellington); Her Excelcency, Lady Blundell; the Rt Hon The Lord Chancellor, Lord Elwyn-Jones (Great Britain); Mrs M Finlay, the Hon Martyn Finlay QC (Attorney-General for New Zealand); Mrs M O'Brien.

Director, Mr Galloway, and his officers have gone to enormous trouble to decorate this hall and its foyer, as well as other venues; and they are helping out in a little surprise at the ladies' function this evening.

"The problem of finding venues was a major one. So too was the problem of decorations. That problem might not have been so difficult if we had told Mr Galloway that at this Conference we were to have ladies on the platform. This is a small contribution to International Women's Year but, if I may say so, Your Excellency Lady Blundell and ladies, a major contribution to the attractiveness of this morning's scene.

"If your Excellency Sir Denis Blundell will excuse me, I simply say how pleased the members of the Wellington District Law Society, of which you are a former President, are to have you and Lady Blundell with us today. I leave it to Mr Castle to express the welcome of the New Zealand Law Society.

"Again, may I be excused Lord Chancellor, Mr Attorney, Chief Justice and Judge Gesell

and other members of the judiciary if (for the reason that other references will be made) I refer but briefly to your presence.

"Lord Chancellor, in paragraph 1171 of Vol 8 of the 4th Edition of *Halsbury* one finds that there is no requirement of law, but merely a practice, that Lord Chancellors be legally qualified. Despite that, and despite the fact that you have told us that your greatest claim to fame was that your brother had not only played rugby for Llanelly, but that he had also captained Wales, we welcome you as an eminently qualified Keeper of the Great Seal; the holder of the highest judicial office in England, now happily as from mid-1974, clearly freed from all of the disabilities previously relating to appointment.

"Mr Attorney, you are the titular head of our profession. We welcome you and Mrs Finlay not only in that capacity, but also as representing the Government.

"Chief Justice, you have been insistent to me throughout that this was a practitioners' conference, and that you and your judicial brethren would gladly fit in with any plans that were made. That, sir, is greatly appreciated, coming as it does from one who in 1960 stood with such distinction in the place in which I stand today. To you and Lady Wild, welcome.

"Judge Gesell, you will more formally introduced to us tomorrow. May I today say how much we appreciate the considerable trouble you have taken at short notice to come with Mrs Gesell to be with us.

"To the other other visiting Judges, Sir Anthony Mason, Sir Mostyn Hanger, Mr Justice Selby and Mr Justice Arulanandom, to all of whom the Chief Justice will refer, I welcome you on behalf of the practising profession.

"I come now to the distinguished guests on the platform. It is appropriate that I start with the old world and, in particular with the President of The Law Society, Mr Singleton, and Mrs Singleton. Mr Singleton is the first incumbent President of The Law Society to visit us. Rightly, sir, is your Society called *The* Law Society. None of us question the right to that title. Just as much of our law has come from England, so too do we pay great heed to the rulings of The Law Society, and of course, of the General Council of the Bar. With you, we welcome Mr David Owen, Private Secretary to the Lord Chancellor, and Mr Hamilton from Northwood in Middlesex, both of whom are in the hall.

"Also from the old world, we have another first in the presence of the President of the Incorporated Law Society of Ireland, Mr Osborne and Mrs Osborne. The correspondence reveals that when the Council of that Society was told of the names of the Chairman and Joint Secretaries, namely O'Brien, McGrath and Shanahan, it was decided that a representative must come. Remembering those three names, William Anthony Osborne of the firm of Brown & McLaren wrote and said he was coming but that he felt like a foreigner. If I tell him that the Maori name of the harbour on which last night's reception was held is Whanganui-a-Tara—the great waters of Tara—he may feel less of a foreigner. In any event, he with all of you, will I am sure feel at home among us.

"We cross the Atlantic and welcome Judge Gesell, whom I have already mentioned, and the President of the Canadian Bar Association, Mr Somerville QC and Mrs Somerville. No President of that Association has been with us before. You, sir, come to us from Toronto. We are happy to have you here not only in your personal and official capacity, but also because recently the Ontario Law Reform Commission produced a voluminous report on the administration of the Ontario Courts, a report which followed three years or more of study; and Court structures and administration is a matter in which we in New Zealand are very interested. Secondly you come from the province which is the home of Osgoode Hall where the Law Society of Upper Canada conducts practical training courses for students—that too is a matter which we in New Zealand are currently studying. We hope therefore to learn much from you in informal talks which will no doubt take place.

"I now cross the Pacific and note with pleasure the presence of representatives from so many countries which share our common ocean.

"Starting geographically in the north, we have Dr Nabuo Naritomi, representing the Japan Federation of Bar Associations, of which he is a former President, and Mrs Naritomi. Dr Naritomi is truly an international legal figure, because he was formerly a member of the Council of the International Bar Association, is now a life member of that Council, and is an honorary member of the American Bar Association. We trust sir, that your presence signifies the beginnings of a new link among lawyers in the Pacific.

"Coming south-west, we have in the hall, from Hong Kong, two New Zealanders—Mr Penlington, whose name figured in the international news last year, and Mr McLean, who

formerly practised in this city. They are accompanied by their wives—the former a daughter of a Napier practitioner, and the latter a former Wellington practitioner. We are glad to see you, too.

"Moving further south-west, I have already mentioned Mr Justice Arulanandom from Malaysia. From Singapore, we have a lady whose name is not on your programme and who is not Mrs Ramrakha. I refer to Miss Namazie, representing the Law Society of Singapore. Perhaps her presence here is yet another recognition of International Women's Year, as she is the first lady representative of that Society, or of any Society, to visit us officially. We are delighted, Miss Namazie, that at the last moment you could come.

"In my tour I now cross the Straits of Malacca and come to Indonesia which is the home of Mr Soelistio, the President of Lawasia. It is a very great honour to have you with us sir, together with Mr Geddes, from Sydney, the Secretary General of Lawasia, who is in the hall. The New Zealand Law Society, and its District Societies, have a firm commitment to the principles which inspire Lawasia. A significant number of New Zealand practitioners are individual members of Lawasia and have been so since its foundation. They recognise the very great importance of closer contact between lawyers in this region—for the purposes of protecting human rights, facilitating dealings between our respective citizens, and endeavouring to ensure that a true rule of law, inspired by principles of political, social and economic justice replace the rule of force, and the damaging consequences of inequality. The current President of Lawasia could not meet with us at a more important time in the rapidly developing history of the region.

"Down now across the Timor Sea to the vast continent of Australia. Australian practitioners are here in large numbers, as befits our kinship, and are headed by the President of the Law Council of Australia, Mr K F O'Leary, accompanied by Mrs O'Leary. New Zealanders and Australians know each other so well, sir, that there is no need for me to say more than that we are meeting together as close friends. Among your countrymen here present are representatives of all the Law Societies and Law Institutes of all the Australian States whose Presidents met together with senior officers of the New Zealand Law Society in Wellington yesterday.

"Finally on this tour, we swing back up the Pacific to the lovely islands of the Fiji group, to mention the youngest Society here represented, namely the Law Society of Fiji, and its President, Mr Ramrakha. As you know, sir, many New Zealand practitioners attended your Society's Conference in mid-1974 and were very hospitably received. We hope to return something of that hospitality to you. There has been a link between us for many years, because so many of your members were educated at our universities, including among them the first Fijian Judge, now the Ombudsman, Mr Justice Moti Tikaram, of whom a number of us, including myself, have the fondest student memories.

"I have concluded my tour, and come back home. I first mention the presence of widows of former Judges and of officers of our Society. Your presence exemplifies the fraternity of our profession; I am so glad that you can be with us. I next greet Sir David Smith and the Honourable A L Tompkins, former Judges of the Supreme Court, and Sir Alexander Turner, a former President of the Court of Appeal. I mention also that I have had a letter from Sir George McGregor, who is confined to his home, but would very much like old friends to call on him. To those other pillars of our judicial system, namely the Maori Land Court Judges and the Magistrates, I extend a warm welcome. I also note with pleasure the presence of our Ombudsman, Sir Guy Powles, and Mr Ken Smithers, formerly here as President of the Law Council of Australia and appointed last week as the first Ombudsman for the State of New South Wales.

"To those practitioners and their wives who have come from New Zealand districts outside Wellington, I say thank you for coming. It is your presence in such great numbers which will ensure the success of this Conference.

"To all of you who have come from far and near, on behalf of all those wearing white and yellow identification tags, I use the old gaelic expression, with which Mr Osborne will be the familiar—coed mille faile—a hundred thousand welcomes.

"Thirty-two months ago, the Steering Committee over which I have been privileged to preside was formed, and later convenors were appointed. With the assistance of two dedicated and diligent Joint Secretaries, those people have worked very hard to ensure your well-being and enlightenment over these six days. We will not cease working until you go home. We are available for any further assistance which you may require. I apologise for some errors which appear in the Conference documents, particularly for the mis-spelling of any names, and for any

other mistakes we may have made. True contrition must be accompanied by a firm purpose of amendment, and I promise faithfully that my committee will not make the same mistakes again.

"With a sense of confidence in the planning, a sense of hope in the fruitful culmination of that planning, and a profound sense of relief, I have much pleasure in handing over the Chairmanship of the 16th Triennial Legal Conference to the President of the New Zealand Law Society, Lester Castle, with whom I have had the happiest of associations since he took office."

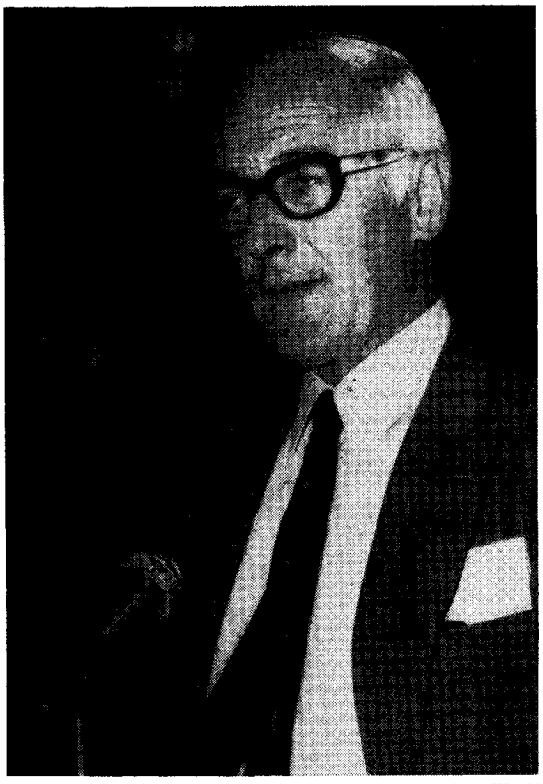
MR L J CASTLE (President of the NZ Law Society): "Your Excellencies, Your Worship and Mrs Fowler, My Lord Chancellor, Mr Attorney and Mrs Finlay, Chief Justice and Lady Wild, other distinguished guests, ladies and gentlemen:

"Those who are unable to be here and the community generally and perhaps some Wellington lawyers closely associated with the preparation for the Conference may be asking 'Why a conference?' I suggest that first and foremost the purpose of law conferences is to discuss the law as it is and to endeavour to find ways of improving it—striving to serve the highest ideals of justice in the interests of the public whom the profession of the law is designed to serve. Nothing in human affairs should be foreign to the legal profession or outside its scope.

"Thus a wealth of experience is brought to this law conference which provides for a great pooling of wisdom. In every sense but particularly in this context do I echo on behalf of the whole legal profession in New Zealand the warm-hearted welcome extended by the President of the Wellington District Law Society to all our distinguished overseas visitors. I also extend an equally cordial welcome to all New Zealand practitioners, all of whom add to that pool of wisdom.

"Fifteen years ago, be the same a little more or less, at the conclusion of the conference in Wellington, the then President of the New Zealand Law Society, the late Mr David Perry, posed the question, was the Law Society doing all that it ought to be doing, and saying all that it ought to say, in the public interest and in the protection of the rights of the people of this country and in the defence of their liberties? We might ask ourselves the same question today —are we as a profession continuing to identify ourselves with the needs of the community, the public whom the profession of the law is designed to serve? The scope and content of the papers to be presented throughout the conference are, I believe, symptomatic of our concern for the rights of the people and the defence of their liberties; and yet there is much to be done.

"Law reform has been the subject of much discussion at previous conferences and is still a lively topic, as indeed it should be. I quote the Hon Mr Justice Barry of Victoria: 'I am aware that in some quarters it is almost a term of reproach to say of a Judge or a lawyer that his approach to a legal problem is of a sociological



Ronald D Woolf

The President of the New Zealand Law Society, Mr Lester Castle

nature. I feel that the law can only serve its true end in maintaining order in society if the principles and rules which the law formulates to meet social needs are examined in the light of these social needs and a new perusal is undertaken from time to time as those social needs change.' Some of us would welcome the establishment now of a permanent law reform and legal research body and I believe there are ways of funding such a body without recourse to Government grants.

"In expressing the gratitude of all those here assembled to the President of the Wellington District Law Society and his committee, we are all mindful of the insatiable demands on the time, energy and expertise of these busy people and although an opportunity will be taken later in the conference to express in a more formal way our joint and several thanks to them, it is appropriate for us at the commencement of these proceedings to extend our warmest congratulations and thanks.

"I believe that nothing but good can come from a conference such as this, and I trust that each and every one of us will derive benefit and a measure of satisfaction from the work and the play of the ensuing days; commencing as we are, in the words of William Shakespeare, with 'the uncertain glory of an April day'.

"Might I at this juncture briefly refer to the saddening event which has occurred within the profession in the last few days, and that is the death of a former Attorney-General of this country, the Hon H G R Mason who served the legal profession unstintingly for many years and with great distinction.

"Our Minister of Justice and Attorney-General, representing the New Zealand Government, has had a long and distinguished career as a practising lawyer in addition to being a Member of Parliament for 14 years. I now invite the Hon Dr A M Finlay QC, as the leader of our profession in New Zealand, to address us."

DR A M FINLAY (Attorney-General of New Zealand): "Your Excellencies, your Worship, Mr President (and may I intervene at this stage sir to thank you very sincerely for your well-deserved and timely tribute to my former colleague Rex Mason), my Lord Chancellor, Judge Gesell, your Honours and other distinguished guests, brothers and sisters in law:

"The event we are inaugurating here today is a triennial one, and in the year 1975 a politician needs no reminding of another event which comes around with tiresome frequency every three years. In the United Kingdom it is supposed to be a five year cycle, but there I am sorry to say they appear to have developed a deplorable appetite for too much of a good thing; a cliff-hanging addiction that has now spread to Australia.

"Incidentally one of my favourite novels is *The Catcher in the Rye,* and I am wondering if we can now expect a sequel, *The Thatcher on the Heath.* Let us hope at all events that this bad habit goes no further, but whether it does or not, I might well take a leaf out of the Law Society's book, and recommend my colleagues to follow its example, by preparing participants for the impending encounter. In the Society's "Guide for Court Witnesses" the bar has offered some sage and timely advice designed to provide what were formerly sitting ducks with at least a few air-worthy feathers and a morsel of cover. What would become of elections, I wonder, if we on the hustings were to follow their example and command the electors as you have advised witnesses, mutatis of course, mutandis, keep calm, refuse to be hurried. Don't memorise your interjection, "let it all hang out" in President Nixon's elegant phrase. Don't let a politician fluster you, put the boot in first, or disconcertingly, don't make jokes, they will probably be bad ones—which might be good advice to candidates too.

"However, to turn to your happening here, your conference, I must congratulate the Society on the breadth and substance of its agenda. Of the eight papers presented for discussion only one would really be described as dealing with lawyers' law, the traditional fare of earlier conferences. The law it seems, yields nothing to the ladies in its zeal for liberation with wigs being burnt as freely as bras.

"Two other topics are concerned with the work of the Courts, and in particular with the important question of their capacity to meet and fulfil public needs. The remaining five range the boundaries of our current economic and social ills. 'Private Right and Public Interest', 'Inflation', 'Product Liability and Consumer Protection', 'Justice for Polynesians'; this is the very warp and woof of politics today, and when you throw in that searing hot potato 'The Right to Life', the occasion seems to me likely to become less a conference and more a marathon talk-back session.

"I must comment however, that Mr Justice Beattie will earn the gratitude of the community for his unemotional and factual analysis on this much debated and voltatile topic. Without entering into the controversy here, which of course wkould be entirely in appropriate, may I say I welcome his recommendation but respectfully query, whether an inquiry into the Lane Report, limited to what he describes as 'a clinical yet ethical approach', would necessarily explore all avenues.

"I have said enough about controversies and conferences. To conclude may I turn to something more congenial. We have it on the authority of W S Gilbert, and this would be I am sure the last gathering to question it, that the law is the true embodiment of everything

that is excellent. It has, he reassures us, no kind of fault or flaw, and our honoured guest the Lord Chancellor, he says, embodies the law. So much my friends and colleagues, for legal fiction and poetic licence. Now for reality and fact. It was my good fortune to encounter Lord Elwyn-Jones at a recent meeting of Commonwealth Law Ministers, and lost no time at all in succumbing to his spell, which goes to show that if the fashion for susceptible Chancellors went out with Gilbert, and in case suspicion should rest on a New Zealander of the same name who displays undeniable interest in people's susceptibilities, I hasten to add W S Gilbert, there still remains a breed of susceptible attorneys, and when you have heard and met him, you too will find your defences crumbling.

"I offer you my own felicitations and good wishes, and a warm welcome to this conference from the Government, with a special word of appreciation from the Minister of Finance. I am sure the profession's gratifying earning rate as recently published, has not escaped his attention, and must produce a gleam in his eye and a glow of satisfaction, every time he fingers a lawyer's income tax return."

MR CASTLE: "We have already been reminded that our Chief Justice has had considerable experience of law conferences. Mr O'Brien has made reference to the fact that as President of the Wellington District Law Society he presided at the opening of this conference in 1960. Long before this however, in 1947 he was a Joint Secretary for a Law Conference, and it is proper for me to refer also to the fact that during the years 1962-64 he gave distinguished service to the New Zealand Law Society as a Vice President. It is my pleasure to call on the Rt Hon Sir Richard Wild, Chief Justice of New Zealand, to address us."

SIR RICHARD WILD (Chief Justice of New Zealand): "Your Excellencies, Mr President, Mr Mayor, My Lord Chancellor, Mr Attorney, your Honours, your Worships, ladies and gentlemen:

"My first words must be to express to the Mayor of the City, and to the Wellington and New Zealand Presidents, the gratitude of those I represent, who are the Judges and also the Magistrates of New Zealand, for your welcome and for inviting us to what you primarily have said, is a practitioner's Conference. Our appreciation is shown most eloquently by the extent of our attendance. Of our 21 Judges in office, 17 are here today and the remaining 4 have regrets as well as good reasons for not being with us. Then as well there are 15 Magistrates and 2 Judges of the Maori Land Court. For every one of them, Mr President, I do most sincerely thank the New Zealand and the Wellington Law Societies for all the enjoyment, hospitality and good fellowship we are about to receive.

"On behalf of them all I join you in this welcome, specially to our judicial colleagues who have come from overseas.

"Lord Elwyn-Jones has been here before as Attorney-General and we are delighted to have him back. He comes this time as the fourth Lord Chancellor to visit New Zealand. Some of us present this morning will recall the sense of awe with which we received our first visiting Lord Chancellor, Viscount Jowitt, in 1951. But that was a fleeting call, his real business being in Australia, and we saw comparatively little of him. Some years later Wellington broke new ground by bringing the first really distinguished overseas guest to a New Zealand Law Conference. It was in this very hall on just such a morning as this almost exactly 15 years ago that we welcomed Lord Chancellor Kilmuir. Then in 1969 we had the honour of Lord Chancellor Gardiner's presence at the Centennial Conference at Rotorua.

Viscount Kilmuir was a Scot. Lord Gardiner is an Englishman. The name of your principal guest today speaks for itself.

"Wales means different things to different people: choirs or coalmines, leeks or protesting students. But in this country, Lord Chancellor, Wales means rugby—and as you have been told, our guest today is not only Lord High Chancellor of England and Keeper of the Queen's Conscience—he has the further distinction of being the brother of a man who captained Wales at rugby.

"He had not been off the plane for three minutes before he was telling we what had happened when New Zealand last played at Llanelly. The President mentioned the Lord Chancellor's brother's captaincy—but he did not give the year. I have done the necessary research, and I may say it has taken some time because to find one particular Jones in the list of Welsh Internationals is like picking out one particular straw in a haystack. It was 1924 when Idris Jones captained Wales. It was also 1924 when the touring All Blacks played both Wales and Llanelly, and every schoolboy of my generation knew the result. Now, Mr President, I propose a pact for the duration of this Conference. If the Lord Chancellor promises not

to mention what happened when the All Blacks played Llanelly in 1973 we will keep quiet about what New Zealand did to Llanelly and also to Wales in 1924.

"I have heard it said that until he was 10 or 12 years old the Lord Chancellor spoke only the language of the hills and valleys. I must leave it to the President to trace the path he has since followed all the way to the Woolsack. For my part, on behalf of all my judicial brethren, I welcome him specially as the head of New Zealand's highest Court. He has many duties other than judicial and, since he took office, he has been able to sit only once as a Judge—but that once, we are greatly honoured to know, was in presiding when the Judicial Committee heard one of our New Zealand appeals. I will say nothing of the result except that rather more of the profession now favour preserving the appeal to the Privy Council. We are greatly honoured, Lord Chancellor, that you have put the Great Seal into Commission and come to see us.

"Judge Gesell has been a member of the Federal Judiciary since 1968 as a Judge of the US District Court for the District of Columbia. His reputation as a liberal thinker and an incisive speaker, particularly in judgments on such issues as a abortion and access to official records (which are not unknown here), has spread through the common law world. We congratulate the firm of Chapman Tripp & Co, not only on their centennial but also upon their inspired generosity in sharing the occasion by bringing amongst us Judge Gesell, whose presence we warmly welcome and whose address we eagerly await.

Sir Anthony Mason was Solicitor-General of the Commonwealth of Australia when I first met him a few years ago, since when he has passed quickly on to the Court of Appeal of New South Wales and so up to the High Court of Australia. Chief Justice Barwick who has been with us on earlier occasions has obviously thought so well of the New Zealand Law Conference that he wants to share it with his colleagues and we are very glad that the choice has fallen on Sir Anthony Mason as a Justice of the High Court for which we all in New Zealand hold the highest respect.

"Mr Justice Arulanandom is, of course, well known to the profession in New Zealand having been here before as a member of the Bar and a very active supporter of Lawasia. Today we welcome him back as a Judge of the High Court of Malaysia and the first member of his Court to attend a New Zealand Law Conference.

"Then there are Sir Mostyn Hanger, Chief Justice of the Supreme Court of Queensland, and Mr Justice Selby of the Supreme Court of New South Wales who is one of the six Judges sitting in divorce. We greet them both warmly, and specially because they represent our nearest neighbours in the judicial world. Chief Justice Hanger presides over a Bench of 12 Judges in Queensland which has a population of almost two million, and Mr Justice Selby represents the Bench of, I think, 38 Judges which serves a population of 4½ million in New South Wales. There may be a lesson there—for anyone interested in Court structure.

"I understand Mr President that participation is the keynote of this 16th Conference. If that includes the Judges, as I believe it does, then we are fortunate in our guests. It so happens that I have had the good luck to meet each one of them before and I am as certain that they will enjoy themselves as I am that you will find in them good Conference value.

"I thank your Society for inviting them and us, and I wish the Conference the great success that all your careful organisation deserves for it."

MR CASTLE: "Thank you Chief Justice, and thank you too Mr Attorney. Your Excellencies, it can be fairly stated that you are no strangers to Law Conferences either. We remember that Your Excellency as President of the New Zealand Law Society, from 1962 to 1968 presided over the triennial law conferences in 1963 and in 1966, and that the legal profession in this country was honoured by the presence of your Excellencies at Christchurch in 1972 when you graciously opened the conference there. As a lawyer of renown in this city for many years, prior to your appointment as High Commissioner for New Zealand to the Court of St James, it is indeed gratifying to all of us that you have consented to be present this morning for the purpose of opening this, the 16th Triennial Conference of the New Zealand Law Society, the Society over which you presided with such distinction in earlier years. It is now my privilege, sir, to ask you so to do."

SIR DENIS BLUNDELL (Governor-General of New Zealand): "Mr President, Mr Mayor, my Lord Chancellor, Mr Attorney, so many other distinguished guests and visitors, ladies and gentlemen:

"I do thank you all for that welcome to me to start me off once again to have the privilege of declaring a triennial conference of the New Zealand Law Society open. I wondered how I

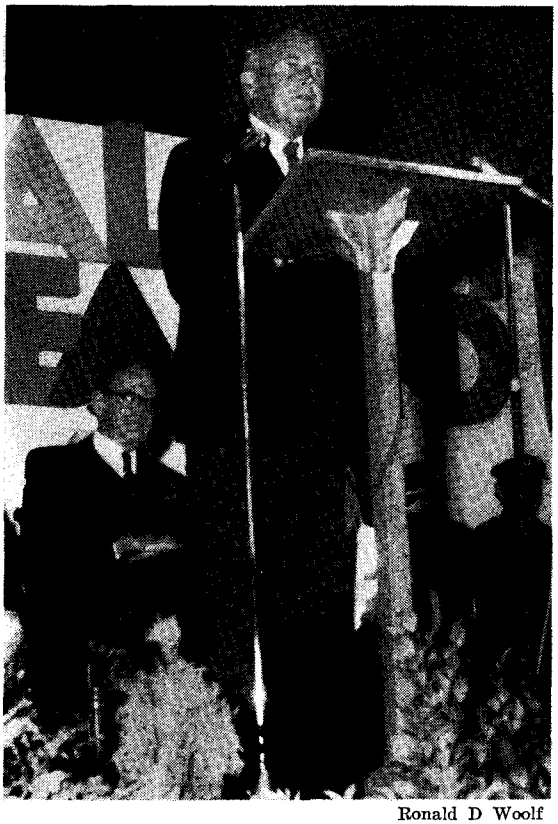
have not detected in part in your enthusiasm some feeling of relief that in this particular innings of *Law-talk* the last batsman has come to the crease, and when he departs hence, you can get up and stretch your legs, talk yourselves instead of having to listen, and enjoy a cup of tea or coffee.

I don't propose, indeed I may not, keep you long. On the cricketing analogy it was never my custom to stay long at the crease, and in this context I have some added problems in that if I was to play a stroke of any ball that had some sort of political swerve in it, I would immediately be given out either lbw or by snicking it into the slips, and in any event I have been told by my captain, the President, that this is a limited over innings and it ought to finish round about 10.30 or 10.35.

"But there are one or two things of course, which I wish to say. Firstly to tell you all again what I am sure you must sense for yourselves, how grateful my wife and I are to be invited to come back and for a short period to be amongst our legal friends, to get the feeling of what goes on in one of your great Conferences. I questioned when I was invited to open this conference, whether I should accept, having had the privilege of doing so at your Christchurch conference. Maybe I was unduly selfish in accepting, but I did want once more to have this opportunity which as you will understand as Governor-General is denied me to such a large extent, of being back with my wife June, here amongst friends. We are indeed so glad to do so and nothing could be better, than that this should be in our own home town where so much of our life has been enjoyed by us both.

"I also would like to add a personal welcome from my wife and myself, but also on behalf of the people of New Zealand to you, Lord Chancellor and all the other visitors we have from overseas. As many of you will know, I have long been an immensely strong supporter of the legal profession in New Zealand participating as fully as our numbers and our distance from other lands permits in gatherings of lawyers in other countries, and inviting them back to our own. It is not only the fact that these are always pleasant meetings, but I do so firmly believe that the common interest of lawyers, and in general the influence which they exercise in their respective countries can make another and a significant contribution to what we all hope for so fully, better understanding and more peace and good will on this earth.

"May I be forgiven if I mention just two of those present because I have special reasons for doing so. Firstly of course may I refer to Lord Elwyn-Jones and my special reasons there is that although we had our first meeting in 1965 on the occasion of the Commonwealth Law Society Conference in Sydney, and again later here in Wellington, my wife and I saw a lot of him and Lady Elwyn-Jones during our term of office over in London. May I interpolate here, I am sure I speak for you all when I say how much we regret that Lady Elwyn-Jones was not able to be with his Lordship on this visit.



Ronald D Woolf

His Excellency, Sir Denis Blundell, formally declaring the Conference open

"But that period of some four to four and a half years was roughly divided in our case with a Labour administration and a Conservative administration. So I met Lord Elwyn-Jones, firstly in the political sphere, and then for the last two years or so when he was back actively practising as a QC, and thoroughly enjoying himself. We are both members of Grays Inn and we met there on a number of occasions.

"So from what you have heard from others,

or from what you have read yourself, I can add the positive statement of the very high regard in which he is held in legal, political and public circles in the United Kingdom. Not for him this gibe about the equity depending on the length of the Chancellor's foot. I don't know how long his foot is, but I do know, metaphorically speaking, he will pirouette and thoroughly enjoy fun and laughter and company, and as probably you will hear when he addresses us later this morning, at the appropriate occasion he can be firm, helpful and most understanding. It is so good to have a man of that calibre with us.

"The other visitor I would like to mention is Mr Justice Arulanandom, because he was one of the group who were at Canberra in 1966 under the chairmanship of my friend and opposite number in Australia, Sir John Kerr. We formed the framework of Lawasia, and at that point of time as you have heard, the Judge was just one of us, a practising solicitor and barrister, and he showed his understanding of things because he appreciated our difficulty in pronouncing his name correctly, and at a very early stage announced he would respond to the name "Fred", and I have always known him as that since then. I would like you to know that both in the deliberations leading up to the formation of the Constitution of Lawasia, and in the activities that went with it he played a very great and useful part, and I am so glad to know he is with us and we have so many others actively participating in Lawasia, and indeed you are going to have a gathering of Lawasia during the course of this Conference.

"Finally on more general matters, may I say what pleasure it does give me to see this great big town hall our ours very largely filled by so many of you from so many parts of New Zealand, as well as our visitors from other countries. This shows the whole-hearted support of the profession to one of these conferences. Something about which those responsible for the organisation have qualms generally, up to about the last two months before the conference is to be held: the registrations do not come in; is the thing going to be a flop? Have we overcommitted ourselves? And so forth. But here once again I understand you are present in such numbers and it must be a joy Mr President, to you and all those in the Wellington District Law Society and elsewhere helping you, to see such a great turnout.

"I always like to add my pleasure in seeing so many of the wives being here as well, because I so firmly believe this just adds something very needed in the overall enjoyment of a conference such as this. It is good to see these lovely chains of colour, fine complexions, everyone looking so well after the function last night. I don't know if I have told you this before, but I myself always enjoy the welcome which one of the Lords Mayor of London gave to the ladies present at a dinner at which my wife and I were present. He said, 'Well ladies, as you can see I am very happily married to my wife, but I always remember my old dad used to say to me even if you are on a diet there is no reason why you shouldn't look at and enjoy the menu.' This always applies to us elderly gentlemen. We are so glad to see you here with us.

"In the special pew reserved for the High Commissioner for New Zealand in Westminster Abbey is a beautifully bound volume of the 1822 Oxford Edition of the Book of Common Prayer. From time to time while present there for various services I used to glance through passages in this book, but there was one statement in the foreword which caught my attention, and which I have tried since to memorise, and which I think reads something like this: 'There was never anything by the wit of man so well devised or so sure established, that has not in the course of time been corrupted.' And I am sure they used the word 'corrupted' in the sense of merely changed or altered. And I have found as life goes on how very true that is in so many respects. It is I would think too absolute a statement as applied to the law, because however much from time to time, civilisation may vary them in practice, there must be some immutables in the meaning and abrogation of law. We have heard one definition of that this morning from Mr Attorney. You will find there are an infinite variety of definitions and descriptions. I myself admire very much the definition given by Samuel Johnson when he says 'Law is the last result of human wisdom applying human experience for the benefit of the public', and on that basis alone you can see why, as human experience never stands still, sometimes progressing, other times sadly gets into retrograde, but it never stands still, the statement which I have read applies at least to a very large extent to the law in all its forms, to law as made by the politicians, or any other law making institution. The administration of justice in the courts, and the operation of it in practice by the legal profession. And having myself now been some seven years away from the active engagement in the profession of law, but having during that time also kept a close interest in matters of law, reading the annual reports of the New Zealand Law Society and

the Wellington District Law Society, reading your legal publications including the recent changeover to *Law-talk*, I have noted very great changes within the profession itself. Of these I only wish to speak on one aspect which has already been covered to some extent by Mr Attorney, and this is to note with great pleasure and satisfaction the general trend of our profession, and the general realisation of our profession for the need for that trend, of becoming more closely associated with all sectors of the public, being concerned to ensure that no-one suffers from lack of legal advice or representation, and being concerned yourselves in trying to adjust some of the social wrongs which are within our community and always will be.

"I was asked recently in Auckland by a young fellow, did I think the legal profession should be leading in the forefront with changes which go along with the changes in our society, or should the legal profession remain somewhat conservative and await the result of political activity or the jelling of Society's viewpoints on various matters. It is I believe a combination of both. In those spheres where the practising lawyer, from his own knowledge can see some change in the law is necessary then I believe that as in the past his clamour for that change should be loud and insistent. And he is speaking of something of which he has direct personal experience.

"But there is the other broader field, which I will call the social field and in which I definitely would include industrial relations. Here I would suggest the lawyer may have a few advantages over the layman from the occasional case or other instruction which comes before him, but in general the lawyer in the field is just one other member of the community and here, if I presume to advise a group of very wise people, the legal profession should hasten slowly; makes its contribution, yes, but not jump out too quickly into the front, because for sure you will only know a certain part of the story, and the need to know as much about the story as you can, I think is evidenced by this amusing story that some of you like me will have read in Sir Basil Neal's splendid book *Farewell to the Assizes,* and he recalls the occasion, and I think it was in Wiltshire, where a man went to his accountant and said 'Look, I am deeply concerned about the fact that really for some years I have not been paying my full income tax and have been keeping some money back; what should I do about it?' and was given the good advice to go to the Revenue people, make a clean breast of it, pay the whole lot and that would be the easiest way out of the difficulty. The accountant said to him 'About how much have you got stashed away?' 'I have something in the order of £5,000 and it is all in notes.' The accountant said 'Right, I will make the appointment and you bring that along and just make a clean breast of it, and I am sure you will be glad of the result.' So all this was arranged, along he came with the sack and in front of the Commissioner he put it upside down, and out flowed hundreds, thousands of notes, and when it was all counted up he found there was over £8,000, and he was so dumbstruck he said 'Good heavens, I have brought the wrong bag'. So always exercise caution.

"I come now to what I am here for, the opening of the conference. You have a splendid comprehensive programme arranged. We would wish we could stay longer to participate fully, but that is not possible in our position. We know too and thank on your behalf those very many who have worked so hard behind the scenes to arrange for this conference to be a success. I am sure, as I am sure you are as well, that this will be an interesting, a rewarding and most enjoyable conference.

"I have great pleasure in declaring open this 16th Triennial Conference."

THE RT HON LORD ELWYN-JONES, LORD CHANCELLOR OF GREAT BRITAIN

Lord Elwyn-Jones was, as Sir Elwyn-Jones, Attorney-General while Labour was in office from 1964 to 1970. He was appointed Lord Chancellor on the return of Labour to office in March 1974. He is a distinguished lawyer who had been a Member of Parliament since 1945 until his elevation to the House of Lords in 1974, representing the Plaistow Division of West Ham from 1945 to 1950 and since the latter year, West Ham South. At the 1974 general election he was returned as Member for Newham, South.

Born in October 1909, he was educated at the University of Wales (Aberystwyth) and at Gonville and Caius College, Cambridge, where he was a scholar and President of the Cambridge Union. He was called to the Bar in 1935 and became a Queen's Counsel in 1953. He is a QC of Northern Ireland and has appeared as Counsel in the Malawi Courts of Ethiopia, Kenya, Libya and Singapore.

In 1934, Lord Elwyn-Jones organised the legal defence of Austrian Socialists for the British National Council of Labour. Two years later he accompanied a delegation which visited Austria to press for an amnesty for imprisoned Socialists. Before joining the Government in 1964 he was a trustee of Amnesty International, and he has attended, as observer, political trials in Germany, Austria, Hungary, Poland, China and South Africa, where he also attended the enquiry into the Sharpeville massacre.

He served throughout the second world war, first in the Royal Artillery and from 1943 to 1945 in North Africa, Sicily and Italy as Deputy Judge Advocate in the rank of Major. In the latter year he was one of the British prosecuting counsel at the Nuremberg Trials.

Elected to Parliament in July 1945, Lord Elwyn-Jones was for five years Parliamentary Private Secretary to the then Attorney-General. Between 1949 and 1964 he was Recorder of, successively, Merthyr Tidfyl, Swansea and Cardiff, and in 1968 was Recorder of Kingston upon Thames. (The Recorder is the principal legal officer of a city or borough having a separate Court of Quarter Session, of which he is the Judge.)

After becoming Attorney-General Lord Elwyn-Jones led the British delegation to the Anglo-American Parliamentary conference in Bermuda in February 1965, and later in the same year attended the Commonwealth law conference in Sydney, going on to Wellington to study the work of New Zealand's Ombudsman prior to the creation of a similar office in Britain. He advised on the Rhodesian situation, and was with the Prime Minister and the Commonwealth Secretary for talks in Salisbury and also attended the meetings on board HMS *Tiger* and HMS *Fearless*. In the winter of 1968-1969 he led a legal good will delegation to India.



Ronald D Woolf

The Lord Chancellor delivering his address

Lord Elwyn-Jones is vice-president and a former chairman of the Society of Labour Lawyers, and a former treasurer of JUSTICE (the British section of the International Commission of Jurists). He is a Bencher of Gray's Inn and a former member of the Bar Council.

LAW REFORM AND LEGAL SERVICES

The Lord Chancellor's Address

MR CASTLE: Your Excellencies, the Rt Hon the Prime Minister and Mrs Rowling, my Lord Chancellor, your Worship and Mrs Fowler:

First may I say how pleased we are, Prime Minister that the exigencies of the day have permitted you and Mrs Rowling to join us this morning in spite of the imminent arrival of a Head of State.

My Lord Chancellor: We know of your office as the Keeper of the Queen's Conscience, as the Keeper of the Great Seal and as Speaker of the House of Lords; we know something of some of your predecessors in office, three of whom have visited these shores.

We have learned from the Red Book of the Exchequer that about the middle of the thirteenth century the Lord Chancellor received five shillings per day together with three cakes, a quantity of wine, a large candle of wax and a considerable number of ordinary candles. We understand that over the years there have been modest increases in these emoluments.

At all events we acknowledge in the presence of Her Majesty's representatives in New Zealand, our gratitude to Her Majesty for allowing you to leave Great Britain to attend, inter alia, our Conference as our honoured guest. We also express our regret that Lady Elwyn-Jones was unable to accompany you.

May I say that such is the calibre and renown of the Rt Hon the Lord Elwyn-Jones, the invitation of the New Zealand Law Society, which preceded the last British General Election, was upon the basis that "irrespective of the will of the people in the United Kingdom", we would all be delighted if you could grace this gathering. In the result you are at this conference as Her Majesty's first subject, ranking after the Royal Family and the Archbishop of Canterbury.

Lord Elwyn-Jones is a freeman of his boyhood town, Clanethly (I will spell that, LLANELLI) and was for nearly 30 years a member of Parliament for a London constituency. As we would hope, and notwithstanding the *Halsbury* "escape" clause, our guest of honour is no stranger to the law. Having been educated at the University

He has appeared as counsel in the courts of Ethiopia, Kenya, Malawi, Libya and Singapore; saw service in World War II and was one of the British prosecuting counsel at the Nuremburg trial.

As Sir Elwyn-Jones our guest was Attorney-General in the Labour Government from 1964 to 1970 and was appointed Lord Chancellor in February 1974 and contemporaneously a life peer. Whilst Attorney-General he visited our country in 1965 to study the work of our Ombudsman prior to the creation of a similar office in Britain. He organised the legal defence of the Austrian socialists for the British National Council of Labour; he advised and continues to advise on the Rhodesian situation; has visited many countries in the interests of Amnesty International; and participated in a legal good will delegation to India.

In addition to his Parliamentary duties he has served as Recorder of a number of cities (principally Welsh), was a former Chairman of the Society of Labour Lawyers, and a former Honorary Treasurer of JUSTICE (the British section of the International Commission of Jurists).

There are many other biographical attributes which time does not permit me to mention. We are privileged to have a man of such stature in our midst and I now ask you sir, the Lord Chancellor of Great Britain, to address us.

LORD CHANCELLOR OF ENGLAND, LORD ELWYN-JONES: Your Excellencies, Mr President, Prime Minister and Mrs Rowling, Your Worship and Mrs Fowler, distinguished guests, ladies and gentlemen: This invitation to address this distinguished assembly has done me very great honour and I am greatly touched by what has been said about me, and if I may say so, particularly by the terms of the invitation you sent me to come. The account that has been given of me bears more relation to fiction than to fact, but I am very gratefulfor the references, nevertheless. I am particularly happy that my vicarious glory as the brother of a Welsh captain has been referred to. He played for Llanelli, and there was a famous occasion when Albert Jenkins, one of our great players, went to take the Llanelli team to play the gentlemen of Blackheath and they turned up one man short. The captain graciously said "Oh we will give you one of our reserves", and Albert said "Don't worry, we shan't be short long." I hope

Mr President I shan't be short long either.

Sometimes when my fellow countrymen are good enough to say nice things about me it falls to me to remind them that the last Welsh Lord Chancellor was Judge Jeffries. It is a very great office. I have been described this morning as the Keeper of the Queen's Conscience. When that was put to Lord Birkenhead he said I find it hard enough to keep my own. But it is indeed a great office, and we have in my list of predecessors no less than four saints. There are some who did not deserve that canonisation.

When I was here last in 1965 I was the Attorney-General, and he has been traditionally known in England as the Bulldog of the Crown. I don't know what designation was given to Dr Finlay but I am happy to say that when I was the Attorney I was called the Corgi of the community. As you know, the Corgi is a *Welsh* dog. On this occasion I follow in the footsteps of Lord Gardiner—and other distinguished predecessors—who was your guest in 1969. The special marks of his term of office as Lord Chancellor, during which I was his alter ego in the House of Parliament, was reform of the substantive law and reform of the machinery of justice. Changes in the law had of course been made before, by piecemeal Parliamentary action and by judicial decision tempering both the severity and rigidity of the law. Law Revision Committees manned by Judges, practising lawyers and academics, meeting when they could from time to time, produced valuable reports to which Parliament sometimes gave effect or Governments pigeonholed. When we came into office in 1964 we decided that a statutory body of full-time Law Commissions working independently of the Government but reporting to the Lord Chancellor should be set up. Since then the two Law Commissions, one for England and Wales and the other for Scotland, have produced a series of Reports in the preparation of which they have made continuous use of the experience and wisdom of the legal profession and of the academic world. Parliamentary Draftsmen assigned to the Commission have produced Draft Bills embodying the Report Proposals. This has obviously eased Parliamentary process during the decade of the Law Commissions' existence and I am glad to say there is a good record of giving parliamentary statutory effect to their recommendations.

The most far-reaching changes proposed so far have been in family law. The law relating to dissolution of marriage has been transformed and the single ground of divorce now is the irretrievable breakdown of the marriage. Later legislation has greatly increased the power of the courts to order financial provision for the economically weaker partner of the marriage on a decree of dissolution. Certain parts of the law which were no longer acceptable to contemporary feelings have been abolished: thus, claims for damages for adultery have gone and so also actions for breach of promise of marriage. Such a delight to the practitioner in my early days. On this last topic the thinking of the Law Commission was much influenced by the 1968 report of the New Zealand Torts and General Law Reform Committee. With you, as with us, the days of Sergeant Buzfuz are over I hope.

The systematic reform of family law now taking place involves issues extending far beyond the breakdown and dissolution of marriage. The long task of reforming our law of family property, initiated by the Law Commission in 1968, is beginning to bear fruit. Last month I introduced in the House of Lords a bill which empowers the Court to order that proper provision shall be made from the estate of a deceased person for his widow, children and other dependants. No longer can they be overlooked or neglected in favour of a Cats Home—not, as I hastened to assure the House of Lords a fortnight ago, that I have anything against cats. The joint ownership of property by husband and wife is another topic of great social importance, and I hope shortly to receive from the Commission a report dealing with joint ownership of the matrimonial home.

The position of the child in the family is a matter of deep concern to us all. At the end of last year I introduced in the House of Lords a Bill dealing with the adoption, custody and care of children. Much remains to be done to ensure that our law makes proper provision for the security and welfare of the child.

In the field of the criminal law, the Commissions expect soon to produce a succession of Bills which will lay the foundation of a modern and comprehensive criminal code. In addition, liability for injuries to unborn children, numerous aspects of the land law and of the law of landlord and tenant, the law of damages for personal injuries and administrative law have also engaged the attention of the Commissions and they have not neglected the humdrum business of tidying up the statute book by the repeal of provisions no longer serving any practical purpose and by the consolidation of enactments still in use. I hope you will not be unduly alarmed when I tell you that by now, only two chapters of Magna Carta still remain.

The work of the Law Commissions is not done behind a wall of secrecy. The Commissions operate openly, and at every stage from planning to provisional proposals and final report they invite and encourage criticism. This is a method of work which I am most anxious to encourage. Law reform is not just a field for specialists. It must be carried along by the wishes and instincts of a whole people.

The major reform in the machinery of justice which was initiated under Lord Gardiner and carried through by my predecessor Lord Hailsham is linked with the name of one who is not a lawyer at all, namely, Lord Beeching. We were a little worried about his appointment because he had closed down so many railways and we thought that might be the fate of the Courts too. Happily this did not come to pass. It was he who presided over the Royal Commission on Assizes and Quarter Sessions which led to the 1971 Courts Act. This unified the higher Courts system and eliminated much overlapping and waste of judicial time and resources. Without these improvements and the setting up of Crown Courts manned by Circuit Judges, I disturbing increase which has taken place in the incidence of crime during the last 20 years. Violence and vandalism have been growing and are causing particular concern in certain areas of our cities, especially as a significant number of the offenders are young people.

Although we cannot be complacent, crimes of violence however only make up about five percent of all crimes. Young people appear to be responsible for a growing share of them, but the 'typical' juvenile offences are theft and vandalism rather than violence. I have noted with interest that your own Children and Young Persons Act which came into force three days ago is in many ways similar both in philosophy and in legislative framework to our own Act of 1969.

I believe that the thinking behind our Act was right. The main objective was to concentrate the treatment of children and adolescents in trouble, whether or not they had been before the Courts, in the hands of local authorities who already had certain existing child care responsibilities. The delinquent child is no longer seen as particularly different from other children who may have special needs or be at risk.

Progress in developing the necessary facilities to support the Act has been less speedy than both central Government and local authorities themselves would have wished. Most of the criticisms have related to the lack of secure accommodation for remand and assessment and for longer term treatment in custody for the minority of particularly unresponsive and difficult young people. These facilities are expensive and they cannot be developed in a hurry. Nor is it easy to recruit suitable staff to undertake this arduous and often discouraging work. Despite our present financial difficulties, the Government are diverting considerable resources into this field.

I hope that in implementing your Act you may be spared some of the problems of local and national liaison and local co-operation which we have had to face. Being a more compact country, you undertake your social welfare work nationally through the central government department of social welfare and not, as with us, through individual authorities. Much, no doubt, will depend on the ability of the Social Welfare Department to create confidence in the programmes which will be made available to young people under supervision and to develop the necessary community and residential resources to support the legislation.

We in the United Kingdom will watch the progress of your new Act with sympathy and interest. I am sure that there will be much that we can learn from each other in this, as in so many other fields.

I have been speaking about the reform of the substantive law and of the machinery of justice. Neither good laws nor good Courts are of any value if people do not have effective access to legal advice and legal remedies. Over the last ten years there has been a growing concern in the United Kingdom about what is inelegantly but conveniently called the unmet need for legal services. The problem has been recognised, I am glad to say, by many members of the legal profession and by non-lawyers as well. It has been recognised by the professional bodies and taken up by politicians of all parties.

I have the good fortune to have a statutory Advisory Committee on the workings of our Legal Aid system. Very shortly after I took office it fell to me to lay before Parliament a report of this Committee of a most disturbing nature. The Committee said that they had little doubt that, first:

> "there are many people whose legal rights are, for a variety of reasons, at present going wholly by default; secondly, that some of these are unaware even that they possess such rights; others realise it but either do not know how to obtain help in enforcing them or lack the money or the ability, or both, to do so; thirdly, that there is a severe overall shortage of solicitors in the country and,

mainly for economic reasons, their geographical distribution is very ill-suited to serve many of the poorer sections of the community; fourthly, that there are considerable areas of the law, notably those relating to housing, landlord and tenant matters and welfare benefits, where expert advice and assistance is urgently needed, but is often hard to come by."

In my first speech in the House of Lords as Lord Chancellor, I described this Report as posing a daunting challenge. At the same time, I said that it must be faced.

The legal services issue raises questions about ends and about means. It also raises long-term questions about ensuring the continuing existence of a thriving legal profession capable of handling the problems which people bring to it and about the independence of the service which is offered. The central objective of a legal services policy must be to ensure adequate access to those forms of advice, assistance and advocacy which will enable people to take advantage of the rights the law has given them. This can be seen in the first place as a matter of justice, in the sense that lawyers use the word, namely, of giving equal access to the law to all. This is particularly important in our common law system of procedure where it is largely left to the parties to bring before the Court the matters which are relevant to their case. The fairness and efficiency of the adversary system depend on the capacity of each side to present its case adequately on the facts and the law. I say adequately, but I trust not too lengthily. Advocates should be warned to avoid the fate of counsel who addressed Chief Justice Coburn, and apologised for taking too much time, and the Justice thundered, "Time! You have exhausted time and encroached upon eternity."

Legal service should be directed towards achieving a just procedure and a just outcome. They are part of what our friends in the United States and it is good to see Judge Gesell here would call "due process". At the same time, it is partly a matter of social justice. Many Legislatures have passed legislation intended to give protection and benefits to the citizen in the fields of housing, social security, consumer problems and employment. It is those who are least well off who are most dependent on the protection which the law gives them in these matters and yet often legal help is either not available to or not used by those who most need it in these fields.

There is, I believe, an even wider perspective to legal services policy, namely, legal services as an instrument of community development. We live at a time not just of social change, but of social instability. In many countries, including to some extent the United Kingdom, there is a deep malaise in some of our urban communities, particularly in areas of deprivation. The causes are only partially understood and they certainly include bad housing, unemployment and lack of educational opportunity, all of them different forms of social poverty. One of the elements in this phenomenon is a disturbing alienation from the legal order and the hitherto accepted legal and administrative machinery. It is in just those communities that I have been describing that there are special needs for legal services. It is just these services, I believe, which can restore people's confidence in the law, the Courts and the legal system to redress their grievances, to protect their lawful rights and provide a framework for an ordered community.

What are the means available to us to meet the legal needs of our people? First of all, we look to the private practising legal profession. We look to the Legal Aid Scheme under which solicitors and the Bar can offer their services to clients of modest means in the knowledge that they will be paid a fair rate for the job out of central government funds.

Since the introduction of our new Legal Advice and Assistance Scheme, solicitors are able to offer to those who are financially eligible, a comprehensive service of advice and help in non-contentious as well as contentious matters. Thus the new scheme can be used for making a will for an old age pensioner, for negotiations over a consumer claim or for investigating the details of an accident. For actual court work we have our civil and criminal Legal Aid Schemes.

It is, I must say, a matter of regret to me that the civil scheme is used predominantly for matrimonial and family matters. Some 87 percent of all cases brought under the Scheme come within these headings. I do not for a moment doubt the importance of providing legal help in these cases. What I do doubt is whether the remaining 13 percent accounts for all the other cases where help is needed It is partly a matter of educating potential clients so that they are aware of the availability of a comprehensive service under the Legal Aid Scheme. It is also a matter of encouraging lawyers to adapt their pattern of work to the wide range of needs which undoubtedly exist. I have

seen it as my job to take every opportunity to encourage lawyers to develop greater expertise in the fields of social and welfare law and University Law Faculties to include this in their curriculum.

The bulk of the work being done for people of modest means is dealt with by private practitioners under the Legal Aid Scheme. By itself this is not enough. This was recognised by the Legal Aid Advisory Committee when they recommended in 1970 that salaried solicitors should be appointed to provide an additional legal service. This recommendation was passed into statutory form in the Legal Advice and Assistance Act 1972. The principle of the appointment of salaried solicitors to provide legal services is accepted across the political board and, I would add, by our Law Society.

The detailed arrangements for employing such solicitors are rather an open question where events have overtaken legislative provision. Under the 1972 Act, salaried solicitors would have been employed by the Law Society. It was, however, never intended that the 1972 Act should be implemented immediately. In the meantime, we have seen the establishment of some twenty schemes in different parts of the country involving the employment of salaried solicitors, often as members of a wider team. These are the Law Centres, with three or four lawyers on the staff and set up mainly, so far, in London. One of them, operating in one of the poorest parts of East London is, I am happy to say, assisted by the daughter of the Home Secretary, the son of the Attorney-General and the son of the Lord Chancellor. Other schemes involve solicitors working in Community Development Projects and Citizens' Advice Bureaux. The establishment of these various schemes is usually the result of imaginative voluntary endeavour. Groups of lawyers mostly very young and others, have collaborated to set them up and have obtained finance from various sources including local authorities, charities and the Government's Urban programme. This year I have made emergency finance available to certain of the Law Centres from my own Departmental funds.

All of these schemes have been overwhelmed with work and have fully proved the need for their services. We now know from experience that legal need is often to some extent concealed until the necessary service is provided. The new service has the effect of both demonstrating and meeting the need. This indeed has been a feature of the extension of the social services since the war.

Voluntary endeavour coupled with the imaginative use of available resources has shown the way ahead. Whilst I think there is a role for the Law Society in the setting up of Law Centres, I believe that the pattern of national development must provide a major role for the voluntary sector. This is not to ignore the fact that in any major field involving voluntary bodies financial assistance will often be needed from government sources.

The question of finance raises difficult issues. In the particular field of legal services, for instance, there is strong pressure to extend Legal Aid to the many statutory tribunals which deal with such matters as Social Security, Rent, Employment and so on. Then again, if we could afford it, it would clearly be desirable to raise the financial limits of eligibility for existing services. However, at a time of serious economic difficulties and inflation and in a year when we shall already be spending about £35 million on Legal Aid, Advice and Assistance, in England and Wales alone, advances in these fields are, I fear, unlikely to receive Treasury blessing.

However, we are now undertaking an urgent examination of the nature and extent of the need for legal services for the sections of the community who need legal help and are not getting it. This will be designed to pinpoint the nature of the deficiencies and the best way of overcoming them within the limits of what is now economically practicable.

It is not simply a question of what should be done, but also of *how* it should be done. Provision of financial help to Law Centres and other legal schemes in the voluntary sector raises delicate issues about the responsibility of those who run these schemes and the independence of the service which is provided.

We in England have nearly 500 years of Legal Aid history starting with a Statute passed in 1495. So has Scotland, in a Statute of 1424 which provided that (and if there be any Scots present I hope they will forgive me for my Welsh-Scottish failure of pronunciation): "Gif there be onie pure creature, for faulte of cunning, or expenses, that cannot, nor may not follow his cause, the King for the love of God, sall ordaine the judge, before quhom the cause suld be determined, to purwey and get a leill and wise advocate to follow sik pur creatures causes: And gif sik causes be obtained, the wranger sal assyith baith the partie skaithed and the advocatis coastes and travel." 1424—The beginning of legal aid in Scotland.

We have therefore a history of concern for ensuring adequate representation to those who appear before the Courts in criminal and civil matters, irrespective of their means. It is also a history of respect for the independence of the legal profession and the integrity of the relationship between a lawyer and his client. This tradition was firmly upheld by each of our political Parties in the evidence given to the Committee under Lord Rushcliffe which sat during the closing stages of the War. It was this Committee whose recommendations formed the basis of the modern provision for Legal Aid in England and Wales. I think it is of some interest to refer to what the Labour Party said on this matter some 30 years ago—similar views I may say were expressed by other parties:

> "There are obvious objections to the State itself establishing and maintaining Legal Advice Bureaux. Not the least of these objections is that the State itself is directly or indirectly affected by many of the claims upon which such Bureaux would have to advise. Nor, in our opinion is it desirable that local authorities should be entrusted with the duty of establishing and maintaining Legal Advice Bureaux. Differences, political or otherwise, might well arise were a local authority to be held responsible, directly or indirectly, for the advice given in any particular matter. Moreover, it has to be borne in mind that many local authorities . . . are themselves frequently parties to litigation."

The Rushcliffe Committee found itself in complete agreement with these views and they were fully accepted by the Labour Government which gave legislative force to the Committee's recommendations and entrusted responsibility for the administration of Legal Aid to the Law Society. I do not thereby mean to imply that the Law Society is the only agent with sufficient independence to qualify it to be concerned in providing legal services. Nevertheless, the principle then followed was, I believe, a sound one.

Indeed, I would go so far as to say that one of the important tasks of a Lord Chancellor is to be the Minister for the independence of the legal profession and of legal services, with the lawyers of course working in close collaboration with social workers.

I have stated the principle. Like most principles it is difficult of application. It is generally agreed that where some scheme involving the employment of salaried lawyers is established some form of management structure is required. The lawyer should not be employed directly by a Government Department—certainly such a Department as, from the nature of its work, receives a large volume of consumer complaints about the service it provides. The same principle applies to employment by a local authority. On the other hand the lawyer is freed from the normal constraints of private practice and is, indeed, deliberately so freed. Lest however, he should become unresponsive to the needs of the community he is appointed to serve, or fail to provide a service on the basis of the terms agreed with those financing the project, it is important that he should be responsible to some managing agency.

It is at this point that recourse can be had to that great English institution the "buffer committee". Here I am referring to those committees which, while receiving finance from Government sources are themselves independent agents and are expected to apply the finance with imagination and initiative and may I add responsibility. We have seen this in the case of the universities with the University Grants Committee. We have seen it in the case of broadcasting with the BBC. At a more humble level we see it in the case of hundreds of voluntary organisations, particularly in the social welfare fields, which are financed by central or local government but are free to manage their own affairs and pursue their own objectives.

I have devoted some time to a discussion of the new momentum in legal services because of the special chord which has been struck in many Commonwealth jurisdictions, as also in the United States by the recognition of the legal needs of deprived communities. Indeed, this was one of the matters discussed at the Conference of Commonwealth Law Ministers held in Lagos two months ago which the Attorney-General Dr Finlay and I attended and to which he made scintillating contribution. In these developments there is a risk of divisiveness. The arguments for change are sometimes advanced in such a way as to appear to pay scant regard to the achievements of earlier generations. Our profession is by nature one of the stabilising forces in society, suspicious of changes which appear to be put forward either for the sake of change or for reasons which are undisclosed and possibly undesirable. As a profession we can accommodate many shades of opinion, but our fundamental raison d'être continues to unite us, namely, to see that justice is done. It is accordingly of special importance that those who promote change and reform should do so in

such a way that they can carry their professional brethren with them. It is perhaps of even greater importance that those who draw their inspiration from received tradition should recognise that the tradition has itself been maintained by a process of change, and seek out with care and promote the good which is to be found in the proposals of dedicated reformers.

Change brings its advantages and disadvantages, many of them unforeseen. This can be illustrated from the Legal Aid field. There was a time, up to about 15 years ago, when Legal Aid was not being granted in criminal matters to defendants who clearly needed it. There was pressure for more liberality on the part of the Courts in granting Legal Aid, not only from reformers, but also from the Lord Chief Justice of the day, Lord Parker. The old deficiency has largely been rectified. Accused persons are now represented in all serious cases and often in comparatively trivial ones. The result has been an increase in work for the Bar. The Barrister no longer depends, if as Gilbert & Sullivan said he did, on marrying a rich attorney's elderly ugly daughter. This has meant that the difficulty of starting life at the Bar is no longer a deterrent to the potential recruit. This in turn has led to a broadening of the base of recruitment. None of this was a matter of set policy at the time. However, here I must strike a cautionary note. It is incumbent upon us as lawyers to bear in mind the responsibility we owe not only to the Court but also to the community to ensure that the provision of legal aid is not abused in any time-wasting manoeuvres or practices. I have drawn attention in England to the fact that cases are taking longer to try—about 10 percent longer each year—and this at a time when there are more of them, particularly in the criminal field. This inevitably places a heavy strain on the Court machinery. I have invited all concerned to examine the problem—Judges and practitioners alike—while in no way seeking to restrict a client's right to have his case fully and effectively presented.

Mr Holland has referred in an interesting paper to be discussed on Monday morning to the relationship between Legal Aid on the one hand and Court structure and procedure on the other. I would not wish to pre-empt the discussion but I will illustrate this connection further from our own experience in the divorce field.

First of all, it has been amply demonstrated that from the 1950s onwards in England and Wales, there was a close connection between the incidence of divorce and the availability of Legal Aid. As the financial limits for Legal Aid were raised so the divorce rate increased. When financial limits were held down divorce levelled out. The pressure of divorce business was a major factor which led to reform in substantive law, in procedure and in jurisdiction. It was partly the pressure of business on the Courts and it was partly the cost to the Exchequer of financing legally aided cases which led to change. Accordingly, divorce jurisdiction was transferred from the High Court to the County Court. The Divorce Reform Act abolished the matrimonial offence and now we have a system where in the simplest undefended cases not involving children or a financial dispute the whole matter can be disposed of on paper without a single visit to the Court. It is not therefore surprising that one-seventh of all divorces in London are now conducted by litigants in person. Without the pressure arising from legally aided business it is probable that none of these highly desirable changes would have been achieved.

Speaking for myself, I am not dismayed by the increase in the number of litigants in person in divorce cases. There is plenty of other work for the lawyers to do although I have to recognise that their enquiries sometimes place a heavy burden on my Court staff. This year sees the 25th anniversary of the implementation of the English Legal Aid Scheme and if it marks a period during which lawyers are released from one reformed area of the law to turn their attention, as many of them are now doing, to the fields of welfare law, housing law and the law of employment, in addition to the spheres of legislation against sex and racial discrimination, my faith in the vitality of our legal system and of our legal profession will have been well justified.

I know that none of the lawyers who are here will be unaware of the duty expressed by one of my predecessors, Francis Bacon, when he wrote: "Every man is a debtor to his profession and ought to make some return". There is no lack of opportunity for this in all our countries, in the contribution lawyers can make to the reform of legal institutions and to the restatement of the law in a changing world.

And so it is with the greatest pleasure that I bring you the warm greetings of my own colleagues on the Bench and in the legal profession in my country and add to them my good wishes for the success of this 16th Triennial Conference of the New Zealand Law Society.

JUDGE GERHARD GESELL

Judge Gerhard Gesell, US District Judge for Washington, DC, has demonstrated great concern for ethical issues facing the United States and the legal profession, and has boldly upheld the rights of the individual person. Since becoming a Federal Judge in 1968 (a Democrat, he was appointed by Lyndon Johnson), the 64-year-old jurist has delivered several opinions with far-reaching effects on controversial issues.

His first widely noted decision, in 1969, found unconstitutional a 68-year-old Washington, DC, law that made it a crime for a physician to perform an abortion except when "necessary for the preservation of the mother's life or health". Judge Gesell said the law was too vague and that it placed upon the defendant the responsibility of proving that the abortion was necessary. He also pointed out that recent Supreme Court decisions had indicated that "as a secular matter, a woman's liberty and right of privacy extends to family, marriage and sex matters, and may well include the right to remove an unwanted child, at least in the early stages of pregnancy". He urged the government to appeal his decision to the Supreme Court, and predicted that he would be upheld.

The Supreme Court decided the controversial issue in 1973, over-ruling all state laws that prohibited or restricted a woman from obtaining an abortion during the first three months of pregnancy.

In a case that centred on an action brought against the Federal Bureau of Investigation in 1971 for its distribution of arrest records and fingerprints, Judge Gesell ruled that the FBI could no longer distribute such records outside the federal government for other than law enforcement purposes. This meant that the nation's banks and insurance companies, as well as any agency that had contributed fingerprints to FBI's files and that had enjoyed access to the Bureau's fingerprint data no longer had this prerogative.

"A heavy burden is placed on all branches of government," the Judge said, "to maintain a proper equilibrium between the acquisition of information and the necessity to safeguard privacy. Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work and move about in this land."

In June 1971 Judge Gesell refused the US government's request for an injunction halting publication by the *Washington Post* of a series of articles based on the so-called "Pentagon papers". These papers, which dealt with US involvement in Vietnam and were classified for national security reasons, had been transmitted surreptitiously to the press by Daniel Ellsberg, a former Department of Defence employee.

Defending the freedom of the press, Judge Gesell stated: "Our democracy depends for its future on the informed will of the majority, and it is the purpose and effect of the First Amendment to expose to the public the maximum amount of information on which sound judgment can be made by the electorate."

The Judge's decisions on Watergate-related issues contributed to his reputation as an outspoken jurist.

Ruling on the October 1973 discharge of special Watergate prosecutor Archibald Cox, Judge Gesell said his dismissal had been illegal because the terms of his appointment had the force of law and they specified that the special prosecutor could be discharged only for "extraordinary improprieties". The Judge noted that Mr Cox had not been fired for that reason, but because he had insisted upon White House compliance with a Court order.

The ruling helped establish the independence of the next prosecutor. He also took the opportunity to criticise a Bill then before Congress which sought to empower the Courts to appoint a new Watergate prosecutor: "Congress has it within its own power," he cautioned. "The Courts must remain neutral. Their duties are not prosecutorial."

In 1974 Judge Gesell presided at the trial of former White House aide John Ehrlichman and three men who were accused of violating the civil rights of Daniel Ellsberg's psychiatrist. The psychiatrist's office had been burgled in an attempt to get damaging information on Mr Ellsberg after the Defence Department employee had turned the "Pentagon papers" over to the press.

In a pre-trial hearing Judge Gesell rejected the defendants' contention that the burglary was justified for reasons of US national security. He also said the break-in was "clearly illegal under the unambiguous mandate of the Fourth

Amendment". That section of the US Constitution protects citizens against unreasonable searches by agents of the government. "The Fourth Amendment," said the Judge, "is not theoretical—it lies at the heart of our free society." In that same case he described the White House conduct which obstructed former White House aides in preparing their defence as "totally offensive to our entire concept of justice" and threatened to cite the President for contempt. In another case he rebuffed a Senate attempt to subpoena five presidential tapes, arguing that the premature release of the tapes could impair "the integrity of the trials arising out of Watergate".

Prior to being appointed a Judge, Gerhard Gesell was a partner in the prestigious Washington law firm of Covington and Burling, which he joined in 1941. While there he specialised in anti-trust cases and acquired a reputation as a first-class trial lawyer. He had begun his career six years earlier as an attorney with the Securities and Exchange Commission.

Judge Gesell is a fellow of the American College of Trial Lawyers, a member of the American Law Institute and the American Bar Association and an honorary member of the Executive Committee of the Yale Law School Association. He received the Yale Law School citation of merit in 1967.

The Judge was chairman of the President's Commission on Equal Opportunity in the Armed Forces from 1962 to 1965, a member of the Lawyers' Committee for Civil Rights Under Law from 1963 to 1967 and a director of the Federal Judicial Centre from 1970 to 1972.

Gerhard Gesell was born in Los Angeles, California, on 16 June 1910. His father, Arnold L. Gesell, was the well-known paediatrician whose books have greatly influenced child development practices in the United States. The son graduated from Phillips Andover Academy in 1928, from Yale University in 1932 and from the Yale Law School in 1935.

Judge Gesell lives in the Georgetown section of Washington with his wife, Peggy. They have two grown children who are pursuing careers in education.

The Gesells usually spend a month in the summer on an island off the coast of Maine, where the Judge enjoys sailing and fishing. They often spend their weekends at their small cattle farm near Leesburg, Virginia.

THE LAW'S EMERGING RESPONSIBILITIES

The Chapman Tripp Centenary Address by Judge Gerhard A Gesell

Chairman: Mr M O'Brien.
Commentators: Messrs F L Parkin and J B Robertson.

THE CHAIRMAN: "Judge Gesell, Lord Chancellor, ladies and gentlemen: This morning we have the privilege of listening to Judge Gesell, who has come, as I told you, from Washington. We owe that pleasure, and we are deeply indebted, to the firm of Chapman, Tripp & Co., which this year is celebrating its centenary, and to mark that event has invited a distinguished overseas speaker in the person of Judge Gesell to address us. Mr Castle will later make further reference to that matter.

"Judge, one of the abiding memories of the many memories that I will have from this conference is the quality and character of the visitors we have had from overseas. Foremost among those memories will be recollections of your good self. I first met his Honour on Monday afternoon briefly as he was passing through on his way to Christchurch. Since then I have seen a little of him. Unfortunately there has not been time to see more. You will have observed from a distance the warmth of this personality that emanates from him. If you had got to know him a little better you would also have come to realise the depth of his thinking and the quality of his character, and above all his courtesy and consideration, which is exemplified in that he is here at all at such very short notice. Despite that very short notice he came with a prepared speech for the benefit of the commentators and one or two others who have had the privilege of reading it. He had to rearrange a heavy Court schedule in Washington—and you will hear just how heavy it is—before he could come away.

"Last night he avoided the dinner because he had a slight throat infection, saving himself for this event this morning.

"On Wednesday of next week—Wednesday Washington time, his Court opens and he presides over a trial which is set down to last 2-3 weeks, and in which no less than 15 counsel are appearing. We appreciate very much indeed your great courtesy and consideration in finding time to come to us at such short notice.

"His Honour is aged 64 years, minus three months. I mention that because he told me the other day he was a bit concerned on reading Mr Holland's paper, and one of the suggestions contained in that paper is related to the retiring age of Judges. You will be pleased to know that his is a lifetime appointment along with all the other 500 or so Federal Judges in the United States. What is more, your Honour the Chief Justice and other members of the Judiciary will be even more interested to know that you can retire at age 70 on full salary for the rest of your life. That may well be a topic for discussion at your Honour's conference tomorrow.



Ronald D Woolf

Judge Gerhard A Gesell delivers the Chapman Tripp Centenary Address while commentators Messrs J B Robertson (left) and F L Parkin nurse their eyes from the glare of television lights.

"Judge Gesell was admitted to the bar in Connecticut in 1935, and to the bar of the District of Columbia shortly afterwards. Initially he was in the Government Service, primarily in the Securities and Exchange Commission, and in 1941 joined the prestigious Washington firm of Covington and Burling, the name of which will be known to some of you, partly by reason of the fact that it was the firm into which and out of which Mr Dean Acheson moved from time to time.

"His Honour held various appointments, in particular, from 1945-46 he was the senior

assistant counsel at the inquiry into the attack on Pearl Harbour. A few years later he was chairman of a Presidential Commission which inquired into equality of opportunity in the armed forces. He was a noted trial lawyer and a Fellow of the American College of Trial Lawyers, and specialised particularly in anti-trust suits and certain aspects of insurance. In 1968 he received a telephone call, as he told me the other day modestly, much to his surprise, and he was subsequently appointed a Federal Judge, which position he now holds. You will have read in the newspapers something of the nature of some of the landmark decisions with which he has been involved, and his deep concern for liberty and privacy both of which matters are reflected in the paper you will hear in a moment or so.

"He comes to us to deliver this address at short notice, but you will find, I am sure, thoroughly prepared. The title of the Chapman Tripp Centenary Address is 'The Law's Emerging Responsibilities', and I warmly invite Judge Gesell to deliver it."

JUDGE GESELL: "You will easily understand the sense of inadequacy with which I approach addressing this distinguished audience of Judges and lawyers. Apart from your natural disappointment that Elliot Richardson could not be here as originally scheduled, you must also be sceptical, as I am, that a trial Judge from a different land, more than 12,000 miles away, can discuss matters relevant to your professional concerns. Recalling the admonition of the great Scottish Judge, Lord Cockburn, that 'Judges should never expose themselves unnecessarily', I confess it would be more comfortable if I, as a farmer, were to discuss feeder cattle, or, as a sailor, to expatiate on cruising off our State of Maine, which rivals even some of your glorious coastline. The enticing invitation to visit your country—a dream I never expected would come true—overrode my fear that I was not fitted for the task assigned. Now, with still lingering trepidation, I must proceed. Hopefully your tolerance will equal your generous hospitality.

"An occasion such as this can be one to look back, to review mistakes and triumphs of our profession. This is the safest and perhaps the easiest course, especially for a foreigner, to follow. But I am going to venture into a more controversial and difficult area.

"This is a period of adjustment and change. The consequences of urbanisation, the impact of recent technological and industrial developments, alterations in moral emphasis; all these place new burdens on underlying legal systems founded on the great traditions of the common law. I hope today to indicate some beginning efforts being made within the American legal system as it attempts to meet these new challenges. Hopefully this will stimulate closer examination of certain aspects of those responsibilities which lawyers and Judges are obliged to recognise as they confront the inexorable demands of modern social change.

"We start, I believe, with agreement on the fundamental premise that any system of law in a democratic society must have as one of its primary goals equality before the law. The system must always be alert to assure a quality of life that rejects conformity as a desirable end in itself. Our common heritage demands that we assure the fullest freedom and individuality of each citizen and protect him against unnecessary intrusion by the state.

"A second premise not so generally accepted, even in my own country, must be that a system committed to inflexible uniformity of method or blind adherence to precedent will eventually fail. The notion that lawyers and Judges are confined by remorseless logic to pitiless results devoid of sensible conclusions should, I submit, be rejected. Justice Cardozo, one of our most revered Judges and legal philosophers, commented that 'jurisprudence has never been able in the long run to resist successfully a social or economic need that was strong and just'.

"Surely events will overtake intransigence; law cannot stand still. 'Modification implies growth', said Justice Brandeis. 'It is the life of the law.' To be sure, our training teaches that justice is not to be taken by storm but is to be wooed by slow advances. But should we not encourage experimentation, seek new insights and make an occasional daring re-examination of a premise, recognising we live in a dynamic society? A legal system simply cannot duck all hard issues and resort to some manner of unrealistic sophistry to rationalise a controversy into a meaningless outcome. The need to proceed with care, to recognise that one's views are not necessarily sound, to act only when well satisfied by fact and experience, is obvious. But a rigidity, a failure of the law to take initiatives, a sort of professional self-satisfaction with the state of things as they are may ultimately prove disastrous to the preservation of individual freedoms in a living democracy. Chief Justice Warren stated it well when he said:

" 'Our Judges are not monks or scientists, but participants in the living stream of our national life steering the law between the dangers of rigidity on the one hand and of formlessness on the other.'

"In outlining some recent developments in the United States which indicate the effort of the federal Courts and lawyers practising before them to make our system more responsive to these imperatives, you will understand, I am sure, that the search for adequate solutions never ends and that if it should appear that a particular approach seems effective in the US, it is not necessarily adaptable here or elsewhere. My purpose is definitely not to be didactic. Our experience will be invoked solely to illustrate the growing demands which, I submit, are inevitably being placed on any modern democratic legal system in these increasingly complex times. To the extent that I have any message, it is merely an appeal for a greater degree of activism and scepticism toward our legal institutions. Each of us in his own way must constantly be seeking appropriate techniques to insure an administration of justice suited to changing social needs.

"Reflecting on the many basic similarities of our two systems, there are no readily apparent reasons to explain the more affirmative role of my country's Judges and lawyers in the formulation of social policy. Not only do we have a common heritage, but we each look primarily to a freely elected Legislature to declare and then to provide for the public welfare. The fact that the States have united under a Constitution which memorialises a specific Bill of Rights, while you have proceeded to reinforce the common law by a series of separate specific statutes, is a distinction which is generally assigned too much significance.

"The common impression exists abroad, and even among some at home, that federal Courts have arrogated to themselves a legislative function. Such is not the case. Our Courts, like your own, are called on to apply accepted principles of statutory interpretation when the occasion requires. There is, moreover, a close working relationship between the Courts and the Congress in the sense that individual Court decisions often spark legislative initiatives and the Courts generally strive to avoid unnecessary intrusion upon the legislative will. It may surprise you to know that Court declarations of unconstitutionality are few and far between. In 185 years, only 94 portions of federal statutes have been found unconstitutional by the Supreme Court, where most of such cases are eventually heard.

"It is true, however, that because of our size and attendant complexities of a rapidly growing urban society, we have come to the belief that our political processes alone cannot, without active assistance of the Courts, achieve the degree of equality and freedom among our citizens that true democracy requires. Where subtle encroachments on liberties occur, these cannot always be readily translated into meaningful political issues to be settled only by resort to the polls. Campaigns tend to oversimplify and concentrate on a few popularly identifiable complaints having the widest appeal. A far-flung bureaucracy, moreover, often becomes too impersonal, proceeding by formula and thus avoiding the specific needs of individuals or segments of society and this default goes unnoticed.

"There has been an enormous proliferation of federal legislation. Current federal statutes—some recent, some of long standing—cover about 15,000 pages of double column fine print. In the development of this legislation it has been considered politically necessary or inevitable on occasion to ignore particularly hard choices by resorting to the unsatisfactory generalities that always accompany compromise. And, of course, almost always circumstances which could not be foreseen when legislation was enacted have inevitably arisen and require adjustment. Almost always there are issues lurking on the edges of statutes or regulations either too small or too controversial to have been resolved at the outset. Thus the Courts have with increasing frequency been called on to fill in interstices of the legislative or regulatory pattern.

"These matters have provoked much litigation. The federal Courts are the logical forum. First, as is the nature of Courts, they must, of course, decide. Once a controversy is presented it must be resolved and specificity of decision is essential to progress. Issues involving aspects of individual freedom or simple fairness can no longer be sloughed off by resort to generalised statutory language or indecisive delegation of responsibility to someone else.

"It is largely for this reason that the federal Courts find themselves necessarily on the cutting edge of much intellectual and cultural change. They become the forum for ideas, often new or unpopular. Resolution of these issues is, of course, tested against established principles and traditions. But there is often occasion for new insights and a degree of innovation. As

Chief Judge Bazelon of the District of Columbia appellate Court observed, Courts perform in two ways: 'First, by giving careful, intense attention to the particular situation before them, they can bring to light important problems that would otherwise remain hidden simply because no one else had the time or the incentive to look at the matter closely. Second, Courts can see that the other institutions keep their promises.' By bringing remote or lurking problems into public view, responsible officials and agencies are stimulated and the danger that actual problems needing answer will remain unresolved through prejudice or self-imposed ignorance is minimised. Skilful lawyers with a social conscience can press complaints of those who feel abused and bring causes forward for decision.

"Allow me to outline an example of this process in actual operation[1]. Responding to public concern over the destruction of our natural environment, Congress passed several generally worded statutes relating to the problem in the late 1960's. One statute, the so-called Highway Act, prohibited the use of federal funds to build highways through public parks if 'feasible and prudent' alternative routes could be devised.

The Federal Department of Transportation nonetheless proceeded with its plans to build a six-lane high-speed expressway through the centre of a 340-acre city park located in downtown Memphis, Tennessee, an older, medium-sized city in a semi-agricultural area. The highway, designed to speed traffic to and from the suburbs, would have severed the city zoo from the rest of the park. Petitions from local citizens' Groups were of no avail, as the bureaucracy in Washington—800 miles away—proceeded, relying on a determination by the local governing board, the Memphis City Council, that the highway should be built. A group of private citizens, as well as local and national conservation organisations, filed suit against the Department of Transportation to enjoin the construction.

"Both the federal trial Court and the Court of Appeals dismissed the case, holding the Department had clear discretion to make site selections for highway placement. The Supreme Court reversed unanimously. Jurisdiction in the Courts to review the Department's decision was found in a statute of general application passed shortly after World War II, which gave the Courts power to set aside agency actions found to be 'arbitrary and capricious' or an 'abuse of discretion'. The Supreme Court stated there was no evidence the Department of Transportation had rationally considered possible alternative routes and that its failure to do so was in derogation of the statute's broadly worded terms. The highway was rerouted. This is but one of many examples where administrative action taken under the delegation of discretionary authority is examined and, where necessary, checked through the Court process in litigation initiated by citizens who were otherwise unable to achieve recognition of a justifiable complaint.

"There is no sound reason why lawyers and Judges must operate under self-imposed restraints that prevent their full contribution to a proper resolution of such cognisable social ills. The common law grew in just this fashion. The times call for a recognition and more affirmative implementation of this responsibility. The proper administration of justice must focus on obstacles confounding the common man as he confronts an impersonal, complex bureaucracy.

"In the United States there has been a growing sense that quite unintentionally the quality of our life is depreciating. An individual crowded into one of our cities feels ignored, unrecognised, unable to make his voice heard. He confronts a proliferating bureaucracy which, rightly or wrongly, he feels is insensitive and unnecessarily regimented. Decisions affecting his job, his housing, his privacy or accustomed habits are made without his knowledge or concurrence. He fears he is becoming a number in a 'datamatic' society and that his particular wants and needs are either ignored or unknown. Broad legislative reforms carried out by major delegations of authority to agencies or the executive seem to many average citizens to become watered down and ineffective when an attempt is made to translate them into the realities of a particular locality or way of life. Strongly felt needs or objections shared by a few are unrecognised by those having major responsibility. Complaints are filtered out through the ascending levels of bureaucracy. These frustrations, reflecting special circumstances, can, as already noted, rarely be adjusted by concrete legislation for their impact is relatively small and overall the social purposes of the legislation and its generally adequate execution by the authority assigned does not arouse effective criticism. Yet

[1] *Citizens to Preserve Overton Park Inc v Volpe*, 401 US 402 (1971).

they are real and a failure to give them full ventilation through the Courts will have, in the long term, a debilitating effect and undermine the most basic principles on which a democratic society must be founded.

"A major commitment of the federal judiciary has long been to safeguard the right to privacy, the right to speak and think independently, the right freely to petition, to associate, to print and the right to equality of treatment before the law. It is, of course, accepted that these rights soon become meaningless unless the citizen is informed and unless he or she has a full participation in developing the rules for the general good that must be laid down. But this is no longer sufficient. A system of justice must be fashioned which not only settles disputes more effectively but which also can provide individuals and groups prompt recourse against arbitrary authority that impinges on these cherished rights.

"It is the literal explosion of controversies generated by these conditions which has increasingly evoked attention of the federal Courts and caused lawyers and Judges to develop new techniques for resolving the issues. We have totally overhauled the operations of our criminal processes in response to these concerns, but it is not of this that I wish to speak today. It is primarily on the civil side of our dockets where new procedures for invoking the almost unlimited scope and genius of our equity jurisdiction are evolving, and where cases of the type I am discussing usually arise.

"Private foundations and other sources of private funds are presently supporting so-called 'public interest lawyers' or 'private attorneys general' who take up the special complaints of groups, large or small, representing articulate, often minority, segments of our society who feel aggrieved. Staff lawyers representing organisations whose names are revealing, such as Common Cause, Public Citizen, Committee for Corporate Responsibility, Action for Children's Television, Public Equity, Consumer Action, The National Organisation of Women, American Civil Liberties Union, the Environmental Defence Fund, and even Society for Animal Rights, as well as many private practitioners are active in this public interest work. Individual congressmen and congresswomen in certain instances have been granted the right to object in Court to executive actions deemed contrary to legislative purpose. The Courts and legislatures are fashioning some permanent procedures for compensating volunteer counsel in successful litigation of this type. Most large and well-established law firms throughout the country have formal or informal 'pro bono publico' units taking many causes free at great time and expense. Many lawyers have, as a consequence, felt a greater sense of usefulness and involvement. These developments, in turn, have had wide appeal to the young men and women entering the profession in growing numbers.

The Courts have broadened concepts of standing to sue and are perfecting techniques for joining large numbers of complainants in single actions presenting common questions of law or fact. Under our developing class action rules, if the trial Court finds a few named representative parties can fairly represent the interests of a larger class as a whole, that the members of the class are too numerous to be joined in the action individually, and that common questions of law and fact predominate, the Court may grant a request to certify the action as a class action. Once certified, all members of the class described in the Court's order, whether plaintiffs or defendants, will be bound by the final judgment. The Court's jurisdiction over absent class members is not predicated on formal service of process. Once a class is certified, the absent members acquire certain rights: for example, the case cannot be settled without the Court's approval and before the case can proceed to judgment, notice to the class members must be given, thus providing them opportunity to opt out of the case by a date certain and thereby escaping the res judicata effect one way or the other.

"Again, a few examples of such actions will illustrate. Citizens sue because a new government structure threatens the balance of the population, the environment and social composition of a particular area; tenants in a public housing project are denied essential services; public health organisations protest that money appropriated is not being spent for designated purposes; instances of racial or sex discrimination need adjusting; consumers of drugs are misled or overcharged; purchasers are unfairly denied credit; the retarded and mentally ill are denied adequate treatment; unpopular political parties find election laws too restrictive; parents complain because school children are unevenly disciplined; prisoners in a particular institution are subjected to inhuman conditions; radio listeners object to government pressures bordering on censorship; aspects of the abortion controversy and other facets of the right-to-life movement place local rules and regulations under scrutiny; and security frauds and other restraints or breaches of trust need

redress. I mention these as examples of the kind of actions which are coming into the sort of Court where I preside, in increasing numbers.

"As of June 1974, there were 4,600 class actions of this general type pending in the federal system, of which one-half were filed in the 16 largest urban districts. These actions, which are both in equity or for damages, are having a profound impact. Our ability to recognise and process complaints of this kind has made for a more coherent society, although we must sometimes appear from afar to be in a continuous state of turmoil.

"Let me now give you a specific illustration of a massive, complex class action having a profound impact[2]. Coal miners, an historically disadvantaged group in our society, are tied by family and tradition to an industry which has been in decline for several generations. They have had a very strong, often socially-minded union which has been in frequent confrontation with mine owners. In 1950, a miners' pension fund was established pursuant to federal statute as part of an overall industry settlement. The fund was intended to pay old age and survivors' pensions, as well as medical benefits, to miners and their families. Administered jointly by a trustee appointed by the union, one appointed by the mine owners, and a public trustee, the fund received a royalty of between 30 and 40 cents on each ton of coal mined. In 1968, the fund was receiving a total of $170 million annually in royalties although, in the nature of things, benefits paid to individual pensioners were small.

"It was asserted in a class action brought in my Court that the union and the trustees had abused their trust. Defendants were the coal miners' union, key union officers, the coal miners' pension fund itself, the three fund trustees, and a local bank, three-fourths owned by the union. A public interest law firm and a private firm pursued the action on behalf of a small group of named plaintiffs who represented all individual coal miners or widows who were receiving benefits from the retirement and pension fund, or who had applied and been denied benefits from the fund. This handful of plaintiffs asserted they represented a class of all coal miners with present or future rights to the fund, a group numbering well into the tens of thousands.

"Newspapers in coal mining areas provided appropriate notice and a class was certified from which only a few eventually opted out. Using the liberal pretrial discovery opportunities provide by our civil rules, the plaintiffs' lawyers were able to present documentary evidence and testimony which definitely established disregard for fiduciary duty. For example, it developed that the fund did its banking business with the union-owned bank, that over a period of 20 years between 20 and 40 percent of its total reserves had been kept on deposit with the bank as cash balances, earning little or no interest, despite the fact that steady, predictable income on conservative investments could have been obtained.

"The failure to maximise the fund by prudent investment reduced the amount of benefits available to the miners. Moreover, over the years the trustees had developed unduly restrictive, arbitrary rules governing eligibility which operated to exclude many miners and their widows from benefits, despite years of service in the coalfields, contrary to representations made and the statutory objective.

"As a result of the litigation, the Court removed two trustees, the banking relationship was terminated, and the union, the bank, and the individuals primarily responsible were held jointly liable for $11.5 million in damages. In the eligibility phase of the case, a settlement was reached, and approved by the Court, which resulted in a retroactive benefits being paid to almost 20,000 miners and their widows who had previously been denied them. Total payments of wrongfully denied benefits released in the case will eventually approach $300 million. The exact size of the plaintiff class was never determined, but over 60,000 written inquiries from miners were received by the fund relating to the case. The attorneys for the plaintiff class logged over 15,000 billable hours on the case, and a fee of approximately $850,000 paid from the trust was awarded. The case lasted over several months and required approximately 40 Court days. The case was never appealed.

"Other examples abound. Following the 1970 invasion of Cambodia by the armed forces of the United States, thousands of protesters converged on Washington, some unruly, others peaceful. Several hundred people assembled

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[2] *Blankenship v Boyle*, 329 F Supp 1089 (DDC 1971); id, 337 F Supp 296 (1972).

[3] *Dellums v Powell*, CA 227-71 (DDC 1975) (unreported); see *New York Times*, "ACLU Wins $12 Million Suit Over Antiwar Arrests at Capitol)), 17 January 1975 at 1, col 2-3.

peaceably on the steps of the Capitol building to listen to speeches by Senators and Congressmen opposed to the war. The rally was broken up by the police more or less indiscriminately arresting those present. Twelve hundred protestors, claiming illegal arrest while engaged in peaceful protest, brought a class action in the District of Columbia. A jury awarded them $12 million in damages[3].

"In another class action, guardians of persons committed to confinement in public institutions maintained by the State of Alabama for the mentally ill and retarded called attention to deplorable living and medical conditions which had been permitted in the facilities[4]. It developed that Alabama was in essence warehousing these socially undesirable people. The trial of the case focused public attention on the inhuman conditions which had developed through neglect and the absence of minimal financing by the political branches of the state. Invoking the developing 'right to treatment' doctrine, a federal trial Judge noted that the only justification which permits the state to confine such people against their will is the conclusion that they are in need of treatment. Since adequate treatment did not exist but was an essential condition to their continued confinement, equity intervened. The state and the plaintiffs were unable to agree on minimum standards. The Court, with the help of numerous professionals appearing in Court as amici curiae, promulgated a detailed set of minimum standards running 17 printed pages. To aid in the enforcement of its decree, the Court appointed two committees of responsible citizens to monitor compliance with the decree and report back to the Court on an on-going basis. The 'right to treatment' issue is currently pending before the Supreme Court[5].

"These examples are sufficient to suggest the dynamic role the law can properly play, the resulting involvement of the Courts in aspects of social policy and the enormous responsibilties being accepted by the practising bar.

"You will realise, I am sure, that the ultimate determinations in matters of this kind do not necessarily rest with the single Judge who first confronts the particular complaint and who, in spite of lingering uncertainty, must decide. A system of appellate review assures that the individual Judge's exercise of power and authority in the first instance may be carefully re-examined on appeal, first to a three-Judge appeals Court and ultimately often to the Supreme Court. Indeed, appeals, especially from decisions involving major issues of the day such as I have been describing, are the rule rather than the exception. In all, about 16,500 appeals were filed in federal Courts during fiscal 1974.

"By supplementing the legislative and administrative processes in this fashion, the Courts are not usurping authority. The jurisdiction of the lower federal Courts depends entirely upon affirmative grants of jurisdiction from the Congress and this jurisdiction can be broadened or narrowed at any time by statute. Significantly, the tendency of Congress has been to broaden rather than narrow jurisdiction, because the role of the Courts in resolving disputes of this type has assisted rather than interfered with orderly government. Increasingly it has come to be understood that the Courts are effective in readapting fundamental principles to new situations as they arise and that by this process officials and the public at large gain a greater appreciation that constitutional rights are protected.

"The process has given a vitality and a sense of contemporary sensitivity to our jurisprudence. Among other things it has caused the Courts to re-examine themselves and to take greater note of their own shortcomings. Essential to a responsible development of the law is, of course, the efficiency of the legal system within itself. Justice delayed is justice denied. Obviously frictions must be promptly attended or animosity and discontent will fester and may eventually erupt. It is not surprising, therefore, that coincident with these developments of which I am speaking there has been an intense re-examination of the way lawyers present issues and the way Courts proceed to decide them. This self-examination, in which the bar has played a major role, has disclosed many weaknesses and opportunities for improvement in the federal system.

"The federal Court system is a group of some 500 Judges scattered across the land who process over 100,000 new civil cases and over 40,000 criminal cases a year. New cases filed annually increased 76 percent in the last 14 years and the litigations, as you will realise, have become infinitely more complex. For years the federal Judges—all proud, independent islands—held to their own ways, adminis-

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[4] *Wyatt v Stickney,* 325 F Supp 781 (MD Ala 1972); id, 334 F Supp 1341; id, 344 F Supp 373.

[5] *Donaldson v O'Connor,* 493 F 2d 507 (5th Cir) cert granted, 43 USLW 3223 (US 22 October 1974) (No 74-8).

tering justice in the light of their individual experience with little contact with their peers, confident in the rightness of their accustomed ways. Being lawyers, many were atrocious administrators, but they were proud and held themselves immune from the delicate muted criticism that more venturesome attorneys occasionally voiced. Court supporting personnel often reflected the personal whims of particular Judges; the quill pen and bound journals persisted too long after the typewriter and modern office equipment and procedures had found acceptance in the business world. There was little, if any, sharing of experience among Judges and inefficiency was often accepted uncritically. Business lagged and backlogs accumulated.

"This condition now no longer escapes notice. Under the energetic and far-sighted leadership of Chief Justice Burger, the organised Bar and the Courts have collaborated in far-reaching reforms. A school to train experienced Court managers has been created, and Court executives having this special training are now being placed in each circuit. A centre for research in the management of case loads and judicial administration has been funded by Congress. Under its auspices Judges meet and share experiences. New Judges are taught the proven techniques of their more experienced colleagues when they enter on the job. Refresher courses are held for Judges after five years on the bench. New methods for fair, effective dispositions are being tested and sophisticated statistical measures of future judicial needs and processing of cases by type are evolving. Much useful data is now aailablc to guide Congress in its choices of legislation affecting the Courts' work load and creation of Judgeships when needed. The computer is also being used to alert trial Judges to case status and to enable them to compare their productivity with that of their colleagues. I receive every month a statement of what I have to do and what I have done, and alongside there is a statement of what each of my colleagues has to do and has done. This has a profound effect on one's pride, and I can assure you on one's efficiency. Many old accepted forms of written pleadings, which used to create a blizzard of motion papers, have been eliminated or minimised. Video-taped testimony is in increasing use in civil cases for witnesses such as doctors whose practice is difficult to accommodate to Court schedules. A monitoring of jury utilisation has reduced unnecessary jury veniremen calls, waiting time and expense. In our own little district we saved in one year by examining the manner in which we were bringing in people for jury service $170,000. In short, there is a real beginning to apply modern business techniques to judicial management. Courts are becoming more efficient but no less fair. The number of cases disposed of per Judgeship increased 30 percent in the last five years, and we were much less on the bench. The image of the judiciary before the public is improving as litigants gain a sense that their controversy is not misplaced in a befuddled process which sometimes had the flavour of a Dickens novel.

"You will, of course, have in mind that across this whole spectrum of developing causes of action and internal reform the judicial and legislative response has been greatly stimulated by the free press. Unlike your country, the conduct of lawyers and Judges is a matter of daily criticism. This criticism is annoying, often proceeds from faulty data and it unsettles the even tenor of our ways. Nonetheless, time and time again federal Courts have protected the press from efforts by the Congress, the Executive and even by misguided Judges to place prior restraint on publication. The press has had almost complete free rein to inquire, to print, to expose. This condition is unique to our society. An untrammeled press serves almost as the fourth branch of government. We have accepted Thomas Jefferson's view that the people are the only true censors of their government and that truth, the matrix of sound public opinion, must be fostered by a free press even when applied to our legal system. It is not unusual for the press to criticise the conduct of a Judge in a case, of his overall performance as shown by the statistics and yet we have survived all that and I think it has been healthy. Our country, after all, was born in revolution. It has remained restless and self-critical.

"The press institutionalises this ubiquitous scepticism. It promotes a dialogue as well as self-inquiry. It has supplemented and encouraged the legal developments previously outlined. Its continuing questioning minimises the possibility that our jurisprudence will sink into a conformity and degree of self-satisfaction that will thwart orderly change as it becomes essential to society's need. Our country is so large and inter-relationships of social and economic forces are so intricate that the efforts of the federal Courts and the Congress to improve administration of justice would have been far less effective had it not been for the continued drumbeat of an inofrmed press. Our almost universal acceptance of the right to report and

to print, particularly on matters affecting the administration of justice and affairs of state, has often enabled otherwise lost causes to be eventually accepted and has greatly served the public interest. Surely it has given vitality to our law and encouraged the legal systems to progress.

"We have always had, and understandably so, a great fear of excessive authority. This has certainly not diminished as the complexity of our society and its size has brought about an ever-expanding code of federal regulation and caused Legislatures in turn to place greater discretionary authority in the hands of the Executive or to delegate authority in general terms to agencies and commissions. As we faced new economic and unexpected social developments that none of our founders could have possibly envisaged, an insistent counteracting need has been perceived to preserve the concepts of individual freedom at the core of the form of government those founders created.

"Many of us closest to the process in our country have come to feel that if access to the Courts had been denied, discontented, alienated elements would have resorted to extra-legal steps to vent their frustrations. There has been a very exacting test of our institutions in recent times. The country has been in ferment due in large part to the unpopularity of the Vietnam war and the excesses known as 'Watergate'. The system withstood this stress and in no small measure the availability of the federal Courts and their established commitment to preserve our basic freedoms prevented authoritarian forces from gaining power by ignoring the principles founded in common law and the Bill of Rights.

"Surely there must be agreement that countries like ours cannot accept a rigid legal system which fails constantly to re-examine its premises, which consciously or unconsciously reverts to a mechanical application of the law in spite of change and which will inevitably, if it follows this course, become so alienated from the needs and demands of its citizens that that its stabilising force will become impotent and eventually be ignored. It is not so much the result in a single case which counts so long as it is reached through jurisprudence that is seeking to accommodate to modern conditions. A bold thrust forward as a situation is perceived may require some retreat and reappraisal. No lawyer can fail to recognise that the winds of reform must be tempered to the political and economic mood of the country, nor can Judges fail to accept the demands of explicit legislation. But Courts and lawyers can and should be willing to lead as the occasion demands. They should be willing to innovate, to experiment, to strike out toward far horizons. Growth with change is an imperative. A degree of activism and scepticism within the entire legal hierarchy is both necessary and healthy. A legal system should never condemn experimentation or reject innovation out of hand, nor enforce an artificial conformity upon the public.

"If and when you face comparable demands, your genius for sensible civilised government will undoubtedly find better approaches than those adopted in the States, but lawyers and Judges must ever be alert to the essential truths of our common heritage and energetically safeguard individual freedom against subtle intrusion by the state whenever occasion demands. This is the nature of our emerging responsibility as we seek to accommodate a legal system founded in the common law to the special demands of today's society.

"I have enjoyed the opportunity to talk with all of you very much and I thank you for your courtesy in listening."

MR O'BRIEN: "Because this paper was not able to be distributed in advance, the method of discussion and commenting will be a little different from other papers presented at this conference. It will be more like the old style. The commentators are Mr Parkin from Wellington and Mr Robertson from Dunedin. In addition Mr Singleton, the President of the Law Society, has also been asked to comment."

MR F L PARKIN: "May I say at the outset that there is no scepticism on my part, nor I am sure on the part of this large audience, that a trial Judge from 12,000 miles away has discussed matters so relevant to our professional concerns. The Judge asked for our tolerance, but what in fact he has aroused are our keenest admiration and gratitude for his masterly address dealing with what he so rightly describes as a controversial and difficult area.

"We in New Zealand share many things with the people of the United States:

"(a) We too find ourselves in a period of adjustment and change. We confront the effects of urbanisation, but on a minor scale by comparison; we are experiencing technological and industrial developments but to a lesser degree; we, too, have alterations in moral emphasis; and we too are conscious of a restlessness and discontent on the part

of many of our people with institutions which have successfully resisted significant change for many generations.

"(b) I believe it to be true that we in New Zealand equally cherish equality before the law, and that we reject conformity as a desirable end in itself.

"(c) I believe that we, as lawyers, agree fully with his Honour that blind adherence to precedent will fail.

"(d) I believe that Judges and lawyers in New Zealand accept the Judge's appeal for a high degree of activism and scepticism towards our legal institutions.

But having mentioned important points of similarity I believe that our peoples differ in their reaction and action towards burning issues of the kind the Judge has mentioned, including excessive exercise of authority on the part of government departments, local authorities, agencies of various kinds and the 'proliferating bureaucracy' of which the Judge speaks. It does seem that United States Judges and lawyers play a more affirmative role than do their New Zealand counterparts in the formulation of social policy. It does seem that our Courts are not so near the cutting edge of intellectual and cultural change as they are in the United States. Federal Courts may not have arrogated to themselves a legislative function, but it would seem clear that United States Courts are frequently the forum for the resolution of issues that would not come before New Zealand Courts. I believe it to be the case that we in New Zealand in larger measure rely on our political processes to achieve the equality and freedom of which the Judge speaks.

"Two examples of recent issues in this country which provoked protest, demonstration and controversy come easily to mind. One was the decision to raise the level of one of our beautiful South Island lakes to aid the generation of electrical power. Another was a decision by central government to forbid the continuation of rugby matches in New Zealand between this country and South Africa, by reason of South Africa's policy of apartheid.

"I have stated the decisions in over-simplified form, and certainly have no wish to express an opinion here as to their correctness. My point merely is that neither of these issues (and there are many others of a similar kind) came before our Courts for resolution. I suspect that, in the United States, issues which so sharply divided our people as these did, would have become the subject of litigation.

"It is not difficult to ascribe reasons for this basic difference of approach to the resolution of important issues:

"(1) Judge Gesell has adverted to the fact that, unlike ourselves, the States of America have united under a Constitution which memorialises a specific Bill of Rights. But, that apart, we in New Zealand are so much smaller that events come under the scrutiny of central Government much more readily than can be the case in the United States. Government here is alert to grievances. Whether the cause is a sense of concern for our citizens, or whether it comes from a desire to be re-elected, is not for me to say, but Government does intervene in a way that cannot be possible in a country of the size and enormous complexity of the United States.

"I suspect that a case such as the Highway case in Memphis, Tennessee, would not have come before our Courts, but that Government would have intervened particularly if, the cynics might say, Memphis had been a marginal seat in Parliamentary elections. I believe, too, that the fascinating Miners' Pension Fund case, of which the Judge spoke, could well have been referred to a Royal Commission or other enquiry, hopefully resulting in specific legislation or other Governmental action to rectify the injustices.

"What I am saying is that our small population permits the adjustment of grievances and attention to the rights of minorities more easily than can be the case in a vast nation. We have our equivalents of the complaints groups of which the Judge gave examples. These groups in New Zealand, and their numbers are growing, also represent articulate and often minority segments of our society, but their endeavours are more directed, I believe, towards persuading politicians than persuading Judges. Access to Ministers of the Crown is normally readily available in our small country, and deputations to Ministers are a common occurrence. There are frequent questions in Parliament, too, on behalf of individual constituents or groups of constituents, and these require the responsible Minister to deal with the matter publicly. In these ways, because our Executive is responsible to our Legislature, recourse to the Judiciary is frequently rendered unnecessary.

"(2) I am not a Court lawyer, and might hope that lawyers in the audience who appear in our Courts will comment, but I suspect that our rules of Civil Procedure relating to repre-

sentative actions do not provide the scope for class actions to the extent that his Honour describes, and that we do not have the techniques for joining large numbers of complainants in single actions where those complainants, except for the burden of their complaint, are disconnected. We do not have any procedure whereby a possibly large number of people will be bound by the Court's decision, by reason of their coming within the definition of the class, unless they opt out in time.

"(3) We have the institution of Ombudsman, who exists to deal with some of the kind of issues that are resolved in United States Courts. Thus, allegations of police brutality on the occasion of a visit by the United States Vice-President were investigated by the Ombudsman at the instigation of a private citizen. So also the Ombudsman enquired in detail into complaints by prisoners at a large maximum-security prison.

"(4) The last reason that I have time to mention is that New Zealand lawyers are not allowed to contract for any proportion of amounts recovered by litigation as a fee. How much this fact acts as a disincentive to litigation I do not know, but I do note that the 4,600 class actions awaiting trial in the Federal system include actions for damages. Our legal profession is not large enough, nor do I believe it to be sufficiently remunerated, to permit firms yet to establish 'pro bono publico' units. But we are learning from our more sophisticated friends. We have legal aid schemes, duty solicitors in Courts, legal advice bureaux, and our younger practitioners in particular are taking the law to the people in a way that is highly commendable. But I think it true to say that their endeavours are essentially directed to the protection of individual rights, rather than to the larger class actions of which the Judge has spoken.

"To conclude, inspiring addresses such as Judge Gesell's help us to face the burdens of which he has spoken, encourage us to ensure that the law does not stand still, and sharpen our resolve not to duck the hard issues."

MR ROBERTSON: "Mr Chairman, distinguished guests: Travelling from London to Brighton on a British Railways train I entered a compartment which was filled by an elderly English gentleman reading *The Times*, and I sat beside him, and opposite me there were two other seats. On one sat a very proper Englishwoman and beside her a beautiful white poodle. Suddenly a very flustered American came bursting through the door and said, 'Would you please move the dog? I can't find a seat.' 'Certainly not,' said the woman, 'that is my Suzy's seat,' and the American disappeared. He returned about 10 minutes later and said, 'Lady, I have been right through this train and there are no seats. Would you please move your dog?' 'Most certainly not,' she said. 'That is my Suzy's seat.' With which the bewildered American threw the dog out the window. The Englishman quietly put down his newspaper and said, 'You Americans always get things round the wrong way. You drive on the wrong side of the road, your light switches are upside down, and now you have thrown the wrong bitch out of the window.'

"With great respect, Judge, I believe you have indicated to us this morning that sometimes you and your countrymen make the right decisions because we have had our attention focused upon the need for a new dimension in our responsibility as a profession. You have demanded new levels when you appealed for a greater degree of activism and scepticism towards our legal institutions.

"Mr Justice Bagnall reflected 'that the only justice that can be obtained by mortals is justice according to law, the justice which flows from the application of sure and settled principles to proved or admitted facts. So,' he said, 'in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past child-bearing; simply that its progeny must be legitimate—by precedent out of principle.'

"This approach is highly desirable in that it ensures a degree of certainty in the law. I believe our challenge today is the introduction of new bloodlines into our system to ensure that the continuing offspring are sufficiently vital and sturdy to cope with the ravages of contemporary society. So in the few moments available I turn not to major substantive reform —for that historically has been New Zealand's forte, but rather to the working of our system in some of its more minor details.

"Judge Gesell maintains that the existence of certain basic rights in the first 10 amendments to the Constitution is 'generally assigned too much significance' in explaining judicial activism in the United States. Consideration of the legal problems arising from the explosive social issues of the sixties demonstrates, however, that the Bill of Rights Protection has been a potent weapon in ensuring that the law provides adequate protection for all, and

not in any way excluding the vocal minority who often sorely try the established majority. If one compares the New Zealand decisions in cases like *Melser* and *Wainwright* (although with some welcome relief with the Woodhouse approach in the Napier duck pond), one finds an anaemic and almost authoritarian approach compared with the robust determination of the protest decisions in the United States. We, as citizens, should be confronted, our smug complacency at living not only in God's own country, but His own social experimenst laboratory are debilitating and sterile. We, as lawyers, should be in the vanguard, but it appears that the Law Society rules have been designed to ensure that lawyers as lawyers remain silent on major public issues. Because of the reluctance of the Society in a corporate way to become involved, the public is virtually denied the opportunity of hearing the legal points of view, and notwithstanding the fact that there is such a diversity of opinion within our profession, the need for them to be aired remains imperative.

"The idea of judicial scrutiny and public review of the actions of officials and agencies and the potency of class actions referred to this morning, will undoubtedly have struck a receptive note in the minds of many. In this country we have initially to do some ground work. Traditionally we, as lawyers, have lived cloistered away, tendering advice on a purely individual basis. Such an approach, if ever defensible, is certainly not justified today. There are thousands of New Zealanders, young and old, many with a non Anglo-Saxon background, often economically disadvantaged, and frequently female, who are unwittingly deprived the benefits of our legal system by their own ignorance.

"We can echo the words of Maule J in this country, 'That there is not one set of laws for the rich and another for the poor', but unless the law is actually operating as a vehicle to assist all, then there is little comfort in that sort of proposition. Judge Gesell attributes to the free press a large measure of credit for the legal ferment and growth in his country. I believe in this country we need not only a freed press but a freed profession with the ability and indeed a responsibility to go out, to stimulate, to enlighten and advise the public of both their rights and responsibilities. A legal system which is so concerned with being responsible that it becomes ossified and fossilised, is not to be more desired than one which is responsive and dynamic even if a little flamboyant.

"Diversity is strength and among our emerging responsibilities is the need to go out and meet the people where they are, and willing to operate a system for their benefit and attuned to their demands. As Mr Justice Devlin, as he then was, once noted, 'There is a right of every man to earn his living in whatever way he chooses; and the existence of that right must not be punished by a professional majority under the pretext—for that is all that it is, although I am sure that it was not consciously adopted as such—that non-conformity is of itself disgraceful'.

"The Judge this morning noted that 'these developments have had wide appeal to the young men and women'. In recent times in this country we have wallowed in a good deal of self-adulation at the introduction of the duty solicitor scheme. Coupling this with criminal legal aid we have had cause to assert that the benefits of counsel are available to all. That is true, but anything more than a cursory examination of the situation produces some disquietening conclusions. A survey of duty solicitor rosters, reveals that a considerable proportion of the lawyers involved have been practising but a year or two—this being consistent with the age factor generally in the Magistrate's Court. These people are entrusted with the delicate and often difficult task of advising a bewildered citizen of his rights. Are we as a profession not rather patronising and indeed flippant in our approach to the Magistrate's Court? We appear to forget that in civil, criminal, domestic jurisdiction here more than anywhere else, the citizen will come in contact with the law. Nobody in the present day would suggest that a person fresh out of law school should tender major advice to a substantial corporate or commercial client without supervision, yet we seem untroubled by allowing these selfsame people to be let loose on the unsuspecting public in the Magistrate's Court where the consequences of their advice and ability is inestimable.

"The problem is not restricted to the duty solicitor scheme. It is compounded by the offenders' legal aid regulations and the rates which are provided under them. Maybe one would like to compare the schedule with the $56 an hour average which Judge Gesell referred to in his statement this morning. What this means is that this area becomes almost the sole and exclusive preserve of the young bloods, who once they have gained their spurs will be considered sufficiently experienced to enter the

area of the real law and deal with problems relating to property.

"Our problem is to ensure that we respond to contemporary societal demands with a total commitment by the profession. A perpetuation of the present approach, whereby the established members of the profession continue to practise as they have for time immemorial, and patronisingly acquiesce in the young doing their thing and getting solace for their over-active social consciences, is a fraud. In the long run we fool only ourselves.

"Whatever the historical reasons for the dichotomy between civil and criminal legal aid, it is clearly intolerable and demands legislative action to have the civil legal aid scheme covering the field. Efforts have been made by Courts to alleviate delay and inconvenience, and we have been intrigued this morning to hear of Court management and Court productivity in the United States. This is highly desirable, but in making our assessment of efficiency and in introducing new procedures we must note our priorities. An example which may be more applicable to those of us who practise in the provinces without the benefit of a resident Judge, is the Supreme Court ready list procedure under which counsel are expected to be available at short notice to appear. The signing of an application for a fixture indicates the matter is ready for hearing but when, because of pressure from other business several weeks if not months elapse before sitting time is available, counsel may find he is expected to appear in the Supreme Court although he has simultaneously a long awaited fixture in the Magistrate's Court or eevn an appointment to see a client. In searching for efficiency we need to regard the requirements of our clients. Often both Bench and Bar act as though the Courts are ours and forget that we are there to serve the public. We forget the inconvenience, whether in time off work, arranging a baby-sitter or travelling a distance which is normally encountered by the public in attending the Court or seeing a lawyer. The public are entitled to proper notice and consideration so that they can organise their programmes and enjoy the legal system.

"In reorganisation I believe that the client in the Courtroom deserves great attention. There is a clear responsibility to do more to lessen the strain and discomfort on all. I would not suggest the introduction of penalties like cleaning pig sties or making marathon runs on rainy days, which are reminiscent of some of the more outrageous examples of a school prefect system gone wild, are the sort of thing which would bring the people into a feeling of ease in our Courts. What they are entitled to, I believe, is a fair hearing before an impartial judicial officer. As Lord Denning once said, 'In the very pursuit of justice our keenness may outrun our sureness, and we may trip and fall.' The fact that we can convince ourselves that justice has been done is not sufficient—who we must convince is the woman with rollers in her hair in the Otara shopping centre or the man on the Lower Hutt unit with his *Truth* under his arm; they are the judges of that particular matter.

"The call this morning has been clear. Reform must be something more than merely tampering with the existing structures, tinkering with preconceived notions and titivating worn out machinery. Experimentation and innovation not for their own sakes but to provide an active and responsive system are essential. A contemporary example, I believe, is the question of costs in criminal cases. We pride ourselves on a system of justice which, with a few notable exceptions, proceeds upon the basis that every man is innocent until he is proved guilty. The application of the costs in criminal cases legislation gives lie to this proposition and, in fact, creates three distinct categories. First, the guilty; secondly, those who are not guilty but nonetheless deserve to be penalised; and, thirdly, that select company whom the Courts believe should have their financial loss mitigated by an award of costs. This tripartite division is basically a judicial convention for the plain reading of the Act indicates a far greater flexibility than its application reveals. Regrettably in a recent decision Mr Justice Chilwell makes no reference to the English practice note where the Chief Justice Lord Widgery has indicated that it should be 'accepted as normal practice that when the Court has power to award costs . . . it should do so in favour of the successful defendant, unless there are positive reasons for making a different approach'. That is no modification or updating of the previous position, but an example of scepticism with past practice and an accommodation of current demands.

"Judicial resistance in this country indicates a need for amending legislation to make it clear that costs should follow the event unless there are clear reasons to the contrary. Only in doing this can we ensure that no one is denied the right to the sort of hearing which we believe is so important.

"Recently my car broke down in South

Otago and I was forced to stay overnight in a farmhouse with no facilities, no water, no power and none of the usual amenities. I shared my bed with a little lad and as soon as it became dark we went into the bedroom and he got into his night attire and I did likewise, and I was touched to see that he knelt down at the side of the bed, on his side, so I thought I should do the same, as I had not seen this for some time. As he knelt down he pulled his hands away from his eyes and through clenched teeth he said, 'Wait until my mother gets you; the pot's on my side of the bed.'

"We as a profession need to learn to involve ourselves in dialogue. For too long we have talked at society, and I believe we now need to talk with, to hear and to listen and to respond to our community."

MR SINGLETON: "Mr Chairman, ladies and gentlemen: May I start by joining in the congratulations to Judge Gesell on the great quality and great stimulation of his address. It is interesting, I think, that at the moment there is a general movement towards controlling the encroachment of the big battalions and protecting the rights of the little man, and also letting him know he has those rights. It is a development which seems to be taking place in many countries, in many different parts of the world and is epitomised by Judge Gesell's address today and by Mr Patterson's paper yesterday, by the appointment of Ombudsmen here and there in which you in New Zealand were so forward looking; in the points about the extension of the legal aid scheme to which the Lord Chancellor referred yesterday, and particularly the appointment of salaried solicitors to bring advice to people in disadvantaged areas and to let them know the advice is available and they may need it.

"He did not incidentally tell you the suggestion of the salaried solicitors' appointment was made by the Law Society both prior to the 1949 Act and the 1972 Act, and if previous governments had acceded to our suggestions we would have been saved a deal of trouble now. The Lord Chancellor was not here to give a plug for the Law Society or he might have told you that the captain of the English rugby football team which beat Scotland in the last international of the season was a solicitor. The *Law Society Gazette* normally has a good deal on the front of leaders and important stuff. I suggested to the editor, and she agreed, that we should scrap all that and put a photograph of him on the front instead.

"Another example of the looking at the constitutional system and the protection of the citizen came last December from Lord Justice Scarman, when he gave in London the annual Hamlyn Lecture, and it is interesting to compare some of the things he said and the suggestions which he made with those in Judge Gesell's address. For instance, the Judge said the fact that the 'States have united under a constitution which memorialises a specific bill of rights, while you have proceeded to reinforce the common law by a series of separate specific statutes is a distinction which is generally assigned too much significance', and he went on later in his address to say, 'These examples are sufficient to suggest the dynamic role the law can properly play, the resulting involvement of the Court, and aspects of social policy, the enormous responsibilities being accepted by the practising Bar, and again by supplementing the legislative and administrative processes in this fashion the Courts are not usurping authority.'

"Sir Leslie Scarman wrote or spoke as follows: 'The common law system is part of our constitution. A new settlement is needed which will retain its strengths while eradicating its features of weakness and obsolescence. In times past the strength of the common law was its universality to go with its origin in the customary law which owed nothing to the activity of Parliament. Indeed it preceded it. This strength, when ranged alongside the power of Parliament, gave it victory over the king in the seventeenth century and led to the constitutional settlement of 1688-89. But the true victor in that settlement was Parliament, whose sovereignty then began. Today, however, it is Parliament's sovereign power more often than not exercised at the will of an executive sustained by an impregnable majority that has brought about the modern imbalance in the legal system. The common law is no longer the strong independent ally, but the servant of Parliament.'

"And he goes on to say, 'We must seek a new constitutional settlement which makes use of judicial power to keep within the constitutional limit the sovereignty of Parliament.' And then, finally, at the end of his lecture: 'It is not enough to diagnose an ill. I, therefore, though with diffidence, will suggest a course of treatment. First, a new constitutional settlement,' he says. 'First on the agenda should be the problem of checks and balances to be im-

posed on the legislative sovereignty of the central Parliament, and on the legislative power of the regional assemblies—this is if we have regional assemblies in the United Kingdom in the future. I would expect that he would find ultimate sovereignty remaining with the central Parliament, but the need for a substantial majority, for instance two-thirds to repeal or amend certain entrenched provisions, I would expect the entrenched provisions to include a bill of rights, guaranteeing fundamental human rights, the European treaties, the devolution to regional assemblies, the statutory majority of substantial size before entrenched provisions could be touched.' I know that the Chief Justice does not altogether with him there. We would hope that a Supreme Court of the United Kingdom would be established; we already have its embryo in the judicial committees of the House of Lords and the Privy Council, with power to invalidate legislation that was unconstitutional, to restrain anyone, citizen, government, even Parliament itself from acting unconstitutionally.

"Sir Edward Coke at one time thought the Courts had this power; Cromwell thought it necessary for good Government. We today must surely see that without it the aspirations of our society, let alone the international obligations of the statute will not be fulfilled.

"Well, ladies and gentlemen, that is a somewhat different approach I think, but it is interesting that these movements are taking place from the different sources in roughly the same direction.

"Having said that, and being entirely convinced, as I am sure we all are, that the lawyers must be involved in this new thinking, and indeed they are and always have been. I think it is a myth that only now are people working up to improve and bring up to date the system. Generally throughout history it is the lawyers who at least as much as other people, and I personally think more than other people who have been involved in this. May I, nevertheless, sound a note of caution. When there is a great movement, as seems to be happening in a particular direction towards a particular thinking, this thinking becomes fashionable, and it becomes fashionable not only with the people in general, but thus with the legislators. It is not a bad thing to be taking part in the fashionable thinking if you are looking for the votes to keep you in Parliament. Therefore, because it becomes fashionable and because the legislation may take place too fast following the thinking, there is the danger of throwing out the baby with the bath water. I have seen this myself in a neighbourhood law centre where I sat on the management committee for a year before I took over as president. Admirable work was done, and we were reaching people who had never heard of a lawyer, and were scared stiff of a lawyer. The very idea of going into a lawyer's office—they came into the Citizens' Advice Bureau downstairs to which they were used. It looked rather like a second rate shop front and they produced their problem. They were told by the lady in the Citizens' Advice Bureau: 'Your problem seems to be a legal one. You pop upstairs and see them up there.' This was excellent and was doing great work, and we on the management committee did nothing but congratulate them on what they were doing. Some times they went off after a hare—we must go round to all the housing areas, all the slummy housing areas and almost say to people, 'Surely you must have some wrong we can put right?' Rather like the free soup syndrome people used to talk about in the days when we made the soup and you jolly well drink it. They would also almost campaign against, for instance, landlords. The impression would be given that all landlords were bad, that all police were racially prejudiced, and not in that context, but in an entirely different context, one hears the same sort of thinking that anything which a former imperial power did in establishing its empire was necessarily oppressive and bad.

"Then we in the management committee, which consisted of some lawyers, some social workers, some academics, some representatives of local citizen groups, would say, 'Steady on. Wait a moment. We here are supposed to be acting like lawyers. Afterwards go out if you like and put on a different hat, but while we are here we are being lawyers and are supposed to be helping people with their legal problems and not running political or other campaigns.'

"I think that is desirable, and that is the sort of note of caution that I would like to suggest to you with regard to this admirable movement which is taking place in so many parts of the world. Those of us who have been concerned in any way with ships know that when the captain wants to alter course he will say port 10, starboard 10, as the case may be, and when the helm of the ship is coming up towards the required course he will say to the quartermaster 'Meet her!', and the quartermaster will bring the wheel back the other way a little so she steadies up on the right course. I think

it is terribly important that we in the legal profession should not only be involved in these movements and in the 'port 10 and starboard 10', but equally important that we should be concerned in the 'Meet her!' to see that it does not go too far and steadies off on the right course in the new direction. Thank you, Mr Chairman."

PROFESSOR PALMER (Wellington): "I taught law in the United States for four years, and I am encouraged to see that Mr Robertson's researches on s 3D of the Police Offences Act which he did at the University of Virginia have now become public to some extent, and I hope he will not prevent himself from making them available in a more permanent form.

"It does seem to me that what is raised by the principal paper was correctly analysed by Mr Parkin in the sense that we rely more on our political institutions. And I think it must be that the reason that that happens is that it is very difficult in the United States, more so than we realise, to get legislation passed.

"The Judge comes from the Federal Judiciary and he did not say very much about the States, but there are many State Judiciaries in America and many of them, I am sorry to say, are not of the same quality as the Federal Judiciary. Some are excellent, but others are not, and those Courts are not on the cutting edge in quite the same way as the Judge's Court is. But the reason why it becomes very difficult in the United States, I think, to get legislation through is because of the separation of powers which is quite foreign to our political structure. With that separation of power embodied in the United States constitution, and all State constitutions, I think that is the reason basically why all Courts in the United States must carry on a more active role than they can here.

MR P HILLYER, QC: "Mr Chairman, I had no intention of speaking when I came here, and it is perhaps an indication of the stimulation of Judge Gesell's paper that I am provoked to do so. I particularly wanted to say that it would be easy in this country for us to say, "Well, it is a matter that the Legislature should deal with, or the real trouble is our judiciary is so hidebound it is no good putting up new propositions to them, or for the Judges to say we can't decide anything until the proposition is put to us.'

"I was moved to say, however, that the necessity is for all of us actively to seek opportunities of putting forward the principles that the Judge has mentioned, and if we are active and conscious of this need we can easily find opportunities for doing so. We will not have the same chance as the Courts do in the US, or as the bar does in the US of finding these opportunities, but we can make them ourselves in a smaller measure.

"The class action that the Judge mentioned is a most intriguing idea; just how much success we would have with starting such an action under the provisions of our Code that permits us to join a number of people into one action, I have some doubt, but it would certainly be very interesting to try and I would like to see some brave counsel, and might even, if it is not advertising, be prepared to do so myself on a suitable occasion, to try and get such an action going."

MR JOHN THOMAS *(Auckland)*: "My main concern is that the standard of the paper presented to us today by the visitor does not obscure the equally important remarks made by the commentator from the deep South. The main paper today has a message for us all as lawyers and practitioners, but equally does the commentator's paper have an important message for more senior practitioners, and what is perhaps a synonymous term, the Law Society, both District and New Zealand. I feel the English President's remarks when he says that the Board of Management had nothing but congratulations for the people working in the legal advice bureau can have two meanings in our local situation, where in fact I personally feel that the Society and the more senior members have nothing but congratulations to offer—no assistance in any way. I have a personal experience in this in organising a roster for one of the legal advice bureaux and there ran into the very same problem that the help or volunteers coming forward are people qualified and admitted in March this year, and they must be made use of because of the lack of suitably qualified members of the profession coming forward and offering their assistance in this field, and I am sure other organisers have similar problems."

MR EDMUNDS (Australia): "One thing I thought this morning that ties us down in Australia and New Zealand to a large extent. It is some 45 years since I started law, and the lecturers are still bedazzled by the reforms of

the Judicature Act. That is 45 years ago, and these reforms are from 102-103 years ago. This is the thing that ties us down.

"In the lower Courts, I think in Australia, it was possible some years ago when pounds were in vogue to commence proceedings in some of the States, up to £1500, with a simple statement of fact and the defendant appeared and he was tried and justice in 99 percent of the cases was given. Once you got beyond that in the Supreme Court you start all the panoply of the Judicature Act, and that is still going on today. There is no reason at all, with the qualities of the profession today, the qualities of the Bench, why it is not possible for the Court to really determine the issues before the parties. Not what the pleadings say, but the issues before them. The chance of these two people ever suing one another again is more than remote, but we are still acting on the proposition that they are likely to start other actions on the one day. We demand this great particularity. The party who wants relief wants his trouble with Jones fixed up, he doesn't know if it is torts or what it is. Surely the Courts today with the experience they have got, with the weight of authority behind them, statutory and common law could fix up the trouble with Smith and Jones without the magnificence of pleadings. I must admit that in Australia, of course, NSW only two or three years ago had the Judicature Act, so we are behind to some extent in Australia, but even they have now caught up. Surely it is possible to make one law advance, to cut out the beauty of the pleadings and get on with settling some of the troubles with Smith and Jones that are before them."

MR SIMON REEVES (Auckland): "Judge Gesell's wonderful speech took me back to Bullrun or Manassas and south of the Mason Dixon, and put some fighting spirit into me, and reminded me of studying Uinted States constitutional law at Virginia as my second foreign language. For a semester I did not understand a word of it but found it entirely intriguing. The remark on class actions and the inability and frustrations that we experienced in Auckland two years ago when we discovered that Osborne House, a rather large and pleasant mansion on Ponsonby Road was to be demolished. A permit had been issued by the Auckland City Council and the worthy and redoubtable Michael Curtis was acting for the company that had bought the site. We in the Ponsonby-Herne Bay Planning Association had no standing according to, if I remember rightly, a recent Waikato-Hamilton Supreme Court decision. We used every tactic we could, some of which I now disclose, such as someone wrote a letter to the unions asking them to boycott the demolition of the property which they did, until they discovered they might be breaking the law, and the person who wrote the letter discovered he might be inciting a breach of contract. We researched the Town and Country Planning Act ad nauseam, with architects, with town planners, with lawyers, and we had no alternative apart from injunction proceedings, which we filed with great reservation because of undertakings which had to be given; we had no alternative but to appeal to the Minister himself. I mention this point because the first commentator said this is a small country and one is easily able to approach the central government. We sent telegram after telegram to the then Minister of Town and Country Planning, Mr Hugh Watt, and when we asked, 'What's what,' he said, 'That's that,' and did not reply. We beseeched him, as we thought, responsible members of the community and said the Town and Country Planning Act was not being followed inasmuch as certain things had not been advertised, etc., etc., and I stand to be corrected by Mr Curtis, and he was our last resort. I personally felt, having been so excited by the American approach, sad and very frustrated—but sad that an approach to the Courts in New Zealand, let alone the expense which we didn't have the money to pay for, may very well have failed, not only if we had had the standing which we were asking for by blowing to the wind, but also because this fighting approach Mr Robertson referred to may not have been there, even if we had the standing."

DR MCELROY (Auckland): "We have been privileged to listen to a truly great address this morning from the Judge, embodying, as I see it, a new and fascinating commentary on the common law, and showing it is capable still of new dimensions, particularly when it is fashioned by strong and able Judges who can still find in the common law, and using that term to embrace the principles of equity, a foundation upon which they can intervene to provide justice against sometimes capricious and certainly oppressive acts that produce hardship to human beings. The difference that has been pointed out between the approach achieved in America and here, is that we have for different reasons which have been mentioned, been

able less than America to use legislation to remedy ours. In the United States it has been more difficult to do that, the Judges have found ways to do it, basing their decisions on interpretations of the Bill of Rights or a statute such as the statute the Judge quoted in respect of the exciting Memphis case, the statute that provided an opportunity to examine administrative actions that were capricious. And if there were such an opportunity here I am sure our Judges would be capable of doing similar great things to give the law new dimensions in these fields.

"I think the approach which might be pursued here is the one Mr Singleton referred to in his reference to Lord Justice Scarman's address, and it is significant that Lord Justice Scarman is indicating in his Hamlyn Address the trend to examine whether there could be a restatement of the principle of the Bill of Rights, or a refashioning of them, even in the United Kingdom. The United States drew tremendous strength from the circumstance that their revolution occurred only about 150 years after the death of Sir Edward Coke, and they were steeped in the statements of principle that he made, not only on the bench, but in the House of Lords afterwards, his vigorous opposition of the King which led to the supremacy of the Parliament being established. But if in New Zealand we could relook at this approach it might well be worth while.

"There have been hesitant attempts to fashion a bill of rights; they have not found too much support. We thought we did not need them. But at the present time I know the Legislature or the Government has promised a bill of rights. It would be less than valuable if it does not include a capacity for examining administrative action that is capricious, and it would be less than satisfactory if it did not find reference or give power to examine, or examine actions in terms of due process. Those are the things I would like to see, and a new momentum may yet be given as a result of this address today to a movement towards advancing a bill of rights that might give us the same kind of platform that they have in the United States and which they have so vigorously taken advantage of."

MR DAVID WILLIAMS: "Mr Chairman, could I just make one brief observation which follows on from Dr McElroy. In my humble opinion we need imagination on the part of the bar more than anything else, notwithstanding Lord Justice Scarman, notwithstanding my learned friend Dr McElroy, my view would be the remedies are increasingly available and what is needed is courage and imagination on the part of the bar. One thing that intrigues me greatly is the paper we will hear from Mr Justice Cooke. One of my colleagues is in the United States at the moment, and he is studying administrative law, and after a good look at what has happened there, he has formed the view that the view that the English Judges and the Commonwealth Judges by judicial innovation, have got us to the point where our system of law is equally efficacious, or equally capable of being used in the manner that is suggested here. I would say it would be wrong to depart from our traditions. Our historical approach has not been one where we have given the power to the Judges to say statutes are unconstitutional. The power is there. What we need is a little more inspiration and imagination from the bar. From brief experience, if the facts of the case are sufficiently strong, and the advocate sufficiently courageous, the bar and the bench in this country can achieve most of the results for which we are seeking."

MR HETA TE HEMARA (Auckland: "For the last four-five months I have been travelling this country with a great deal of interest, and at the present time I am very saddened at the picture I see among my youth and among my race. We are so far out in the cold—you people have got everything made here. What sticks out is this—we are so far apart, the polarities are so great, it is no joke. I see a great need, especially in the legal system in this country. Adopting the good will, the good will of the Maoris so that we could have your good will. This is just as practicable as your legal jargon. In this way I feel that the human aspects of my brothers and my sisters who are in the prisons, in the borstals, in the orphanages, to me are just as important as everyone here. It is so sad to me to be present in many of the Courtrooms of this country and see the cold, efficient process which is done in most Courtrooms. This is what makes us so far apart. We have very little personal experience of each other, very little knowledge of each other, so that with all your expertise, all your great knowledge, here is a challenge to you people. Forget your legal jargon and come a bit closer to us."

MR GERARD CURRY (Auckland): "A point raised by Professor Palmer as to the difference between the States and New Zealand in terms of the possible effects of legislation, and the

access to our legislators. To me one of the major differences is found in the party structures of our political parties. In New Zealand parties present a consistent policy. Mind you, it is inevitably contradicted over the years, but within the party itself at one particular time we do have party discipline. In the States the difficulty is there is no party discipline. Consequently, to get any effective legislation through involves a great deal of manipulating, of trying to count votes and the whole process becomes rather complex, from a pragmatic point of view. It seems to me this in itself suggests perhaps the underlying point of difference and that is this, that because we have a homogenous society we can, in fact, have party discipline offering a defined party structure. In the States, the society is so diverse, so large, the values are so different and the expression of those values often tends to take so many differing forms that these differences do not allow the same possible degree of uniformity and access as our society allows. I think we must bear that in mind when trying to decide exactly where we are going to join the balance between what degree of the cutting edge is to be handled by the Court and what degree must remain in the hands of the Legislature.

"While I do not wish to appear to be over-reticent as to the role of law and lawyers, it does seem to me that two aspects of the involvement of the Courts in the States in the cutting edge area should be borne in mind in considering this question. When the Courts are involved in the forefront of the cutting edge, it leads to a degree of political interest in what could be regarded as the legal sphere. This has a further complementary aspect, that in part it leads to an atrophying process in the legislative sphere because much of the political activity is diverted through the Courts and not through the Legislature, where perhaps in our system it should be. I would simply end by saying that I think in our system, while we must advance some of the processes of the law outlined by Mr Robertson and other speakers, I do join in the remarks made by Mr Williams, that our law provides for significant degrees of social advance by spirited use of what is already there, and it may well be we should turn our attention to those areas by using what is there and then perhaps we will be in a position to consider where is the major cutting edge."

MR L CASTLE: "The Chairman, Judge, ladies and gentlemen, as I understand it my instructions are not to give you an address but simply to express on behalf of us all gathered here this morning, our deep sense of gratitude to Judge Gesell for his paper. Indeed there is very little left for me to say that is not of itself repetitive by way of thanks, because not only have our very able commentators referred to the Judge's paper in such commendable terms, but also the subject of the excellence of it has been adverted to from the floor. It is a pity that Judge Gesell is not permitted the time as a farmer to discuss feeder cattle, and as a sailor to expatiate on cruising off the State of Maine. You have referred, sir, to our natural disappointment that Elliott Richardson was unable to be present this morning, but may I say, sir, that whatever disappointment we may have felt has been more than assuaged by your own delightful personality and the excellence of your address. The contribution from the floor was again ample evidence of the intense interest that you have engendered. You, sir, and Mrs Gesell have graced this conference in your turn. We express our deep gratitude to you both, and we wish you safe return to your homeland.

Mr O'Brien, in his opening comments this morning, referred to the generosity and thoughtfulness of Chapman Tripp & Co in arranging in their centennial year for this address. This firm, a Wellington firm initially, has produced giants in the past, and is not without contemporary giants. Moreover the partners in Wellington have had the temerity to open a branch in Auckland, and indeed in Whangarei, and in expressing, as we have done, our thanks to the Judge, we must not overlook our deep sense of gratitude to Chapman Tripp & Co for this delightful occasion. I ask you to express your thanks in the usual way.

PRIVATE RIGHT v PUBLIC INTEREST

By C I PATTERSON

Mr C I Patterson was born at Reefton in 1929, and educated at Reefton District High School, St Andrews College, Christchurch, and the University of Otago. He graduated LLB of the University of New Zealand in 1951, and was admitted as a Barrister and Solicitor in that year. He joined the firm of Barnett and Cleary, Solicitors, Wellington, in 1953, and has continued the practice of the profession in Wellington, where he is a member of the firm of Watts and Patterson. In 1966 he was appointed a member of the Contracts and Commercial Law Reform Committee, and in 1973 he was appointed Chairman of that Committee. He has served on committees of the New Zealand Law Society, and is currently a member of the Society's Legislation Committee. He is a director of several companies. He and his wife, Claire, have four children.

1. Introduction

It is right that we should pause from time to time to consider a matter fundamental to all our laws; to remind ourselves that the whole body of substantive law represents many points of compromise between the interests of society and the interests of individuals, and to ask ourselves and others who may be concerned whether or not the various interests are today held in proper balance. For it is in the law that we find the formal expression of those restraints upon the natural liberty of each individual which are thought to be necessary to secure the advantages of civil society.

Our law is not like that of the Medes and Persians, which altered not. Changes are made with such rapidity that not all the resources of modern communication can keep us supplied with the information necessary to know the law. Indeed, important changes are sometimes made overnight[1]. There is also the spectacle of legislation by exhaustion favoured not only by the present Government, where the quality of debate in the noctural hours is in strange contrast with the gravity of the subject-matter. When it is noted that the 1974 Session of Parliament established a record of endurance, when our Prime Minister himself has questioned whether there has been too much legislation, when the flood of enactments and regulations is such that we scarcely have time to read, let alone understand them, it is time for us to ask whether, in all this frantic activity, the great purpose of it all has been forgotten.

In this condition we may fairly ask the lawmaker to remember that he strikes the balance between public and private interests, and we may fairly enquire whether those interests are held in proper balance today.

2. The individual in society

The theme is so spacious in scope as to bring under review the objects and purposes of society itself. "Private right" I take to signify all the rights and freedoms regarded as pertaining to the individual. These are not easily defined, but for the purposes of the discussion they may be taken to embrace at least the catalogue contained in clause 2 of the draft New Zealand Bill of Rights considered, and abandoned, in 1962[2], viz:

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1 See, for examples, the Cornish Companies Management Act 1974, which not only placed certain companies under statutory management, but also made substantive changes to their rights and liabilities; the Hire Purchase and Credit Sales Stabilisation Regulations 1957, Amendment No 26, gazetted on 2 September 1974, which included a provision that it should come into force on 3 September 1974, but which was amended by Amendment No 27, gazetted on 5 September 1974, which was "deemed to have come into force" on 2 September 1974, whereby it was decreed that Amendment No 26 was amended to come into force on 4 September 1974 (and I might mention that the text of all this reached my office by direct post from the Government Printer on 10 September 1974); and *Johns v Westland District Licensing Committee (No 2)* [1961] NZLR 577. I do not overlook retrospective changes, of which one of the most notable is the Exchange Control Regulations 1965, Amendment No 5, made and gazetted on 3 February 1972, which deemed itself to have come into force on 2 February 1972, and purported to prohibit people from selling shares in a leading public company listed on the Stock Exchange, not withstanding that they may have sold them.

2 In 1964 a Parliamentary Select Committee considered a New Zealand Bill of Rights and recommended that the Bill be not allowed to proceed. The recommendation was adopted and the Bill lapsed. For the text of the Bill, and the evidence received by the Select Commitee, see 1964 Journals Appendix I, 14. I do not disagree with the Committee's recommendations, but I have found it of interest to examine the submissions. Professor C C Aickman

(a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law:
(b) The right of the individual to equality before the law and to the protection of the law:
(c) The right of the individual to own property, and the right not to be deprived thereof except in accordance with law:
(d) Freedom of thought, conscience, and religion:
(e) Freedom of speech and expression:
(f) Freedom of peaceful assembly and association.

"Public interest" is no less an amorphous concept, which I take to signify the interests of society as a whole in the broadest sense.

Everyone has their views upon these concepts, but it is fair to say that those views are largely subjective, because they flow from personal experience and aspirations.

I do not propose to develop a political or sociological debate on the place of the individual in society. Some think that society as a group is the fundamental, and that each member should have only a residue of rights and freedoms after the interests of the group have been satisfied. Others focus upon the individual first, and take the view that he should be required to cede only what is necessary for the common good. I think this difference of approach is important because it colours one's attitude to all specific questions. Suppose, for example, the issue is whether New Zealand should establish a national pension fund. Those who take the first view would say, "Of course we should, and the fact that private interests may be affected thereby is irrelevant." Those, however, who take the second view would say, "Maybe we should, but private interests are active in this area, and let us first be satisfied that it is necessary or desirable to affect their activities." You will gather from what is subsequently said in this paper that I favour the latter view, and I declare my interest accordingly.

While on a personal note, it seems appropriate for me to mention that I rely mainly on my experience as a commercial lawyer, and that I am conscious of the fact that vast areas in which the interests are in conflict have not been touched on in this paper. Amongst them are laws respecting the use of property and town planning law, the compulsory acquisition of land by the State, family law especially relating to the status of marriage, divorce and the status of children, laws of personal conduct such as the use of drugs, sexual behaviour, and abortion, product liability laws and laws for the protection of "consumers", and large aspects of the law of torts. My hope is that experts in these and other fields will be willing to contribute from their special experience to the discussion of the thoughts expressed in this paper.

I think we can pass beyond political or sociological debate. We can, and should, look at this theme as lawyers, and discuss it in the light of our special qualifications as lawyers. So let us first establish our special place in the discussion.

3. A lawyer's approach to the theme

It must be noted that our daily work is concerned with the application of the law. The enforcement of the common will upon the conduct and affairs of individuals is not for us a theoretical or philosophical matter. For us it has a stark reality. Daily are we required to explain, interpret and apply legal rules in particular situations. Our experience in this respect can surely command some special attention.

Moreover, there are sound practical reasons why we, in the exercise of our profession, should take an interest in the theme, apart altogether from our interest as members of our society which imposes its will on us no less than on others.

First, we must know the object and purpose of a law. It is not enough to know the text of an enactment, or the leading form of expression of a legal principle. We are enjoined to accord

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introduced his instructive submissions as follows: "It is generally recognised that increasing State activity in the social and economic spheres can bear heavily on the freedom of the individual and that it is a major concern of modern government to ensure that a proper balance is maintained between the public interest and the interests of the individual." The Solicitor-General of the time, H R C Wild QC, now Chief Justice of New Zealand, saw the problem a little differently. He said: "The essential difficulty in a measure of this kind lies in striking the right balance between, on the one hand, the guarantees without which a Bill of Rights would not be worthy of the name, and, on the other, the qualifications necessary if established law and practices are not to be threatened." While the point made by the learned Solicitor-General is, of course, substantial, the fundamental issue is, I respectfully think, best exposed by the learned Professor.

such fair, large and liberal construction and interpretation to each enactment as will best ensure the attainment of its objects[3]. We are also told that in interpreting statutes, Courts are required to apply their knowledge of the world and to take into account all kinds of social and economic considerations[4].

Secondly, our clients today are not content merely to receive the law; they look to us for justification and explanation, as well as exposition.

Thirdly, inasmuch as the state of balance between the conflicting interests on any particular issue is never determined once and for all, it is necessary to know the current tendency as an aid to predicting which of competing interests is likely to be preferred. I believe that all of the landmark decisions of our Courts exhibit this common feature—that someone perceived that the time was opportune to record a movement of the balance of preference. Therefore, we need to know which tendency is being followed for the moment, as we are always looking for the solution of our clients' problems of the moment.

I have therefore given consideration to those propositions concerning the theme which I believe lawyers are especially qualified to discuss, and I offer these to you tentatively for your benevolent consideration.

4. One lawyer's propositions

This paper will consider the following propositions:

(1) There is no single formula for the proper accommodation of public interests and private rights. (Part 5)
(2) Developments of the tax laws are an indication of the current tendency. (Part 6)
(3) In our society, the accommodation is achieved by rules derived from two main sources—the common law and legislation, and finds its most active recent development in legislation. (Part 7)
(4) Legislative preference of one of several courses not only promotes the preferred course, but may also prohibit, inhibit or discourage alternatives. (Part 8)
(5) Legislative inhibition of one of several courses promotes the other courses. (Part 9)
(6) The pursuit of ideals should not eliminate that which is imperfect until it is clear that something better is attainable. (Part 10)
(7) There are limits to what the law can do. Other forces, both economic and social, may deal with an unbalanced situation more effectively and more fairly than a legal rule. (Part 11)
(8) Where it is appropriate to deal with a problem by creating or applying a rule of law, the law cannot stand by. In that situation, failure to deal with the conflict by legal means may amount to a preference of the interest which ought to be inhibited, or an inhibition of the interest which ought to be preferred. (Part 12)
(9) Where it is desired to change an existing legal situation, the change should be made only by lawful authority. (Part 13)

5. No permanent solution

While all the great declarations of social purpose emphasise the rights of each person as an individual, none has been able to define once and for all the desirable point of balance between the rights of one and the rights of his fellows[5]. This, I think, we must accept as part of the human condition, entailing the constant appraisal of each issue as it presents itself.

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[3] Acts Interpretation Act 1924, s 5 (1) (j). Ward, "A Criticism of the Interpretation of Statutes in New Zealand Courts" [1963] NZLJ 293.

[4] Such as the scarcity of housing and the availability of cheap, secondhand furniture; see *Woodward v Docherty* [1974] 2 All ER 844.

[5] (a) The American Declaration of Independence of 4 July 1776 asserts that all men are created equal and have "certain inalienable rights, that among these are life, liberty and the pursuit of happiness", but says nothing as to the mutual accommodation of these. The Constitution of the United States of America does prescribe fundamental laws.

(b) The Declaration of the Rights of Man and of the Citizen of the French National Assembly adopted on 26 August 1789 asserts that men are born and remain free and equal in rights and have natural and imprescriptable rights to life, liberty, property and resistance to oppression as well as to freedom of speech, of the press and of worship. Liberty is defined as the ability to do whatever does not harm another.

(c) The Manifesto of the Communist Party (English edition by F Engels of 30 January 1880) includes the sentence: "In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association in which the free development of each is the condition for the free development of all."

(d) The Universal Declaration of Human Rights

Consider, for example, three statements upon the scope and function of law:

(1) "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."
—J. S. Mill: Introduction to his *Essay on Liberty*.

(2) "The principle that runs through all the recent legislation is that the State is responsible for seeing that all the supplies and services which are necessary for individual wellbeing are available to all."
—Lord Denning: "Freedom under the Law"—the Hamlyn Lectures.

(3) "The union of liberty with order is the last stage of civilisation and the perfection of civil society. It is in proportion as these two qualities are combined that the merit and value of different governments are to be estimated. . . . Whichever way the balance is overthrown, the interests of the community suffer. . . ."
—Lord John Russell: *The History of the English Government and Constitution*, 1821.

Some will say that the second statement does not go far enough for this country at all events. Our legislators are not content to ensure that supplies and services are available to us—they "thrust them down our throats despite our teeth". They prescribe as law what they think is good for us, and employ the compulsions of law to ensure that there will be no choice about it[6]. We should note the growth of such affirmative commands and ponder their implications.

Of the increase of prohibitive legislation there is apparently no end, and it is clear that the prohibitions are not limited to the prevention of injury to others.

In addition to these points, we should note the development of State participation in all kinds of affairs[7]. The force of law is employed to establish State monopolies or participants carrying on activities which in earlier times were merely observed and supervised by the State.

I do not think much purpose would be served by arguing here that one view or the other should prevail. Each of us has his own thoughts on that subject. There, I think, is the paradox which precludes a finite solution. It is discussed by Macaulay in his essay on John Hampden. He asserts that all the prosperity and internal peace of fourteenth century England, the object of the admiration and envy of all surrounding States, were the fruits of a spirit in the people designated as proud and outrageous in its assertions of civil liberty. I would like to think he was right. With such thoughts in mind, it will do no harm to remind our lawmakers that the good of all requires attention to each[8]. I

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adopted by resolution of the General Assembly of the United Nations on 10 December 1948 proclaimed, "common standards of achievement for all peoples . . . to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms . . ." A catalogue of rights and freedoms follows.

(e) The current position in England (and New Zealand) is adequately stated in 7 *Halsbury's Laws of England* (3rd ed) 196, as follows: . . . since Parliament is sovereign, the subject cannot possess guaranteed rights such as are guaranteed to the citizen by many foreign constitutions. It is well understood that certain liberties are highly prized by the people, and that, in consequence, Parliament is unlikely, except in emergencies, to pass legislation constituting a serious interference with them. The absence of constitutional guarantees makes necessary, and perhaps stimulates, a strong public opinion on this subject."

[6] For example, the New Zealand Superannuation Act 1974 compels every employee without exception to contribute part of his earnings to a fund for the provision of a pension on his retirement. The Bill which led to this enactment went further—it proposed that employees and self-employed alike should be obliged to join such schemes. Some self-employed felt they could make better provision, and are, no doubt, grateful that they have been spared from the clench of this statute. Employees have no choice. See also the discussion of the Accident Compensation Act 1972, post.

[7] In 1974 Parliament constituted or amended the constitution of some of the State trading entities by the following enactments:
Housing Corporation Act 1974
New Zealand Export-Import Corporation Act 1974
New Zealand Superannuation Act 1974
Pork Industry Act 1974
Rural Banking and Finance Corporation Act 1974
Scientific and Industrial Research Act 1974
Tobacco Growing Industry Act 1974
Tourist Hotel Corporation Act 1974
Wool Marketing Corporation Amendment Act 1974.
I had intended to attempt to make an exhaustive list of State trading organisations constituted by Act or regulations, but I have not had time to do so.

[8] It is not without significance that Archer Shee's petition of right against the dismissal of his son from the Navy on an accusation that he stole a 5/- postal note should have become one of the most celebrated of English cases, and the basis of Rattigan's "The Winslow Boy". The remarks of Mahon J on the despatch of Court business, recorded in [1974] NZLJ 276, are respectfully commended.

— Confidence in the veracity of our accounting systems is shaken, as it is feared that the historical cost methods employed are not disclosing true costs, that "profits" are overstated, and that capital is being depleted:
— The Stock Exchanges are virtually deserted, and shares in our leading public companies are selling at less than the Tangible Asset backing:
— Interest rates in the uncontrolled sectors have reached their highest levels since 1929:
— The supply of funds to the controlled sectors has fallen away:
— Prices of land and buildings have increased dramatically:
— Relations between employers and employees are strained, especially by "relativity" arguments and "demarcation" disputes.

There are, in my opinion, grounds for thinking that this and cognate legislation are themselves causes of inflation[40]. I suspect that it is all an example of the futility of expecting legal rules to dominate economic forces, and I would like to commend some observation of Turner J, as he was then, to your attention—"He left commerce to itself and it developed fruitfully as the liberal textbook writers say that it will when so left"[41]. I do not mean that Governments should ignore commercial affairs; I do mean that Governments should recognise the limited efficacy of legal rules in this area.

(c) The Layby Sales Act 1971 arose out of a report of the Contracts and Commercial Law Reform Committee[42]. There is some good advice in para 12:

"12. We see little advantage in practice in requiring the giving of fidelity bonds, the segregation of layby goods from the vendor's assets, or the banking of payments by layby purchasers in separate trust accounts as under the New South Wales Act or (in a different field) the Building Contracts (Deposits) Act 1962 of the State of Victoria. These requirements offer no real security against the dishonest trader, who will simply ignore them. Indeed, the semblance of security may be exploited by the cheat in order to delude his victims more effectively."

12. In legal situations, the law cannot stand by

My eighth proposition is that where it is appropriate to deal with a problem by creating or applying a rule of law, the law cannot stand by. In that situation, failure to deal with the conflict by legal means may amount to a preference of the interest which ought to be inhibited, or an inhibition of the interest which ought to be preferred:

(a) One controversial area in which this proposition may be tested is the restraint by injunction of interference with contractual relations[43]. It is a matter for regret that the judgment of Mahon J in the *Kawau Island Ferry* case[43] has not been reported. His Honour had before him a motion for writs of attachment of certain union secretaries for alleged disobedience of an interim injunction. One ground urged upon the learned Judge on behalf of the secretaries was that the substantive proceedings were being carried to the Privy Council. In the course of an oral judgment, Mahon J said:

". . . I must recapitulate the true nature of the argument which the unions and their secretaries contend for in the present proceedings, and which, so far as I understand it, they intend to submit to the Privy Council. Their case has nothing to do with the right to strike, or the right to withhold their labour. Their case is that they may unlawfully procure the withholding of essential supplies of goods, and that the Courts of the country are powerless to intervene. It will be seen that such an argument may be extended to cover a wide category of situations. It would permit the grocer or the butcher to be put out of business by a union if he failed to comply with a union demand arising out of a dispute with the appropriate shop em-

40 For a point of view of the instability of the monetary system, see O'Keefe, "New Zealand at the Crossroads" [1974] Recent Law, 271.

41 *Norman v Inspector of Factories* [1961] NZLR 1014 at 1015.

42 "Layby Sales", a report of the Contracts and Commercial Law Reform Committee. Government Printer, August 1969.

43 *Flett v Northern Drivers Union* [1970] NZLR 1050; *Kawau Island Ferries Ltd and Anor v Northern Drivers Union and Ors* (Unreported, Supreme Court, Auckland, No 375/74, Mahon J, 1 July 1974); I T Smith, "The Use of Injunctions in Industrial Law" [1974] NZLJ 432; see also A K North KC (as he was then), "Law and the Public Conscience" (1949) 25 NZLJ 116.

figures do not, of course, take into account the feature I notice next.

(b) *The emergence of special forms of contribution*

Two other significant developments have a material effect upon the proportion of the national product which is taken and applied for the common good as seen by the Government.

First, it must be noted that many organisations are by law obliged to hold Government Stock. Finance companies are required at present to invest a proportion of their assets in Government Stock[10]. Superannuation Funds are required to hold approximately 30 percent of their net assets in public sector securities in order to qualify for the exemption from income tax[11]. Life insurance companies are required to hold 30 percent of their assets in public sector securities[12]. There are more. These kinds of enforced loans fall squarely within the provisions of the Petition of Right of 1627[13]. There do not appear to be any statistics available recording the amount of these exactions.

Secondly, it must be noted that by force of law certain subjects are required to contribute to funds of various kinds, notably the funds established under the Accident Compensation Act 1972, and to a superannuation fund pursuant to the provisions of the New Zealand Superannuation Act 1974. While these may not be regarded as taxes in the strict sense, they are exactions imposed by law. Moreover, it is reasonable to assume that a substantial proportion of these funds will be invested in Government Stock.

It is not, therefore, possible to obtain an accurate measure of the funds contributed under compulsion of law to the central Government, a situation which I regard as profoundly disturbing.

(c) *Changing attitudes to tax avoidance*

In a relatively short space of time, which I would put at no more than 30 years or so, attitudes to tax avoidance have changed markedly[14]. This is illustrated by two citations:

(i) "No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow — and quite rightly — to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue."[15]

(ii) ". . . there has been a growing awareness by the Legislature and the Courts alike that ingenious legal devices contrived to enable individual taxpayers to minimise or avoid their tax liabilities are often not merely sterile or unproductive in themselves (except perhaps in respect of their tax advantages for the taxpayer concerned), but that they have social consequences which are contrary to the general public interest. There is the problem, too, that the Legislature usually is lagging several steps behind the ever-developing arrangements worked out by experts in this field on behalf of their taxpayer clients."[16]

One focal point of the argument is s 108 of the Land and Income Tax Act 1954 as enacted by s 9 of the Land and Income Tax Amendment Act (No 2) 1974. A sharp division of views regarding the respective functions of Parliament and the Courts emerged in the Parliamentary Debate on the 1974 enactment. In *Commissioner of Inland Revenue v Gerard*[17] McCarthy P said:

"This appeal is from a judgment of Wilson J in the Supreme Court in which he raises his voice against the failure of the Legislature to take heed of the many criticisms of s 108 of the Land and Income Tax Act 1954, not only by Judges of this Court and the Supreme Court in New Zealand, but also by members

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10 Finance Companies (Government Stock) Order 1973 (*Gazette*, 1 November 1973, p 2244, as amended by the Finance Companies (Government Stock) Order 1973, Amendment No 1 (*Gazette*, 21 March 1974, p 505)).

11 Section 86D of the Land and Income Tax Act 1954 (Reprinted 1973, Volume 3, NZ Statutes, 2012).

12 Life Insurance Companies Investment Order 1973 (SR 1973/236).

13 3 Car Ic, 1, 7 *Halsbury* (3rd ed), 231.

14 See I L M Richardson, "Attitudes to Income Tax Avoidance" (1967) 30 NZ Journal of Public Administration, p 1.

15 *Ayrshire Pullman Motor Services v IRC* (1929) 14 TC 745 at 763, per Lord Clyde.

16 *Elmiger v CIR* [1966] NZLR 683, per Woodhouse J at 686.

17 *CIR v Gerard* [1974] 2 NZLR 279 (CA) per McCarthy P at 280.

of the Privy Council, Lord Donovan and Lord Wilberforce in particular, and against the Commissioner's extension of the operation of this extraordinarily difficult section to what he, Wilson J, called a world of fiscal phantasy. I think it proper that I should say that I think that strong words by the Judge were justified. The section is notoriously difficult. It cannot be given a literal application, for that would, the Commissioner has always agreed, result in the avoidance of transactions which were obviously not aimed at by the section. So the Courts have had to place glosses on the statutory language in order that the bounds might be held reasonably fairly between the inland revenue authorities and taxpayers. But no one suggests that this is satisfactory, especially as one result has been that the Privy Council has been forced in a number of cases to assume the task, rightly one for the Legislature, of providing the tests according to which our people are to be taxed."

During the course of the Parliamentary Debate, the learned Attorney-General, goaded, it would seem, by the reference to "fiscal phantasy", responded:

"I suggest it is legal fantasy if what is admitted to be a device to avoid taxation cannot be seen for exactly what it is and treated as such. I believe those remarks were not only uncalled for, but were unnecessary."[18]

One steps between giants with trepidation, if I may respectfully say so, but I feel bound to express plainly my own view that the statement of McCarthy P was entirely warranted. The point is simply this: what is the effect of the annihilation of an arrangement pursuant to s 108? I respectfully think that is a matter for the Legislature to prescribe, and note that some attempt to do so has been made in the 1974 Amendment Act.

7. The sources of law

Our laws are found from two sources: first, the common law of England as developed by our own Courts, and secondly, New Zealand statutes and subordinate legislation.

It is, I think, of relevance to note that the approach of the common law to a problem is essentially different from that of a statute or regulation. The common law is developed from a "myriad of single instances" and, over the course of time, principles are discerned from many particular cases. Statutes and regulations prescribe rules of more or less general application which the Courts are required to interpret and apply to particular cases. The application of the common law moves from particulars to principles; the application of statute law moves from principles to particulars.

The question whether one system is better than the other as a means of adjustment to shifts in the balance of preference between public interests and private rights is, I think, very debatable. I think the processes of the common law impose less shock on the system, but some may think they do not move with sufficient speed, and they are not free from injustice. It is also difficult to achieve a major change in an area in which the common law has become defined by high authority[19]. On the other hand, the generality of statute law may cause immediate injustices in particular cases.

To illustrate the responsiveness of the common law to changing social ideas, I choose as my first example the liability of an owner of land for damage to adjacent land. *Dalton v Angus*[20] was regarded as authority for the view that, in the words of Lord Penzance[20], ". . . it is the law, I believe I may say without question, that at any time within 20 years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground". In *Bognuda v Upton and Shearer*[21] our Court of Appeal held that an adjoining owner owed a duty to his neighbour to take reasonable steps for the protection of the neighbour's property from damage as a result of excavation of the owner's land. The Court founded the decision on the broad principles of liability enunciated by the House of Lords in *Donoghue v Stevenson*[22].

As a second illustration, I would like you to consider how you would advise Parliament to express now in statutory form the principles in *Hedley Byrne v Heller & Partners*[23].

Thirdly, the citations in Part 6 (a) might be read again.

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18 1974 NZPD 4193.

19 For a discussion of the common law doctrine of public policy, see L F Moller (as he was then), "Some Aspects of the Doctrine of Public Policy" (1947) 23 NZLJ 91.

20 *Dalton v Angus* (1881) 6 AC 740; [1881-5] All ER Rep 1, Lord Penzance at 604; 13.

21 *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741.

22 *Donoghue v Stevenson* [1932] AC 562.

23 *Hedley Byrne v Heller and Partners* [1964] AC 465; [1963] 2 All ER 575.

Nevertheless, it must be acknowledged that it is in statute law that we find expression of the most radical changes in the balance of preference, and I therefore propose to discuss some features of statute law in more detail.

8. Legislative preference inhibits alternatives

My fourth proposition is that the legislative preference of one of several courses not merely promotes the preferred course, but may also prohibit, inhibit or discourage the adoption or development of alternative courses. This is, I think, a most important principle. I think it is self-evident.

The principle has many applications. I will illustrate some of them:

(a) The first application I would mention derives from the maxim that the expression of one thing excludes alternatives ("expressio unius exclusio alterius"). I think our legislators often overlook this maxim. They did so, I believe, in enacting the Accident Compensation Act 1972. Section 5 enacts that where any person suffers personal injury by accident in New Zealand, or dies as a result of such injury, no proceedings to recover damages arising directly or indirectly out of the injury or death may be brought in any Court. Instead, a claim may be made for compensation under the Act, which in many cases is payable only in the discretion of the Accident Compensation Commission. To some, this will prove to be a poor substitute for the former remedies in tort because of the limitations upon the quantum of compensation (ss 113 to 125). But whatever view may be taken as to the necessity or desirability of abolishing those[24], the question I wish to raise is whether it was necessary or desirable to abolish rights of action for personal injury caused by breach of contract? There are, of course, many people who undertake for reward to care for others, such as doctors, dentists, hospitals, and convalescent homes. It seems to me that s 5 of the Act has the effect of abolishing rights of action against them, whether founded in tort or contract. What I find to be particularly disquieting is that despite the prolonged consideration given to the proposals, it seems to be tolerably clear that all concerned in the formulation of the proposals and in their enactment in legislation overlooked the fact that personal injury can be caused by breach of contract. The Report of the Woodhouse Commission[25] discusses only what is referred to as "the Fault Theory" without discrimination between contract and tort[26]. The Commission notes (para 377) that the Medical Association of New Zealand emphasised the importance of the doctor-patient relationship, and observes, "We well understand the need to preserve this relationship". The Report says nothing about the legal incidents of the relationship or the impact of the proposals upon them. In October 1969 the Minister of Labour presented to the House a paper described as a Commentary on the report of the Royal Commission[27]. This does not discuss the contractual position either. Then there was a Select Committee of the House of Representatives appointed to consider the Report and the Commentary[28]. This Committee said that it received a great deal of evidence of opinions about whether the common law action for personal injury should be retained, partly retained, or abolished entirely. The Select Committee concluded that, "The action is increasingly unable to grapple with the present needs of society, and that something better should be found". The Select Committee does not distinguish between actions in tort and actions in contract, and simply joins in the round condemnation of the "common law action".

Finally, it needs to be said that there is no explicit reference in the Act itself to liability in contract. So it appears that the Legislature has failed in this respect to weigh all the competing interests in enacting that actions for damages for personal injury or death shall no longer be entertained by the Courts. It appears to me that in the zealous pursuit of one preferred interest, the Legislature has swept away other interests, apparently without noticing their existence.

(b) We are seeing a great deal of legislation setting up Government agencies for the carrying out of commercial activities[7]. I do not wish to enter upon a discussion as to the desirability of State participation in all these affairs. What I do wish to emphasise is that the very act of

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[24] Ken H Marks, "A First in National No-Fault" (1973) 47 ALJ 516; further developments in Australia are noted in (1974) 48 ALJ 413.

[25] "Compensation for Personal Injury in New Zealand". Report of the Royal Commission of Inquiry. Government Printer, December 1967.

[26] Ibid, Part 3, "The Common Law Action", p 42.

[27] "Personal Injury—A Commentary on the Report of the Royal Commission of Inquiry into compensation for personal injury in New Zealand". Government Printer, October 1969.

[28] "Report of the Select Committee on compensation for personal injury in New Zealand", Government Printer, 1970.

setting up State agencies may inhibit private activity. For this reason, it is not sufficient for our Legislature to look narrowly at the question whether or not a State agency should be constituted. The Legislature should take a broad view and face explicitly the question whether the State agency is to have a monopoly or is to be only one of competing agencies. There are, of course, some activities which can only be effectively carried on through a State monopoly. The defence of the national territory is traditionally the prime example. But I think those classes of activity are very limited. It has been found beneficial and profitable to set up companies carrying on the business of providing security guards for private property. Private hospitals and private schools still flourish because there are people who consider that they provide a better service than the State organisations. Therefore, it seems to me that when it is proposed to constitute a State agency, the greatest of care must be taken to deal fairly with the question whether the State agency is to enjoy a monopoly, or whether, on the other hand, it is intended merely to be one of a number of competitors in the selected area. I think this question is often overlooked.

(c) The preferential treatment which is often accorded to State agencies by legislation can have profound effects on others. I will refer to two particular matters by way of example:

(i) By s 31 of the New Zealand Superannuation Act 1974 the New Zealand Superannuation Corporation is exempted from land tax and income tax. In its submissions on the Bill, the New Zealand Law Society pointed out that the purpose and consequences of this exemption had not been explained, and observed that as it appeared to be expected that the Corporation would enter into competition with other financial institutions, it would therefore seem to be desirable to ensure that the benefit of the tax exemption would enure to the contributors to the Fund, instead of being reflected in terms of business which those in competition with the Corporation would be unable to match. I regard the point as important, because the White Paper which preceded the Bill explicitly stated:

> "An important part of the proposals is that the Government is not setting out to achieve this on its own. It is inviting the private sector to join in partnership with the public corporation which will be established, to provide alternative schemes, or supplementary savings for retirement."[29]

It would therefore follow, so it seems to me, that the incidents of the establishment of the State corporation should have corresponded with those applying to the private sector. Taxation is an important incident. The exemption from taxation of the State corporation as one of several competitors confers an immense competitive advantage on the State corporation. The advantage could be used to reduce the gross income of the State corporation, to increase the net yield to the contributors to the State Fund, or to cover the costs of inefficiency, or a combination of these. However it is used, it can be a basis of unfair competition with the private sector, and destroy the "partnership" in the provision of optimum pension schemes contemplated by the White Paper. Hence, the Law Society made the submission, and it is a matter for regret that there is nothing in the Act dealing with the point.

(ii) Another form of preferential treatment is the exemption of State corporations from the financial and accounting rules applicable to companies. We are all familiar with the requirements of the Companies Act 1955, designed to ensure that the state of affairs of a company will be laid before its shareholders at least once a year, in a manner which enables the shareholders to have a "true and fair" view of the state of affairs of their company. Rules for the preparation and presentation of this information are prescribed in some detail. Armed with this information, the shareholders are able to question the directors of the company, and secure the information they desire regarding the company's activities. They are also able to compare the results of their company with those of other companies. None of this applies to the State trading corporation[30]. Usually it is prescribed that the corporation will present an annual report to Parliament, but the contents of such reports are not prescribed, and an examination of a collection of such reports shows wide variations of the quality and quantity of information, especially accounting information, contained therein. The very basis of accounting of most State trading organisations differs fundamentally from that of a company.

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29 "White Paper on New Zealand Superannuation Scheme", Government Printer, September 1973, p 10.

30 Even where the State participates through the instrumentality of a company incorporated under the Companies Act 1955 the accounting provisions of that Act are usually negated—eg, s 5A (6), Ministry of Energy Resources Act 1972, inserted by s 2, Ministry of Energy Resources Amendment Act 1973.

Usually, the State corporations operate on what I call "the big bag" principle, keeping accounts only of the receipts of and expenditure from the big bag. No attempt is made to establish the capital of the enterprise, or to disclose whether or not it is profitable. Where the State enterprise has a monopoly, this may not be of much significance, because the comparison of the results of a monopoly with other results may not have validity. That is not always the case, however, because some comparisons can be made. It would be interesting, for instance, to be able to compare the results of the operations of the Electricity Department with the results of the operations of the suppliers of other forms of energy, such as the Natural Gas Corporation, the gas companies, and the oil companies. Accordingly, I raise a plea that Parliament should require State trading corporations which are in competition with private interests to present accounts in sufficient detail to enable comparisons to be made.

(d) I think the scale of State activity in the commercial area to which I have referred raises a question which we need to consider with some deliberation. The question is, what form of commercial association should be preferred today? At the turn of the century when State involvement in commercial life was, broadly speaking, limited to supervision and regulation, there were relatively few State trading corporations. Now there are a very great number. On the other hand, at the turn of the century the preferred method of establishing a new undertaking was the formation of a public company, with a consequent invitation to the public to subscribe for shares. Of recent years, relatively few public companies have been formed. Usually they result from the transformation of an existing private company into a public company when the proprietors of the private company desire to dispose of part of their interests. The formation of a new public company to undertake and develop a new project is an exceeding rarity.

It would, I think, be useful for us to discuss the reasons for this tendency. One paramount reason is, I think, the demand of the Government for the funds necessary to finance all the activities which the Government sees fit to undertake today. By various means, funds which in private hands could be expected to be saved and invested in capital subscriptions are diverted to the Government, which itself undertakes the capital expenditures. If I am right in that view, I think we should then discuss the question whether this tendency is desirable. I doubt that it is, because I believe that the best supervision of activities of a commercial nature is provided by an experienced board of directors and an interested body of shareholders who will concern themselves closely in the examination of the undertaking's affairs. Alongside that, the supervision which can be given by Parliament is unsatisfactory.

The point I wish to make is that there are developing patterns of State control and State enterprise in competition with private interests, on a basis which does not enable comparisons to be drawn of their respective performances. The first step in remedying this situation is to review the accounting procedures of State organisations, so that these become comparable with those of public companies. Only when that has been done will it be possible to make an intelligent appraisal of the relative merits of vesting control of a commercial enterprise in a State corporation or a public company. My suspicion is that in terms of efficiency, economy, and profitability, the public company would emerge as meriting preference.

(e) Finally, in testing my proposition I would like to refer to Sir Henry Maine's famous generalisation that the movement of progressive societies up to his time had been from status to contract[31]. I think that we are witnessing a different tendency, whereby contract becomes the qualifying condition of a status. Many of our recent statutes have created statutory incidents to contracts whereby rights and obligations originating in the statute are vested in one or other of the contracting parties. The extensive provisions of the Hire Purchase Act 1971 furnish many examples. They should be seen, I think, as statutory preferences over all other courses, entailing that the anticipated costs of compliance will be built in to the finance charges in all cases, whether or not the parties desire to be bound by those terms, for there is no lawful alternative. Maybe the total effect is beneficial; certainly the freedom of parties to choose their own terms is substantially abridged. Other important areas in which this tendency is evident are contracts of employment[32] and cognate contracts such as sharemilking agree-

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[31] Maine, "Ancient Law" (Pollock's edition), 182. For a recent study of the notion of status, see R H Graveson, "Status in the Common Law", University of London—The Athlone Press 1953.

[32] Reference should be made to the Industrial Relations Act 1973.

ments[33]. We should observe developments on these lines with particular care.

I hope enough has been said to illustrate my proposition. The examples may not be the best available; they are simply those which occurred to me as I thought on the theme. I am sure that those who attend this conference will be able to suggest many more.

9. Legislative inhibition promotes alternatives

The fifth proposition is the converse of the fourth. It is that legislative inhibition of one of several courses promotes the other courses:

(a) I think that the failure to recognise this proposition is responsible for the chaotic mess in which our law of personal property security finds itself. There are many ways of securing a given commercial result. If a man desires to have the use of goods, he may buy them for cash from his own resources, buy them with money lent to him by another (possibly the vendor), buy them under a credit sale agreement whereby the vendor allows him time to pay the purchase money, obtain them on hire purchase (of which there are two principal forms, the conditional agreement for sale and purchase, and the bailment with option to purchase), or take them under a "simple" bailment. I do not pretend that this catalogue is exhaustive. What has happened is that governments have imposed rules applicable to one or other of the forms of transaction without, so it seems to me, giving sufficient weight to the indirect effect of moving the business from that form to another form. Indeed, the very development of hire purchase was due to the commercial community's unwillingness to accept the law applicable to agreements for sale and purchase[34].

(b) Similar tendencies can be seen operating in the law of associations. The company incorporated under the Companies Acts served, and continues to serve, the commercial community well. But the impact of taxation and restraints upon borrowing led to the development of other forms of organisation. So, we have Group Investment Funds under the Trustee Companies Act 1967, the Unit Trusts Act 1960, the Syndicates Act 1973, and contributory mortgages administered by nominee companies. All of these present their special problems. Variety is said to be charming, but I regard all of this as a symptom of imbalance in the law relating to companies.

(c) By reason of the provisions of the Chattels Transfer Act 1924, it was not, until recently, possible for a sole trader to give an effective security over his stock in trade. The instrument had to contain a precise inventory of the chattels. But companies under the Companies Acts could give an acceptable security by means of a floating charge. So a great number of small companies were formed simply for the purpose of enabling security to be given. Much money, time and effort was wasted in the process. Here an unnecessary limitation was promoting alternative courses. Accordingly, on the advice of the Contracts and Commercial Law Reform Committee the law was changed to enable sole traders to give security in certain cases[35].

Again, other examples can certainly be given, and I hope many will be produced in our discussion.

10. The pursuit of ideals

My sixth proposition for the proper accommodation of public and private interests is this. The pursuit of ideals should not eliminate that which is imperfect until it is clear that something better is attainable. I think this is an axiom—a self-evident truth—but I state it because it is often overlooked. Because it has been overlooked, people have been deprived of such amenities as they had, often as a step towards the substitution of better things which sometimes never come. *Alford's* case[36] whereby the licence to a decrepit hotel at Charleston was restored by the Supreme Court after it had been cancelled by the Licensing Control Commission,

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[33] Sharemilking Agreements Act 1937 and the Sharemilking Agreements Order 1973 (SR 1973/103).

[34] *Helby v Matthews* [1895] AC 471; [1895-9] All ER Rep 821.

[35] First Report of the Contracts and Commercial Law Reform Committee on Chattels Securities, Government Printer, September 1973; Chattels Transfer Amendment Act 1974. A Property Law Amendment Bill on the lines proposed by the Committee was introduced in 1974, and has been referred to a recess committee.

[36] *Alford v Licensing Control Commission* [1954] NZLR 479, restoring the licence of the European Hotel at Charleston.

should be dinned into every bureaucrat. I would state the principle of it thus—merely because the amenities of a district are poor is no reason to take them away from the inhabitants or forfeit the rights of those who provide them.

11. There are limits to what the law can do

Our Courts have been careful to ensure that their authority is not diminished by the making of futile commands[37]. I respectfully think our legislators need to be reminded of this salutary principle. The story of King Canute and the waves should be required reading for each of them. So I have formulated my seventh proposition thus: There are limits to what the law can do: other forces, both economic and social, may deal with an unbalanced situation more effectively and more fairly than a legal rule.

(a) I was asked once by a belligerent housewife to draft a bill to suppress the vice of cosmetic manufacturers in putting out their goods in containers much larger than the volume of the contents. She inveighed against the deception of the purchasers. I advised her to take time on the television, so that she could open the tins and reveal the volume of the contents in public view. She did not think much of my advice. I saw her next when s 8 of the Consumer Information Act 1969 was being enacted. With the promulgation of the Consumer Information (Quantity) Notice 1971 (SR 1971/150) her triumph was, no doubt, regarded by some as complete. There is no reported prosecution, and so far as I know there has been none.

(b) The example I wish to discuss seriously is that of price control:

(i) The Control of Prices Act 1947 constituted the Price Tribunal and vested in it certain jurisdiction to make price orders. The exercise of the jurisdiction has caused a great deal of stress. People complained that they did not understand what was going on[38]. That is still the case. Copies of the Tribunal's decisions are not available. In my opinion the proper accommodation of public and private interests in these matters requires that sufficient information to enable an interested observer to understand the reasons for decision should be available from the Tribunal. I am sure this could be done in a manner which would respect the confidence the Tribunal may wish to attach to information given in any particular case. The practice of the Taxation Board of Review might be considered appropriate.

(ii) Alongside the Control of Prices Act 1947 there is a mass of Stabilisation Regulations. These are made under the Economic Stabilisation Act 1948, which authorises the Governor-General by Order in Council to make such regulations as appear to him to be necessary or expedient for the general purpose of the Act and for giving full effect to the provisions of the Act and for its due administration. The general purpose of the Act is prescribed in s 3 as "to promote the economic stability of New Zealand". The regulations are required to be laid before Parliament (s 11 (4)). I have a collection of what I believe to be the important ones. As I write this, they include:

The Wage Adjustment Regulations 1974
The Hire Purchase and Credit Sales Stabilisation Regulations 1957 with 27 Amendments
The Economic Stabilisation (Motor Car Hiring) Regulations 1971, with two Amendments
The Price Freeze Regulations 1973
The Stabilisation of Prices Regulations 1974.

There are others. They have many antecedents to which it is necessary to refer. They include provisions purporting to "suspend" statutes (eg, reg. 16 of the Wage Adjustment Regulations 1974) and other bizarre features[1].

(iii) It is clear that this vast mass of legislation has failed to achieve the declared purpose:
— Inflation proceeds at an accelerating pace[39].

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[37] *Lumley v Wagner* (1852) 1 De G M & G 604, *Wolverhampton and Wallsall Railway v London and North Western Railway* (1873) LR 16 Eq 433, *Hill and Plummer Ltd v Pinchin Johnson & Co (NZ) Ltd* [1957] NZLR 758.

[38] *Drewitt v Price Tribunal* [1959] NZLR 21.

[39] The Hon the Minister of Finance said in his statement on the economic situation on 23 October 1974: "In common with most other developed nations, New Zealand has experienced high rates of domestic inflation in the 1970s. Prices rose by an average 3.8 percent a year in the 1960s, and by 8.5 percent a year during 1970-73. They increased by 11.5 percent in the year ended September 1974." (Page 14)

— Confidence in the veracity of our accounting systems is shaken, as it is feared that the historical cost methods employed are not disclosing true costs, that "profits" are overstated, and that capital is being depleted:
— The Stock Exchanges are virtually deserted, and shares in our leading public companies are selling at less than the Tangible Asset backing:
— Interest rates in the uncontrolled sectors have reached their highest levels since 1929:
— The supply of funds to the controlled sectors has fallen away:
— Prices of land and buildings have increased dramatically:
— Relations between employers and employees are strained, especially by "relativity" arguments and "demarcation" disputes.

There are, in my opinion, grounds for thinking that this and cognate legislation are themselves causes of inflation[40]. I suspect that it is all an example of the futility of expecting legal rules to dominate economic forces, and I would like to commend some observation of Turner J, as he was then, to your attention—"He left commerce to itself and it developed fruitfully as the liberal textbook writers say that it will when so left"[41]. I do not mean that Governments should ignore commercial affairs; I do mean that Governments should recognise the limited efficacy of legal rules in this area.

(c) The Layby Sales Act 1971 arose out of a report of the Contracts and Commercial Law Reform Committee[42]. There is some good advice in para 12:

"12. We see little advantage in practice in requiring the giving of fidelity bonds, the segregation of layby goods from the vendor's assets, or the banking of payments by layby purchasers in separate trust accounts as under the New South Wales Act or (in a different field) the Building Contracts (Deposits) Act 1962 of the State of Victoria. These requirements offer no real security against the dishonest trader, who will simply ignore them. Indeed, the semblance of security may be exploited by the cheat in order to delude his victims more effectively."

12. In legal situations, the law cannot stand by

My eighth proposition is that where it is appropriate to deal with a problem by creating or applying a rule of law, the law cannot stand by. In that situation, failure to deal with the conflict by legal means may amount to a preference of the interest which ought to be inhibited, or an inhibition of the interest which ought to be preferred:

(a) One controversial area in which this proposition may be tested is the restraint by injunction of interference with contractual relations[43]. It is a matter for regret that the judgment of Mahon J in the *Kawau Island Ferry* case[43] has not been reported. His Honour had before him a motion for writs of attachment of certain union secretaries for alleged disobedience of an interim injunction. One ground urged upon the learned Judge on behalf of the secretaries was that the substantive proceedings were being carried to the Privy Council. In the course of an oral judgment, Mahon J said:

". . . I must recapitulate the true nature of the argument which the unions and their secretaries contend for in the present proceedings, and which, so far as I understand it, they intend to submit to the Privy Council. Their case has nothing to do with the right to strike, or the right to withhold their labour. Their case is that they may unlawfully procure the withholding of essential supplies of goods, and that the Courts of the country are powerless to intervene. It will be seen that such an argument may be extended to cover a wide category of situations. It would permit the grocer or the butcher to be put out of business by a union if he failed to comply with a union demand arising out of a dispute with the appropriate shop em-

40 For a point of view of the instability of the monetary system, see O'Keefe, "New Zealand at the Crossroads" [1974] Recent Law, 271.

41 *Norman v Inspector of Factories* [1961] NZLR 1014 at 1015.

42 "Layby Sales", a report of the Contracts and Commercial Law Reform Committee. Government Printer, August 1969.

43 *Flett v Northern Drivers Union* [1970] NZLR 1050; *Kawau Island Ferries Ltd and Anor v Northern Drivers Union and Ors* (Unreported, Supreme Court, Auckland, No 375/74, Mahon J, 1 July 1974); I T Smith, "The Use of Injunctions in Industrial Law" [1974] NZLJ 432; see also A K North KC (as he was then), "Law and the Public Conscience" (1949) 25 NZLJ 116.

ployees' union. The grocer would have to accept the union demand or have his business destroyed through lack of supplies. The same fate could be meted out to the owner of any business, large or small, and the owner of the business would have no redress. If the present argument is correct, no Court can be permitted to restrain union action by injunction or, if an injunction is in fact made, then it is ineffectual because of the claim by the unions that they are entitled to dispute it. In the present case, therefore, the unions seek the power to damage or destroy the business of any man who will not obey an industrial demand which they consider justified. In particular, the Drivers' Union is contending for the right to damage or destroy such a business when the owner of that business is in a trade dispute with an entirely different union, and where the Drivers' Union is in no way concerned with the matter. . . . Now I have no doubt that the defendants . . . are quite sincere in their views that unions should not be subject to control of their actions by injunction, but I have to remind them . . . that an injunction must be obeyed. It must be obeyed by any person against whom it is made, whether that person be a company, an incorporated association, a company director, a housewife, or any individual citizen. The unions and their secretaries claim to be immune from that jurisdiction and from that obligation. The argument for the unions, as appears from their published announcements, represents a demand for selective or distributive justice, a concept which is foreign, so far as I am aware, to any free society. Distributive justice bears the hallmark of despotism."

Leave was granted to issue a writ of attachment against the secretary of the Northern Drivers' Union. The case engendered strong feelings. Some unions represented to the Government that the law should be amended to exclude the jurisdiction exercised by Mahon J. The Attorney-General made public statements to the effect that he would not countenance the placing of any person beyond the law. I respectfully believe that he has the entire support of the profession, and of all thinking men in taking that position.

(b) Another difficult area in which to test the proposition is the law relating to monopolies, as enacted in the Commercial Trusts Act 1910. Here, I think, the law did stand by in failing to distinguish between those cases in which the law should have intervened, from those in which it should not. Parliament did not define "the public interest". The Courts of the day were unwilling to resolve the problem[44]. So the Commercial Trusts Act 1910 came to be regarded as a dead letter[45]. I think this experience illustrates one major problem. Should the public interest be determined by Parliament, which can only speak in general terms and must always leave the consideration of particular cases to others; or should it be determined by the Courts or by a special Commission or Tribunal? The Trades Practices Act 1958 established a Trade Practices and Prices Commission. The Commerce Bill now before a Parliamentary Committee proposes to set up a Commerce Commission with certain powers[46], but proposes to vest wide powers in an Examiner[47], in the Secretary of Trade and Industry and his delegates[48], and in the Minister[49], and proposes to create new offences[50]. There is also to be a special Appeal Authority[51], and power to make regulations[52]. Here, indeed, is a proposal for a fascinating division of labour. I view it with considerable reserve. I fear that these procedures will not settle the inherent problem of resolving conflicts between private rights and public interests in the commercial area, but perhaps the answer does lie in the establishment of an independent and well-equipped Commerce Commission to superintend all these activities.

(c) Another area from which the law has

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44 *Crown Milling Co Ltd v The King* NZPCC 37, *Haslam*, "Trade Combinations" (1931) 183, *Robson*, "New Zealand—The Development of its Laws and Constitution" (2nd Edition) 285, *Collinge*, "Restrictive Trade Practices and Monopolies" (1969) 40-44.

45 It applied only to a very limited range of goods, and it is not surprising that no attempt was made to extend the range.

46 Commerce Bill (Commission), cls 3 to 21, 24, 27 to 29, 34, 35, 36, 55, 61, 70, 86 to 90, 91 to 94, 104, 122.

47 Commerce Bill (Examiner), cls 31, 32, 33, 35, 36, 60, 112.

48 Commerce Bill (Secretary's powers), cls 70, 73 to 85, 95, 96, 99, 100, 104, 107, 108, 112, 121.

49 Commerce Bill (Minister), cls 56 and 57, 60, 65, 67, 70, 91, 98.

50 Commerce Bill (Courts), cls 22, 23, 25 and 26, 37 to 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 58, 59 and 60, 66, 95, 97, 105 to 110, 114, 116, 117, 118, 119.

51 Commerce Bill (Appeal Authority), cls 63 and 64.

52 Commerce Bill (Regulations), cls 71, 123.

stood aloof is that of privacy. In April 1973 the Law Revision Commission made a report on the problems presented by computer data banks[53]. The principal recommendation was:

> "There should be established by legislation an independent agency whose basic functions would be the observation and appraisal, with the necessary powers of inspection, of the rapidly expanding and changing field of gathering and handling of personal information in computer data banks in both the public and private sectors; assessment of practices or trends which might endanger privacy; keeping Government informed; and making recommendations for legislative or other controls which it might from time to time consider desirable."

With respect, it seems to me that the enquiry must proceed on a much broader basis. *Robbins v Canadian Broadcasting Corporation* (1958) 12 DLR 2d 35, is an instructive example. The plaintiff, a consulting physician, wrote a letter of criticism to the producer of a television programme. He concluded his letter by wondering whether the letter would be read over the programme. It was, and the plaintiff's name and address were broadcast twice. The announcer suggested that viewers might write to the plaintiff, "to cheer him up". As a result, the plaintiff's telephone began ringing soon afterwards, and continued to ring for three succeeding days until he had it disconnected. In addition, he received a quantity of abusive mail, and pranks were played on him, as by sending taxis to his house. He brought an action against the Broadcasting Corporation, founded by Art 1053 of the Civil Code of Quebec, which provides as follows:

> "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill."

The Quebec Superior Court held that he was entitled to damages, and awarded him $3,000. The Court felt that it was unnecessary to attempt a precise definition of the "fault" of the corporation. To the Court it was sufficient to find that "never in this wide world can it be deduced that the producer and master of ceremonies were invited to 'set the dogs' on the plaintiff for having dared to criticise."

The evils of gossip (some call it "news") were well recognised in early times. Blackstone tells us of it:

> "8. Lastly, a common scold, communis rixatrix (for our law-latin confines it to the feminine gender), is a public nuisance to her neighbourhood. For which offence she may be indicted; and, if convicted, shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or cucking stool, which in the Saxon language signifies the scolding stool; though now it is frequently corrupted into 'ducking stool', because the residue of the judgment is that, when she is so placed therein, she shall be plunged in the water for her punishment"[54].

Excesses of the press, radio and television, investigators, credit reporters, and other purveyors of information to the distress of the subject might be restrained by this interesting device.

Some light is thrown on the subject by the law of privilege[55]. It is important to recognise that the point is quite distinct from defamation, as *Robbins'* case shows. The private right here under consideration is the right to be left alone. The public interest can only be based upon a need for information, or inquisitiveness. Other private interests are involved where there is a need to acquire information.

The fair balancing of these interests is not easy to achieve, and I agree with a recent comment that the law as presently constituted cannot do it[56]. I would like to see an examination of the question whether a general provision of liability on the lines of Art 1053 of the Civil Code of Quebec (supra) would offer the best solution to this and other problems.

13. The law can only be changed by law

It should not be necessary to include so elementary a proposition in a paper of this kind. Obviously, in a strict sense, if a proposed change is implemented by lawful means, it has effect; if it is not, the law remains unchanged. But what is the position when a proposed change is announced, and the procedures are set in motion to implement the change with

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53 Law Revision Commission — Report of Subcommittee on computer data banks and privacy. Government Printer, April 1973.

54 4 Blackstone's Commentaries, ch 13, p 169; see also George R Scott, "The History of Torture throughout the Ages" (London) (1954), 239 and 40, and Christopher Hilbert, "The Roots of Evil" (London) 1963, 29 to 36.

55 Moodie & McKelvey, "Medical Privilege", Brooker & Kane Ltd, October 1974.

56 Peter Burns, "Privacy and the Law: 1984 is Now" [1974] NZLJ 1.

effect, if enacted, from the date of the announcement? Such an announcement does not change existing law, but it has the effect of precluding reliance upon existing law. Two examples illustrate the problem:

(a) The Land and Income Tax Amendment (No 3) Bill which was introduced in the 1974 Parliamentary Session has been stood over by order of the House to the next session. It proposes substantial changes to the taxation of the proceeds of the sale of land (other than a taxpayer's farm or residence) sold within 10 years of purchase. Profits or gains from the sale, less limited deductions, will be assessable for income tax if in the opinion of the Commissioner they were enhanced "to a significant extent" by a change in town planning rules affecting the property, or the likelihood of such a change. Subclause (5) of cl 3 of the Bill states that these proposed provisions will apply to any sale or disposition made on or after 23 October 1974. So the owner of commercial property or property held as an investment who wishes to sell faces a difficulty. He does not know whether he will be taxed on the proceeds or not. So he is inhibited from dealing with his property by Government action which in effect suspends the existing law. That should not happen.

(b) A similar problem is presented by ministerial announcements of an intention to change the law where the effective change is delayed. Such a case came before the Supreme Court in 1973[57]. On 2 March 1970 the Under-Secretary to the Minister of Agriculture addressed a conference of poultry farmers. He announced a scheme to limit the production of eggs. Amongst other things, the number of fowls a poultry farmer could thereafter keep would be limited to the number he had on that day, with certain exceptions he explained. Thereafter, enquiries were made to establish the number of birds held by each poultry farmer on 2 March 1970. But the regulations constituting the scheme were not made until 26 November 1970[58]. They differed in several respects from the scheme as announced on 2 March, but in substance they purported to have the effect of limiting the number of birds a poultry farmer might lawfully keep to the number he had on that day. They were not laid before Parliament as required by the enabling Act. Consequently, in 1971 an Act was passed to validate them[59]. In the meantime, the Egg Marketing Authority had decided on the number of birds it considered the plaintiff was entitled to keep. It made that decision on the basis of the announcement. In the Supreme Court it became evident that a provision of the regulations which had been thought of well after 2 March might apply to the plaintiff. So the decision was set aside to enable the plaintiff to present an application on this ground.

Conflicts of the public interest in egg production and the rights of poultry farmers to carry on business should not be dealt with in this confused way. The confusion and much expense would have been avoided if the regulations had been made on or shortly after the ministerial announcement.

14. Recommendations

(a) A statement should be presented to Parliament annually setting out details of all moneys received by the Crown under compulsion of law (Part 6).

(b) The provisions of the Accident Compensation Act 1972 should be reviewed as to their application to liability for personal injuries caused by breach of contract.

(c) Where a State trading agency is to be constituted, deliberate consideration should be given to the question whether it is to have a monopoly, or is to act in competition with private interests.

(d) If the State trading agency is to act in competition with private interests, the incidents of its constitution and operations should be similar to those applying to private interests; in particular:
  (i) Taxation should bear equally on both classes; and
  (ii) The accounting procedures should be as nearly as may be identical.

(e) Decisions of the Price Tribunal should be made public, subject to the exclusion of confidential information on a basis similar to that adopted by the Taxation Board of Review.

(f) The economic effects of price control should be reviewed.

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[57] *Robertson and Ors v Egg Marketing Authority and Ors* (Unreported, Supreme Court, Wellington, A.189/71).

[58] Egg Marketing (Production Entitlement) Regulations 1970 (SR 1970/236).

[59] Primary Products Marketing Regulations Validation and Confirmation Act 1971.

(g) Further consideration is necessary to the Commerce Bill with particular reference to the allocation of powers and functions.

(h) The Government should undertake a study of the law relating to privacy, with particular reference to the case of *Robbins v Canadian Broadcasting Corporation* (1958) 12 DLR (2d) 35.

(i) Where the Government intends to change the law affecting private rights, there should be no unreasonable delay between the announcement and the effecting of the change.

15. Recapitulation of main propositions

1. There is no single formula for the proper accommodation of public interests and private rights. (Part 5)
2. Developments of the tax laws are an indication of the current tendency. (Part 6)
3. In our society, the accommodation is achieved by rules derived from two main sources—the common law and legislation, and finds its most active recent development in legislation. (Part 7)
4. Legislative preference of one of several courses not only promotes the preferred course, but may also prohibit, inhibit or discourage alternatives. (Part 8)
5. Legislative inhibition of one of several courses promotes the other courses. (Part 9)
6. The pursuit of ideals should not eliminate that which is imperfect until it is clear that something better is attainable. (Part 10)
7. There are limits to what the law can do. Other forces, both economic and social, may deal with an unbalanced situation more effectively and more fairly than a legal rule. (Part 11)
8. Where it is appropriate to deal with a problem by creating or applying a rule of law, the law cannot stand by. In that situation, failure to deal with the conflict by legal means may amount to a preference of the interest which ought to be inhibited, or an inhibition of the interest which ought to be preferred. (Part 12)
9. Where it is desired to change an existing legal situation, the change should be made only by lawful authority. (Part 13)

DISCUSSION

Chairman: Mr B G Elwood

Commentators: Messrs D F Dugdale and J B Horrocks

THE CHAIRMAN, Mr Elwood: "Ladies and gentlemen, we meet for the first time with a new conference format, and as a result of what we achieve today we may find a pattern set for future conferences. I trust you will bear with me in any need I have to be a firm but fair chairman. I know there are a lot of people wishing to speak about a lot of subjects this afternoon.

"We have been billed as a major contest, Private Rights v Public Interest, and we are coming to you live from the Majestic Theatre, Wellington, and we have two major contestants. On my immediate left Mr John Horrocks of Auckland, tipping the scales slight lighter than his erstwhile opponent. On my right, weighing a kilogram or two, Mr Don Dugdale, also of Auckland. The promoter of this contest today is Mr Colin Patterson of Wellington. I hope as a result of the comments you are about to hear, we will have a far ranging, deep searching and spontaneous discussion on major issues.

"I have much pleasure now in asking Mr Colin Patterson to introduce his paper."

MR PATTERSON: "Mr Chairman, let there be no doubt that we as a profession are deeply concerned with the well being of our country, with the stability of our social order, with the profitability of our economic affairs, with the fair and equal treatment of all persons under our law, and with the liberty of the subject. Let there be no doubt on those subjects.

"I say this at the beginning because I see in the press from time to time observations that suggest that there is doubt, and I deny those. We go about our work quietly, without ostentation. We, I believe, consider deeply the future of our society and the balance that is held between the claims of the society in which we live and the claims of those who live in it. We have, I believe in the past, and will continue to make in the future, a very

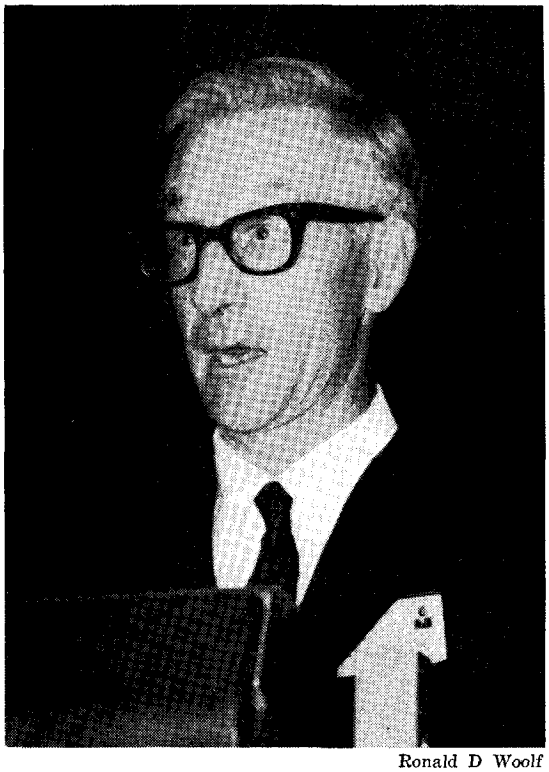
significant contribution to the study of these fundamental questions.

"In this paper I have attempted some initial approach to the problems. First I point out that the whole body of our substantive law comprises the formal expression of the many points of balance which our society prefers at a particular point of time between the interests of the public and the interests of the private citizen. I emphasise that this point of balance is never established permanently once and for all. It is a constantly shifting point. I point out that none of the major declarations of social policy has been able to establish for us this point of balance. I invite you to consider closely, for example, the sentence quoted from the Communist Manifesto in which it is said that there will be a society in which the free development of each, is the condition of the free development of all. That sentence could have been written by J S Mill. I certainly agree with it; I doubt very much that the Communists do. It illustrates the meaningless nature of all universal declarations of this kind.

"We on the contrary I think, must constantly appraise and reappraise, the point of balance of each particular issue. The common law can and has done this, but latterly we have looked at the point of balance mainly through legislation.

"I mention then the processes and contrast these two methods, the common law on the one hand which moves I think from particulars to principles, and while its processes may be slow and perhaps imperceptible at any particular point in time, some remarkable changes and complete reversals of policy are reflected in our common law decisions. I also look then at the more popular device today for achieving this accommodation, that is the legislative process, and I have suggested a Parkinson's Law for the Legislature. Some propositions which I imagine you will regard as obvious, but which to me are important. In the course of laying out this Parkinson's Law I have taken a number of illustrations of particular problems. Most of these are drawn from the commercial sector, I think really only two could be said to lie outside that; those two being the Accident Compensation Act in its effect upon contractual rights, and the law regarding privacy. I have done this deliberately because my instructions are to provoke discussion, and if I have done anything well in this paper, I have I hope goaded not only my friends from Auckland, but a considerable number of you to offer other illustrations."

THE CHAIRMAN: "I now invite into the ring, dressed in a blue and white striped shirt, the alleged arch conservative on this panel, John Horrocks."



Ronald D Woolf

Mr C I Patterson

MR HORROCKS: "Mr Chairman and Mr Patterson, may I first of all say I thought I was going to follow my honoured and learned friend on my left, so I have literally been tossed into the ring. He pointed out to me by the way that one of the slogans outside this theatre was called 'The Death Wish', and asked if I would make a quip about it, and I said I would follow him, but I realise he must have got together with the Chairman before then, and I hope this is not a death wish.

"I would like Mr Chairman, to first of all pay a tribute to Mr Patterson on the industry and scholarship which he has displayed in compiling this paper. It is a vast subject, and one on which probably everybody in this room has differing views, if not in broad principle at least in degree, and I know it is your hope, sir, that both Mr Dugdale's and my comments will be at this stage comparatively brief because of the interest that has been displayed in the paper,

and the wish for genuine participation from the floor.

Just a few brief comments, because I should also explain that we were specifically asked not to prepare a written commentary, but there are one or two topics that we would like to raise.

"I would like to mention first of all briefly the question of a Bill of Rights. I believe that to any lawyer in a society such as ours in which the preponderance of the law making rests so heavily now with the Legislature, and we have no written constitution, that there is an attraction in having some bill of rights, or a declaration of the rights of an individual, but I cannot see, and I think this is also the view of my colleagues that one can really introduce any such bill that will have any useful and lasting purpose as long as Parliament remains the sovereign power that it does in our society. Any such bill is to a large extent meaningless. It can be at best only a pious hope and a declaration of intentions. The subject is under discussion in the United Kingdom at the present time, and is part of the main theme of the address of Lord Justice Scarman in his recent Hamlyn lectures. The comment in the United Kingdom is in line with this, that any such bill or rights, or any such entrenched provisions relating to personal rights and liberties, would only be as good as the Courts' capacity for enforceability, and that must in the end depend upon what Parliament has to say.

"In our society, I believe our best means of achieving the protection of the private interest or the private right against the public interest, and preserving what we feel is to be a reasonable degree of balance, lies on the pressure that we, either as electors or as an informed and learned profession can bring on our legislators, because in the end the vast bulk of our law is going to increase in its proportion in the statutes and regulations.

"In the type of society in which we live there have been many rapid technological developments, to take but two, transport and communications. It would be, in my opinion, impossible for the common law to have developed the codes of conduct and the rules by which we live in a motorised society, in a society dominated by aviation, and transport in all its modern forms. Only a code of conduct promulgated through the Legislature is really possible to cope with an ever changing and increasingly complex situation.

"The same applies in the field of communications. It is only really through the Legislature that those rules can be formulated. So our remedy lies in ensuring that those rules are the fairest and the best and the clearest that can be developed.

"I feel also that there are one or two particular points in Mr Patterson's paper that I would like to support, and I mention one of the last, remembering what his Worship the Mayor said this morning in talking about State trading corporations, I believe that State agencies which are engaged in commercial activities or in revenue producing activities from the public at large, should be called to account much more clearly and much more comprehensively than they are at the present time. The move towards greater State participation in the commercial field is one that is increasing all the time, it is not likely in the foreseeable future to slow down very much, and I think it is definitely very unlikely it will decrease, and if we are to be subjected to more and more State involvement in these fields then if there is to be any adequate measuring rod against the performance by the private sector in the same field, whether it be in transport, whether it be in health, or whether it be in education, then the State sector must be required to place before the people full and comprehensive information which can be clearly understood so that its performance, and the performance of the private sector can be properly measured and any improvements made.

"I know this is not a commercial thing, but I would like to raise, to my mind one instance of where the State does intrude in the field of personal and private relationship in so far as our divorce laws are concerned. We have heard from the Lord Chancellor this morning the progress that has been made in the United Kingdom towards the do-it-yourself type of legislation, and if I remember correctly, he said a large proportion of cases were now done completely on the papers without any appearance whatsoever in the Courts. For the life of me I have never been able to understand why a marriage in which the two parties do not have any items in dispute, and in which there are no questions of custody or property to be determined, cannot be dissolved by a simple deed of dissolution and filed in the Registry Office without ever having to go to Court. I do not see it is the prerogative of the law except because society has placed some importance on the sanctity of marriage, but I do not see it as the prerogative of the law to interfere and require people to effect their dissolution through the Courts when they did not have to go to the Courts in the first instance to get married. I am sure we are moving very much in that direc-

tion, and I think it is something the legal profession should look at objectively. I know many younger lawyers are certainly doing so and we should not consider our vested interests in this.

"Reverting for a moment to the State agencies, one wonders just how far, on a very topical note, the broadcasting and television agencies will have to account publicly for their performance. It almost looks on the present indication as if it is going to be very difficult to deal through Parliament with any complaints the ordinary person may have in respect of this new service. I am sure that the Attorney-General is very well aware of what is happening in that field, but here is an example of where the private citizen in a very important media, may be deprived of his rights of calling to account the people who are providing the service for which he is paying.

"I am unable to agree with my friend Mr Patterson on his suggestions regarding the compulsory contribution of finance which the Government requires from time to time in the way of lodgment of Government stock, savings and other matters of that concern. I feel in that particular respect he is on rather dangerous ground. A Government's fiscal policy and the implementation of it, must always leave it with room to manoeuvre in respect of general financial contributions for the country's stability. But I agree it would be much more helpful if all this information was readily available so that one could actually ascertain just how much the Government does take from us on a compulsory basis, and return us a modest interest rate which does not take any account of inflation, and therefore by progression allows the investment to be eroded.

"There are one or two other things I would have liked to have said, but I am very conscious of your desire to allow the participation from the floor, and I feel at this stage I should hand over to Mr Dugdale."

THE CHAIRMAN: "Thank you. I now invite into the ring Mr Don Dugdale who has a reputation of having a very good left hook."

MR DUGDALE: "Mr Chairman and ladies and gentlemen: I have a very genuine respect and admiration for my good friend Colin Patterson, but on most occasions I disagree with most of what he has to say, and this is one of those occasions.

"Two points I would like to make at this stage, and the first one is this: I would contend, and perhaps I should say in view of the Chairman's delicate remarks at the beginning of this session, I would contend stoutly, that different societies at different times have different ideas as to the extent to which it is legitimate for the State to interfere with the freedom of the individual. We regard it as axiomatic today, for example, that the State should not interfere with the individual's religious belief, but that was not always so in English history. We regard it as axiomatic (most of the time anyway) that the State should not interfere with the individual's political belief. That is perhaps at times a rather shaky one. On these particular matters, at particular times, there is consensus, but on other matters there is no consensus as to the boundaries of legitimate State interference, and that is particularly so in the case of State interference in economic affairs and really you can interpret the whole political history of England and New Zealand for most of the nineteenth century right up until the present time as a conflict on just that point, or as far as it is legitimate for the State to interfere in the economic activities of the individual, and insofar as you can find an ideological dividing line between the National and Labour Parties in New Zealand today it is probably there, on this point as to how far it is legitimate to interfere with economic activities.

"Well now, Mr Patterson's heart seems to bleed for the tax evaders and similar parasites—and mine does not. And his heart seems to bleed for those persons in trade whose nasty habits are likely to be inhibited when the Commerce Bill becomes law, and my heart does not bleed for them, and no doubt these conflicting views indicate where Mr Patterson and I stand respectively in the political spectrum, but probably there is no more significance to them than that.

"The other main area of conflict of this sort in New Zealand today is the extent to which it is legitimate for the State to interfere with the sexual activities of the individual, and of course the whole argument about homosexual law reform turns really on this very point. That is all I want to say about that.

"The other thing I wanted to draw to your attention, to comment on, was the observation of Mr Patterson where he says, perfectly correctly, that legislative inhibition promotes alternatives. That is undoubtedly so, and always a statute tends to awaken the ingenuity of the conveyancer to try and find a way round it. The law of trusts had its origin, as I understand the position, in this search for a loophole in a certain statute against subincudation whatever that might be. The whole con-

cept of hire purchase had its origin in finding a loophole around the Factors Act. The practise of appointing receivers, or making provision in debentures to appoint receivers, was to find a loophole in those provisions of the law that cast very onerous duties on mortgagees in possession. The bulky objects clause in a memorandum of association is the conveyancer finding a loophole around the restrictions in the Companies Act provisions that limit the company's powers to its objects. So yes, of course it always is so that an Act promotes people trying to find a way round it. Perhaps the best example is the whole history of usury and moneylending which is a history of statutes followed by dodges to get round it.

"But where I would, I think differ from Mr Patterson is the moral to be drawn from that. Let us grant if you dam the stream the water will try to get past along some other channel, but it does not seem to me to follow from that that you give up trying to dam the stream. You keep on trying and you build up other dams to achieve the social purpose you are after. It seemed to me that Mr Patterson rather drew the opposite conclusion and invited you to accept that if the first damming of the stream does not work, then you should give up the effort, and I don't agree with that for one moment.

"The last resort of the legislator, in this process of trying to stop what is regarded as anti-social, is the sort of provision that you have in s 108 of the Land and Income Tax Act, which as you know has been imitated in other provisions, such as the Hire Purchase Regulations and the Property Speculation Tax Act, and I rather got the impression Mr Patterson thought this was unsporting, and no doubt it is, it takes away the fun of trying to devise a way round a statute, it is one of these horrible provisions which says the Court can cut through your carefully elaborate structures and have a look at really where you are trying to go.

"But again, although such provisions may be unsporting, I do not think that they are illegitimate, it seems to me they are a perfectly proper device to be adopted by the Legislature as a last resort in trying to achieve the social objects it is driving at."

THE CHAIRMAN: "Thank you Mr Dugdale. At this stage I propose to adjourn the contest sine die, to be brought on at any time without notice. Now I wish to open to the floor the subject-matter of the paper and the comments of the commentators. I have in front of me a series of switches showing time. There are two people I want to invite from the floor to make a major contribution. First of all Mr L H Southwick, and Professor Szakats. The Society is hoping there will be an on-going consideration of the matters raised today."

MR J S O'NEILL (Dunedin): "Mr Chairman, distinguished guests, ladies and gentlemen. I congratulate Mr Patterson on his paper. I wish to make mention regarding the moral issues involved in legislation, because I believe at the present time these are the most important insofar as they affect the basis of the society in which we live.

"Thought precedes action, and when certain conduct or courses of action are crystallised in law, or facilitated by law, citizens will inevitably in crisis, seek the action indicated therein, possibly to the detriment of other solutions to their problems.

"It was disturbing this morning to hear in the address of Lord Elwyn-Jones, that on the implementation of legal aid in England, 87 percent I think he said of the cases wherein legal aid had been taken advantage of, were matrimonial cases, and that when legal aid was made available, divorce increased. This is a line which I have personally in my own way been endeavouring to hammer for a long time, that legislation does indicate and determine the sort of solution that people will seek to their problem. I regard it as deplorable that 87 percent of the people seeking legal aid were involved in matrimonial cases, and that the making available of legal aid has led to an increase in divorce.

"Lord Elwyn-Jones I think, suggested that the provision of the service of legal aid had both identified the need, and serviced the need. I feel myself that there is an urgent need for us to look more carefully at our present view of public policy regarding divorce. The attitude to marriage now is defective, I believe, in many cases before people have even entered into marriage, and the logical outcome of this view is seen in this move now for divorce to be done purely by paper work, and without any appearance in Court. This of course is eventually leading to the logical sequence that the piece of paper itself really is meaningless, and marriage and the family I am sure, will suffer."

MR JOHN PREBBLE (Auckland): "I would like to amplify the comment of Mr Dugdale which I think was the burden of his speech, that is

the paper really is a series of opinions about what allowance should be permitted to the Legislature in interfering with private rights. Mr Dugdale gave one example of the paper's limitations. There are in fact a number of separate matters covered in the paper, and I would like to consider the section on taxation. The figures that we are given indicate that over the last 20 years the percentage of the gross national product of New Zealand taken up in taxation has increased by about 5 percent. Surely one can draw all sorts of conclusions from that. Another possibility apart from Mr Patterson's conclusion, is simply that New Zealand was not heavily enough taxed in the past to provide the level of social services that we should have. There is some support for that argument if one compares New Zealand's levels of taxation with those of other countries.

"The Ross Report in 1967 did this, and at that stage, their latest figures, New Zealand's rate was 25 percent, Australia 23, United States 27, United Kingdom 28, Canada 26, France 37. It can be seen that New Zealand is not out of line with the rest of the world, in fact by coming up to a figure of about 30 percent we are more or less evening things out. The other tax figures which one could quote surely go against Mr Patterson also. Our maximum rate of income taxation is very low at 50 percent; our estate and gift duty taxation is remaining static or probably with inflation reducing. In the last ten years or so it has gone from 22 to only 28 million.

"Then Mr Paterson goes on to criticise the Government taking money from various financial institutions, in particular insurance companies, but he neglects at the same time to mention the privileged position of insurance companies under the income tax legislation, which as you all know permits one to reduce one's income tax by buying life insurance, so it is surely not unreasonable that the institution should be obliged to provide some of their money for the common good.

"Finally, I would suggest to you, the fact that economic regulation does not appear to have prevented inflation, does not necessarily show that there should be no economic regulation. It is just as likely inflation would have been worse if we had not had that regulation."

MR G B FERROW, (Sydney): "If I could comment very briefly on three matters raised in the paper, and by commentators and also by the Lord Chancellor this morning. The first matter concerns the statement that undoubtedly sovereignty of Parliament is the key to all debates on bills of rights, and the protection by those and other means of human and individual rights. This statement I think is true, and I think it cannot be better illustrated than by reference to the administration of President Roosevelt some years ago in America, and more recently the attitude on the same questions of the present Government of the Commonwealth of Australia. I refer to the use of Government information acquired for one purpose, being used or misused for other purposes. In particular the use of tax returns for the purposes of the political wishes and desires of a government, to influence and more than influence, to coerce members of the public. The Government of the Commonwealth of Australia, has to its credit, to its eternal credit, rejected the move by the then Attorney-General, the then-Senator Murphy, to allow him as Attorney-General access to Taxation Department files. History and historical records have shown what use the Roosevelt administration made of such supposedly confidential returns in America.

"It is to be hoped that the attitude of the Australian Government on this question will be continued and reflected in other areas of government administration as well.

"The second point is that I fear the trend today is however, to the contrary. That I think is illustrated by the fact that there is a vast amount of legislation and subordinate legislation which requires not so much individuals, but trading concerns, whether they be groups of individuals or whether they be corporate organisations. If I may tear aside the corporate veil for a few brief moments; when all is said and done the activities of a corporation are nothing more than the activities of a few individuals, and if individuals should be protected from intrusions on their privacy, so too should combinations which they operate. When we speak of freedom of speech, we mean a lot more than freedom to talk. Talk is the tip of the iceberg to which we refer. What we are really concerned about is that freedom to exercise our minds, that freedom of intellectual honesty, so that we are not induced, unduly influenced, coerced or blackmailed into making up our minds, according to the dictates of another, least of all by the Government.

"Where there is this vast mass of legislation today, with the constant supply of all sorts of statistics concerned with the management and financial affairs of companies available to a government, then that government will be able to, as we have seen to our cost in Australia in

very recent times, that government will be able to manipulate and coerce companies into doing its wishes on political matters with the threat of reprisal if they do not co-operate, and they know that reprisal will be likely because the government has the knowledge of what to do by way of reprisal.

"And my final point is to refer to a comment by the Lord Chancellor this morning when he spoke of legislation in Britain which will in future require a testator to make provision for his spouse—his wife in his will. The statement was made that no longer will cats' homes be preferred to wives. In answer to that, history has shown to our profession in particular, time and time and time again, that no matter how much those who believe that by legislation and incessant regulation social attitudes can be influenced, will be proven wrong again. All that will happen is that most people will leave nothing in their will, they will probably have no will, and the wife will suffer. Besides the point made by Mr Patterson in his paper, all that law will produce is a minority of testators who have not gone to an estate planner for cats' homes, will find that they are oppressed and victimised, once again a triumph for regulatory attitudes in legislation."

MR DUGDALE: "My hackles rose at most of what the speaker said. To take only one point, what he describes as governments obtaining information and using it to manipulate and coerce citizens can surely be described far more rationally by saying governments need facts to achieve the social purposes they believe to be right, and presumably they have been elected to carry out. The sort of emotional approach we have heard from the last speaker does not really cast light on the question. I rather wondered too when I listened to him, is there really any rational basis for the coyness we have about tax returns and our financial position? Why, rationally, is it thought proper that our financial situation should be covered by a fig leaf? All sorts of other fig leaves have been abandoned in recent years and I do not express any concluded points on this view, but just what rational explanation there is for this aim, this desire to hide one's financial position, I am just not sure."

MR IAN BARKER QC (Auckland): "Mr Patterson as he concluded his remarks this afternoon asked for other illustrations. I presume he means illustrations of other undesirable legislative ploys and although I don't think I can better the bizarre tale of the eggs which he refers to in the case of *Smith v Egg Marketing Authority,* and it is a thousand pities that was not reported, not only for the very good reason that Mr Patterson and I and Chilwell J as he then wasn't, were counsel in that matter, but for the even better reason it gives in the judgment of White J an account of what must be one of the most bizarre legislative mess ups in recent years, resulting in the curiously named Act that Mr Patterson mentions in his paper.

"What I am going to tell you about is the Public Works Amendment Act 1973. Some of you may know at a similar function six years ago I expressed some interest in this topic, which I think has some of the same basic philosophy behind it as this paper. That was an Act that brought into being a right of objection to the Town and Country Planning Appeal Board when the Minister of Works or the local body wanted to take this land. That Act or Bill started life as an innocuous looking Bill to amend the Public Works Act and to anybody who looks at Bills, was not very important and was just machinery things, but lo and behold in a supplementary order paper there was introduced this vast number of sections which brought into being this appeal right or objection right, and made several other fairly major changes to the assessment of compensation, and also to the question of solatium payments. Of course this was slipped in through a supplementary order paper and nobody had really much opportunity to comment on it. The New Zealand Law Society got to hear of it at a very late stage, and I was able to assist them in the submissions, but they were not able to get hold of many people in the profession who would have had something worth while to contribute. That went through, and the other thing about it was there were very many precedents in overseas jurisdictions, particularly in Canada where Royal Commissions had carried out research into this particular area, but there was no attempt made by the propounders of the Bill to do any research or homework on what had been done in other jurisdictions.

"So what I am saying, my example of a legislative ploy which is not so good is three things, first don't introduce things by a supplementary order paper if you are making a substantive change to the law, secondly give people time to comment on it who perhaps have something to comment, and thirdly look at overseas examples."

DR FINLAY (Attorney-General): "I am prompted to intervene by Mr Horrocks' very

polite and gentle invocation of my name so he would not think it was taken in vain, but I am bound to confess at the outset that I realise that this was the only one of the papers that I had not read through, fairly late this morning, so my scrutiny of it is fairly sketchy and peripheral.

"But I did notice as I hastily ran through it, that it cited and presumably invoked the authority of *Main v Milne*, but it seemed to me to echo much more the philosophy of Adam Smith and Ricardo and their modern day high priest Von Highet. It occurred to me that I should really come to this provisional conclusion which the argument I have heard subsequently today sustains, that the title and topic are misconceived, and a more fruitful discussion would have been invoked if it had been called "Public Right v Private Interest", because I think that would have sketched out more meaningfully the areas that are properly in dispute.

"I did note that the paper contrasts the scrutiny that was given to accounts of private companies with that given to the public accounts, to the disadvantage of the latter. It is publicly and I believe justifiably believed, that the spirit which prompts the individual who drafts and sets out company accounts today is mainly to conceal rather than reveal, and I suspect company accounts by and large, public or private, receive the minimal degree of scrutiny and a great deal less than accorded the public accounts. After all they are open to scrutiny for I think thirteen full days of Parliamentary time, and the limit of their examination is confined only by the ability and zeal of the opposition. By this I mean of course any opposition, and if the opposition chooses to spend those thirteen days feathering its political nest rather than doing the job of examining the accounts, that is their privilege.

"Mr Horrocks went on in similar vein to deplore that some State trading accounts are not open to inspection. Of course in the main they are; the Railways Department, the Post and Telegraph Department. He makes a point about the Broadcasting Council and the Corporations under its control, and that is not without validity. In a passage in the House recently I contrasted them with the nationalised industries in Britain, and cited the authority of Westminster for the unavailability for them being examined in the House, because of the similar rules that prevail for the nationalised industries in Britain. I have to concede that there is a compensating factor there, that there is a standing committee on the nationalised industries, and if the accounts of the public corporation, or any public corporation are to be removed from public examination in the place that would normally be, namely Parliament, there is some ground for suggesting that there might well be set up in New Zealand a similar institution to that in Britain, a committee on the nationalised industries, which would have the responsibility as an arm of Parliament of doing what can no longer be done openly in full Parliament."

MR PATTERSON: "I would like to point out that my criticism is directed towards the accounts of State agencies, not to the public accounts as such."

MR L H SOUTHWICK QC (Auckland): "Mr Chairman, to be brief I have written what I want to say. First of all this paper is called Public Interest v Private Rights, and you will remember that Mr Dugdale said that there are certain areas where he contended that different societies have different ideas of the degree of interference by the State in certain things. That is probably where he is in Dr Finlay's camp when Dr Finlay said this paper might better have been called "Public Rights v Private Interest". It is for that reason too I think, that Colin Patterson says that there is no single formula for the proper accommodation of public interests and private rights.

"But what I am going to say is this, if we do get to that point where we are talking about public interests—not public rights—but public interests against private rights, too often it is very true that our legislative preference promotes a desired course to the practical exclusion of any real ability in the private interest to preserve his rights. Now that to my mind, in looking at this matter broadly, is the strong issue in this paper, especially in a country where we have a single House, not a second House.

"It is my simple submission that except where you have got a strong public right—which is pretty obvious, except in those cases public interest must be prepared to face full and free and searching rights of scrutiny and objection. In my submission very much of our legislation does not permit that to occur, and I only need to refer to the very Act Ian Barker mentioned, the Public Works Amendment Act. It is better than it was, but it still would appear to deny a full and proper right of objection against not a public right, but a public interest, and I suggest that rights to object to the exercise of what is seen as a public interest must be so full and ex-

pansive as to allow all matters to be considered.

"I suggest however, ladies and gentlemen, more than that, which is this—that some Ministers of the Crown, very unfortunately perhaps but nevertheless truly, see the right of objection as a pretty meaningless thing, and in instances express an intention of going ahead whatever the position may be, in my view confusing public interest with public right. I submit that we as lawyers have to keep a very close watch on this where the public interest contests private right. Let us as lawyers see to it that the public interest is thoroughly tested against private rights.

"Just one more thing I want to say, and that is to demonstrate that I am not fooling when I put this as strongly as I do. I took a matter for the Law Society to a Minister; his reply to me was: 'This is a matter of public interest and I don't care what you say, we have the majority to carry the thing through. That is what I am on about.' Let us therefore see as lawyers that when public interest is in conflict with private right that the public interest is required to prove the strength of its right."

PROFESSOR A SZAKATS (Dunedin): "Mr Chairman, thank you very much for giving me the opportunity to express some views on this paper, and I want to join those persons who congratulated the author. I am quite sure after finishing my comments I won't receive a rousing clapping like my learned predecessor. The writer of the paper tried to show us the balance between the interests of society and the interests of the individual, and he referred in his wide sweeping discussions to so many different matters, certain matters which we hear about, and self-evident truths. The common character is that these all can be endlessly debated without any conclusion. As to self-evident truths, perhaps I might use this expression, that public interest does not necessarily negate private rights, but frequently coincides with it, and public interest is not always the same as the interest of the State. The pre-supposition that private interest inevitably clashes with public right, that they are items on both sides of the balance sheet, I think is one of the favourite fallacies which cannot be upheld.

"Because of the short time given to me I intend to confine myself to a few concrete matters. One refers to Sir Henry Maine's famous statement on the development of societies from status to contract, and the reverse, that now develops from contract to status because of the incorporation of statutory terms in certain contracts. Closer examination again reveals that the presupposition of monetary terms into contracts still places the emphasis on the contractual character.

"An employment contract in which legislative terms and terms of collective agreements, awards are incorporated, certainly retains its contractual character because the terms take their effect through the contract. Anyway can it be deplored that legislation protects the consumer, protects the employee, and generally protects the weaker members of society? Is it so disastrous that this so-called freedom to contract is abridged? Really freedom is nothing else than the freedom of the stronger party to impose terms on the weaker party. A kind of contract of its own, a kind of take it or leave it. If the tendency to impose terms by public authority is deplored, it should also be deplored if a big commercial entity does so. Anyway, to talk of freedom of contract is a nineteenth century idea, somewhat naive, and now somewhat discredited. James Stuart Mill said that freedom of contract is merely freedom from coercion.

"The other matter is limitation of what the law can do. I entirely agree with the learned author that there are limits, and if the social and political convictions are definitely against certain manifestations of the law, then the law should be changed. It is not that legislation should impose social norms, but legislation should take consideration of existing social norms and ethics. The law should be changed by law of course but Otto Kahn-Freund lucidly illustrates the limits of the law, and if I may say so, the lack of adeptness of the common law to reach the realities of industrial actions. Observing the legal technicalities, and observing the law of injunction, Mahon J and the Court of Appeal certainly were correct in their judgments. I respectfully disagree that the case had nothing to do with the right to strike, and I respectfully submit that that was the real issue. The present moment of course is not suitable to deal with this very complex matter, and I do not intend to do so; I published a paper which deals with this matter. For the present purposes suffice it to say if legislation has granted the right to strike in the Industrial Relations Act, unjustified industrial action should be more clearly defined, and rational proceedings provided for the prevention and settlement of industrial action, and if necessary for the imposition of penalties

through the tribunal designated for that purpose, and this is the Industrial Court.

"If a party to a dispute has the right, as it has now, to bypass the procedure provided in the Industrial Relations Act by taking common law action, and through the instrumentality of the Court, and if that can negative a right given by the legislation, then what is the use of the legislation?

"Apart from the concept advanced that such an application for an injunction, such an application of communal law, creates unfortunately a general disrespect towards the law."

THE CHAIRMAN: "To round off the contest from the antagonists' point of view, I would invite first of all Mr Dugdale to put his blessing on the comments that have been made."

MR DUGDALE: "I want to talk about only one set of observations, and that is those of Mr Southwick. It seemed to me with respect, that it is not really helpful to speak in abstract generalisations in the way he did. He gave us but one concrete example and that was the Public Works Amendment Act, but he did not tell us exactly what he thought was wrong with it. I suppose the criticism of it is the right of objection which it gives the Town and Country Planning Appeal Board only the power to recommend, so that at the end of the day the decision remains that of the Minister or the Government or whoever is doing the taking of the land. Really this boils down to the question doesn't it, of who should have the ultimate right of decision, legislators who are elected, or judicial persons who are not. The same sort of question arises in respect of a bill of rights, and in my view at the end of the day it should be the legislators rather than some other people who have the right to make the decision, and after all if they transgress in the sort of way that Mr Southwick suggested they do, they get their come-uppance at the end of three years, and this seems to me the healthiest and most sensible way of dealing with it."

MR HORROCKS: "I don't think I need traverse any of the field Mr Dugdale has just mentioned, because we are quite surprisingly very largely in agreement and I will have to argue that out with Mr Southwick afterwards.

"I would like to say I welcomed the Attorney-General's remarks about the possibility of having some sort of standing committee or some sort of similar institution to the one in the UK with respect to State Corporations or agencies, or nationalised industries. I think that would be well worth while looking at for establishment in New Zealand. But I would like to take issue with him on the implications that the standard of company reporting in New Zealand is designed to conceal rather than reveal, if I heard him correctly. I think the general standard of reporting of public companies in New Zealand in any event is a pretty high standard in accordance with the Companies Act. Otherwise sir, I thoroughly welcomed the Attorney-General's remarks."

MR PATTERSON: "Mr Horrocks instanced the transport laws as incapable of devisement under a common law system; so they are but they are not an example of the problem with which this paper is concerned. The transport law, such as the law which says keep to the left, are rules of convention and habit, and don't raise conflicts between private interest and public right.

"To Mr Prebble on taxation, I would merely say an increase from 25 percent to 30 percent is a 20 percent increase; to my mind a significant increase.

"To Dr Finlay in regard to 'Public Right v Private Interest', yes, the title, sir, is troublesome. It is not of my choosing let me say, it was the subject assigned to me. The thought might perhaps be best captured by changing it to 'Public Rights v Private Rights'; that is where the conflict lies.

"To Professor Szakats, thank you for your ready concurrence with the proposition that the public interest does not always clash with private rights. That is the point of my citation of the historian McCormick in a passage which I hope we will all read, as it to me represents the sense of this matter. Does the prosperity and internal peace of a society depend upon the freedom of its citizens, or does it depend upon their constraint.

"Lastly to my friend Mr Dugdale who talked of damming streams, at which he might no doubt be more proficient than me. May I remind him that there is a difference, which King Canute sought to demonstrate, between a stream and a tide."

THE CHAIRMAN: "I think I should declare a no-contest between the participants caused by the interference of the promoter. In thanking the commentators and Mr Patterson, can I also thank those who have contributed from the floor and hope the Law Society will find it worth while. Whether it be public right or public interest, the discussion on the place of the private interest will and must continue between us, whether as electors or as lawyers."

DANGEROUS PRODUCTS AND THE CONSUMER IN NEW ZEALAND

by GEOFFREY W R PALMER*

Professor G W R Palmer was born in 1942 and educated at Nelson College and Victoria University of Wellington where he graduated BA in political science and LLB. He worked for the firm then known as O'Flynn and Christie until taking up a British Commonwealth Fellowship at the University of Chicago in 1966 where he graduated JD. He took up a lectureship in political science at Victoria University in 1968 and in 1969 he was retained by the Government to draft the White Paper on the Woodhouse Report: "Personal Injury—A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury In New Zealand". Later that year he returned to the United States and taught at Iowa and Virginia. Before taking up his Chair at Victoria in July 1974 he was Principal Assistant to the National Committee of Enquiry of Compensation and Rehabilitation in Australia and is currently a consultant to the Australian Government and the New Zealand Accident Compensation Commission.

Synopsis

(1) The consumer movement has a number of disparate goals. It aims to prevent monopoly and encourage competition. Measures are promoted which attempt to increase a consumer's information about products so that he may better make an informed choice. Efforts are made to protect consumers against sales methods which tend to exploit the consumer or bring undue pressure upon him to make a purchase. The movement encourages the development of standards to eliminate physical hazards from products which endanger safety. Concern is expressed in a number of ways about the price charged for goods and services. The major focus of the present enquiry is into the development of safety standards.

(2) The unifying thread running through the consumer movement consists of a protest that items which people want to buy are not available in the quantity and quality they want at the lowest possible price. The aims of the consumer movement are the same as those of the competitive market. Consumers vote with their dollars in the marketplace. In theory the market provides every consumer with the opportunity to have a say in what should be produced and in what quantity and quality. The most perplexing problem is to decide when the market left to itself provides the appropriate means of increasing people's welfare and when intervention in the market will provide a better solution. The choice is between traditional common law rules regulating the market and direct statutory control. Considerable differences exist between the two and the case for intervention requires economic analysis.

(3) A gap exists in our law relating to defective and dangerous products. At a time when we are overhauling our consumer law it is a matter to which we should give earnest consideration. Our increasing appetite for a wider range of consumer products has increased the hazards we face. Many of these hazards are encountered in products we buy for use in and around the home. Colour television sets, rotary lawn mowers, washing machines, and almost everything else we use around the home are capable of inflicting serious injury. The great attraction of focusing attention on product safety lies in the realisation that, while we have devoted great efforts to the prevention of road accidents and occupational injury, we have done hardly anything to encourage safety in the home.

(4) Different views exist as to whether negligence, strict liability, or caveat emptor provides the best rules of civil liability to allocate accident costs. With the passage of the Accident Compensation Act 1972 all use of these methods for allocating personal injury costs were rejected. In New Zealand we have spread the costs of compensating accident victims over the whole community. The manufacturers of dangerous or defective products and most people who use them do not pay for the costs of injuries those products engender. In economic terms we have "externalised" the cost of injuries. We have avoided using the power of the market to deter accidents. While the power of that market deterrent was probably never very significant we are in this

* Mr L V Castle, Reader in Economics, kindly read and commented upon the economic arguments in this paper.

single respect marginally worse off than before for accident prevention.

(5) For the following reasons New Zealand should enact legislation to minimise the losses caused by dangerous and defective products:

(a) As a community we have decided to pay for the compensation and rehabilitation of everyone who is injured. Since we pay the bill as a community we are entitled to minimise the accident costs which dangerous and defective products impose upon us. We are entitled to require the manufacturer to consider those costs by the means of regulating the safety of his products. We are entitled to ask manufacturers to modify their products to make them reach minimum requirements of safety.

(b) Unsafe products are a definite danger to the consuming public, a circumstance which takes their manufacture outside the province of liberty. We should no more permit the manufacture of dangerous and defective products than we should allow some manufacturers to subject their workforce to unsafe working conditions, or public eating houses to sell contaminated food.

(c) A competitive market needs informed consumers. The variety and complexity of modern merchandise is such that the consumer's knowledge about safety characteristics is sketchy. Very little advertising focuses on safety issues. The consumer generally is in a poor position to make any appreciation of safety factors. Many consumers have a psychological block about considering the risks of personal injury involved in using the products they buy.

(6) Parliament should pass a Products Safety Act which applies to any article or product of any type or class intended for sale to any person for use or consumption. The Products Safety Act should have the following features:

(a) A Products Safety Commission comprising five full time Commissioners should be appointed. Each would serve a term of five years.

(b) The Products Safety Commission should be independent but attached to the Department of Health for administrative purposes.

(c) The Commission should formulate product safety standards to be prescribed by regulation. The standards should consist of such requirements as to performance, composition, contents, design, construction, finish or packaging, and the form and content of warnings to accompany the product as are reasonably necessary to prevent or reduce the risk of injury to persons using the products. Two types of standards should be used, products safety standards and product information standards. The Commission should also decide which products present such unreasonable risk of injury that they need to be banned altogether.

(d) Failure to comply with the prescribed standard should be an offence. But there should be no civil claim in favour of those who might suffer personal injury as this would run counter to the Accident Compensation Act.

(e) The Commission should conduct proceedings leading to the formulation of a product safety standard. The Commission should commence such proceedings on its own initiative although any person, including a manufacturer or consumer could petition the Commission to commence proceedings.

(f) The Commission should hold public hearings before formulating any standards or banning any product. It should have extensive power to obtain documents and information and to compel people to appear as witnesses.

(g) After the conclusion of the public hearings the Commission should consider all the information available and make findings in writing as to the determination to be made.

(h) Within 30 days of the date of delivery by the Commission of its findings and determination any person adversely affected by the determination (and any association or organisation of consumers, manufacturers or importers) should be able to apply for review of the findings and determination to the Administrative Division of the Supreme Court, with a subsequent appeal on questions of law only to the Court of Appeal.

(i) After the time for appeals has expired or the appeals have been disposed of, the Minister of Health should cause the product safety standard to be prescribed by regulation.

(j) The Commission should make an annual report to Parliament.

I The consumer movement and the market

During the past decade in most western countries there has developed a reasonably substantial political movement aimed at improving the situation of the public who buy in the marketplace. Its critics have described the movement, rather inelegantly, as "consumerism"[1]. The consumer movement has developed its most distinctive form in the United States, although many countries, including our own, have imitated some of its characteristics. The basic thrust of the consumer movement has been a demand for legislative intervention in the market, an intervention which goes far beyond reform of the basic laws which regulate our exchange relationships, the law of contract and the sale of goods[2].

The so-called war on poverty in the United States led to a searching examination of consumer credit and the enactment of truth-in-lending laws[3]. Ralph Nader's book *Unsafe at Any Speed* led to the enactment of comprehensive legislation dealing with enforced safety standards in the manufacture of automobiles[4]. Regulatory agencies in America such as the Federal Trade Commission and the Federal Communications Commission have felt the pressure of the consumer movement and have become more vigilant in dealing with unfair or deceptive advertising[5]. Laws have been passed dealing with fair packaging and labelling, and fair credit reporting[6]. Controls on the sale of food, drugs and cosmetics have been tightened[7].

There appear to be five major areas of concern to the consumer movement:

(a) Preventing of monopoly and the encouragement of competition.
(b) Measures which are designed to increase a consumer's information about products so that he may better make an informed choice.
(c) The protection of consumers against sales methods which tend to exploit the consumer or bring undue pressure upon him to make a purchase.
(d) The development of legal standards designed to eliminate physical hazards from products which endanger the consumer's safety.
(e) Concern about the price charged for a product.

This paper concerns itself only with safety standards. But there is a unifying thread running through disparate goals of the consumer movement. That thread consists of a protest that the items which people want to buy are not available in the quality and quantity they want at the lowest possible price. Stated in that way it becomes evident that the goals of the consummer movement are the same as those of a perfectly competitive market. Consumers vote with their dollars in the marketplace. In theory the market provides every consumer with the opportunity to have some say in what should be produced and in what quantity and quality, including safety features. The scarcity of resources and the competing desires of other members of the society determine price and availability. A perfectly competitive economy is one in which there is perfect competition, perfect information is available to everyone and the costs of bargaining are insubstantial. In practice, of course, these conditions never exist. But in the market for some products many of these conditions exist to a substantial extent.

There can be no doubt that the most perplexing problem facing economic decision makers is to decide when the market provides the best means of regulating the economy and when it does not. It is perplexing because we do not know for many products how close to the model of perfection the actual market is and to what extent distortions can be cured by legislative intervention[8].

Free market economists in the United States have been vociferous in their criticism of legislation passed with the aim of protecting the

1 Posner, "Reflections on Consumerism" 20 University of Chicago Law School Record 19 (Spring, 1973).

2 G J Wallace, *Materials on the Control of Consumer Problems*, 3 (1972).

3 Consumer Credit Protection Act (Truth in Lending) 15 United States Code Annotated, ss 1601-1677. (The United States Code Annotated is hereafter cited as USCA.)

4 R Nader, *Unsafe at any Speed* (1965).

5 P Keeton and M Shapo, *Products and the Consumer: Deceptive Practices* 257 (1972).

6 The Fair Packaging and Labelling Act, 15 USCA, ss 1451-1461; The Fair Credit Reporting Act, 15 USCA, s 1681 et seq.

7 The Food, Drug and Cosmetic Act 21 USCA, s 301 et seq.

8 Cayne and Trebilcock, "Market Consideration in the Formulation of Consumer Protection Policy" 23 University of Toronto Law Journal 396 (1973).

consumer[9]. They deny its efficacy. They charge that laws passed with the aim of protecting the consumer usually result in restricting competition and do the consumer more harm than good. We have a situation then, where all sides are agreed that it is desirable to maximise social welfare. A perfectly competitive economy produces the optimum amount of welfare. The consumer movement aims to increase people's welfare. But the consumer movement and the free market economists are deeply divided upon the appropriate strategy for achieving the ends[10]. The disagreement revolves around questions as to why the market has failed and what the best means is of remedying that failure.

In order to make any headway in the rapidly burgeoning field of consumer law the lawyer needs a thorough appreciation of the economic issues at stake. He needs this grasp not only to help formulate policy in the area but to argue cases the result of which will often depend on an analysis of the economic effects of this trade practice or that pricing agreement.

Perhaps New Zealand lawyers have taken too seriously words addressed to them by the Privy Council in the *Crown Milling* case: "It is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy"[11]. To the extent that this statement suggests that our Courts and special tribunals ought not to take evidence upon, consider, weigh and state the economic implications of their decisions it is plainly wrong. Sophisticated economic analysis is at the very root of good decision making in the regulation of the marketplace. I suspect that the apparent inability of New Zealand lawyers to handle economic issues with sophistication has led businessmen and Governments to be very wary about allowing the Courts and the profession to play any great role in that part of our law which regulates competition, monopolies, price control and trade practices.

What lawyers often fail to realise, because the insight is essentially an economic one, is that the rules of the market are largely rules of common law[12]. Property rights, transactions involving the transfer of wealth, the rules governing the possession and retention of goods and sales have their origins in the common law often supplemented by statute. All this is so obvious we tend to forget the truth of it. But it is a point which can be illustrated simply. Imagine a society in which no property rights exist. If I decide to grow a crop of wheat I will need to till the soil and expend money and labour upon nurturing the crop. When the wheat is ready to harvest my neighbour comes along and helps himself. There is no legal remedy because there are no property rights in either the land or the crop. In such a society productive cultivation will cease because those who engage in it cannot ensure that they will derive benefit from it. Compare such a society with our own. Our rules of property allow for rights, which for many purposes are exclusive, over a range of natural resources. These rights are transferable. And it would appear that to an important extent our society accepts the view that the creation of such rights is important in securing for society the efficient use of resources.

The foregoing illustration points up an important distinction which must always be kept in mind in any analysis of consumer law. The choice is between common law methods of protection and other direct statutory methods of control. The choice is not between doing nothing and doing something; we have an elaborate set of legal rules at the very foundation of our economic existence. The law provides many remedies to those who are dissatisfied and have been hurt by their transactions in the market. To disregard those remedies and to promote a new species of regulation requires demonstration of important ills about which our present rules do not and cannot speak.

The differences between the common law strategy and direct regulation are profound. The common law method of regulation receives its enforcement impetus from individuals invoking legal rules in their own self interest. The choice of whether to litigate or not is a private choice. Public regulation relies upon Government officials exercising statutory powers subject to political control. Apart from important differences in the political characteristics of the two methods of regulation there are im-

9 M Friedman, An Economist's Protest 148 (1972); Winter, "Economic Regulation vs Competition: Ralph Nader and Creeping Capitalism" 82 Yale Law Journal 890 (1973).

10 Green and Moore, "Winter's Discontent: Market Failure and Consumer Welfare" 82 Yale Law Journal 903 (1973).

11 *Crown Milling Co Ltd v The King* [1927] AC 394, 402.

12 This part of the paper relies heavily upon R Posner, *Economic Analysis of Law* 156 et seq (1973).

portant economic implications. It has been suggested in the United States that "There is abundant evidence that legislative regulation of the economy frequently, perhaps typically, brings about less efficient results than the market-common law system of resources allocation"[13].

In New Zealand two comments need to be made about that remark. First, it may well be that the political characteristics of direct regulation are substantially different in this country than they are in the United States. There are strong suspicions in that country that Government agencies act more as political brokers between the competing interest groups directly affected and hardly at all as guardians of the public interest. Who, in the New Zealand environment, would accept Milton Friedman's charge:

> "There is an invisible hand in politics that operates in the opposite direction to the invisible hand in the market. In politics individuals who seek to promote only the public good are led by an invisible hand to promote special interests that it was no part of their intention to promote"[14].

Second, it can be argued that efficiency in economic terms while one of the goals in the New Zealand political culture, is not the prime goal. Thus, direct regulation may be defensible here because it promotes other goals (economic security, full employment, for example) notwithstanding its adverse effect upon efficiency.

So far I hope that I have demonstrated that an important issue in deciding what type of consumer law you want is an assessment of the economic implications of the competing alternatives together with an appreciation of the implications of moving from a common law method of regulation to a direct statutory method of control.

II Defective and dangerous products

All of the five major areas of concern to the consumer movement have been the subject of legislation in New Zealand. In both coverage and substance these laws are less substantial than those enacted by the United States Congress[15]. There is an irony in this since New Zealanders pride themselves in being tolerant of legislative intervention by the state and Americans are traditionally suspicious of it. We have a Trade Practices Act which is rather tentative in its approach but which has as its objective the encouragement of competition[16]. We have a Consumer Information Act which regulates to some extent misleading labelling, packaging and advertising[17]. We have a Consumer Council[18]. We have outlawed pyramid selling and severely restricted door-to-door sales[19]. There has long been power to deal with prices[20]. It is not my purpose here to analyse the strengths and deficiencies of New Zealand laws on these subjects.

The Commerce Bill, which is before Parliament at the time of writing, deals comprehensively with trade practices, pricing agreements, monopolies and takeovers and prices[21] Although the Bill has been subjected to severe criticism, so far as the rules relating to competition are concerned it will bring the law more into line with what has been done in the United States and, more recently, Australia. I doubt whether that is a point which many of its critics appreciate. Businessman in New Zealand do not seem overly eager to be subjected to the discipline of competition.

My complaint is not so much with what we have done, but with what we have not done. There is a great gap in our law relating to defective and dangerous products. At a time when we are overhauling our consumer law it is a matter to which we should give earnest consideration.

Our expanding appetite for a wider range of consumer products has increased the hazards we face. The variety and ubiquity of those hazards is astonishing. A massive United States Government study has catalogued the array of dangers which come from increasing material affluence[22]. Shorn of tales of horror and enlivening detail some of the hazards isolated by the Commission were:

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13 Ibid at 329.

14 M Friedman, *An Economist's Protest* 143 (1972).

15 The New Zealand situation is examined by R G Lawson, "Protection of the Consumer in New Zealand—Some Recent Developments" 3 Otago Law Review 49 (1973).

16 Trade Practices Act 1958. See J G Collinge, *Restrictive Trade Practices and Monopolies* (1969).

17 Consumer Information Act 1969. For a comment see G K Churchill, 6 Victoria University of Wellington Law Review 99 (1971-1973).

18 Consumer Council Act 1966.

19 Trade Practices (Commerce Commission and Pyramid Selling) Act 1974; Door to Door Sales Act 1967.

20 Control of Prices Act 1947.

21 Commerce Bill 1974 as reported from the Commerce and Mining Committee to House of Representatives, 9 October 1974.

22 National Commission on Product Safety, *Final Report* (1970).

- architectural glass in windows and doors. People walk through glass doors believing the space to be open.
- glass bottles and containers sometimes explode or break. When they do the consequences can be serious.
- television sets. The Americans have found that colour television in particular is very dangerous—the high voltage causes many fires.
- gas appliances can produce a variety of injuries.
- fire places and other heaters often cause burning.
- ovens and other cooking equipment often cause burns.
- bicycles cause many injuries to children. The chopper bicycles have a proven record of danger compared with ordinary bicycles.
- electrical hazard can result from a wide array of products in everyday use in the home.
- drugs and medicinal preparations offer many hazards both from misuse and side effects.
- household chemicals constitute a hazard to toddlers. Almost anything within the reach of a child will go into its mouth.
- furniture can frequently cause injury. The American Report mentions the case of a mother whose infant son was strangled by the top of his own cot.
- the design and construction of footwear can contribute to accidents.
- ladders may cause injuries.
- power tools, circular saws, drills and other high speed hand tools can cause a variety of injuries. Some of the hazards are electrical and some result from the swirling gears, chains, teeth, blades, or flying fragments.
- sporting injuries account for many casualties and too little attention has been given to revising ways of making sports equipment and protective clothing effective.
- rotary lawn mowers are a fertile source of lacerated and amputated limbs.
- injuries caused to children by toys are numerous. Children can be expected to misuse many of their toys and this should be taken into account in designing them.
- washing machines, especially those with power wringers can produce serious injuries.
- electric blankets and flammable clothing can cause burns.
- aerosol cans constitute a hazard from explosion and flammability.
- the backyard swimming pool is a place where many young children drown.
- cosmetics can cause skin eruptions, loss of hair, allergic reactions, itches, burns, and lacerations.

The Commission found that there were more than 350 categories of product which presented hazards[23]. The foregoing examples are particularly associated with the home. The home is a hazardous place. The United States Commission on Product Safety reported in 1969 that 30,000 people were killed in and around the American home annually; 110,000 were permanently disabled. 585,000 were hospitalised and more than 20 million were injured seriously enough to require medical treatment[24]. The Commission found that "Most of these casualties are associated with consumer products"[25]. Although the death toll from home injuries was not as large as that for road injuries in the United States it was more than double the number caused by work-related accidents. The total number of people injured at home is more than four times as many as those injured on the highways. Children under 15 form a disproportionately high number of those injured in the home.

At the time of writing no reliable statistical evidence exists on the magnitude of the injury problem caused by dangerous or defective products in New Zealand. Very soon, however, the Accident Compensation Commission will be producing statistics of a comprehensive sort never before available in New Zealand. Hopefully those statistics will tell us what we need to know about the incidence of product-related injuries. I would anticipate that the pattern which emerges will be similar to that in the United States. If that turns out to be the case we have an urgent problem.

There is an added reason for focusing attention upon consumer product safety. It lies in the realisation that we have devoted considerable legislative and administrative efforts to the prevention of road and occupational injuries. Because of our relative neglect of consumer product safety a sustained effort there is likely to yield more rapid and dramatic reductions in injuries than efforts in the other two spheres.

23 Ibid at 34.
24 Ibid at 10.
25 Ibid.

The promotion of safe products will also improve occupational safety, especially where tools and machinery are the agency of accident. Farm accidents are of particular concern in New Zealand and product safety standards for farm equipment could reduce the accident toll on the farm.

New Zealand's legislative efforts in consumer product safety have been fitful and sporadic. It has been possible to get action when some hazard captures the public imagination—fireworks come to mind[26]. Too often our record has been one of indifference. We have a larger number of statutes governing safety in the workplace[27]. We have many fewer touching upon consumer product safety. Some motor vehicles standards can be prescribed under the Transport Act 1962 although we do not apply the stringent safety requirements which now exist in the United States[28]. The Machinery Act 1950 requires the dangerous parts of machinery to be fenced, although the main emphasis of the Act is on occupational safety. The Explosives Act 1957 restricts and controls the manufacture, importation and use of explosives; a wide range of inflammable materials come under the Dangerous Goods Act 1957. Poisons and toxic substances are controlled by the Poisons Act 1960. Others fall within the Agricultural Chemicals Act 1959. The Food and Drug Act 1969 provides a procedure through which new drugs must pass before they can be offered for sale commercially. Food and drink can be analysed and there are strong measures to prevent the adulteration of food. But our legislation in New Zealand touches only two or three of the hazards catalogued earlier.

We do have some legislation which is valuable to consumers without compelling manufacturers to take any steps. Perhaps the single most important watchdog for consumer safety in New Zealand is the National Consumer Council established under the Consumer Council Act 1966. The Council is empowered to protect and promote the interests of consumers of goods and services by whatever lawful means appear to it expedient.

Consumer advice centres have been opened and the Institute runs a complaints advisory service. Of course, the consumer organisations are concerned with many other things besides safety. We also have the Standards Act 1965 establishing the Standards Institute, which does useful work in promoting standard designs which, among other things, incorporate appropriate safety features. The National Safety Council does valuable work in the field of safety education in the work sphere.

The Accident Compensation Commission is directed by its statute to "take an active and co-ordinating role in the promotion of safety . . ."[29]. To an extent these dual roles may be contradictory. The legislation stops short of giving the Commission any teeth by which it might accomplish its accident prevention objectives. Rather the Commission is enjoined to "establish close and harmonious working relationships" with agencies and organisations concerned with safety[30]. The Commission is instructed to engage in safety education, produce safety literature, conduct safety campaigns, carry out research, provide statistical data and seek new ways of reducing the number and severity of accidents. It is also provided that the Commission will investigate how safety might be promoted by the use of increased levies. So far very little has occurred. While it may be possible to attain some advance in consumer product safety under the rubric of the Accident Compensation Act it is hard to see how a great deal can be accomplished without new legislative initiatives.

Most of the legislation discussed above is administered by departments and the legal profession has not been heavily involved. Lawyers were concerned to establish damages claims relying upon breaches of the statutes and regulations made under them. Indeed, civil liability arising out of unsafe conduct was the profession's central interest in safety. It is to a discussion of the effects of civil liability upon accident prevention that we now turn.

III Strict liability, negligence and caveat emptor

For many years the common law of negligence awarded damages for personal injury to some of those injured by dangerous and defective products. The snail in the bottle and the chemicals in the underwear which

26 Machinery Act 1950, s 21B; Explosives Amendment Act 1974.

27 By my count there are at least 10.

28 National Traffic and Motor Vehicle Safety Act of 1966, 15 USCA, s 1381 et seq.

29 Accident Compensation Act 1972, s 43 (1).

30 Accident Compensation Act 1972, s 44.

caused the wearer to get dermatitis are examples for which it is unnecessary to cite authority.

Negligence gave the manufacturer a choice. If a safety measure could be adopted by the manufacturer at a cost less than the expected cost of damages awarded were the measure not adopted then the manufacturer would adopt it. If nothing could be done about the hazard anyway then the manufacturer would not be liable for failing to prevent the harm—there was no negligence. The American, Judge Learned Hand, characterised the rules of negligence as containing an explicit economic component; the defendant is guilty of negligence if the loss caused by the accident, multiplied by the probability of the accident occurring, exceeds the burden of precautions that the defendant might have taken to avert the risk[31].

Our own rules of tort so far as the manufacture of defective and dangerous products was concerned never got any further than negligence. In most situations liability was not imposed unless fault was present or could be imputed by res ipsa loquitur. While it was open, at least since 1932, for a plaintiff to sue a manufacturer in negligence for personal injury, the quantity of such cases never assumed the proportions of motor accident or industrial injury litigation.

Now the possibility of suing any manufacturer of a dangerous or defective product which causes personal injury is no longer available in New Zealand[32]. It might be thought on first impression that such a development produces a void in our accident law in that manufacturers no longer have an incentive to avoid making defective and dangerous products. But before we reach such a conclusion let us examine the safety implications of a strict liability rule.

The imposition of strict liability for personal injury on the manufacturers of dangerous or defective products in the United States has been described as "... the most radical and spectacular development in tort law during this century"[33]. I might add, parenthetically, that this statement was made before the enactment of the Accident Compensation Act 1972. Not content with destroying a manufacturer's protection from liability based on the theory that there was not privity of contract with the ultimate consumer of the product who was injured by it[34], the American Courts imposed strict liability[35]. An authoritative formulation of the Rule is to be found in s 402A of the American Law Institute's Restatement, Second, Law of Torts:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> "(a) the seller is engaged in the business of selling such a product, and
>
> "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> "(2) The rule stated in subsection (1) applies although
>
> "(a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> "(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The economic implications of this rule are different than for the negligence rule[36]. The new rule requires the manufacturer to pay all the costs of accidents which the defect or danger in his product causes; his choice is between paying the cost in the form of a judgment at law or paying for precautions which will prevent the accident in the first place. He will pay for avoidance measures only when it costs less than accident costs are likely to be. Thus far the analysis is very similar to the negligence analysis, although the accidents for which the manufacturer will be held liable may be more numerous.

Strict liability does have the effect of making some people pay for something they would

31 *United States v Carroll Towing Co* 159 F 2d 169 (2d Cir 1947).

32 Accident Compensation Act 1972, s 5.

33 American Law Institute, Restatement, Second, Law of Torts; Section 402A Tentative Draft No 7, Reporter's Comments.

34 *MacPherson v Buick Motor Co* 217 NY 382, 111 NE 1050 (1916).

35 *Henningsen v Bloomfield Motors* 32 NJ 358, 161 A 2d 69 (1960); *Goldberg v Kollsman Instrument Corp* 12 NY 2d 432, 191 NE 2d 81 (1963); *Greenman v Yuba Products* 59 Cal 2d 57, 377 P 2d 897 (1963); *Luque v McLean* 8 Cal 3d 136, 501 P 2d 1163 (1972).

36 McKean, "Products Liability: Trends and Implications" 38 University of Chicago Law Review 3 (1970).

rather do without. They may elect to buy an unsafe product knowing that it is risky but preferring to run the risk rather than pay more for a safer product. Impecunious people may not be able to afford the product at all if the cheaper more dangerous one is removed from the market by reason of strict liability rules. With strict liability the manufacturer would not be likely to supply those consumers who preferred the risky product. But it can be argued that many consumers are ignorant of the dangers of various products; that advertising does little to fill the vacuum of their knowledge. Since the best knowledge of the risks is with the manufacturer he is in the best position to do something about them, especially when to do so will reduce his net liability costs. Strict liability compels the manufacturer to insure consumers against defects in his products. On the other hand it can be suggested that the net effect of the rule in terms of accident prevention is zero or perhaps negative because any incentive for the consumer of the product to be careful is removed by the imposition of the rule. The potential victim now has no interest in paying for accident prevention activity. Indeed, an argument can be made that the best rule from an economic point of view is a blanket rule of caveat emptor because this "encourages the maximum range of products geared to meet all variations in demand"[37].

A dramatic illustration of the relative poverty of strict liability as a deterrent comes from an American case[38]. Car 1 was driving along the highway at night. The driver lost control of the car when he sought to avoid part of an ironing board lying on the road. Car 2 was following behind Car 1, observed the trouble and managed to stop behind Car 1. Car 3, a Corvette Sting Ray Fastback arrived on the scene and observed the stopped cars and flares which had been put in the area. It slowed down. Car 4 arrived last and banged into the back of Car 3, propelling it forward and causing it to veer across the road into the safety curb. At the time of the collision the speed of Car 3 was estimated to be 20 to 24 miles an hour and Car 4, 40 to 45 miles an hour. The evidence was that impact in Car 3 felt like a "hard jolt". Then there was a boom and an explosion. Car 3 had three occupants. All of them received severe burns. Two of them died from their burns. The survivor was awarded $375,000 damages. Altogether the defendant, General Motors, had to pay out more than $650,000 in respect of claims made by or on behalf of those three people in Car 3. The defendant's liability arose because of the defective design of the 1965 model Corvette. Its body was made of fibreglass, which does not bend but must break if sufficient force is applied. The gas tank of the Corvette was $7\frac{1}{2}$ inches from the external surface of the car's rear bumper bar. Tests showed that tank was subject to rupture and displacement upon application of a wide range of forces. The plaintiffs said that the Corvette was defectively designed in that a relatively minor impact would result in the injection of gas droplets into the passenger compartment. The trial Court gave judgment for the plaintiffs and this was upheld on appeal. The accident occurred in 1965. The Appellate Court delivered judgment in 1970. General Motors was still manufacturing Corvettes with fibreglass bodies and fuel tanks very near the rear in 1973. They may still be for all I know. The case exemplifies the calculation of a manufacturer that it is cheaper to pay the accident costs and retain the defect than to produce a new design free from the defect.

We have been examining the capacity of different legal rules of liability to induce safe conduct and prevent accidents. To the economist it turns out that the imposition of liability may have no economic effects. This unexpected insight is true, in theory, at least, and results from one of the most important articles ever written on the subject of law and economics, "The Problem of Social Cost" by Professor R H Coase which appeared in 1960[39].

Coase discussed a series of cases decided in England in the 19th century. A typical example was one in which land owners suffered damage to their crops and buildings from fires started by railway engines. Coase pointed out that if the damage suffered by the landowners was greater than benefits reaped by the railway the landowners would be able to pay an amount of money to the railway to curtail its activities or fit spark arresters. If the damage from the sparks was less than the benefit derived from operating the railway, then the railway would continue since the landowners

37 Buchanan, "In Defence of Caveat Emptor" 38 University of Chicago Law Review 64, 72 (1970).

38 *Badorek v General Motors Corp* 11 Cal App 3d 902, 90 Cal Rptr 305 (1970).

39 Coase, "The Problem of Social Cost" 3 Journal of Law and Economics 1 (1960).

would not be able to pay enough to cause it to cease operations. And to make the railway stop when its function was judged more valuable by the market, would reduce total productivity. Thus, if the railway could make a bargain with everyone with land adjoining the line, and there were no costs associated with making the bargain, it would not matter whether the railway was liable for damage caused by the fires or not—economically there would be no difference in productivity[40].

In essence the Coase theorem teaches us that the choice of liability rule has no effect on the economic allocation of resources. In the area of safety it may not matter which party bears the liability. We may produce the same amount of safety whichever rule we choose. This conclusion may cause lawyers to feel that they have been arguing about something irrelevant for years. But they need not be so gloomy. In the real world the rule of liability often does matter[41]. It matters because the Coase theorem depends on some fairly heroic assumptions. The first assumption is that there are zero transaction costs, ie there are no costs in carrying out transactions. This is unrealistic because in order to carry out a market transaction "it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up a contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on"[42]. It also assumes that people are free to bargain and there is no interference with voluntary exchanges. In other words, a perfectly competitive market exists. Most economists now accept that the theorem is correct if the assumptions are granted. The problem is that in the real world the pure conditions are never met. In a situation where there are costs in carrying out transactions and there is interference with voluntary exchanges it is not clear how the theorem applies.

So the Coase theorem provides the economist with a point of departure from which to go forward into the real world and find out which arrangement most reduces total costs in comparison with other arrangements for each category of products. But there seems to be agreement that there is no necessary economic criterion for preferring caveat emptor, negligence, or strict liability[43]. The economically correct answer in terms of allocation of resources may well require different rules in different product accident situations.

It might be suggested that New Zealand should adopt a strict liability rule for dangerous or defective products causing property damage even though personal injury cases are now dealt with by the Accident Compensation Act. But it is difficult to contemplate strict liability without personal injury. And I would suspect that the development of a strict liability rule for property damage would now be much more difficult. The majority of the Torts and General Law Reform Committee has recommended against it[44].

IV Consumer product safety

The relevance of the foregoing discussion may not be self evident. In New Zealand we have rejected all three alternatives of caveat emptor, negligence and strict liability as a means of allocating accident costs. Implicit in the foregoing analysis was the fact that one of the three solutions was the best. By adopting none of them we have done something important in economic terms. We have spread the costs of compensating accident victims over the whole community. It is true that some attention has been given to raising the money from some of the people whose activities cause the injuries, namely motor vehicle owners and employers. But none of the manufacturers of dangerous and defective products nor most of those who use them pay anything towards compensating those who are injured by the products. The economist would say we have increased the "externalities"[45]. This is a complex idea which I am deliberately simplifying but in blunt terms it means that we may have created a situation where the cost of the product does not include the cost of the blood its use will cause. An external cost is one which does not accrue to the firm which produces

40 I have deliberately simplified what is a complicated and subtle argument.

41 Demsetz, "When does the Rule of Liability Matter?" 1 Journal of Legal Studies 13 (1972).

42 Coase, "The Problem of Social Cost" 3 Journal of Law and Economics 1, 15 (1960).

43 McKean, "Products Liability: Trends and Implications" 38 University of Chicago Law Review 1, 118 (1970); Posner, "Strict Liability: A Comment", 2 Journal of Legal Studies 205 (1973).

44 Report of the Torts and General Law Reform Committee, "Products Liability" (March 1974).

45 G Calabresi, *The Costs of Accidents* 144 et seq (1970). J Seneca and M Taussig, *Environmental Economics* 67 et seq (1974).

the product but one which is imposed on all of society or a part of it. Such costs are outside the market system and do not become reflected in market prices[46].

All of the three choices discussed earlier gave some incentive to the manufacturer or user or both to reduce the level of accidents. To the extent that this was accomplished it was by ordinary market forces. Now we have externalised the costs of large numbers of product accidents causing personal injury. In order to deal with such externalities it is often necessary to resort to collective rather than market action. But the costs and benefits of a collective decision to intervene must be carefully weighed.

An example may make the point clearer. Let us postulate that chain-saw manufacturers were liable, under our previous law, to pay damages for an identifiable number of serious accidents caused by chain saws each year. The cost of the chain saws would reflect those accident costs. It may be that the manufacturer could avoid some of the accidents by the installation of a safety device. If chain saws became too expensive because only limited safeguards were possible, bushmen might switch to axes. Shifting the losses away from the parties concerned with chain saws and putting them on the community generally sacrifices whatever discipline there was for minimising the losses. In other words, to the extent the market gave us any deterrence we have lost it.

In most cases I do not think the power of that market deterrence was very significant. Certainly, it would not be anything like a sufficient reason to be hesitant about improving the welfare of the community by making personal injury a question of community responsibility. But in this single respect we are marginally worse off for deterrence. Then there is the more obvious point that we have taken very few steps to maximise consumer product safety in our community. Yet we have decided to pay for the compensation and rehabilitation of everyone who is injured. Such a combination of circumstances leads me to the inevitable conclusion that we should take a decision to legislate on the subject of consumer product safety. As a community we are entitled to minimise the accident costs which dangerous and defective products impose on us. We are entitled to require the manufacturer to consider those costs by the means of regulating the safety of his products. By these means we can, to use the jargon, "internalise the externalities". We are entitled to ask manufacturers to modify their products and make them reach a minimum requirement of safety. If the dangers are too great and the safeguards which can be taken are too few we should ask for the manufacturer to cease marketing the product. Obviously some products are inherently dangerous—they must be and cannot be anything else. We can reasonably ask that the hazards involved in the use of such products be brought to the consumer's attention. We already require such warnings to appear on cigarette packets. It is this point which leads to the most difficult argument of all. Its essence is best stated by Professor Milton Friedman:

> "Every time we take an automobile ride—or cross the street—we knowingly risk our lives because we think the gain from the ride or from crossing the street justifies the risk. Just so, a smoker may view the pleasures of smoking as justifying the cost on length of life. We may wish to cajole him, plead with him, try to change his tastes. Do we have the right to do more? To use his money, extracted in taxes, to persuade him that he has reached the wrong decision?"[47]

The answer to these questions is at the heart of the decision to intervene for safety generally. I think that the answer is clearly, Yes. We have decided in this country to spend taxes supporting the standard of living of the widow and children of the smoker if he dies of lung cancer. We are entitled to take action to prevent him costing the community money. His action will cause distress to others and cause them to be reduced to a state of dependency.

To say this is not to deny that the free development of individuality is one of the essentials of well being. It seems to me that such restrictions are compatible with John Stuart Mill's principle "... every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be

46 The problem of how to deal with externalities plagues the economics of almost all social policies, see the discussion of drug abuse in A J Culyer, *The Economics of Social Policy* 234-240 (1973).

47 M Friedman, *An Economist's Protest* 152 (1972).

bound to observe a certain line of conduct towards the rest"[48].

As the benefits conferred by the society go up so do the obligations. In a society which has decided to compensate all injury, conduct which produces injury is not a matter which touches the actor alone. Unsafe products are a definite danger to the consuming public, a circumstance which takes their manufacture outside the province of liberty. We should no more permit the manufacture of dangerous and defective products than we should allow some manufacturers to subject their work force to unsafe working conditions or public eating houses to sell contaminated food.

A further justification for intervention exists. It is agreed on all sides that a competitive market needs informed consumers. Although that need is universally acclaimed the goal remains difficult to accomplish. The variety and complexity of modern merchandise seems to increase at an exponential rate. I shall shortly buy a power motor mower. Yet I know nothing whatever about what distinguishes a safer mower from a less safe one. Many agree that the consumer's knowledge about the safety characteristics of products in the marketplace is more sketchy than his general knowledge concerning a product's properties. It is significant that very little advertising focuses on safety issues. The explanation seems to be that by making safety an issue in his advertising the manufacturer brings to the customer's attention that there are risks attached to the product. In many instances this would be something he would be unaware of until stimulated to consider it. For this sort of reason we see very little advertising of the sort:

"Buy X brand circular saw. It stops you cutting your hand off."

Generally speaking the consumer is in a poor position to make any appreciation of safety factors. I do not know how to determine whether one car is safer than another. I do not know how to tell how much preservative is in the meat I buy or how much should be in it. Neither do I know anything about goods which I must procure because other people have told me to do so. For example, I know nothing about the drugs my doctor prescribes for me or the material the dentist puts in my teeth. The people who make these things know much more about them than those who use and consume them. There seems no easy way of remedying the paltry state of consumer information about safety. To some extent marketing techniques this century have exacerbated the problem. My impression is that people rely less and less on the judgment of their local retailer and more and more upon large companies, the identities of which have reached them through advertising but from which they are separated in place and time and with which they have little, if any, communication.

There is another point which is a little like the last but analytically distinct from it. It may be that in the area of accidental injury people do not wish to make sensible decisions for themselves. People do not seem to be very good at estimating rationally their chances of suffering death or injury[49]. There seems to be a psychological block about considering the issues.

Unlike some advocates of consumer measures I find the decision to intervene a difficult one. The desire to intervene often stems from inchoate general preferences and on the justification that any regulation is better than none. Unfortunately intervention which is carried out with inadequate economic analysis would often do more harm than good to those ends it was designed to assist. Ad hoc restrictions on market forces often fail to achieve their purpose and so far we have not developed a general theory of consumer protection which can form the basis of a coherent strategy. Fortunately for my argument New Zealand has a history of legislative intervention in the market. Here intervention is relatively easy, I think too easy. Nevertheless I find the case in favour of legislation on consumer product safety clearly made out.

V The solution: A Product Safety Act

The suggested solution to the problems canvassed in this paper is to pass legislation to protect people against unreasonable risks of injury from hazardous products and to assist them in evaluating the comparative safety of products. The model upon which the recommendations are based is the Consumer Product Safety Act which became law in the United States in 1972[50]. Parts of that Act are strikingly similar to provisions which found their way

48 J S Mill, *Utilitarianism, Liberty and Representative Government* 132 (1964 ed).

49 G Calabresi, *The Costs of Accidents* 57 (1970).

50 15 USCA, ss 2057-2081, 86 stat 1207, Public Law 92-573, 27 October, 1972.

into the Trade Practices Act 1974 passed by the Australian Parliament[51]. The recommendations here borrow freely from both the United States and Australia with copious amounts of adaptation to suit New Zealand conditions. The recommendations do contain, however, a number of features which may seem novel to New Zealand eyes. There is a deliberate attempt to use the techniques of the judicial process to generate facts and findings upon which safety regulations should be based. The scope of judicial review by the Administrative Division of the Supreme Court has been made very wide.

(1) *Coverage*—The Product Safety Act should apply to "any article or product of any type or class that is intended for sale to any person for use or consumption"[52]. This definition is wider than that in the American Act which refers to articles for use "in or around a ... household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer ..."[53] The American Act excludes from its ambit tobacco, motor vehicles, poisons, aircraft, boats, food and drugs, concerning all of which separate federal legislation exists. The work accident situation in America is dealt with by the Occupational Safety and Health Act of 1970[54]. The Australian definition of goods includes "Ships, aircraft and other vehicles"[55]. In the New Zealand context I would favour the inclusion of motor vehicles because we have no systematic legislation dealing with the safe design and construction of motor vehicles such as exists in the United States[56]. By a recent amendment to the Transport Act power does exist to promulgate some standards, although in substance New Zealand relies upon the vigilance of those who formulate the standards overseas[57].

Safety should be dealt with as comprehensively as possible. The creation of many separate divisions has been one of the most serious obstacles to accident prevention in the past. For this reason I think attention should be given to integrating some old legislation with the new. Candidates for consideration would be the Explosives Act 1957, Dangerous Goods Act 1957, Food and Drug Act 1969, and Machinery Act 1950. There may be a case for erecting separate regimes for some of these categories although such proposals should be examined closely. These Acts do contain specialized provisions which go beyond the promulgation of standards for safety and information which will need to be retained.

(2) *A Products Safety Commission*—A Products Safety Commission should be appointed. Five full time Commissioners appointed by the Governor-General in Council should each serve a term of five years. The Commission should be independent and chosen from a variety of callings. There should be a doctor, an engineer, someone with experience in manufacturing and importing and a lawyer. One of the Commissioners should be appointed as Chairman. The Commission should be attached to the Health Department for administrative purposes and be serviced by that Department. The Department would need to recruit a number of technical experts to assist the Commission.

In New Zealand a number of organizations could lay claim to a share in the administration of a Products Safety Commission. In Australia the question of safety standards was dealt with in the trade practices legislation. The United States opted for a separate regulatory Commission with its own staff dealing only with consumer product safety. Looking at the previous pattern of safety regulation which has emerged in this field in New Zealand the Health Department seems to be the most appropriate home for the new Commission. The Department already administers the Food and Drug Act the most comprehensive statute in New Zealand of the type now recommended. Close relationships should be maintained by the Commission with all organisations and departments interested in safety. The statistics gathered by the Accident Compensation Commission would be of particular importance to the new Commission.

(3) *Functions of the Commission*

(a) To formulate product safety standards to be prescribed by regulation. Such standards should consist of such requirements as to performance, composition, contents, design, construction, finish or packaging, the form and content of warnings or instructions to accompany the product as are reasonably necessary to prevent or reduce the risk of injury

51 Trade Practices Act 1974 (Aust), ss 62-63.
52 cf Consumer Information Act 1969, s 2.
53 15 USCA, s 205 (a).
54 84 Stat 1590, Public Law 91-596.
55 Trade Practices Act 1974 (Aust), s 4.
56 National Traffic and Motor Vehicle Safety Act of 1966, 15 USCA, s 1381 et seq.
57 Transport Act 1962, s 77A.

to persons using the product. Two types of standards should be employed: (i) Products Safety Standards; (ii) Products Information Standards. This latter category could be expanded to deal with information as to quality, quantity, nature and value of the product if this were thought to be desirable[58].

(b) To decide which products present such an unreasonable risk of injury, against which no feasible safety or information standard would adequately protect the public, that the product must be banned from commerce.

(c) To conduct continuing studies, investigations and research into deaths, injuries, diseases and losses resulting from accidents involving products.

(d) To test products, develop product safety test methods, and formulate testing standards to be observed in different product categories.

The formulation of a standard will require the Commission to balance the probability that a risk will result in harm against the effect the proposed standard will have upon the product's usefulness, cost and general availability. An obviously unreasonable hazard would be one which could be prevented without sacrificing the utility of the product, increasing the cost or restricting its availability.

It will be objected that many products used in New Zealand are imported from other countries over which New Zealand can have no control. And the size of the New Zealand market may be so insignificant that manufacturers overseas would prefer not to sell here rather than alter their product. This complex issue can be balanced by the Commission along with the other issues it will need to consider. In regard to some products, standards formulated overseas will have to be accepted. But it is valuable to consider these matters from a New Zealand viewpoint. Many countries do not control product standards at all and those that do sometimes do not apply those standards to goods produced for export[59]. Considerations will vary with the cost and technological complexity of the product and they deserve to be weighed separately in each product category.

(4) *Procedure for developing standards*

(a) A proceeding for the development of a product safety or information standard or banning of a product should be commenced by notice in the Gazette and any other publication or notification as the Commission shall think fit. The Commission should give notice in writing to any person or organisation who stands to be adversely affected by any action the Commission might take. The notice should identify the product and the nature of the possible risk. The notice should also include an invitation that allows any person or organisation to submit to the Commission a proposed standard to cover the item in question.

(b) Any person including a manufacturer or consumer should be able to petition the Commission to commence a proceeding and should be entitled to be heard by the Commission on that petition.

(c) The Commission should hold public hearings keeping a complete record before formulating any standard or banning any product. The Commission should have extensive powers to obtain documents and information and to compel people to appear as witnesses before it. The rules of evidence should not apply. Proceedings should be conducted with as little formality and technicality and with as much expedition as possible. The Commission should be represented by counsel and any person or organisation which the Commission finds has an interest in the proceedings may be represented. This would include consumer organisations as well as manufacturers and importers.

(d) After the conclusion of public hearings the Commission should consider all the information available and make findings in writing with respect to any proposed determination including the following matters:

(i) the degree and nature of the risk of injury the determination is designed to eliminate or reduce;

(ii) the approximate number of types or classes of product subject to the determination;

(iii) the needs of the public for the product and the probable effect of the determination upon the utility, costs or availability of the product;

(iv) any means of achieving the objective of the determination while minimizing adverse effects upon competition or disruption or dislocation of manufacturing, importing and other commercial

58 Trade Practices Act 1974 (Aust), s 63.

59 The American legislation does not apply to products produced for export although it does apply to those imported into the United States. 15 USCA, ss 2066-2067.

practices consistent with the public health and safety;

(v) in the case of a determination banning a product, that no feasible product safety or information standard would adequately protect the public from the unreasonable risk of injury associated with the product;

(vi) that the determination is reasonably necessary to eliminate or reduce an unreasonable risk of injury and is in the public interest;

(vii) a specification of the date from which every determination shall take effect having regard to the danger of the product and the adverse effect upon manufacturers and importers likely to be caused by the determination.

(e) Within 30 days of the date of delivery by the Commission of its findings and determination any person adversely affected by the findings and determination (and any association or organisation of consumers, manufacturers or importers) should be able to apply to the Administrative Division of the Supreme Court for review of the findings and the determination. The Court should be empowered to confirm, vary in whole or in part, quash or remit back to the Commission with instructions the findings and determination of the Commission. The record made by the Commission should be brought before the Supreme Court. The Court should have power to receive further evidence if it thinks fit. The judgment of the Supreme Court should be final, except for appeal to the Court of Appeal on questions of law.

(f) After the time for appeals has expired or the appeals have been disposed of the Minister of Health should cause the determination to be prescribed by regulation. While this procedure is somewhat unorthodox it was thought that having an independent agency making regulations itself would be more difficult to fit into the New Zealand constitutional pattern. It is not anticipated that the Minister should himself review the regulations or revise them, indeed it is important that he should not.

(5) *Miscellaneous matters*

(a) The Commission should make an annual report to Parliament including:

(i) a list of determinations made during the year;

(ii) a statistical analysis of the incidence of injury resulting from products with an identification of the sources of injury;

(iii) a list of prosecutions made and their results;

(iv) a summary of research activities;

(v) the extent of co-operation with other organisations and departments charged with safety responsibilities.

(b) Strong provisions will be needed allowing the Commission to secure all the information and data it needs to formulate standards but there will have to be requirements to ensure the continued secrecy of trade secrets and confidential business information which comes into the possession of the Commission and the staff assisting it.

(c) Special measures may be necessary to prevent the stockpiling of products not meeting standards already prescribed but not yet in effect.

(d) Provision should be made to allow each product to bear a certificate that it complies with the appropriate standard.

(e) Health Department inspectors should have the power to enter factories, warehouses, storehouses, and retail establishments to inspect products.

(f) It should be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce or import into New Zealand any product which is not in conformity with an applicable safety standard or any product which has been banned as a hazardous product. The maximum fine should be substantial, up to a maximum of $10,000.

(g) Provision should be made for the seizure and condemnation of products held by any manufacturer, distributor, importer or retailer who is offering for sale products which do not conform to a duly prescribed standard or which have been banned.

(h) Provision should be made requiring manufacturers and importers to furnish a notice and a description of any new product to the Commission before its distribution in commerce. A new product would be one which incorporates a design, material or form of energy exchange not previously employed to any substantial extent in New Zealand and in respect of which there exists a lack of information sufficient to determine the safety of the product. It should not be necessary to gain the Commission's clearance before marketing a product; the purpose should be to keep the Commission abreast of new developments so that it can institute safety standard proceedings promptly.

DISCUSSION

Chairman: Mr J P Cook

Commentators: Messrs J G Collinge, D A R Williams

THE CHAIRMAN: "In addition to Professor Palmer, there are two commentators on this topic—Mr Collinge, from Auckland, who is a partner in the firm of Nicholson, Griffin & Co. His education in law has been at Auckland and at Oxford. He will be known to you as the author of a work, *The Law of Marketing*, and various works on trade practices and monopolies.

"Mr D A R Williams is a partner in the firm of Russell, McVeagh & Co. His education has been in Auckland and at the Harvard Law School.

"I now ask Professor Palmer to speak to you."

PROFESSOR PALMER: "The purpose of this paper is to look beyond accident compensation, because in my view we have concentrated too much on the money aspects of compensation, and not done enough about accident prevention. This paper, therefore, offers a partial solution to that problem. It suggests new legislative initiatives on the accident prevention front. Many of you will know that home accidents are a very potent source of accidental injuries and that we in New Zealand have done hardly anything about that. We have a great deal of legislation about safety in the workplace, about safety on the road, but not very much on the legislative front for home accidents. The increasing technology and sophistication of our society has meant that there are very many products available in the ordinary marketplace which are dangers. To mention just a few—rotary lawnmowers, washing machines with wringers, fireworks (which we have recently done something about), colour television sets. The catalogue of these hazards is endless. The United States faced a similar problem in the late 1960s and they set up a presidential commission to make recommendations about it. That commission found that there were more than twice as many deaths from home injuries as there were from accidents in the workplace; and the total number of people injured, the American report said, was four times the number injured on the roads. The presidential commission went on to point out that most of those casualties—ie the casualties in the home—were associated with consumer products.

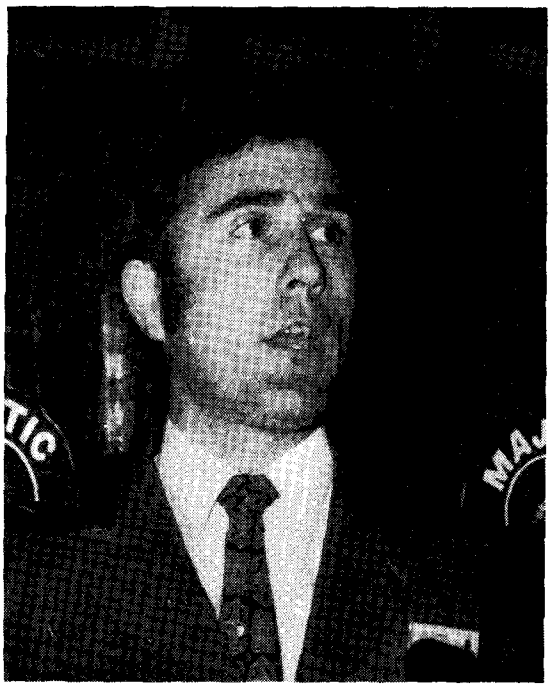
"We have no reliable figures in New Zealand on what the precise pattern of injury in so far as the agency which caused it is concerned. The Accident Compensation Commission will shortly be giving us some figures and we will be able to compare the figures in New Zealand with those in the United States, but I doubt whether the overall pattern will be very different.

"The proponents of safety legislation can connect their arguments up with the consumer movement. The consumer movement in Western societies today is a fairly potent political movement. It aims first of all, I suppose, to prevent monopolies, to encourage competition, to reduce prices of products and prevent unfair price discrimination policies, and also to increase the information which is available about products. One of its other aims is to encourage the development of safety standards. Many of you will be familiar with Ralph Nader's book, *Unsafe at Any Speed*, which led to the establishment of safety legislation for automobiles in the United States with a considerable degree of public controversy.

"The unifying thread which runs through all this effort in the consumer area is that people are unhappy with what the market is producing for them. They are unhappy with the quality and quantity of the goods which they can buy and at the price at which they can buy those goods. The irony of the situation is that the consumer movement has exactly the same ends as the market. The free market in Western societies aims to produce goods that the population wants at the price they are prepared to pay with the quality characteristics which the population votes for with its dollars.

"It may be that the market in our community is not in for a very good future, but nevertheless it is a very important source of regulating the sorts of things which can be sold and bought; and the ground rules of the market in our society are, and always have been, set by the common law in statutes like the Sale of Goods Act. So we have a large amount of traditional common law which has set the ground rules for the market, and people seem to be becoming increasingly upset with those rules. The most perplexing problem

facing people who are interested in reform of this type is to decide when the market is the best solution to regulating a situation and when intervention by legislation will provide a better solution.



Ronald D Woolf

Professor G W R Palmer

"Sometimes the market left to itself will provide an adequate solution; sometimes it will not. The problem facing decision-makers is to decide when such a decision to intervene must be made, and why; and perhaps in New Zealand we have tended to intervene mindlessly and too frequently, and the result has been that we have not always achieved the results we have set out to achieve by intervening in the market.

"Let me deal briefly with the situation as it was before the Accident Compensation Act. For dangerous and defective products, the basic remedy was the law of negligence. There were suggestions from time to time that we should move to strict liability for dangerous products —a situation which the Americans in fact did move to, and the Americans have had for some years, strict liability for dangerous and defective products. There were basically, in the common law framework, three possible alternatives, all of which had certain merits: there was the alternative of caveat emptor, under which people could be left to their own devices so far as any accidental injury was concerned resulting from a product; second, negligence; and third, strict liability.

"All those rules have different economic effects, and I won't go into them now, although they are analysed in the paper. There are important economic differences between those alternatives, but the critical point for the present discussion is that we have, by abolishing all possibility of negligence or strict liability, in the field of dangerous products, to some extent reduced the power of the market to deter the production of dangerous and defective products. What I am saying in simple terms is that, to some extent, but only *some* extent, there is less deterrent than there was to produce dangerous and defective products.

"In my view, the Accident Compensation Act has produced an entirely new situation which now calls for intervention. The costs of dangerous and defective products do not fall on the manufacturer and do not fall on the accident victim. They fall on the community at large, because the community at large has quite rightly decided to compensate all victims of accident. What we have done, in economic terms, is to some degree externalise the costs of those accidents. We have freighted them on to the community and taken them away from the activities which engender those accidents.

"What I am saying is, that if there ever was any deterrent in the market system to reduce the production of dangerous and defective products, we have lost that deterrent. I therefore suggest that the market can no longer be said to provide any solution to deter the production of dangerous and defective products. I therefore suggest that the market can no longer be said to provide any solution to deter the production of dangerous and defective products. I therefore say that we need to intervene. There are a number of reasons why intervention can be justified.

"The first one is that since we have decided as a community to pay for the compensation and rehabilitation of all accident victims, we are justified as a community in reducing the amount of money we will have to pay by ensuring that some of the agencies which produce those accidents do not occur; namely, that where defective and dangerous products can be made safe, they should be made safe, so that we as a community do not have to pay for the cost of those accidents.

"Secondly, while some would argue that the production in the marketplace of goods that people are prepared to pay money for is an issue which involves liberty, that, in fact, is a false argument; and we are as much entitled to intervene to ensure that manufacturers produce safe products as we are to prevent public eating houses being contaminated and factories being dangerous.

"Thirdly, market failure in the safety area is acute. People have insufficient information to judge the danger of many of the products which they buy. Some of the products, indeed, they do not buy; they are bought as a result of other people's decisions—doctors prescribe drugs and plumbers prescribe pipes. The problem is that people are unaware of the sort of dangers the products they are interested in buying demonstrate. There is a further difficulty that they have a psychological blockage about trying to assess the risks involved. They prefer not to be told that they are likely to suffer danger to life or limb.

"I suggest that a Product Safety Act be passed by Parliament, and that it be moulded on the American reform; that the Product Safety Act would set up a Product Safety Commission of five members, who would be independent, but the Commission would, for administrative purposes, be attached to the Department of Health. The purpose of the Commission would be to prescribe safety standards. The standards could consist of such requirements as performance, composition, contents, design or packaging, and the form of content of such warnings as may be necessary with some products. There should be two types of standard—a product safety standard, and a product information standard; and failure to comply with any regulations promulgated under this system should be a criminal offence with a $10,000 fine.

"The Commission should, in my view, conduct proceedings leading to the formulation of these regulations; it should conduct proceedings on its own initiative, or a manufacturer or a consumer could petition the Commission to commence a proceeding which would lead to the promulgation of a consumer product safety standard.

"After the conclusion of the public hearings the Commission would make findings in writing as to all the matters before it, and there would be a full appeal to the Administrative Division of the Supreme Court. Some may find the very full rights of review which I am recommending rather too much, in the sense that the Administrative Division is thought to be restrictive in what it should review. My own opinion is that the number of matters which are coming before the Courts are becoming less and less and the number of matters which are consigned to special agencies is becoming more and more; and I am interested in giving some more full-blooded issues back to the Courts.

"After that procedure, a regulation will be promulgated, and would not be one which the Minister, in my recommendation, would have any discretion to alter or change. That is a change from the usual method of executive government in New Zealand, whereby the regulation would be promulgated by the Governor-General in Council, but the executive, namely the Cabinet, would have a power to say, 'Well, we don't want this regulation. We want that one'. Under my recommendations, that would not occur. Once the full appeal procedures had been exhausted, the regulation would be promulgated in the way that it came out from these procedures without any possibility of alteration by the executive. That is to prevent pigeonholing of recommendations from regulations, to prevent political pressures from groups who may have an interest in altering those regulations.

"Those in very brief terms are the recommendations, and I think I should leave it at that for the moment, except to say that there is a great deal of economics in this paper. It is there deliberately, because in my view New Zealand lawyers need to know more about economics than they do. Almost all legal decisions have economic implications, and very frequently lawyers do not analyse effectively in their arguments before Courts, and neither do Courts analyse in their decisions the economic implications of their decisions. Lawyers do not tend to couch their arguments in economic terms, and while many lawyers know a great deal about economics because they deal with them, especially commercial lawyers, all day long, the level of that knowledge does not become publicly visible. There has been an explosion in the United States in recent years in law schools in relation to economics where it is taught to most law students. Many law schools have economists on the faculty, and I suggest to you that economic analysis can provide a less wooden approach to the analysis of legal problems and the conventional approaches that you take, and that if lawyers can learn to handle economic issues in a sophisticated way that will satisfy business

men and commerce, that they are likely to play a more important part in the regulation of the economy than they have hitherto in New Zealand."

THE CHAIRMAN: "I now outline the method of discussing the paper. Talking about it beforehand, the four of us decided we would divide the paper into four. I shall ask one commentator to speak on one division, the other commentator to come in on that, and then it will be open to discussion from the floor. The four divisions are:

"(1) Is there in fact a danger, and if so does it require a remedy?

"(2) What should the remedy be?

"(3) Accepting that there should be a remedy, such as Professor Palmer suggests, what administrative form should it take?

"(4) The capacity of lawyers to handle economic theories.

Other people may wish to raise other points, and I hope there is time to do so.

"I now ask John Collinge to give some comments on the first of these divisions."

MR COLLINGE: "I think Professor Palmer is to be congratulated on his paper. He makes a very compelling case for the necessity of dangerous product legislation in the United States; but the question that is exercising my mind is, do we need similar legislation in New Zealand? I think a very strong argument can be made for such legislation immediately. One only has to read the reports of the Consumer Institute to see that there are clearly dangerous products in existence in New Zealand. Flammable clothes, prams, pharmaceutical packaging, electrical equipment, refrigerators, are five that come immediately to my mind, and there are many others. Further, there are many issues which are subject to a conflict of scientific evidence, eg PVC, some of the weedkillers similar to 245T, and also, in the past, cigarettes. These issues perhaps need a legal forum for them to be decided.

"Professor Palmer suggests that we need to wait until the report of the Accident Compensation Commission to see whether legislation is necessary in New Zealand. I don't believe that is necessary. I think the evidence is there already. I think we can conclude that there is evidence of dangerous products. Is there a void in our legislation covering them? Since we have to take the Accident Compensation Act as a fait accompli, at least for the time being, the issue now is whether the manufacturer has sufficient incentive to make safe products. In this respect I think he is under a real temptation to cut costs in very cost-conscious times, by neglecting quality control standards, and by neglecting safety; and arguably, society needs some protection against the very real temptation which it seems to me manufacturers have. After all, there is no effective criminal sanction at the moment, and the civil sanction, the remedy in tort for property damage involves complex questions about consequential loss. Certainly these legal questions are too complex for the pocket of the ordinary consumer.

"The third point that arises out of this is whether market deterrents are a sufficient safeguard; and, of course, it can't be doubted that the withdrawal of purchasing power is a very real sanction to manufacturers. However, the evidence suggests that this is a temporary phenomenon, consistent with the publicity that the particular product is getting at the time, and when the publicity wears off, as it were, sales revert to normal. The evidence to back this up tends to be rather confidential and difficult to come by, but my marketing friends tell me that this is the almost invariable pattern, in relation to most products.

"But the real compelling point, to my way of thinking, is that, if safety were a real marketing consideration, we would expect to find more manufacturers selling their products on the basis of safety. Companies like Mercedes Benz are the exception, and not the rule. If manufacturers really felt that safety sold products, there would be some market deterrents, but the manufacturers don't think there *are* sufficient market deterrents and therefore the incentive is not there from the market."

MR WILLIAMS: "I agree with almost everything John has said. The only additional observation I would make of a rather mundane and practical nature is that, in my experience, since the passing of the Accident Compensation Act, you will find that many manufacturing concerns will be wanting advice on the implications of the Act for them. Without putting too fine a point on it, I think there is discernible a bit of a sigh of relief that they are now in a situation where, excepting the property damage side of it, the injury side of it is taken care of by the legislation. This particular attitude, if it is widespread, may be a practical demonstration of the fact that there was some deterrent

in the past, and that perhaps we are losing a little of that now. That is one of the reasons that persuades me to think there is a case for legislation of the kind that Professor Palmer talks about. I must say I advance that with a trace of reluctance, because in this day and age there is so much legislation and so many new commissions that one wonders where it will all end. In spite of that, I am persuaded, with Professor Palmer, that this is an area that does require legislative intervention."

THE CHAIRMAN: "Ladies and gentlemen, what do you think about this? Do you think this is a problem which requires a remedy? Is this a topic which requires debate, or are you prepared to accept what has been said?"

MR A A T ELLIS (Wellington): "My question relates to the motorcar. I agree that these arguments basically come down to economics, but when you are considering the motorcar as a dangerous article, now that the manufacturer no longer has the publicity of a negligence action if his car is defective, he has little publicity to fear apart from the odd consumer report in whichever magazine criticises cars, and he can always reply in *Motor* or *Auto Car* to vindicate the aesthetics of his product over safety.

"In a country which has a speed limit of 50 mph it seems to me remarkable that we should spend so much of our money buying a car that is capable of doing two or three times the speed limit, and most of the value in that motorcar is to invite you to do something illegal. It is a temptation. I would like to know where the sanction is in motorcar production or introduction to this country, to emphasise safety factors instead of providing us with, God knows, another temptation to do something delicious but evil. For myself, I don't know of any adequate legislation to control the safety qualities of our motorcars."

PROFESSOR PALMER: "When I was researching this paper I took this matter up with the Transport Department. I was shown an amendment to the Transport Act of a few years ago—s 77 (b) which enables them to prescribe standards for motorcars. It is not a very wide-ranging provision, and is nothing like the comparable provision in the United States. It is noticeable to me, coming back to New Zealand, that there are a great many cars sold here which would not comply with the American standards. For example, I had a car which, if you don't have the seat belt on, it buzzed; some people might disagree about the value of such a feature. But there is no doubt whatever that Ralph Nader's Act in the United States has really brought safety home to Detroit in a way that the market could not and never did. Indeed, in Detroit, motor engineers said for years and years that you couldn't sell safety. I suggest that the problem with the line you are taking, Mr Ellis, is essentially this: that this is such a small market, compared with world markets, that to prescribe unrealistic standards in comparison with other larger markets for motor vehicles would mean that we would not have any motorcars if we insist on that, and for that reason I deliberately said in this paper that consumer products safety standards should be prescribed for motor vehicles; but I think they should be prescribed looking at what has been happening in the United States and England and other large countries, Japan especially, which manufactures for those markets. That way, I think you could get a reasonable degree of safty and not deprive yourself of the product you want."

MR WILLIAMS: "Recently there has been consideration of air pollution standards of motor vehicles, and precisely the same issue has arisen. How does a small country like New Zealand legislate when vast assemblies of motor vehicles are put together elsewhere. It is a problem, but on the other hand, it has been found that you can get the advantage of a lot of overseas legislation by legislating yourself, and, curiously, it has been discovered also that a number of motor vehicles are made with certain features in the manufacturing company and prior to assembly here those things are actually taken off. Air pollution devices installed on cars in Japan will be removed before they are assembled in New Zealand; so, while it is a difficult problem, there is still no reason why we cannot tackle it to some degree."

THE CHAIRMAN: "I think we had better accept that there is a problem which requires a remedy. If we don't accept that at this stage, it will be very bad for this session.

"I will pass now to the second division, and ask John Collinge again to start this discussion, which is a longer one than the one we have had."

MR COLLINGE: "Professor Palmer has suggested what is essentially a criminal sanction, a penalty, a fine of $10,000 for breach of the safety regulations. My initial reaction to that

was that the fine is too low. I am reminded that Australia now has legislation and they set their maximum fine at $50,000, and it seems to me that manufacturers will regard $10,000 as a payment of an insurance premium which they can amortise over the whole of their production run. In other words, it may not be a sufficient deterrent. I think the point needs to be made that perhaps a larger maximum penalty, one which is more geared to the potential damage or danger that a defective product causes, is called for. I don't think that a criminal remedy is the sole one we ought to be looking at. I think the civil remedies are very important. The reason for this is that we have a consumer movement, a growing awareness of the interests of the consumer in such matters, and I think it is desirable to endeavour to attack that movement as a means of enforcement. This leads to a suggestion that perhaps we can have class actions whereby groups of consumers can exercise a civil remedy.

"It seems to me that civil remedies are of two kinds. Basically they are contractual, and if a consumer purchases a defective product, and that product is found to be unsafe, one would automatically think that he ought to be able to return the product and get his money back. Of course, our normal rules of rescission would not allow that, but an act such as Professor Palmer suggests could include an amendment to the contractual remedy to allow rescission and money back on a class basis.

"The second civil remedy is, of course, the property damage point. We could legislate to clear up some of the difficulties in relation to consequential loss. We could even legislate for strict liability for property loss. I think that the civil remedies are going to be a very important enforcement aspect of this legislation—even more important than the criminal ones.

MR WILLIAMS: "One of the interesting things about the Federal Trade Commission in the United States has been that it has not been an unqualified success in regulating dangerous products, and one of the reasons that is often given is that there is no incentive for a consumer to lay a complaint, because there are only criminal sanctions, or what they call 'cease and desist' orders, so that you cannot manufacture any further, and as a result of the lack of incentive for consumer complaints, the Commission spends a large amount of its time dealing with complaints laid by competitors. Manufacturer A will lay a complaint saying that an equivalent product made by Manufacturer B is unsafe, and the Commission is compelled to spend a vast amount of time in that kind of area. It is true that in some cases that will be important, but there does seem to be a case for trying to make more of an incentive for justified and realistic complaints from consumers.

"The only things I have been able to think of are, first of all, the question of the legal costs; because if in fact the consumer is compelled to produce the evidence and present his case, that may be burdensome, and perhaps this authority could have some power to award costs on a solicitor-client basis in a case where a complaint was found to be justified.

"Secondly, if there *is* a fine, then, as the Courts sometimes do, perhaps part of that fine may, in appropriate cases, be given to the complainant. Otherwise I fear we may have little work for this Commission, notwithstanding that there are very significant problems lying around."

MR F E L STEWART (Melbourne): "So far the panel seems to have gone into this problem on the basis that there should be criminal proceedings of some sort, and fines or some monetary payment, which will cause the manufacturer to do what he should have done in the first place. One problem, it seems to me, is that if a manufacturer has to pay a sum of money, he can always ensure against that, and all that does is to transfer to the general public the cost or, as has been suggested, it can be amortised over a period of time. An alternative method of getting at the problem would be to put the manufacturer in the position where he has a lot of goods which he can't sell. That is something he *cannot* insure against; so an alternative suggestion would be, that goods should be subject to standards, and if goods do not come up to those standards, then they should not be allowed to be sold. That is something which is far more likely to hit the manufacturers and make them change their product to comply with something that is safe and complies with the regulations."

THE CHAIRMAN: "Would you say that that would be an alternative remedy against the manufacturer, or do you envisage it as a replacement for the fine?"

MR STEWART: "No, not as a replacement for the fine. It may be described as a cumulative method, one of various methods. I think all these methods have their place, but this is

one which was not mentioned by the panel, and which I feel also has a place in the scheme of protection for consumers."

MR G P CURRY (Auckland): "There is one aspect I would not like to be left out of this discussion. I hate to be drawing attention to the possibility of personal criminal liability and the possibility of imprisonment sanctions for directors of companies in appropriate situations. I know this sounds like an old saw-horse and a rather conservative attitude, but, nevertheless, there have been, for example, instances in the United States where this may have been appropriate. Professor Palmer is probably aware that much of the development of safety glass, particularly for motor vehicles, was suppressed for a very, very long time in the United States. It was not implemented, and as a result of that failure, there was a high death rate associated with road accidents, quite unnecessarily had the proper implementation been brought forward. I am suggesting that it may well be that we should not look just at financial sanctions, but also at really shafting home a direct criminal liability to a director in an appropriate situation. Indeed, again drawing on the experience in the United States, in some of the environmental legislation where there have been polluting aspects, there is some body of evidence to suggest that where criminal personal liability is shafted home to a director in an appropriate position of control, then it tends to have a greater degree of effect than the mere financial provisions. Has Professor Palmer any reaction to that particular suggestion?"

THE CHAIRMAN: "You feel that the occupation of being a director should be a more hazardous one than it is already!"

MR CURRY: "It is very easy for a company to vary these financial commitments and hide behind the veil of the company itself; but, nevertheless, these decisions have a very personal effect, and maybe there should be some very personal responsibility exercised."

MR J F TIMMINS (Wellington): "On the question of a manufacturer who is going to manufacture defective goods—and I gather that some people think that some manufacturers are likely to do this deliberately through sharp practice—surely, if he is going to do that, he will take the trouble to incorporate into his price structure whatever fine he might be likely to have to pay ultimately, so the sanction will not be there at all."

THE CHAIRMAN: "I hope that is not regarded as a general comment about manufacturers!"

MR K L SANDFORD (Chairman, Accident Compensation Commission): "I echo Professor Palmer's views that New Zealand lags seriously behind most of the rest of the world in its appreciation of the accident hazard, and of the way we go about regulating it. I may be misinterpreting the New Zealand character, but I think there is a reluctance—it is bred in us, I think—any proposition, any idea, that is expressed in grave or challenging terms. It is overstating it to say we are timorous in this way, but we are inclined that way, and this is perhaps one reason why in the past we have shrunk a bit from being tougher in the field of accident prevention. He is quite right in saying that not enough has been done in New Zealand in accident prevention, particularly in the field of product safety. You might well say, 'What is the Accident Compensation Commission doing about it?' I make no apology for saying that we simply have not had time to do very much, except spend about $\$\frac{1}{2}$ million in the 12 months we have been operating, but it can be expected that the Commission will be making a public announcement of what might be of a major nature—by the time my fellow commissioners and advisers have edited it, it may be reduced to a minor announcement—but it is not being ignored, and we hope we will do something practical.

"The extent of the problem of product safety could perhaps be measured from this: of all the accident victims admitted to public hospital, what do you think is the most prevalent source? Industry? No. Motor accidents? No. Thirty-one percent are home accidents. A high proportion of those are from falls. Falls in the home are the greatest single source of accidents in New Zealand. This leaves a major area of accidents from product defects. There is good work being done, as Professor Palmer knows, by the Consumer Institute, and the Department of Health. The Department of Health turns out a vast number of pamphlets—how many of you have ever seen one?

"I think it would be inappropriate of me to comment on Professor Palmer's view that there should be an independent Commission set up for this purpose.

"I just add two further comments: it would

appear to go against the grain of New Zealand thinking that an independent organisation like a Products Commission should have the power to issue its own regulations. This is quite common overseas. For example, the British Columbia Workers' Compensation Board and the new Safety and Health Act, in England, give power to those organisations, after conducting public hearings, of issuing their own safety regulations which have the force of law. You avoid then the political compromises that may follow.

"Finally, the question is asked, what incentive is there on the manufacturer, now that accident compensation has removed his legal liability to do things safely and make things safe? There is a small sanction available under Accident Compensation whereby, if we find a product has caused a disproportionately high number of accidents, we can increase the levy on that manufacturer. I think this will only have small value, but, again from overseas, what can be of greater value, and which might make some New Zealanders shrink—but it is done in British Columbia, it is done in America, it is done in England—if a safety requirement is imposed on a particular manufacturer, or even in the absence of one, if a fully qualified inspector, with the support of his superiors, sees a hazardous situation in a factory, or in the manufacture of a product, he can by notice close down that portion of the plant, and if it is grave enough, close down the whole factory. There is the ultimate sanction, a sanction which a manufacturer would respect and fear."

THE CHAIRMAN: "I will now ask Professor Palmer to reply to one or two points raised up to this point."

PROFESSOR PALMER: "If I may make a general comment, it seems to me I am surrounded by a bunch of ardent interventionists, who really want to hurt people in commerce.

You have to bear in mind, when talking about the acceptability of such proposals, that very hard criminal sanction and enormous fines are likely to produce enormous opposition to any legislation based on these recommendations, and these recommendations have been framed with that in view. Let me say, however, that there is provision in the paper which would enable all the goods to be confiscated—that might help Mr Stewart's argument quite a lot.

"On the point Mr Curry raised, I think I am opposed to imprisoning company directors. I understand that it is done in the United States, and my colleagues keep reminding me that this is not the United States—a point which I have some difficulty in appreciating! But nevertheless I do feel on this occasion that that American remedy is not necessary in New Zealand. I do not think New Zealand businessmen are the sort that you need to take to them with that sort of weapon.

"The point that Mr Timmins raised is more difficult than perhaps he realised, in my view—whether or not you can build the fine into the pricing of the product depends on the competitive situation you are in in the market. If you are already at the inefficient end of the market and increase your price, you may go out of business, because the efficient end of the market is much cheaper than you are already. Indeed, it is usually the inefficient end of the market which produces the defective products, so I am not sure that your proposition holds true.

"So far as the amortisation of the fine is concerned, I was contemplating that it would be a continuing effect; it is more difficult perhaps to amortise $10,000 a day than all at once.

"In reply to Mr Sandford, I am heartened that the Accident Compensation Commission is taking such an interest in safety. Nothing but good can come from it. I am very grateful that such an experienced practitioner in New Zealand can perhaps convince his colleagues that the method of regulation which is proposed here is not as novel as it sounds."

THE CHAIRMAN: "I now ask Mr Williams to lead us into the next aspect of this topic."

MR WILLIAMS: "If I could crave your indulgence for one moment, I cannot resist intervening on the question of imprisonment for company directors, and saying that in two recent New Zealand statutes, the Clean Air Act and the Marine Pollution Act, there is already provision on the part of company officials, on a showing that they had knowledge of the offence and participated in it; and of course that must always be the crucial qualification. It is not quite as novel in New Zealand as some people may think.

"The next particular area is under which Department this Commission should be. Professor Palmer's suggestion is that it should be a five-man commission attached to the Health Department. My own view is this: that we have so many new commissions and agencies that if there is a possibility of bringing new work into

an existing agency, then we should, as a matter of principle, avoid creating any more. My suggestion would be that the work of this particular Commission is closely allied to what will be the responsibilities of the Commerce Commission, and I would think that there is the necessary expertise in that Commission for it to undertake this role. That would also have the consequence that the Department of Trade and Industry would be in the background instead of the Health Department. Whilst it is true that the Health Department has already some involvement, because it regulates therapeutic drugs and that sort of thing, my opinion would be, especially as the new Commerce Act is enacted in the form that it now stands, that the Commerce Commission would be the body to undertake this task, and link it up with the Department of Trade and Industry."

MR COLLINGE: "The issues which the Commerce Commission has to decide are very similar to the issues here. Do you want market freedom on the one hand, or consumer protection on the other? Which is in the public interest? There are a number of comments that can be made on the structure suggested by Professor Palmer. I am not convinced, for instance, that a Judge of the Administrative Division of the Supreme Court is the appropriate person to have automatic right of appeal to on the merits. I am not convinced that his decision would be better than an expert equally experienced in matters such as engineering, marketing, commerce and so on. I am not necessarily convinced that the Minister should not have the ultimate power as to whether legislation in the form of regulations ought to be passed. It seems to me that if we delegate legislation absolutely, are we getting fairly close to the situation of a benevolent dictatorship? And that is not a form of government which I care for particularly. Perhaps the most important thing is in relation to the criteria that you have to spell out in this type of Act. New Zealand history has shown that where you don't define the public interest in a statute, that statute tends to fall into disuse. One of the principles that have got to be spelled out in the Act, is that this Act is not intended to protect the unduly careless. The additional cost does not justify that form of protection, in my submission. It must be made clear that the Act is not designed to create a uniformity in the marketplace.

"Let me give you an example of what I mean: just take machine tools used in carpentry around the house. A duffer such as myself would want all the safety features he could find, but an expert may feel that the utility of the product is very much restricted by these safety features, and they may not be necessary for him. We ought not by legislation to create a sort of uniformity in the marketplace where everybody has to put up with these safety features. We ought to keep the market varied with colour and with dynamism. We should not by legislation restrict that process.

"The third objective is that we must be very careful not to load too much extra cost on to products for doubtful reasons. It is important to bear in mind that there are very often very much cheaper ways of solving the problem of defective products. It might be solved perhaps by attaching a warning to the product; by appropriate means of advertising; supplying information with the product, rather than by banning it outright or modifying it heavily. We have to be careful to weigh safety measures against cost of material, and these objectives and possibilities all become spelled out in any legislation. This is the real crux of the matter, in my view."

THE CHAIRMAN: "There are some weighty matters in this, and I hope you are prepared to comment."

MR J B STEVENSON (Wellington): "I think we might find some difficulty if this were attached to the Commerce Commission. The current indication seems to be that it will have more work than it can handle if the legislation is in the form that it is, even with quite appreciable amendments, particularly if all price transactions as well as trade practices and so on fall within the ambit of that Commission, and if there were added to it product protection matters discussed here. Nor would I agree that necessarily the persons who are on the Commerce Commission would be the most suitable to deal with product protection.

"Government at the moment is finding difficulty in getting men with sufficient commercial or business expertise and calibre and standing to sit on the new proposed Commerce Commission. Perhaps the Product Commission should be in the form suggested, and I would strongly support a right of appeal purely to the Administrative Division."

MR R M DONOVAN (Paeroa): "By nature I am averse to any kind of commission or extra statutory or regulation to prevent or provoke claims for accident or the safety of the public.

I feel that if we, as practitioners, should feel able to certify as to the standards of our advice and practice, then this question of the safety of products should be left to the manufacturers in the main. There is a public interest, and there is a state interest; but I would strongly urge that we put fairly and squarely the responsibility where it lies—on the manufacturer. He wants to make goods, he wants to sell them, he wants to make a profit out of it. That would be the first thing, and in this society in the twentieth century, this is where we should look at the degree of responsibility that on the one hand that the manufacturer will accept, and prove that he can accept it, and the intelligent use on the part of the consumer, and through his own organisation the consumer can show that he has done that. It is a bad thing that we must always look to the State, or to a statute or a regulation, to say, 'Now I'm safe'. It appears that if some regulation is required, it is a regulation of things. We are used to this. I can think of certified potato seed, and grass seed, where the use is clear, but there are many things which you cannot certify. The de Havilland aircraft, when they first went into use, blew up; they were not certifiable at that stage. The demand for this kind of action, which we recognise in the community, comes with increasing technology and techniques, and if things could be certified as safe, not safe, or not yet certifiable, by a body of manufacturers, in the main, with a representative of the consumer and the State, I would submit that that is the kind of organisation and the kind of responsibility we want to encourage."

MR P D MCKENZIE (Wellington): "It seems to me that in looking at the kind of Commission or body to take responsibility, one needs to be aware that the problems may be even wider than the paper suggests, which is wide enough. The Accident Compensation Act leaves us with a legacy, not only of an absence of deterrent in the marketplace with regard to products, but also the recent amendment which leaves us in the position where for medical malpractice again the common law action is not available. So we have the position where there is no deterrent, at least in the form of individual action, available against the medical profession, dentists, opticians, and indeed hospital boards. Here again, we need to attack the total problem, when we are looking at the kind of body that we are going to ask to take responsibility in this area, and this may be a factor to be taken into account in perhaps preferring a body under the aegis of the Health Department—as Professor Palmer suggests—as against giving the role here to the Commerce Commission. I agree that the type of role that the body takes should be different in the malpractice area from that which it takes in the product area, but here factors tend to point towards the Health Department, or indeed the existing safety provisions of the Accident Compensation Commission, if it were given the necessary increased power, rather than the Commerce Commission."

MR J H WALLACE (Auckland): I speak as a manufacturer, and have been sitting back listening to the legal side of it with some interest. There is one point on which I agree with Professor Palmer, and that is that directors should not be liable to imprisonment! We manufacture several hundred thousand major home appliances a year for export and for home consumption. We also manufacture medical equipment. Speaking just for our industry, I would say that we need no more legislation. We are very conscious of safety in the design of our products, and always in manufacture. The advent of the Accident Compensation Act has had no effect at all on our thinking, and I don't think it would on any responsible manufacturer. We also act as general agents for a major Japanese manufacturer, and bring in a lot of electrical equipment from them. The present electrical and Standards Association regulations that we have to comply with are so stringent that they have to make modifications to this equipment that are not needed in any other country, so as far as I am concerned, we are over-regulated and over-legislated already. We don't want any more."

THE CHAIRMAN: "Thank you, Mr Wallace. I am glad to find there is someone prepared to strike a blow for the manufacturer. As a sort of part-time director, I was becoming rather depressed!"

MR LORD: "Like Mr Cook, I am glad that somebody has struck a blow for the manufacturer. I feel that we are highly over-regulated already, and I could not go along with the need for any further Commission in that regard. I think it was said that 31 percent of the accidents occur in the home, but I would suggest that the large majority of those accidents are not caused because of the product, but because of the sheer carelessness of the consumer. We

cannot legislate against the carelessness of the consumer. Then there is the question of use, and what is dangerous and what is not. I wondered whether I would be able to buy golf or cricket balls in the future, because someone might decide that they should be soft so as not to hurt people in the future."

MR D L MATHIESON (Wellington): "I support those who have suggested that the Commerce Commission would be unlikely to have the expertise to deal with safety matters, and I think that in particular a person with accountancy training who is able to deal with those typical Commerce Commission matters or Price Tribunal matters such as profits and ratio of profits to shareholders' funds and so forth, is unlikely to be able to be able to deal satisfactorily with the very complex issues relating to safety, degree of risk, and indeed some medical questions.

"Principally, I would like to address myself to a remark in the paper which says 'any person including a manufacturer or a consumer should be able to petition the Commission to commence a proceeding and should be entitled to be heard by the Commission'. I have done a little thinking about this problem of 'standing' in the past, not only in administrative law but also standing before tribunals, and it is abundantly clear to all of us that not only is there a grave problem with locus standi in administrative review proceedings, but there is also a grave problem in relation to representation of the public before bodies such as the Price Tribunal. It seems to me to be a strong criticism of our present Price Tribunal arrangements under the Control of Prices Act that there are no clear criteria for the selection of organisations to represent the consumer's interest, and it becomes a matter of discretion by the Tribunal, and that becomes a matter for virulent criticism by the press. I think that is a reproach, and I make the modest suggestion that in the Commission, if we decide to have a Commission, we might have statutory provisions enabling a body of persons, whether incorporated or not under some other statute, who claim to be representatives of consumers, applying to the Commission for recognition as an authorised consumer-representative organisation, and that the Commission could hold a hearing on the question whether this recognition should be granted or withheld. It would be hopeless to expect a single consumer to carry the burden of these complex proceedings. If an individual consumer had the finance and the ability to do so he should be discouraged from doing so, because how can it be said that he represents all the other consumers in the country? He may be hopelessly unrepresentative; he may be a 'crank'. Therefore, the suggestion is that we should not accept the suggestion in the paper that a single consumer should be able to set the ball rolling; but we should envisage quite a sophisticated set of statutory provisions as part of our remedy, for identifying representative consumer organisations. These might be trade unions, or the Federation of Labour. These different sorts of bodies that have specialised interests at the moment would have to come forward and say that in addition to their existing specialised interest, they have a genuine right to represent their members in this kind of hearing.

PROFESSOR PALMER: "The basic reason that I do not want the Commerce Commission to do with it is that I can see there is a feeling against a Commerce Commission developing of quite a powerful sort, and I don't want this proposal to be mixed up with that one.

"On the laissez faire argument, let me say that it is true that we have less regulation in this field than the United States, which is held up to us as the paradigm case of a capitalist society using a free market. We have much less regulation in this area than they do, and therefore I remain unpersuaded by the laissez faire arguments, however convincing I find it in other areas."

THE CHAIRMAN: "Professor Palmer has said in his paper: 'I suspect the inability of New Zealand lawyers to handle economic issues with sophistication has made businessmen and government very wary about allowing the Courts or the profession to play any great role in that part of our law which regulates competition, monopolies, price control and trade practices.' I would ask Mr Williams if he would like to say something about that, briefly."

MR WILLIAMS: "I wouldn't suggest for a moment that the learned professor is being deliberately provocative, but he comes fairly close to it. In my submission I think that in present situations lawyers are in fact grappling with economic issues, especially before tribunals. They are not having a lot of choice, and what is happening is that they are getting an economic education in running the cases they have to, and after that occasionally turning their minds to some of the more theoretical aspects

of economics. I am all for encouraging lawyers to acquire the theoretical background. They have good qualifications on the practical side. I do not consider there is any need for undue alarm. The only warning I would put out is that we do not get on the economics bandwagon to the extent that when we come to solve the problem we overlook aspects that economists are no better off with answers than we already are; for example, questions of fairness and equity and so on must always remain, no matter where the economic analysis leads."

MR G B M LAW (Wellington): "This is a socioeconomic problem, as I see it, and I am a little reluctant to comment on it, but I am reminded of the comment made by R S Surtees, 'Hunting is the sport of kings; it is like war but has only 25 percent of its dangers painless.' To some extent this applies to the consumer field. Some of us are always going to want to do things in a wrong way. John Citizen is doing it all the time—he stands on a ladder with a mouthful of tacks. The backlash of this is what concerns me—that is the legislation that may come as a result of pressure from manufacturers and which says, 'You may not do this; you may not do that; you may not use this product in that way', and manufacturers will accept no responsibility because they do not know how it is going to be used. I think this is the most concerning issue of this whole matter. Thank you for a most helpful paper."

THE CHAIRMAN: "I hope you have found this subject interesting. I certainly have. I do not think it is possible fully to discuss any matter such as this in one hour fifteen minutes. We have filled that time and more. I am now going to ask you to vote on whether you feel, broadly speaking, that some action should be taken."

(Result of votes: the "ayes" have it.)

A vote of thanks to the speakers was carried with acclamation.

SANZ Technical Adviser writes: As an engineer I am naturally reluctant to dispute with a professor of law on a legal topic, but nevertheless I must point out some inaccuracies in the foregoing paper.

In simplified form, Professor Palmer's argument is as follows:

(1) The Accident Compensation Act 1972, by abolishing actions for damages in respect of personal injury, removed a constraint that helped force manufacturers to ensure that their products were, to a degree, safe.

(2) This has left "a gap . . . in our law" illustrated by the fact that "our legislation in New Zealand touches only two or three" of 22 hazards listed by way of example.

(3) The solution is to enact a Product Safety Act that would, inter alia, establish a Product Safety Commission one of whose functions would be: "To formulate product safety standards to be prescribed by regulations."

In discussing "legislation which is valuable to consumers", Professor Palmer says: "We also have the Standards Act 1965 establishing the Standards Institute, which does useful work in promoting standard designs which, among other things, incorporate appropriate safety features." This statement is incorrect.

The Standards Act 1965 did not "establish the Standards Institute", but on the contrary had the effect of abolishing the Standards Institute (a section of the then Department of Industries and Commerce) and replacing it with the Standards Association (an independent statutory body).

The Standards Institute and its predecessors since 1932 did not, and the Standards Association does not, promote "standard designs". Indeed, of the 1,470 current New Zealand Standards and the 800 or so overseas standards "endorsed" as suitable for use in New Zealand, the overwhelming majority contain just what Professor Palmer asks for, namely, "such requirements as to performance, composition, contents, design, construction, finish or packaging, the form and content of warnings or instructions to accompany the product as are reasonably necessary to prevent or reduce the risk of injury to persons using the product."

Safety is a dominating consideration in the preparation of New Zealand Standards, but it is not the only consideration, and so New Zealand Standards contain many other requirements also.

As the Act puts it, a New Zealand Standard is "a description of any commodity, process, or practice, by reference to its nature, quality, strength, purity, composition, quantity, dimensions, weight, grade, durability, origin, age, or other characteristics or by reference to any mark or label on any commodity" promulgated "with the object of improving the quality of goods produced in New Zealand . . . promoting industrial efficiency and development, and promoting public and industrial welfare, health, and safety."

New Zealand Standards cover many things besides "consumer products" that pose potential hazards of personal injury, most notably perhaps the design and construction of buildings.

The procedures for formulating, amending, and revising New Zealand Standards are based on worldwide experience in the production of national and international standards extending back to 1907 when the now British Standards Institution was created.

These procedures involve both expert and representative committees, availabiilty of drafts for public review, and Ministerial approval; several hundred New Zealanders are members of Standards Association committees, and many more participate by commenting on drafts.

(The Standards Association also issues various "miscellaneous publications", formulated by less elaborate procedures, of which MP2801: 1971 *Guidelines on the Safe Design of Domestic Equipment* is the most immediately relevant to this debate.)

In comparison with the existing system, Professor Palmer's suggested "procedure for developing standards" appears to me to be completely impracticable (I am tempted to say "ludicrous").

It is true that a New Zealand Standard is not enforceable in its own right but must first be incorporated in some legally binding document such as an Act, regulation, bylaw, or contract. However, this is done to a far greater extent than Professor Palmer appears to realise; the Electric Wiring Regulations 1961 provide a good example, as do the Tractor Safety Frame Regulations 1967 (which Professor Palmer could well have mentioned when he said that "product safety standards for farm equipment could reduce the accident toll on the farm").

I understand that there is a reasonably extensive legal literature on the techniques of drafting legislation in such a way that detailed statements of technical specifications are replaced in the text by reference to one or more standards, and recommendations on these techniques were recently adopted at a meeting held by the United Nations Economic Commission for Europe.

I suggest, therefore, that Professor Palmer's discussion of standards must be regarded as inadequate.

In addition, I suggest that the number of hazards that Professor Palmer envisages as galloping through his "gap . . . in our law" must be considerably reduced. He says that "our legislation in New Zealand touches only two or three" of 22 listed hazards. However, to this "two or three" we must add a further five covered by the Electric Wiring Regulations 1961, two covered by the Fireguard Regulations 1958, and one covered by the New Zealand Standard Model Building Bylaw, which appears to be used by almost all local authorities.

Of the remainder, several are covered by New Zealand Standards, but I am not aware of any way in which these can be enforced by prosecution (unless the Crimes Act 1961, particularly ss 145, 156, 157, 190, and 203, could be called into play).

I also query whether Professor Palmer underestimates the effect to which "statutes governing safety in the workplace" also serve to protect people in the home. For example, the Construction Regulations 1961 lay down detailed requirements for ladders (with reference to both New Zealand and British Standards) and although the regulations apply only to "the workplace" this makes up so significant a proportion of the market that surely few ladder manufacturers would make ladders that did not comply. A similar argument applies to power tools.

If we also remember that some hazards simply have to be accepted (for example, what can legislation do about the fact that "ovens and other cooking equipment often cause burns"?) then the New Zealand picture is far less gloomy than it is painted.

One final, and purely personal observation: Despite my criticism of his paper, I agree with Professor Palmer that a Product Safety Act could be a useful addition to our law, although not in the form he proposes.

B D CASHIN,
Senior Technical Adviser,
Standards Association of
New Zealand.

Professor Palmer replies: Mr Cashin seriously distorts the reasoning in my paper in order to criticise it. Nothing he says destroys the logic of my position. Mr Cashin is concerned to stress the work of the Standards Association of New Zealand, to which I devoted one sentence in a lengthy paper. I am sorry I used the word "Institute" and not "Association", although the body with the actual decision making capacity is a Council, see Standards Act 1965, s 17.

Mr Cashin may be surprised to learn that in the course of my research I examined the Standards Act 1965 and came to the conclusion that the regime erected by that statute was largely irrelevant to achieving the objectives I had in mind. Nothing Mr Cashin has said has altered that view. The idea of voluntary self-regulating standards has been around a long time, as Mr Cashin rightly points out. But I suggest that in terms of accident prevention the results achieved have been something less than overwhelming and it is time to fill the gap. What is needed is machinery for the creation of *legally enforceable* standards for safety. Try as it might, Mr Cashin's organisation cannot achieve such a result however many overseas standards it might endorse. No doubt it was the inherent deficiencies of voluntary standards which were among the reasons which led legislatures in Australia and the United States to adopt machinery for the creation of compulsory consumer product safety standards of the type I recommend. In short, the Standards Association has never achieved the objects I want. It cannot do so for the legislative power does not exist.

The Standards Association is doing useful work, and I would not want Mr Cashin to be apprehensive about its future. It would not be superceded by the creation of a Consumer Product Safety Commission, for that suggested organisation has a different purpose.

Comparing the development and endorsement of voluntary standards with the compulsory ones I advocate, Mr Cashin suggests that my suggestions may be "ludicrous". I should not have thought that the use of a vituperative adjective was an adequate way of describing a process which seems to be working well in the United States. Certainly it is not a conclusion which is entitled to much consideration since it rests on no analysis. The way in which standards are developed by consent for voluntary use is quite different from the way in which a legally enforceable standard should be developed. Mr Cashin then says he finds my discussion of "standards" inadequate. In the sense that he is using that word he is no doubt correct. I simply did not address myself to "standards" as they are developed by his Association. We are debating different issues.

Mr Cashin further charges that I have overlooked significant regulations and statutes in arriving at the conclusion that there are gaps in our law. It is true that I did not catalogue every mortal provision in the books relating to consumer product safety. What I cited was sufficient for the purposes which I had in mind. It is clear—

(a) There is no comprehensive, co-ordinated approach evident on our statute book relating to consumer product safety.
(b) There are many products about which there is no law.
(c) We are dependent on ad hoc statutes and regulations rather than a coherent and continuing development of compulsory standards.

Mr Cashin himself seems to concede that the vast majority of standards do not find their way into legislation. It is true that some of the examples I used are covered *to some extent* by some of the regulations I did not cite. But I pointed out that the United States Commission found that there were more than 350 categories of product which presented hazards. For the bulk of these we have no applicable law. Indeed, Mr Cashin seems to concede as much or he would not agree that the Product Safety Act could be a useful addition to our law.

But the critical point I made in the paper was not the patchwork-quilt quality of our safety legislation, bad though that is. The more vital point was the recent demise of the common law action for damages, including breach of a statutory duty. A great deal of the paper was devoted to analysing the economic implications of this change and why that change militated in favour of a Consumer Product Safety Act. That change is the most important we have made in the law of torts this century and Mr Cashin does not seem to appreciate its significance.

One of the great difficulties of producing a comprehensive accident prevention programme is that safety people tend to work away at their own specialised tasks without seeing safety as an integral whole. I invite Mr Cashin to stop for a moment the important work he is undoubtedly doing and contemplate the big picture. I find disquieting his suggestion that things may not be so bad on the consumer product safety front.

CONSTITUTIONAL BREACH?



Ronald D Woolf

A "meeting of powers" at the Opening Reception as Judge Gerhard A Gesell is introduced to the Attorney-General, Dr A M Finlay QC, by Mr J F Jeffries.

THE LEGAL PROBLEMS OF INFLATION

by I L McKAY

Mr I L McKay was born in 1929 and educated at Waipawa District High School, St Patrick's College, Silverstream, and Victoria University College. He graduated BA, LLB in 1952 and following a period in Scotland studying Highland bagpipe music he joined his present firm, now known as Swan Davies McKay & Co.

Mr McKay is a member of the Council of the Wellington District Law Society and of the New Zealand Council of Law Reporting. Since 1971 he has been Chairman of the Torts and General Law Reform Committee and a member of the Law Revision Commission. He is a director of several companies and is on the panel of counsel in Wellington instructed to prosecute for the Crown.

Few people would dispute that inflation is the major problem confronting the Western world. It threatens not only our economies but our whole way of life. New Zealand shares the problem, but we must find our own solution to it. Overseas factors influence our economy, but the responsibility for controlling their effects within New Zealand is ours.

New Zealand's present inflation rate is lower than that of Britain or Australia. This is cold comfort. It is still too high. If it is not controlled it will ruin us. Until it is controlled it causes monstrous injustice.

Because inflation causes injustice it must be of concern to the lawyer. Justice is our business. We do not deal in every day practice with the broad sweep of Government policies, but with the problems of the individual citizen. We see the effect of laws and policies on the particular situation of the people who come to us for help or whose affairs we administer. That is why the profession has traditionally played so important a role as a watchdog for the protection of individual rights and the remedying of injustices. Much of the work of our Society is devoted to matters of public interest of this kind. We must now grapple with inflation, to help our clients to live with it in the short term and to press for effective long term remedies.

The problem

In the four years to 30 September 1974, the Consumers' Price Index has risen 44 percent[1]. The dollar has dropped to 69 cents in the values of only four years ago. In the last quarter of the period the increase has been 3.7 percent[2] which, if compounded for a year, is equivalent to an annual rate of 15.6 percent. At even 15 percent, prices and wages will double in less than 5 years, quadruple in 10 and increase eightfold in 15—your dollar will then be worth 12 cents because prices will be 8 times their present level. In one lifetime of 70 years the equivalent of $1,000 will become $17.7 million.

The people who are the first victims of the situation are those who can least afford it—the retired person, the widow, the young married couple, the small saver, the separated wife with children to care for.

The retired person whose superannuation appeared adequate for his future needs has had it reduced in value by over 30 percent in the last four years. At 15 percent inflation, it will be worth one-eighth of its present value at the end of 15 years.

The ordinary working man entrusts his savings to the Post Office or other savings bank. He may invest a little in government stock and his widow may lend on first mortgage. Year by year their savings have been stolen. The interest on savings bank deposits and government securities is lower than the inflation rate. The Page Committee on National Savings in the United Kingdom described such a situation in 1973 as "a cruel deception on the small and unsophisticated saver who has responded to appeals to his patriotism and to assurances that his capital will be absolutely safe".

As a class, house purchasers profit from the situation. Their own investment retains its value and they enjoy a capital gain to the extent that they relied on loan moneys. Their mortgage is reduced each year in real terms. They profit quite unjustifiably at the expense of the mortgagee, but the benefits are only enjoyed in the later years of the mortgage. Property ownership is seen as a way to beat inflation so the demand for property increases and with it, prices. Domestic housing costs have risen 98 percent in the five years to December 1973

1. From 1274 to 1831.
2. From 1765 to 1831.

and 34 percent in the last year alone[3]. The average married couple saving for a deposit to buy a home has an almost impossible task, as the cash requirement increases faster than the ability to save. Eventually rising prices exhaust the mortgage market, compounding the difficulty. Those who do succeed in acquiring a home face mortgage commitments in the early years that are excessive to the point of hardship.

Separated wives with children have always worked on a tight budget. Inflation robs them of part of their small income. The procedures for review are cumbersome and slow, and they can never make up the lost ground.

Business, in which I include farming, is the means by which our community is organised to provide the goods and services it requires. It provides employment for our work force and the wages, salaries and dividends with which to pay for our needs. It is the base on which depend the Government and public sectors of services and employment. Business is being undermined by inflation.

Traditional accounting methods show paper profits that conceal the truth. Depreciation based on historic cost assumes that the value of the dollar is constant. It is not. The amount written off over the life of the plant is, in fact, substantially less than its true cost and quite inadequate for its replacement. Inflation increases costs, and with them the amount required to finance raw materials, stocks of finished goods and debtors. More money must be found merely to sustain the same level of production. Many businesses now face a crisis of liquidity. Borrowing is no answer as the problem is a continuing one, and no business can indefinitely borrow more and more. Those who do borrow are not concerned at high interest rates, as the devaluing of the capital will more than compensate. They gamble on the continuance of the present high rate of inflation, and acquire a vested interest in it.

In the meantime, wage demands are based on the false picture painted by company accounts, and price control is exercised on the same unreal basis. Taxation levied on paper profits may absorb or even exceed the whole of the true profit for the year in question. Some companies collapse, others cut back their operations, unemployment results and the whole community suffers for its folly.

The farmer deserves a special mention. He cannot raise his prices. He is faced with inflationary cost increases at home, enormous increases in freight and shipping and rock bottom overseas prices. He has neither cash nor incentive to develop or even maintain his productivity.

A further side effect of inflation is the enormous uncalculated administrative cost. Countless senior executives spend most of their time watching daily cost increases, recalculating prices, preparing and submitting applications for price increases or approvals, appearing before pricing authorities, nursing their companies' cash flows, chasing an ever increasing number of reluctant debtors, keeping at bay an ever increasing number of pressing creditors, dealing with increasingly frequent award negotiations and in their turn involving the time of professional advisers, Government officials and others.

The tax gatherer is, perhaps, the only beneficiary from inflation. No longer is Parliamentary approval required for massive tax increases. Inflation continually pushes each taxpayer further up the graduated scale. A married man who earned $100 per week in the 1971 tax year paid an average rate of 24.6 percent in tax. In the 1975 year the same real income is called $144 and his average tax rate is 28 percent. The rate on extra earnings has gone from 43 percent to 47 percent.

In the four tax years to 31 March 1974 the Consumers' Price Index increased by 38 percent[4] but total tax increased by 103 percent and income tax by 118 percent[5]. The figures for the 6 months to 30 September 1974 showed further increases of 33 percent and 48 percent on the corresponding period of the previous year[6]. Our politicians claim the credit for reducing taxes when, in fact, they merely give back a portion of the extra tax that has been taken by stealth. If they had to ask openly for approval of the massive tax increases that have been imposed in the last three years, they would not dare.

3. From 1153 to 2286 and from 1703 to 2286: Urban House Property Price Index, NZ Official Year Book 1974, p 531.
4. From 1207 to 1663, averaging the four quarters in each tax year.
5. From $1181m to $2395m and from $779m to $1698m: Monthly Abstract of Statistics, November 1974 p 59.
6. From $795m to $1061m and from $475m to $705m, ibid.

The lawyer's role

Inflation is not merely a problem for the economist. It is a problem for everyone, but the lawyer has a particular responsibility. He should be concerned at injustice wherever he finds it. Because he deals with problems in the particular, as they confront one of his clients, he is in a position to draw attention to results which our policy makers may not have appreciated. As an adviser to people in individual transactions and in the conduct of their affairs, he has a duty to safeguard them where possible from the adverse effects of inflation. In the drawing of contracts, wills and settlements or the negotiating of agreements, he must take account of inflation and protect his client wherever possible.

I see the lawyer's role in relation to inflation as a fourfold one:

(1) To advise his clients and draw up their contracts and other instruments in such a way as will protect them where possible from the adverse effects of inflation.

(2) To influence the course of the common law in adapting to meet the new problems which confront it.

(3) To press for legislative intervention where appropriate.

(4) To assist in formulating the guidelines for government action to reduce and control inflation, and to ensure that any such action is taken with proper regard for its effect on individuals.

Mitigating the effect under the existing law

It is the responsibility of the lawyer to guide and shape a wide variety of dealings and transactions. He must also clothe them in a form of words which will achieve the intended result. He cannot do this today if he ignores inflation. The basic rule must be to avoid using simple money terms to specify payments to be made other than in the immediate future.

The alternatives are indexation, the use of review clauses and the use of proportions rather than monetary amounts.

Indexation is the relating to a specified index of amounts which are expressed in money terms so that the amounts will be varied up or down according to changes in the index. It is not a new idea, but is attracting increasing attention. Already an Australian text has been published which includes precedents[7]. It is a flexible method of dealing with the problem because of the wide choice of index available and the ability to limit the extent of the adjustment.

Pecuniary legacies and annuities in specific form should be a thing of the past. How can a testator's wishes be expressed by a legacy of $1,000 which means $1,000 if he dies this year, but may mean $500 only 5 years hence? How can one fix the appropriate amount for an annuity when at 15 percent inflation its value will be halved every 5 years? We do not even know what the future rate of inflation will be. It could well follow overseas examples and greatly exceed the current 15 percent. The simple solution in the case of legacies is to express the gift as a percentage share of the residuary estate. This will take account not merely of inflation but of the extent to which the testator's assets keep pace with inflation. The alternative is indexation. The legacy is expressed as a sum of money to be adjusted in proportion to the change in the appropriate index.

In place of the annuity a more flexible approach is commonly used. An adequate proportion of the estate must be set aside, the income from which will be paid to the beneficiary. The trustees are directed that if in their view the total income of the beneficiary is insufficient to provide a reasonable standard of living, or if some special expenditure is warranted, they are to make additional payments from capital. This leaves the decision to the trustees, but they are charged with a positive duty rather than a complete discretion. They may be empowered to make the extra payment by way of loan repayable on death so that the annuitant will not pay income tax on payments from estate capital, and will, in turn, leave a reduced estate to attract death duty. An annuity can be indexed by providing a nominated amount which is to be adjusted according to changes in the index. There is a practical difficulty in determining how much capital should be set aside to meet the future increased annuity.

Lawyers acting for wives on separation agreements should seek some protection against the erosion of maintenance payments through inflation. Adjustment can be based on an appropriate index or on the husband's income, or related to changes in relative income. At the least, there should be express provision for

7. "Inflation as it affects Legal and Commercial Transactions", A G Lang (1974).

periodic review. Without this, the Courts may be loath to intervene until the distortion is long overdue for adjustment.

In matrimonial property disputes it is common for the wife's interest in the home to be quantified in money terms. This can be manifestly unjust. Any comparison of the respective contributions must take account of the changes in money value over the relevant period. The interest of one spouse should be quantified as a sum of money only if an immediate payment is contemplated, and even then allowance should be made for the difference in money values between the time when the contribution was made and the time of the assessment. If payment is to be postponed then the only fair basis is to quantify both interests and convert them into fractional or percentage shares. The present system confers an unfair advantage on one party. The lawyer for the other spouse should be alert to this, but his ability to negotiate a fair settlement will depend on the degree of enlightenment shown by the Courts in those cases which are not settled by agreement.

Damages are assessed without regard to the drop in money value between the date at which the assessment is to be made and the date of judgment. However, the Court has power under s 87 of the Judicature Act 1908 to award interest on damages up to 7½ percent[8]. The rate was increased only last year. Many writs are issued which omit to claim interest. There is no excuse for not claiming interest in those cases where it can be allowed. Even the period between the date of judgment and date of payment may see a significant drop in money values and where there is any delay in payment we owe it to our clients to insist on payment of the interest that is legally payable on all judgments by R 305 of the Code of Civil Procedure.

The solicitor acting as a trustee, or advising trustees, faces a major problem in regard to investment policy. Is it just that interest at rates appropriate to a period of high inflation should be treated entirely as income and paid to a life tenant? How far should a trustee go in trying to safeguard the real value of the capital, and what form of investment is open to him? He should, at least, consider carefully how best to achieve a fair result as between life tenant and residuary beneficiaries, having regard to the extended powers of investment given by the Trustee Amendment Act 1974 and to the specific powers of the particular deed or will.

Indexation

A form of indexation has been used for years in the field of building and civil engineering contracts. The standard escalation clauses allow adjustments to the contract price for changes in the cost of material and labour. Material costs are adjusted on the basis of normal current prices and labour costs on statutory or award changes only. Changes in actual rates or ruling rates for labour are ignored. The preparation and processing of claims is complex and time consuming. There is a trend towards direct indexation to an appropriate wage index and materials index, or in the case of materials, to assume a normal movement which is a constant percentage of the movement in the wage index[9].

The Wage Adjustment Regulations 1974[10] use the consumers' price index as an index for the making of cost of living orders by the Industrial Commission affecting all awards and collective agreements as well as certain other rates of remuneration.

An example of the more sophisticated indexation appropriate to a commercial transaction is contained in the Kapuni Gas Purchase contract, which is a public document. The contract is for a primary term of 25 years and stipulates the price to be paid over the period for gas supplied by the oil consortium from the Kapuni field. A composite index is used. The Department of Statistics publishes four separate wholesale price indexes for commodities used in particular sections of industry. The contract uses these indexes, but specifies a proportionate weighting to be given to each. The base index is the average over the first 12 calendar quarters. The price is to be increased annually after the first 5 years in proportion as the composite index for that year exceeds the base index.

A particular problem arises in the case of loan transactions such as mortgages. If the client lends $1,000 at the seemingly high rate of 15 percent interest, his net yield after tax may be only 8¼ percent. With inflation running at 15 percent as in the September 1974 quarter his return is illusory, and he is actually losing

8. Judicature Amendment Act 1974, s 7.
9. British Electrical and Allied Manufacturers' Association (BEAMA) Contract Price Adjustment Formula; NZ Ministry of Works PW 32/805/28/1 of 30 March 1973.
10. SR 1974/143, reg. 4.

his capital. Suppose, however, the loan is indexed so that on due date he is to be repaid his $1,000 adjusted to current money values. He might then be content with a mere 3 percent interest. But, would the Courts strike out the index provision as a clog on the equity of redemption, and if not, would they treat his compensation for capital loss as being income for tax purposes?

No confident answer can be given, but it is surely up to the profession to draw the index clause with sufficient care, and to present the reality of the situation to the Courts with sufficient clarity to obtain a sensible result. In *Lomax v Peter Dixon & Co Ltd*[11], the English Court of Appeal treated a discount or premium offered in a loan transaction on account of capital risk as being capital and not income. Lord Greene said[12]:

> "A good example of the difficulty is to be found in the contracts of loan which used to be made on a gold basis when the currency had left or was expected to leave the gold standard. In such contracts the amount to be repaid was fixed by reference to the price of gold ruling at the repayment date and, if the currency depreciated in terms of gold, there was a corresponding increase in the amount of sterling to be repaid at the maturity of the loan. It could scarcely be suggested that this excess ought to be treated as income when the whole object of the contract was to ensure that the lender should not suffer a capital loss due to the depreciation of the currency."

There is a sufficient basis in this decision for someone to chance his arm with a properly drawn contract using indexing to escalate the principal sum[13].

Where indexation is appropriate I would list the relevant considerations as follows:

(1) Aim at simplicity. Complex adjustment clauses are only appropriate for the larger commercial transactions where sophistication is necessary and the parties can understand and apply a complex formula accurately.

(2) Choose an established official index. These are authoritative and readily ascertainable from the Monthly Abstract of Statistics, and are likely to continue to be published.

(3) Provide in express terms for the possibility of a change in the base year. The consumers' price index gives comparative figures on the base 1965 equals 1,000. At some future date a new base year will no doubt be chosen. The simple application of the annual index number would be quite contrary to the intention of an index clause. The Court of Appeal of New South Wales has taken the sensible view and made the adjustment[14], but the good draftsman should make express provision.

(4) Choose the appropriate index. A wide range is available in the Monthly Abstract of Statistics. A seller seeking protection against cost increases may want a different index from a buyer concerned that his own product remains competitive with others sold in the same market. In most cases the desire will be simply to provide protection against a decline in the value of money. For this purpose the consumers' price index is probably the best available, despite its imperfections. It measures retail price variations of a large range of goods and services chosen and weighted to reflect the expenditure of a typical consumer. How typical he is in fact cannot be measured. Changes in patterns of spending and consumption or in the quality or durability of goods are not taken into account apart from the periodic review of the method of compiling the index. Separate figures are available for the four main centres, 10 larger centres and groupings of smaller centres. In other cases it may be appropriate to use one of the various production indexes or nominal wage rate indexes.

(5) The adjustment provision should be clearly expressed. For this purpose it must specify not only the frequency of adjustment but whether the monthly, quarterly or annual index figure is to be used. The precise section of the index must be specified, eg "food" or "all groups". One must decide whether an adjustment is to be made in every case, or only when the index varies by a minimum percentage or number of points. It is also necessary to decide whether the obligation is to vary to the full extent of any variation in the index,

11. [1943] 1 KB 671; [1943] 2 All ER 255.
12. At 677, 259.
13. See B G Hansen, "Income Tax—Combating the Effects of Inflation in Loan Transactions" (1973) 6 VUW Law Review 382.
14. *Tanner & Ors v Stocks & Realty (Premises) Pty Ltd* [1972] 2 NSWLR 722.

or only to some specified proportion such as one half.

(6) It is prudent to include provision for a substitute index in the event that the index chosen ceases to be published, or is so changed as to be no longer comparable with that for earlier years. The simplest way is to vest in a third party the power to determine an appropriate substitute index. A suitable person could be the nominee of the President of the District Law Society, Society of Accountants, Institution of Engineers, Chamber of Commerce, Real Estate Institute, Manufacturers' Association or similar body. The criteria by which such a person is to determine an appropriate substitute index should be stated, eg as reflecting changes in the general cost of living or in the cost of particular goods or materials.

(7) Remember that it is the obligation which is to be adjusted. No one can be required to pay more than legal tender to discharge a money debt. One can, however, adopt one figure as the primary measure of a liability and provide for variation in certain events[15].

Review clauses

Review clauses are an old and familiar device. The commonest example is the provision for rental review in leases. Many leases granted under the Public Bodies Leases Act 1908 provided for review at 21 year intervals. We may look back with envy on such stable times. A few years ago the standard term for commercial leases was 5 years with a review of rental if the lessee exercised his right of renewal. Then it became accepted that increases in rates should be passed on to the lessee each year. Now it is standard to provide for more frequent review of rental. The normal arbitration clause and the need for professional valuations make this an expensive exercise if indulged in too frequently. There is scope here for the use of an index for the purpose of an annual adjustment, with review on a market valuation basis every third or fifth year.

There has been increasing use, particularly in shopping mall developments, of a rental that is calculated wholly or partly as a percentage of turnover in the business conducted in the leased premises. This protects the landlord from inflation as well as taking account of any increase in the real value of the premises. The landlord protects himself against the risk of an inefficient lessee by basing his rent on turnover rather than profit, and by fixing a minimum rent. He stands to gain if the lessee's business prospers but there are advantages to the lessee in having a rent that varies according to his ability to pay.

Clauses have been developed for the purpose of adjusting long term contracts in the light of changes in currency exchange rates. These can be adapted to cope with inflation. One or both parties may be given the right to call for an adjustment by agreement or arbitration in certain events, at certain intervals or at a time of the party's own choosing within the contract term. The latter provision is an interesting compromise. The party desiring the review must assess whether he should exercise his right now and absorb increases thereafter, or wait until a later stage and obtain a more substantial adjustment from that point on.

Where parties have mutual interest in continuing to do business with each other it is usually impractical for one to insist on the strict terms of a contract which has become grossly distorted through inflation. Each has an interest in the health and viability of the other, and in preserving a reasonable relationshp.

The future course of the common law

The Courts have not been insensitive to the new situation created by inflation. They must depend to a large extent, however, on the assistance of counsel if the law is to develop in a way that will avoid injustice.

The historic attitude was expressed by Lord Denning in 1956 as follows[16]:

> "A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at the time. Sterling is a constant unit of value by which in the eye of the law everything else is measured. Prices or commodities may go up or down, other currencies may go up or down but sterling remains the same."

Last year the same Judge held that under Common Market law an English Court should in appropriate cases give its judgment in

15. *Stanwell Park Hotel Co v Leslie* (1952) 85 CLR 189.

16. *Treseder Griffin v Co-operative Insurance Society Ltd* [1955] 2 QB 127.

17. *Schorsch Meier v Hennin, The Times* 27 November 1974; *Dominion* 28 December 1974.

foreign currency. He said[17] that from 1605 it had always been accepted that one could give judgment only in sterling. He added:

> "This was because of our faith in sterling. It had been a stable currency which had no equal. Things are different now. Sterling floats in the wind, it changes like a weathercock with every gust that blows. So do other currencies. That change compels the Court to think again about that rule. The reasons for it have now ceased to exist."

For years the Court ignored inflation when calculating damages[18]. In *Mallet v McMonagle*[19] Lord Diplock said:

> "The only practical course for the Courts to adopt in assessing damages awarded under the Fatal Accident Acts is to leave out of account the risk of further inflation on the one hand and the high interest rates which reflect the fear of it and capital appreciation of property and equities which are the consequence of it on the other hand."

This is undoubtedly a logical approach in normal times, but present inflation rates are higher than interest, especially after the interest is taxed. The vast majority of people are not able to invest in appreciating assets that will move with inflation. Many claims, particularly those of a large and complex nature, may be some years old by the time they come to trial or arbitration hearing. The plaintiff will lose perhaps a third of his just entitlement because the judgment in his favour takes no account of the decline in money values.

The Courts have yet to tackle this problem despite the clear injustice that results. It is not easy to see how they should do so unless Parliament is to adopt an overall system of indexation as in Brazil. But the Courts are at least showing an awareness of the need to consider future inflation in some cases. *Taylor v O'Connor*[20] was a fatal accident claim by the widow and daughter of an architect killed in a car accident. The learned Judge increased his multiplier from 10 to 12 "to shield the plaintiff to some extent against the effects of inflation". Their Lordships did not regard this as a good ground for increasing the multiplier. The award was upheld, however, and the relevance of inflation was acknowledged in most of the judgments. Lord Guest regarded the multiplicand of £4,000 as "a generous estimate", but said "justification can be found for the figure of £4,000 in allowing for possible future increases in salary and the effects of inflation". Lord Pearson said "certainly it is right to have regard to the prospect of continuing inflation as an important factor in the situation". Lord Reid said:

> "It will be observed that I have more than once taken note of present day conditions—in particular rising prices, rising remuneration, high rates of interest. I am well aware of the school of thought which holds that the law should refuse to have any regard to inflation but that calculations should be based on stable prices, steady or slowly increasing rates of remuneration and low rates of interest. That must, I think, be based either on an expectation of an early return to a period of stability or on a nostalgic reluctance to recognise change. It appears to me that some people fear that inflation will get worse, some think it will go on much as at present, some hope it will be slowed down, but comparatively few believe that a return to the old financial stability is likely in the foreseeable future. To take any account of future inflation will no doubt cause complications and make estimates even more uncertain. No doubt we should not assume the worst, but it would, I think, be quite unrealistic to refuse to take it into account at all."

In *Mitchell v Mulholland (No 2)*[21] Lord Reid's view was cited by Edmund Davies LJ in holding that evidence directed to inflation was admissible, although he sounded a note of caution that it was rare that such evidence would be helpful.

There have been signs too of a more realistic approach to the award of interest in giving judgments for damages. In *Myron (Owners) v Tradax Export SA Panama City RP*[22] Donaldson J said:

> "It is of paramount importance to the speedy settlement of disputes that a respondent who is found to be under a liability to a claimant should gain no advantage and that the claimant should suffer no corresponding detriment as a result of delay in reaching a decision. Accordingly awards should, in general, include an order that the

18. See *O'Brien v McKean* (1968) 118 CLR 540; *Fletcher v Autocar and Transporters Ltd* [1968] 2 QB 322; *Mallett v McMonagle* [1970] AC 166.
19. Ibid at 176.
20. [1971] AC 115, 135, 142, 129.
21. [1972] 1 QB 65.
22. [1969] 2 All ER 1263, 1268D.

respondent pay interest on the sum due from the date when the money should have been paid."

Similar comments have been made by Lord Denning MR in *Jefford v Gee*[23] and Dunn J in *The Funabashi*[24]. In *Bevan v Blackhall and Struthers (No 2)*[25] where there was a contractual basis for the award of interest Beattie J had regard to the varying rates of interest incurred by the plaintiff and awarded interest at 10 percent.

The Judicature Amendment Act 1974 has empowered the Court to award interest up to 7½ percent in place of the previous 5 percent. It is to be hoped that this will be widely exercised and that Judges will realise that 7½ percent less tax goes only a very small way towards compensating a plaintiff for the injustice of having his claim reduced by the decline in money values. As Salmon LJ said of the corresponding rate of 4 percent which applied in England from 1838 until 1971[26]:

> ". . . the provision has become ridiculously unjust. Indeed, legislation has at last been introduced to cure what has for so long been a glaring anomaly. It positively encouraged all judgment debtors to postpone discharging their liability for as long as possible. In cases in which very large sums were involved it paid the defendant with a bad case to carry it to the Court of Appeal and if possible to the House of Lords even if he knew that he had no real chance of winning. He might then postpone the date of payment for two years or even more. In the meantime he would have the use of the money which he could easily invest at about 8 percent or in growth stocks at a lower yield . . . in either case, even after paying the cost of his unsuccessful appeals he would be much better off than if he had paid his creditor promptly; and his creditor would be correspondingly worse off."

In other areas there is much to be desired, but it is the profession which must ensure that the relevant considerations are placed before the Court.

In *Hector v Hector*[27] the Court of Appeal upheld the award to a husband of £1,000, being about a quarter of the equity in the matrimonial home, but postponed payment until the death of the wife, the sale of the property or the attaining by the youngest child of the age of 16 years. The child was then eight years old. At 20 percent inflation the £1,000 will be worth only £232. How much better is the approach of Pennycuick V-C in *Re Nicholson*[28], who increased the plaintiff's share in the matrimonial home from one half share to 21/41.

In New Zealand a Judge has refused to increase maintenance on the ground that the amount had been agreed between the parties 19 months earlier[29]. He said: "The cost of living has increased since then, but so has the amount of the wife's own earning." So also, presumably, had the husband's earnings, but the wife's and children's maintenance had dropped 12 percent in purchasing power in the 19 month period. In the same case the wife's entitlement in the matrimonial home was assessed in money terms as at the date of the separation agreement. The learned Judge said:

> "I think it is clear that the general rule will be that determination should be at the time of the breakdown. It is as from that date that the wife is free to make her application, and she should not be in a position to increase her entitlement simply by delaying her application and waiting for the process of inflation to assist her."

But the "process of inflation" does not assist her, nor does it increase her entitlement. It merely preserves her interest at the same level in real values. The Judge has fixed her entitlement in money terms at an earlier date, and then awarded her the same number of dollars in depreciated currency. Why should she be paid less than the Court found to be her true entitlement, and why should her husband's share be augmented in consequence?

It is refreshing to compare the more recent approach of McCarthy P in the Court of Appeal in *Stevens v Stevens*[30] where he said:

> "The problem of division would not be difficult were it not for the escalation in the value of the property which has taken place as a result of a general rise in property values since the parties separated. It would be unjust if the wife were to have her share in the property calculated on the basis of 1968 values and then be paid out in 1974 money."

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23. [1970] 1 All ER 1202, 1210.
24. [1972] 2 All ER 181.
25. [1973] 2 NZLR 45, 74.
26. *London and Overseas Freighters Ltd v Timber Shipping Co SA* [1970] 3 All ER 756, 759j.
27. [1973] 3 All ER 1070.
28. [1974] 2 All ER 386.
29. *D v D* (unreported, Wellington 20 December 1973).
30. [1974] 2 NZLR 129 at 134.

In dealing with such topics as maintenance, matrimonial property and Family Protection Act awards the Courts must be conscious of the injustice that can result where future payments are expressed in fixed monetary amounts without provision for frequent adjustment. If a widow is to be awarded an annuity from her husband's estate it should be indexed to avoid the cumbersome and expensive procedure of successive applications for review.

If indexing is used in a loan transaction and the Revenue claims tax on the consequent capital adjustment, it is to be hoped that our Courts will follow the realistic view expressed by Lord Greene MR in the *Lomax* case cited earlier[11].

Traditionally, our Courts are conservative, and in many ways it is proper that they should be so. But conservatism should not be allowed to stand in the way of justice. It cannot be stressed too strongly that adherence to a legal fiction of stable money values in times of high inflation results in injustice. Unless fettered by the express terms of a statute, the common law should always be flexible enough to adapt to a new situation in such a way that broad justice is done.

Inflation affects other tribunals besides the ordinary Courts, and they too depend on counsel to ensure that the problems of inflation are appreciated and that ways are suggested to meet them. The Price Tribunal has yet to recognise fully the unreality of traditional accounting methods in present conditions and the illusory nature of paper profits which take no account of stock replacement or of the gap between historic cost depreciation and true replacement cost. Businesses which of their nature have an above average proportion of their investment in plant or machinery are unfairly penalised, and face an uncertain future. As more companies adopt inflation accounting to give a true picture of their financial affairs such factors will be more readily recognised.

Compensation for the compulsory taking of land is another area in which inflation has not been recognised and substantial injustice results. The compensation is assessed at the date of taking of the land. The assessment involves the obtaining of valuations and other expert reports and sometimes lengthy negotiation. On occasion it must await the determination of involved town planning objections and appeals affecting the zoning of the land. There are major claims outstanding in this city for land which was taken over three years ago. Whatever value is arrived at the compensation will be reduced by at least 30 percent because paid for in inflated currency. Interest is commonly allowed at the absurdly low rate of 5 percent, and is liable to income tax[31].

Section 42 of the Public Works Act 1928 does not refer to monetary values. It confers a right to "full compensation", and these words have been liberally interpreted.

Will the Court be prepared to put aside the outdated fiction that the dollar is "the constant unit of value by which in the eye of the law everything else is measured" and accept Lord Denning's later acknowledgment that "things are different now"?

Areas for legislative intervention

Parliament should also be concerned at the injustices caused by inflation. If it cannot effectively control inflation it should at least mitigate some of its effects.

Legislation that refers to specific monetary amounts is quickly outdated. The modern trend is to leave the figures to be supplied by Order in Council. This enables figures to be updated without a further Act of Parliament, but in practice, the updating is too often overlooked.

Carriers' liability has remained at $40 for any package or unit since 1944[32]. The equivalent in today's money would be $158. The Legal Aid Act 1969 gave assistance to litigants with a disposable income of up to $2,000 a year and disposable capital assets up to the same amount. By the time last year's amendment was enacted the value of this limit had dropped by 33 percent to $1,378 in equivalent values[33]. The allowances to the successful litigant for party and party costs and witnesses' expenses are hopelessly unrealistic. Costs in the Supreme Court and Court of Appeal were last fixed in 1966 and have since been eroded by 45 percent[34].

The English tradition has always stressed the importance of an impartial judiciary free from political or other pressures. Fundamental to this concept has been the principle that Judges can-

31. *Marshall v Commissioner of Taxes* [1953] NZLR 335 (CA).

32. Statutes Amendment Act 1944, s 25, as re-enacted by the Carriers Act 1948, s 6 and the Government Railways Act 1949, s 23.

33. Consumers' Price Index for March 1970: 1232; September 1974: 1831.

34. Ditto. June 1966: 1025; September 1974: 1831.

35. Judicature Act 1908, ss 8, 10.

not, save in quite exceptional circumstances, be removed from office nor can their salary be reduced[35].

Today, their salaries are reduced every month by inflation, and they must rely hopefully on the good will of Government to restore them from time to time. We have ceased to insist on principles to which we still pay lip service.

The only rational answer is an Act to update all monetary amounts in existing statutes and regulations, and to relate them to an index for the future.

Indexation should also be applied to our graduated scale of income tax, so that taxes cannot continue to be increased without parliamentary approval. At the same time, our tax laws should allow an appropriate method of inflation or constant purchasing power accounting, so that the true income alone is taxed. At present, we call capital income, assess it for tax, and then wonder why there is a liquidity crisis.

There has been much debate on the advantages and disadvantages of indexation of government loans. A decade ago, when inflation was about 3 percent, would any politician have dared suggest that a capital levy be made every year on all deposits in the Post Office Savings Bank? Today, it is done by stealth, but the Government is just as much responsible for the resulting injustice as if it had imposed a direct capital levy.

The Committee on Financial Markets of the Organisation for Economic Co-operation and Development (OECD) issued a very thorough and detailed Report in 1973 on Indexation of Fixed Interest Securities. Articles which deal with the topic in less depth have appeared in recent issues of the *Economist, Financial Times* and *Australian Financial Review*[36]. The New Zealand Monetary and Economic Council has advocated the issue of index linked or inflation-proof bonds at very low and perhaps even zero rates of interest, the objective being to give protection rather than a high yield[37].

If the Government accepts the morality of repaying its borrowing in equivalent value then indexation is unavoidable. It is a simple matter of justice. It is no answer that the investors have voluntarily placed their money in the Post Office or in Government stock. The small investor is persuaded by advertising, unaware of the extent of the inflationary steal, and unskilled in evaluating alternative forms of investment. The large investor in Government stock acts under Government compulsion through the compulsory ratio imposed on financial institutions. Not only should the capital repayments be adjusted but the additional dollars repaid in the inflated currency should not be taxed as if they were income. Interest should also be adjusted if overall fairness is to be achieved.

There are side effects, however. The issue of indexed bonds by Government in present circumstances could have a major effect on the whole financial market. Funds would be diverted from other sectors. Unless some strict limit were placed on Government borrowing an excessive amount of savings would be channelled into Government control and added to the vast funds accumulating under the Accident Compensation Scheme and the Superannuation Scheme with consequences which have yet to be fully assessed. If limits are imposed, some form of rationing will be necessary. Seekers of finance in the private sector must find ways to compete, either by themselves adopting indexation or by offering much higher rates of interest. In either case the burden of the extra cost of borrowing, even though it may be a nominal money cost rather than a cost in real terms, must result in higher prices. These, in turn, affect the index with the danger of a self-perpetuating cost price spiral.

This has happened to some extent in countries which have adopted indexation[38]. Finland issued a 10 year marketable loan in 1945 which provided for capital repayment to be fully linked to the wholesale price index. This was converted by the issue in 1953 of indexed bonds, and further issues followed. The private sector followed suit until by 1967, 76 percent of domestic Government bonds, 85 percent of bonds issued by financial institutions and 30 percent of bonds issued by other companies were indexed. Company bonds generally gave only partial protection to 25 percent or 50 percent of the extent of the index movement. In 1967 the currency was devalued with consequent rises in import prices and export incomes.

36. Eg *Economist* of 9 February, 27 April and 18 May 1974. *Financial Times* of 18 April; 13 May and 10 June 1974. *Australian Financial Review,* 18 and 24 April and 10 June 1974.

37. Report No 24 (December 1972) p 100; Report No 27 (May 1974), p 39.

38. Annex to Appendix to "Indexation of Fixed Interest Securities; Report of Committee on Financial Market OECD".

Through the network of index linkages this threatened an inflationary spiral which would have rapidly cancelled the desired effect of devaluation on the country's external balances. The result was a new programme of stabilisation which incorporated the prohibition of index linkages.

Israel has used index securities from as early as 1948 but some 20 years later abandoned the practice in favour of fixed annual "inflation premiums".

Finland's problems seem to me to have been related to the choice of an overall price index as the base. This brings into the index factors that are external to the country. If the prices of imported goods rise, as in our own case last year with oil prices, this is a real cost to the country which must be borne. It is not a mere monetary adjustment as is the case where wages are increased and added back into prices. If we seek to compensate for real cost increases such as the increased cost of imported goods there is nowhere from which the compensation can be obtained unless we have a real gain in income through increased productivity or higher export prices. What is needed is a more sophisticated index that is adjusted to exclude external and other real factors, and is a true inflation index.

It may become necessary to exercise control over the use of indexation in the private sector to ensure that the indiscriminate use of indexes does not accelerate "cost push" inflation. In Germany value guarantee clauses require the approval of the Bundesbank, as being a departure from the principle of nominalism for money debts by which the nominal amount of a financial commitment remains its measure regardless of changes in purchasing power. Approval is given according to certain specified criteria which ensure that the index chosen is relevant and appropriate to the nature of the particular transaction.

France made extensive use of index linking clauses for fixed interest securities during the 1950s. Most nationalised industries linked their bonds to commodity prices. Private issues generally related their interest rates to internal production or earnings.

The most frequently quoted example of indexation is Brazil, and it is Brazil which has gone the furthest in the direction of complete monetary correction. Since 1967 all financial ininstruments, public and private, are linked to a wholesale price index. A reference index is provided by which companies are allowed to write up the value of their fixed investment and working capital. Index linking applies to Government bonds, company assets, corporate balance sheets, interests, time and savings deposits, rents, outstanding tax payments, arrears of wages and salaries, mortgages, bills of exchange, medium and long-term loans. All index compensations are exempt from tax. Wages and salaries are subject to collective bargaining, but are adjusted annually according to a wage control formula. The aim is to maintain constant the real purchasing power of wage earners. The basis for the adjustment is the average of the change in the cost of living in the preceding two years and the estimate of the rate of inflation for the ensuing year, to which is added a percentage corresponding to the average increase in national productivity in the preceding two years. It is claimed that Brazil's 15 percent inflation brings far less noxious results than rates between 4 percent and 5 percent in other countries. The country's rate of inflation has, seemingly, been successfully reduced without hampering economic growth. There is no doubt, however, that all these adjustments in turn feed further inflation.

Not to be overlooked is the psychological effect of a Government decision to adopt indexation. It could be seen as an admission of failure and a decision to live with inflation rather than control it. Pressures on Government to grapple with the underlying problem might be weakened. Whether we like it or not, however, we are living with inflation and we are not controlling it. Justice requires that we mitigate its effects, and the steps to do this can be introduced in conjunction with a strong anti-inflationary programme that shows a real determination to grapple with the underlying causes at the same time.

The New Zealand Monetary and Economic Council in recommending the issue of inflation-proof bonds has suggested that "insofar as they reduce the need for speculative investment to maintain real savings these bonds could actually play a positive role in restraining inflation"[39].

A possible side effect to indexation of securities is the attraction of overseas investment funds with a consequent lowering in interest rates on the one hand but an inflationary effect through increased money volume. This factor is mentioned in the reply of the Swiss Conseil Federal to a parliamentary question asked on 1 March

39. Report No 27 (May 1974), p 39.

1972. But New Zealand already has the controls available to meet any such problem. The Conseil Federal points out, however, that:

> "a small country which is heavily dependent on the world economy cannot afford to allow inflation to develop at a rate above the international average without its economy and structure suffering serious distortion and other ill effects. So long as foreign countries do not follow the same trend as we do with regard to indexation there can be no question of compulsory cost of living indexation and it would be quite impossible to accept this risk at a time like the present when priority must be given to fighting inflation"[38].

These comments suggest a cautious approach, but the problem should not be ignored. At present we have indexed wages through cost of living orders under the Wage Adjustment Regulations 1974. Before that direct bargaining achieved results in excess of cost of living increases. Prices rise with "admissible costs" under the Stabilisation of Prices Regulations 1974. Shall we continue to rob savings with the excuse that "priority must be given to fighting inflation"?

Mr Luxton's Investment Bonds Bill (1974) suggested a limited approach by the issue of inflation adjusted bonds in multiples of $10 with a maximum holding of $1,000 for any one person in any year. The adjustment would be assessed by a committee, but not so as to exceed the increase in the consumers' price index. No tax would be payable on the capital adjustment. Interest would be at 2 percent on the original nominal amount only, and compounded until maturity. The capital adjustment would be increased if necessary so that when added to the interest it did not fall below 5 percent of the nominal amount of the bond.

I would go a little further. Bonds should be available which are subject to capital adjustment to correct the effect of inflation. The adjustment, being a correction of capital, should not be taxable. To avoid too great a distortion of financial markets some limit is necessary. The present injustice affects the small saver and the unsophisticated rather than those who choose a fixed investment despite their appreciation of the effect inflation will have. The bonds should therefore be available only to individuals, and with a maximum holding for any one person of, say, $25,000 in 1975 values. The issue of the bonds should not be restricted to Government but should be open to trustee and private savings banks and other financial institutions. All such bonds should be issued in identical terms and the $25,000 limit should apply to a person's total holding. The inflationary adjustment should be on the basis of an index which excludes the effect of factors external to New Zealand. If no such index can readily be provided then the alternative is Mr Luxton's proposal of a committee to fix an appropriate adjustment, but not so as to exceed the increase in the consumers' price index. Interest, if any, can be at a very low rate, but it should be payable on the capital as adjusted from time to time. Administrative cost is no problem. The calculation of the capital adjustment of the required percentage is no more difficult than the calculation of interest, and can be done by computer.

The control of inflation

I have suggested some of the steps we should take to mitigate the effects of inflation. We must at the same time attack the root causes. The economic know-how is available, but our political leaders cannot apply it unless the community is educated to accept the only measures which can succeed. The Shah of Iran recently stated[40] that increases in oil prices accounted for only 2 percent of the Western world's 20 percent inflation rate, the balance being caused by its internal situation. He said: "The Western nations are not governed. Why? A thousand reasons why. Besides, its less the fault of the leaders than of the political structures which make it impossible to govern them".

One of the major factors in the inflationary spiral is the impact of wage increases on prices and of price increases on wages. From the time of the "nil" wage order in 1968 until the Economic Stabilisation Regulations 1973 wages were fixed by direct bargaining in which the more militant unions used actual and threatened industrial action to coerce employers. Employers could not rely on firm Government support. The effective wage rate index for all groups, which is derived by dividing the nominal wage index by the consumers' price index, rose from 988 to 1,235, a 25 percent increase in real purchasing power[41]. This is partly explained by the narrowing gap between nominal and ruling rates. There remains, however, a real increase which can only have come from two possible sources. There may be a bigger cake through

40. The *Dominion*, 31 December 1974.
41. Monthly Abstract of Statistics, November 1974, p 62.

increased productivity, higher export prices or lower overseas costs. The alternative is a division of the cake in a different way, so that one person's gain is another's loss.

Direct bargaining is another name for "might is right". It is the direct antithesis of the rule of law. It rewards the strong at the expense of the weak. The more militant, less responsible and more critical to the economy a trade union is, the more it gets. The weaker or more marginal an industry, the more it is forced to concede. The late secretary of the Clerical Workers' Association, Mr D G Nolan, criticised the inaction of the previous Government as putting a premium on militancy which would compel the more responsible unions to follow the example of their militant brothers. This trend is already apparent. The real gains achieved by some sectors have been achieved at the expense of others. People on fixed incomes such as superannuitants have been robbed. So have those who rely on interest and savings. Company dividends are too small in total to make a significant contribution, but the balance of company profits has been raided. These are needed for reinvestment to ensure the healthy development of business, the replacement and modernisation of equipment, the provision of employment for the next generation, and the production of goods and services for the benefit of the whole community. The extent of the raid has been concealed by the inadequacy of traditional accounting methods to give a true picture in an inflationary situation. The crisis of liquidity is upon us now, and we should take heed of the collapse of major companies in England and Australia where the pace of inflation reached our high levels at an earlier date.

In his New Year message the President of the Federation of Labour looked forward to a return to direct bargaining when the Stabilisation Regulations expire in June "so we can take our rightful place at the bargaining table with employers". The areas of free bargaining must be restricted to the extent necessary to ensure justice and the common good. No man should have the right to take what he can by force, whether as wages, prices or profits.

People must be brought to realise that one cannot get something out of nothing. No one should object in principle to the recent increase in annual holidays to three weeks, although the introduction of it should prudently have awaited better times. The extra week's holiday means less production, however, because people will not work harder to compensate. They must, therefore, take a drop in wages. They can take it as a direct reduction in wage rates, which they would regard as unthinkable, or as an inflationary drop in the purchasing power of their wages, which has precisely the same result but is accepted. They can then subsidise their extra holiday by an inflationary raid on the fixed incomes and savings of the older generation.

Equal pay for women is another example. If the community really believed in it, male workers should have been prepared to accept an equivalent reduction in their own incomes so that the total wage bill remained the same. By increasing the total wage bill without any increase in productivity the same result was achieved through inflation, without the male worker realising it. Of course, he obtained higher wages to compensate for the increased cost of living, but these rates in turn pass into costs and the game continues.

There is a great need for a system which enables people to see what is really happening and what is the true effect of their actions. Relativity is a popular basis for wage claims, but of its nature it should not justify leap-frogging. The ideal would be a comprehensive tabulation of wage rates with the calculation of a suitably weighted average. All rates should vary proportionately to an index based on the consumers' price index but adjusted to exclude external factors. Increases in the cost of imported goods should not be the subject of adjustment as they are of their nature a real burden on the whole community. The whole community should benefit when overseas costs are reduced. Increases should be given to enable the wage earner to share in significant long term increases in export prices. The corollary is the acceptance of a decrease in the event of long term decreases in export prices. Any union should be able to seek a review of its position relative to other awards, but any increase in one rate would then be spread through a compensating reduction in all other rates, so as to maintain the same weighted average and hence the same total cost. Other unions should be entitled to resist an application for a review of relativity.

To introduce such a system might require the assistance of the Shah of Persia. In a Western democracy no such solution is possible without massive education of the public to an understanding of the present situation and its dangers, and real leadership to obtain acceptance of the measures proposed. If we are afraid to face reality the only fair alternative is comprehensive indexation as in Brazil.

Price control and profit control become virtually synonymous because prices are fixed to allow a certain return on shareholders' funds. It is idle to expect workers to accept wage controls if prices remain free. In some areas competition or consumer resistance is sufficient. In other areas these factors are largely ineffective. The controls must be exercised realistically, however, in the light of financial statements which reflect the true position without the distortions of inflation. Price increases should allow for the recovery of cost increases not only from the date of the price increase but for the period since the price was last determined. For the purpose of comparisons with the return on funds of other companies in the same industries there should be a much more sophisticated and appropriate index than the very limited analysis of public company accounts produced by the Reserve Bank which must be used at the present time. It is based on published accounts which have been prepared on different bases. Assets have been acquired at different times, some companies have revalued their assets, some balance sheets include goodwill, and there are a host of other variable factors that make it a crude tool. Something better is called for to ensure the protection of the consumer on the one hand, and the health and viability of business in the interests of the whole community on the other. The cost of proper statistical and other assistance is minimal in comparison with the vast amounts involved in price applications.

The Price Tribunal or the proposed Commerce Commission should have its importance and independence recognised by the appointment of a judicial officer as President, as has been the case with the Restrictive Practices Court in the United Kingdom since its establishment in 1956[42], and it should be served administratively by the Justice Department which should provide a secretary and research staff. The Prices and Trade Practices Division of the Department of Trade and Industry should continue to present or oppose cases as they do now but without the dual role of also acting on behalf of the Tribunal.

Taxation and Government spending have a substantial impact for better or worse on inflationary trends. Government is unlikely to relinquish its control on these areas and Parliament is a largely ineffective watchdog. A good Government might be persuaded to accept laws which will enable its decisions to be more clearly seen and understood, and if necessary criticised. This may expose Government to more criticism, but it should also enable it to avoid mistakes more readily, and with them the grounds for criticism. The indexation of the graduated tax scale, for example, would prevent Government from increasing taxes while claiming to reduce them. If an increase is required it would have to be sought openly and justified.

Finally, there is a need for an independent economic watchdog to alert the public to trends and dangers and ensure that the economic effects of Government policies and actions are seen and known. The New Zealand Monetary and Economic Council fulfils this role to a limited degree, but its reports are too comprehensive to have much impact on the public at large.

If we do not adopt firm sensible policies to control inflation, or else to adapt to it wholly on the Brazilian model, we are headed for disaster. Businesses will fail or increasingly be propped up by Government—a concealed means of Government expropriation. Unemployment will result from business failures and from the general cutting back by other companies to avoid failure. The resulting hardship will be compounded by the wiping out of savings through inflation. A strong hand at the helm will be desperately needed, and people will be conditioned to accept such a strong hand whether from the left or the right. These conditions led to the rise of dictatorship in Germany and Italy in the 1930s.

Summary of conclusions

Inflation, as we know it today, is a major threat to our whole way of life. Already, it is a cause of widespread injustice and hardship, of false optimism through distorted accounts, and of unproductive work.

The lawyer should be concerned at injustice. He must protect his client where he can. He must help to shape the law so as to meet the problems of inflation, both through the Courts and through appropriate legislation. He has a contribution to make in determining how best to control and reduce inflation.

In many fields there are means available to the conveyancer and the common lawyer alike to allow for the effects of inflation and avoid the anomalies that can result. There should be an increasing awareness on the part of the pro-

42. Restrictive Trade Practices Act 1956 (UK), s 2.

fession both of the problem and of the means to combat it, whether through the avoidance of money terms or the use of indexation or of provisions for review.

Counsel must ensure that the Courts and other Tribunals are fully informed both of the problems that may arise in particular cases, and of the means which might be adopted to avoid them. The Courts must ensure that justice is not denied by reason of a reluctance to depart from past concepts which are no longer valid.

Parliament must remedy the injustices and anomalies which result from changing money values and the capital levy on savings that is made through inflation. References to money amounts in statutes and regulations should be indexed. The recommendation of the New Zealand Monetary and Economic Council for the issue of inflation proof bonds should be implemented.

There must at the same time be a realistic attack on the underlying causes of inflation. Wage bargaining on the "might is right" principle and leap-frogging on the grounds of alleged relativity can only result in a worsening of the situation. Wages must be fairly adjusted for internal factors affecting money values and for variations in productivity. Relativity should be subject to review, but logically any such review should be within the limits of the total national wage bill.

Prices, and therefore profits, must be controlled in areas where competition or consumer resistance are inadequate for the purpose. Controls must be based on the true financial position, and not on the distorted figures which inflation produces. More sophisticated statistics are necessary to provide a proper standard of comparison.

Taxation and Government spending must be watched in a manner conducive to stability. The graduated tax scale should be indexed so that taxes cannot be increased without parliamentary approval. Income tax should be levied on true income, not on the apparent but non-existent income shown in accounts which ignore inflation.

There is need for an economic watchdog such as the Monetary and Economic Council to take steps to create an informed public that is aware of the economic implications of Government policy, and to exert a real but independent influence on that policy.

Part of New Zealand's problem results from overseas factors that are beyond our control. We must find ways to live with these factors which share their burden justly. The rest of our problem is internal. If we are to find a solution to it, we must first learn to face reality.

DISCUSSION

Chairman: Mr B L Stanley

Commentators: Messrs B J Petrie and B K Knowles

THE CHAIRMAN: "Your honours, other distinguished guests, ladies and gentlemen: It is my pleasure to introduce Mr Ian McKay of Wellington, who will introduce this session by producing further comments on his paper. We have had a low key profile of him given at the beginning of his printed paper and he is well known and of considerable standing in Wellington and New Zealand Law Society circles."

MR MCKAY: "The first point I seek to make in my paper is that inflation is a proper concern of the lawyer. This is so because it causes injustice and justice is our business. We deal with the problems of the individual citizen. We see the effect of laws and policies in particular situations. When we find injustice, we have a duty to speak out.

"In recent months, our rate of inflation in New Zealand has been approximately 15 percent. That is sufficient to halve the value of money every five years. Those most affected are those who can least afford it. I have instanced the elderly, whose retirement income is reduced to one quarter after 10 years; the small saver, whose savings bank deposits and government securities are stolen from him year by year; the young married couple facing a near impossible burden in trying to buy a home; the separated wife struggling to bring up children on a maintenance allowance that is perpetually out of date.

"Other factors with which you will be familiar are the pressures on business. Work-

ing capital must be found for the ever-increasing nominal value of stocks of raw materials and finished goods and of debtors. It cannot be found fast enough while profits are calculated on traditional accounting methods to give a quite unreal picture which becomes the basis for price control, for the assessment of taxation and for the making of wage demands.

"I have mentioned the farmers' problems, and would like to add a brief example which has been given to me. It is an actual case. In 1971, when he sought advice, a farmer had an estate worth approximately $100,000. Death duty, after allowing for widow's exemption, would have been approximately $13,000. There was $10,000 of life insurance, leaving about $4,000 to be found in cash for the balance of duty and administration expenses. He died two and a half years later, near the end of 1973. His same assets at much higher valuation attracted duty after widow's exemption of over $56,000. The life insurances yielded $11,000, a cash shortage of $45,000 plus administration costs. The problem was not only to raise such a sum on the equity in the farm, but to service the loan if it could be obtained.

"I have referred also to the massive increases in taxation brought about by inflation —some three times the increase in the consumer price index over the last four tax years for which figures are available.

"Against this background, I have suggested a four-fold role for the lawyer. His first task is to advise his clients and to draw up their contracts and other instruments in such a way as will protect them where possible from the adverse effects of inflation.

"Under this first heading, I stress the need for the lawyer to be alert to the fact of inflation, so as to ensure that he brings about for his client the true intended results. To do this, he must avoid using simple money terms to specify payments to be made other than in the immediate future. Examples are pecuniary legacies, and annuities under wills, maintenance payments to wives and children, the quantifying of interests in matrimonial property, drawing up of long term contracts.

"I suggest three remedies. The simplest is to use proportions rather than monetary amounts —eg, to express the legacy as a defined share of residue, or the spouse's interest in the home as a percentage share. Review clauses have their place, and are a familiar device in leases. They can be extended and developed into a wide variety of situations. The third remedy is indexation.

"Indexation is the relating to a specified index of amounts which are expressed in money terms, so that the amounts will be varied up or down, according to changes in the index. It is not a new idea, but is attracting increasing attention. I have given examples of its use in practice, and have suggested a number of conditions which should be borne in mind in the use of index clauses. These are set out at pp



Ronald D Woolf

Mr I L McKay

399 and 400 of the printed paper. I have also drawn attention to the tax implications of indexing the principal sum in a loan transaction.

"The second role of the lawyer in relation to inflation is to influence the course of the common law in adapting to meet the new problems which confront it. I do not regard this as the sole prerogative of the Judges. They must depend on counsel to bring forward the facts and present the argument that will enable the law to adapt sensibly and properly to the problems of inflation. Fixed monetary amounts must be treated with caution in family protection and matrimonial property cases. As the learned President of the Court of Appeal said in a recent case to which I refer, 'It would be unjust if the wife were to have her share in the property calculated in on the basis of 1968 values, and then be paid out in 1974 money.'

"I refer to the *Lomax* case, in which the

English Court of Appeal treated a discount offered in a loan transaction on account of capital risk as being capital and not income for tax purposes. The same Court recently recognised the validity in a pricing context of 'replacement cost' accounting, although subordinate legislation has since nullified the decision. The case is *Associated Portland Cement Manufacturing Limited v Price Commission,* reported in *The Times* of 12 December 1974, and referred to briefly in the *Financial Times* of the same date.

"I refer also to the developing attitude of the Courts in regard to future inflation as affecting the assessment of damages. The way is far from clear, but there has been at least some recognition that inflation may be a factor to be taken into account.

"More important, to my mind, is the difficult question of inflation between the date on which a right is acquired, and the date of judgment. It is not unusual for some damages claims to be heard years after the cause of action arose. This may be due to the complexity of the case, the involvement of technical experts, or the sheer pressure of work on the senior members of the bar. If damages are to be assessed today on figures relating to events even four years ago, the plaintiff will receive only 69 percent of a true compensation. At present rates of inflation, this discrepancy will become higher. I have pointed to the similar injustice that arises in the assessment of compensation for the compulsory taking of land.

"The third area in which the lawyer should be concerned is in pressing for legislative intervention where appropriate. I have given examples of monetary amounts which appear in statutes and regulations and have become hopelessly outdated. The limits of disposable income and capital to qualify for legal aid had dropped by 33 percent in real terms before they were belatedly reviewed. The contribution a successful litigant recovers on account of his costs is now 45 percent less than our legislators intended.

"I refer to the English tradition which has stressed the importance of an impartial judiciary free from political or other pressures. Fundamental to this concept has been the principle that Judges cannot, save in quite exceptional circumstances be removed from office, nor can their salary be reduced. It is so laid down in our Judicature Act. Today, however, judicial salaries are reduced every month by inflation, and our Judges must rely hopefully on the good will of government to restore them from time to time to their previous level. We have ceased to insist on principles to which we still pay lip service.

"The only rational answer is an act to update all monetary amounts in existing statutes and regulations and to relate them to an index in the future.

"Indexation should also be applied to our graduated scale of income tax so that taxes cannot be continued to be increased without parliamentary approval. At the same time, our tax laws should allow an appropriate method of inflation or constant purchasing power accounting so that the true income alone is taxed.

"I have supported the recommendation of the New Zealand Monetary and Economic Council for the issue of index linked or inflation proof bonds. If the government accepts the morality of repaying its borrowing in equivalent value, then indexation is unavoidable. It is a simple matter of justice. It is no answer that the investors have voluntarily placed their money in the post office or in government stock. The small investor is persuaded by advertising, unaware of the extent of the inflationary steal, and unskilled in evaluating alternative forms of investment. Not only should the capital repayments be adjusted, but the additional dollars repaid in the inflated currency should not be taxed as if they were income. Interest should also be adjusted if overall fairness is to be achieved.

"I am conscious, however, of the side effects which could result from the issue of indexed bonds by government. Funds would be diverted from other sectors. Unless some strict limit were placed on government borrowing, an excessive amount of savings would be channelled into government control. If limits are imposed, some form of rationing will be necessary. Seekers of finance in the private sector must find ways to compete, either by themselves adopting indexation, or by offering much higher rates of interest. In either case, the burden of the extra cost of borrowing must result in higher prices, which would in turn affect the index, with the danger of a self perpetuating cost price spiral.

"I have referred to overseas experience in this field, with particular reference to Israel, Finland, West Germany, France, and Brazil. I accept the need for a cautious approach. At the same time, we already have indexed wages, through cost of living orders under the Wage Adjustment Regulations 1974, which use the consumers' price index. The provisions of the Stabilisation of Prices Regulations 1974, relating to price increases to recover "admissible

costs" are a form of indexation. There is no excuse for continuing to rob savings, at least in the case of the ordinary man, whose avenues of investment are limited.

"I have referred to Mr Luxton's Investment Bonds Bill, which was introduced into Parliament last year, but I would go further. The issue of the bond should not be restricted to government, but should be open to trustee and private savings banks and other financial institutions. I have suggested a limit of $25,000 in 1975 values for the total holding of all such bonds by any one person, and I have suggested using an index which excludes the effects of factors external to New Zealand.

"Finally, there is a role for the lawyer in the task of controlling inflation. The formulating of guidelines for government action to reduce and control inflation is not solely a matter for the economist. Government policies must be expressed in laws which are workable, and the lawyer should ensure that any such action is taken with proper regard for its affect on individuals.

"One of the major factors in the inflationary spiral has been the impact of wage increases on prices and of price increases on wages. Direct bargaining is another name for 'might is right'. It is a direct antithesis of the rule of law. It rewards the strong at the expense of the weak and puts a premium on militancy. The real gains achieved by some sectors have been achieved at the expense of others. People on fixed incomes such as superannuitants have been robbed. So have those who rely on interest and savings. Company dividends are too small in total to make a significant contribution, but the balance of company profits has been raided. These moneys are needed for re-investment to ensure the healthy development of business, the replacement and modernisation of equipment, the provision of employment for the next generation, and the production of goods and services for the benefit of the whole community. The extent of the raid has been concealed by the inadequacy of traditional accounting methods to give a true picture in an inflationary situation. The result has been a crisis of liquidity. We should take heed of the collapse of major companies in England and Australia, where the pace of inflation reached a high level at an earlier date.

"People must be brought to realise that one cannot get something out of nothing. People are not going to work harder because they now have an extra week's annual holiday. They must, therefore, take a drop in wages. They could take it as a direct reduction in wage rates, which they would regard as unthinkable, or as an inflationary drop in the purchasing power of their wages, which has precisely the same result, but is acceptable. It is, of course, subsidised by an inflationary raid on the fixed incomes and savings of the older generation.

"Equal pay for women is another example. If the community really believed in it, male workers should have been prepared to accept an equivalent reduction in their own incomes, so that the total wage bill remained the same. By increasing the total wage bill without any increase in productivity the same result was achieved through inflation, without the male worker realising it. Of course, he obtained higher wages to compensate for the increased cost of living, but these rates in turn pass into costs, and the game continues.

"There is a great need for a system which enables people to see what is really happening, and what is the true effect of their actions. Relativity is a popular basis for wage claims, but of its nature it should not justify leap frogging. I have suggested, as an ideal, the comprehensive tabulation of wage rates with the calculation of a suitably weighted average. All rates should vary proportionately to an index based on the consumers' price index, but adjusted to exclude external factors. Increases in the cost of imported goods should not be the subject of adjustment, as they are of their nature a real burden on the whole community. Any union should be able to seek a review of its position relative to other awards, but any increase in one rate would then be spread through a compensating reduction in all other rates, so as to maintain the same weighted average, and hence the same total cost. Other unions should be entitled to resist an application for a review of relativity.

"I agree that such a system could not be introduced without massive education of the public to an understanding of the present situation and its dangers, and real leadership to obtain acceptance of the measures proposed. If we are afraid to face reality, however, the only fair alternative is comprehensive indexation as in Brazil.

"I think it is idle to expect workers to accept wage controls if prices remain free. In some areas competition or consumer resistance is sufficient. In other areas these methods are largely ineffective. The important thing is that the controls are exercised realistically in the

light of financial statements which reflect the true position without the distortions of inflation. Price increases should allow for the recovery of cost increases not only from the date of the price increase, but for the period since the price was last determined. There is need for a much more sophisticated and appropriate index than is presently available for comparing the return on funds of an applicant company with industry generally. I have suggested also, an upgrading of the status, and of the services available to the price tribunal or its successor.

"I have referred to the substantial impact for better or worse which taxation and government spending have on inflationary trends, and to the need for indexation of the tax scale to ensure that tax increases have to be sought openly and be properly justified. I have referred also to the need for an independent economic watchdog to alert the public to trends and dangers and ensure that the economic effects of government policies and actions are seen and known. The New Zealand Monetary and Economic Council fulfils this role, but I should like to see its reports have a much greater impact on the public at large.

"There will doubtless be many aspects of this subject I have not dealt with in my paper, and I hope some of these may be brought out in discussion. I believe the injustices of inflation should be of major concern to all of us, and that we as lawyers should be involved in their solution."

THE CHAIRMAN: "I suggest to contributors, without in any way wishing to force discussion on any particular lines that if there is anyone here who prefers to speak at this stage on the suggestions Mr McKay has made for the use of existing instruments to try and cure if we can for the sake of our clients, the problems we are facing of inflation, then perhaps you could speak at this stage. If it suits we can at a later stage move to the greater responsibilities which I think the profession has in ensuring that where necessary there are changes in the law and in the practice."

MR M JOEL (Dunedin): "I would like to congratulate Mr McKay on his paper. He has in my humble opinion set out in it very well the effects of inflation as we have felt it so far. He has also set out very well what he calls remedies for it, but I would suggest they are not really remedies—they are really palliatives. All he has suggested we can do as a profession without considerable legislation, is to provide palliatives which will make the worst of inflation, which is a dreadful disease, which I submit cannot be cured except by action well beyond us, which is action in the political industrial sphere.

"The effects of inflation so far have been considerably masked by the affluence from which we have perhaps suffered during recent years, but these effects are going to come to the surface very, very quickly in different ways.

"May I mention for a moment the situation of local government. The general government has got off so far fairly well in some ways in that income tax has mushroomed due to inflation, but local government, which I think has not been considered, has suffered and will suffer considerably in the next few months, the next year or two. For instance, local government borrowing has in effect been halved because local government is unable to borrow more than the precise money figures fixed quite a number of years ago. So local authorities can borrow less than half the real amount they could borrow then for public and other works in their areas.

"On the other hand, government valuations as we know are completely unrealistic. In one of the four main cities, I won't mention which one, the government valuation was made in 1971, and I know as I speak from experience, the Chairman of its financial committee has found he cannot raise the rates this year even to cover ordinary inflation, because the maximum tax rate is based on a 1971 government valuation, which should be perhaps doubled or trebled to bring it up to realities today. This is a matter which will affect counties, boroughs and cities throughout the country within the coming months, and if not within the coming months, then certainly by next year. I would suggest this is one of the aspects in which the dreaded effects of the disease is going to make itself really severely felt by the ordinary citizen of this country within a very short time."

MR R FEIST (Wellington): "Two matters I would like to refer to briefly, one concerning a trustee's duty for allocation of income and the responsibility of bearing a proper balance between rights and capital. Might I suggest in this regard that the Society could well press for legislation to enable to give trustees a right to apportion income up to, say, 5 percent income; to add it to capital and that that 5 percent should be free of income tax. This would

mean that the profession as a whole should support such a change and give this right to trustees generally.

"On another matter, the question of the lending of client's money on mortgage. We have discussed this in the office, the question of some form of indexation, but it seemed to us that unless the Society adopted a procedure as a Society and applied it across the board, it would not be appropriate for any individuals to start the ball rolling, so I suggest that the Society give earnest consideration to drawing up precedents that could be adopted by the Society for this purpose, and again the Society would have to make representations to the government to make sure indexation was not taxed.

MR C I PATTERSON (Wellington): "I rise to congratulate Mr McKay on this excellent paper, which, in my humble opinion, is the most important to come before this conference.

"I wish to make two comments: first, money is regarded as a measure of value; it is also a storehouse of value, but Mr McKay is concerned with it as a measure. In the Department of Weights and Measures there are kept standard measures of weight, length and the like. These are kept at a constant temperature and under a constant pressure so that the dimensions and weights never vary. Money is not kept like that; it is tinkered with by every economic force. It is not kept at a constant value, and that is the problem which, in my submission, we will never solve until we can devise a means of preserving the value of money."

MR F J ELLIS (Australia): "There is one point I would like to mention on this question of preparing documents to protect the terms of the bargain between the parties. I seem to mostly act for mortgagors. I cannot see if I were a borrower, like the chap who sings, 'If I were a carpenter', that I would be game to sign a mortgage for any long term which is indexed. It is not to say it is a good thing, it is not that I wouldn't or I shouldn't, but I am pretty damn well sure that I wouldn't. And there is the nub of the question. I seem to recall cases on gold clauses which were happily written about 1917, when it comes to payment time it just cannot be met, and on that point I think the whole theory of indexing long term obligations will fall. The previous speaker said you need a permanent source of value. The Lord Chancellor mentioned payment of one large candle and two small candles; so this has been going on for a very long time, and the previous paper delivered here said it is not a very good idea to try to do the impossible; we have to try to do the possible. Thank you."

MR KNOWLES: "The point that concerned me is the reference in a number of places to maintaining real terms, or real values. In an economy such as our own, it seems quite impossible we can live with what might be called real values, and this is one of the major problems, of course, in the wage structure today where the attempt is made to retain real values through the use of cost of living indexes and the like. Unless we can import into any indexation a much more sophisticated reference to terms of trade which are fundamental to our total economy, we are still going to create a new privileged class, those who are indexed and those who are subject to the terms of trade. Mr McKay in reference to the persons who could not shift their burden who are either the fixed income earners or the export industries—we might manage to fix the fixed income people, but if we leave the whole burden on the export industries we will go further towards killing the economy on which we hope to base this indexation."

MR J BURNS (Christchurch): "My comment, far from being a helpful one is a helpless one, but I am going to make it anyway, because it occurred to me the effect of the Property Speculation Tax with which a lot of you are troubled shows perhaps even more clearly than a lot of Mr McKay's examples have done, the appalling thing the effect of inflation is. Under s 4 of the Property Speculation Tax Act, as a lot of you will know a good deal better than I, the assessable profit is calculated at the amount by which the value of the land at its disposition exceeds the value of its acquisition. Accordingly, if we apply Mr McKay's scale of inflation of 15 percent per annum over 18 months, the inflatory aspect on any given amount of capital is probably 24 percent.

If the property owner sells his property at the present time after only 18 months, then the capital he originally put into it has inflated by about 24 percent, so if his profit in terms of the Act is no greater than 24 percent, then it is an imaginary one. In most city centres over the last 18 months, his profit is not likely to be greater than 24 percent and likely to be less. That being so, instead of being taxed with

a tax of 75 percent for 18 months, which the Act calls for, the real effect, as I calculate it, is that there is a tax of 18 percent on capital on the original investment. Calculating back, the original capital he put in has actually substantially reduced. I see what is set out in the Act for the 18 months' seller as a tax, as actually being a fine against his original capital. That is why I say it is a helpless comment."

THE CHAIRMAN: "I would not describe it as helpless. It is a further illustration of the problems touched on by Mr McKay. Fortunately property tax is a matter dealt with by printed forms and printed exemption clauses, and one would almost think, printed signatures. When more people are caught by the property speculation tax we will know more about it. It is not as grim as that other section in the Land and Income Tax Act.

MR B CLARK (Auckland): "May I join in the praise to Mr McKay for stepping out of the strict sphere of law and giving us an excellent exposition of the problem. I would like to make one comment, and perhaps through you, Mr Chairman, pursue one inquiry. I think that by way of comment that Mr McKay rather presumes that a wealth tax, in whatever shape or form, is undesirable. All I suggest is that that may not be so. The inquiry I would make is to ask through you what Mr McKay suggests should be done in the specific area of superannuation. As of a few days ago a good proportion of the community must be in the Government's or some private scheme. What Mr McKay has said, it would seem to me, has obvious significance in relation to superannuation where the period may be as great as 40 years. What should be done in that sphere?"

THE CHAIRMAN: "I will refer both those questions to Mr McKay."

MR MCKAY: "I have not wished to imply any view on the desirability or othetrwise of a wealth tax. I think my view and that of everybody in the community is that all taxes are undesirable, but they are necessary. There may well be a time and place for a tax on capital. If there is to be such a tax then it should be what it purports to be and not be disguised as income tax, not be disguised as a tax on profit, as our property speculation tax is, when it is really only a tax on inflationary increases at nominal value. Superannuation is too vast a topic for me to express my views or any views here. It deserves a whole paper of its own.

MR PETRIE: "When I read Mr McKay's paper I was most impressed with it. I found little in it with which I could disagree, but I can't help but express the opinion that it does fall short in many respects in giving us the lead we might have expected. It seems to me he has gone so far and then shied away from the last fence on each occasion. So far as his question of indexation is concerned, this is, of course, a relatively established practice now, and the only matter at issue is the extent to which the Commissioner of Inland Revenue will allow it to proceed.

"So far as damages and matrimonial claims are concerned, these are also matters at which we have been looking for a number of years, and we have had to adopt the attitude that inflation is something with which we must live. That is not really the question which he poses in the final couple of paragraphs of his paper. He there asks us what we can do as a profession in order to try and halt inflation. Despite the speech from the throne this morning, I think this is an occasion when the Law Society must get away from its social conscience and get into the industrial arena. There must be introduced some sort of legislation which has sanctions, not only against the capitalists, but against the communists and which will re-establish the rule of law. If we can't do this we won't even be left holding the tail of the horse which has bolted.

"We are a long way from our markets and and we must control our prices and increase our productivity. The means by which that is going to be done is something towards which our Society should be bending its attention. If we don't do so then all the social funds on which we are drawing, legal aid and all the other things, will be unable to be funded.

"As the Monetary and Economic Council said in its February report, if there are no company profits there are no job opportunities. If there are no jobs there will be fewer incomes and less money available, which in itself will aggravate the cost push inflation. It is a question which I feel we must face. It is one in the industrial area, but it is one which we can't avoid too long.

"There are two other aspects of Mr McKay's paper which intrigue me, and I only wish they had been made in 1972 to see what politicians of both parties would have done. Those are the effects of equal pay for women, and one

week's extra holiday. It would have been interesting to see how they would have dealt with the inflationary effects of these when they were so keen on them as planks.

"I think Mr Joel can cease worrying about his problem of liquidity after the Minister of Transport announces the container port next week. He will probably be able to borrow sufficient funds from one of his ad hoc bodies."

MR MCKAY: "Just perhaps picking up a few points made so far, Mr Joel also raised the question, whether the paper proposed remedies or rather only palliatives. I have tried to give an indication of both, but I have been endeavouring to look at the subject from the viewpoint of the profession—what we should be doing about inflation. The decision on remedies rests with Government, with the politicians, but we have a role to play, not only promoting remedies, but promoting a general awareness of the problem, and in particular the injustices of inflation. We also have a duty while we have inflation to come up with palliatives to protect the public while we can. One message that does come through from any consideration of the subject is that the palliatives themselves are complex and complicate the whole situation, and it might well be a lot better if we could attack the problem at the root and seek a proper remedy.

"I am grateful to Mr Patterson for the analogy on weights and measures; I think it is a valid one. Money is for many purposes used as a measure of value, and we use it as if it were a measure when in fact it is not. We treat it as if it were the same as a pound weight, but it is not. It is nothing like it and we don't face the reality of it.

"On the other hand if one is going to talk of real terms and real values, then I agree entirely with what Mr Knowles said. The existing indexes we have, such as the consumer price index, are not appropriate indexes to use for restoring a true measure of value. They reflect not only inflation but also external factors beyond our control. We do need, and could well afford to have, much more sophisticated tools for use in this field, in particular an index which is a true measure of internal inflation, but which does not seek to benefit some sectors of the community at the expense of others by allowing some to be compensated for changes in our terms of trade which ought to be borne fairly by the whole community."

MR POTTINGER (Wellington): "Arising out of Mr McKay's original summary and his comment about palliatives a moment ago, may I just mention one particular and perhaps small aspect, about the question of the injustices of inflation, which are a concern to us all. This is a matter where we, as lawyers, the Law Society can perhaps assist our brethren the accountants. Mr McKay mentioned this briefly in his paper, but it is quite clear that the present documents placed before company shareholders as annual accounts, by reason of inflation of course, bear very little, if any, meaning or association with facts. I think Mr Patterson in his earlier paper this afternoon again mentioned this side of the matter.

"My point is this, that for the moment, as I understand it, the accountant's profession is wrestling with the problem of inflation accounting. Some companies are endeavouring to show their profits in inflation terms, but I am confused with CPP and lifo and fifo and all these other matters they are still trying to resolve. Let me make a plea as a lawyer for this Society to try and assist the accountants to reach a resolution on this matter, because it seems to me for the moment company accounts are fooling shareholders and are fooling us when it comes to advising clients as to investment. I say this, too, as a further extension of what I have been endeavouring to point out. At the end of last year I endeavoured, with the assistance of an accountant, to try to persuade a certain tribunal which sits in the city that we should have a price increase. We put forward an elaborate case, based on the inflationary effects of the accounts, and the inflationary effects and consequent fall in the return on shareholders' funds. It was rejected and the Tribunal continues its present course by holding to historic values.

"Now, sir, as I say, this is a matter not only for that tribunal, but for every shareholder in the country, and for every lawyer advising his client on share investments we should get into. This is one of the injustices of inflation, and is of concern to us all."

THE CHAIRMAN: "For myself I think that is an utterly valid comment with which you closed. We have to recognise historic cost values always quoted in accounts are not just out of date—they are plain false, and it may well be your suggestion is an apt one, that the Society play some part in getting accountants to change their approach on this."

scheme by which instruments are entered by solicitors on the duplicate certificates of title to secure priority. It is a characteristic of these schemes that they purport to fix and secure priority only, the validity of instruments and other documents (which are protected in that respect) not being guaranteed and remaining to be ascertained and checked by solicitors on behalf of their clients. The acceptance of this type of responsibility may become an important and necessary part of practice in the future, even though computers (upon which complete reliance should not be placed) may be expected to revolutionise methods of registration and searching.

DISCUSSION

Chairman: Mr H Tohill.

Commentators: Messrs R B G Mahon, L H McLelland.

THE CHAIRMAN introduced the speaker and the two commentators.

PROFESSOR BROOKFIELD: "No one discussing the Land Transfer system can well avoid the phrase 'indefeasibility of title'. The Chief Justice of Australia recently criticised it as 'jargon'. It is jargon, I suppose, but like so much jargon, it is convenient. We would be hard pressed, I think, not to use the term now. But it is with some relief that one can now relegate part of the controversy that surrounds the law of indefeasibility to the past—namely the 'immediate versus indefeasibility' controversy. It exercised the Society 12 years ago when it last discussed the Land Transfer system, but has gone now with *Frazer v Walker* and it is now settled that a void instrument generally gives the benefit of immediate indefeasibility of title to the person in whose favour, without fraud on his part, the instrument was registered. But the Privy Council left that rather extraordinary case *Gibbs v Messer* intact, preferring to distinguish rather than to overrule it. Much of the first part of my paper is an examination of that extraordinary case, now explained and confirmed by the Privy Council, in which the registered proprietor was fictitious, and an instrument purportedly executed by him in favour of a real person claiming in good faith was held to remain a nullity, despite registration of it.

"To defend *Gibbs v Messer,* as explained by the Privy Council in *Frazer v Walker,* may seem something of a Miltonic exercise—an attempted justification of the ways of God to man—or rather, of the ways of the Privy Council to the profession. But whether or not my defence succeeds, as I think it does, or whether or not the inclusion of *District Land Registrar v Thompson,* within the *Gibbs v Messer* principle, is sound, it still is so that *Gibbs v Messer* stands as law, at least in its peculiar circumstances. There is a practical consequence. *Gibbs v Messer* appears to require a purchaser's solicitor to check, or at least to receive some assurance that the registered proprietor from whom title is to be taken, is a real and living person.

Now, perhaps it would be realistic to say that no purchaser's solicitor is going to make any such check, the *Gibbs v Messer* situation being so extraordinarily rare, and it might be suggested, not worth guarding against. But such a routine check, even though it might be difficult to show that the person who appears on the register is the person purporting to be the registered proprietor now, would have the effect of preventing not just the very rare *Gibbs v Messer* situation, but other circumstances of fraud as well that may more often occur; and that would be a gain. The point is that regardless of on whom it is that the loss falls when there has been fraud, and registration of a void instrument as a result, our concern must be to see that these situations occur very rarely. If it were part of the practice of the profession to make some such check, and to be more particular, the purchaser's solicitor would ask for some assurance. The vendor's solicitor might have to inquire a little bit about a new client. Somebody who comes into the office with a certificate of title in the name of John Smith and says 'I am John Smith'. One should, I think, simply as a matter of course, go a little beyond merely accepting his word for it.

"Turning now critically to *Boyd v The Mayor of Wellington.* If an Aucklander may criticise that case here within the citadel, the

and that sort of arrangement, where the trustees are given specific power to purchase land for investment."

MR ABRAHAM (Feilding): "As a country practitioner I took keen note of Mr McKay's opening comment. The situation of the farmer who made provision for estate duty on a $100,000 estate, and who now dies, and we find that the estate is worth $\$\frac{1}{4}$ million. This is the sort of thing which is going on and the family is faced with the sad fact that what they have had perhaps for two or three generations has to be sold in order to meet the Commissioner of Inland Revenue. As a palliative I wonder if the Society should not press for an amendment to the Estate and Gift Duties Act to allow a deferment of payment of duty attracted by income producing assets for a number of years, perhaps even 10 years provided interest at a reasonable rate is paid to the Department. This would overcome the sort of problem which we face in the country districts all too frequently.

"There are a couple of other comments I would make. As far as an income for the widow is concerned I have myself from time to time provided that there shall be a certain proportion, perhaps one and a-half, perhaps twice the income received by a shop assistant under the award current in the district. I hope it works. A minor palliative, the complaint made of delays of compensation under the Public Works Act. This is one which I have to look at from time to time and there is provision, which I don't think is used frequently enough, for payment of compensation immediately it has been agreed upon, and for the position of the expropriating local authority or the Crown to be protected by the registration of a compensation certificate. This procedure is not used nearly often enough in my view."

THE CHAIRMAN: "I am certain there is not a will draftsman present who when he puts a will in the strongroom does so with the earnest hope no other lawyer will ever look at it."

MR GEDDES (Auckland): "Mr McKay accepts that the use of indexing is itself inflationary, and I understand that he therefore has to say he has to limit it in certain cases. Alternatively, that we have to use an index which excludes completely foreign influences. So how does one go about starting an index which does not include foreign influences if it is to be of any use at all to anyone who is interested in preserving his capital. A farmer's total receipts is dependent entirely on overseas influences, his fertiliser—the total cost would be dependent on overseas influences—his motor vehicles, whether they are totally made up in England or partly made up here, are dependent on overseas influences, and I want to ask Mr McKay whether the suggestion he makes that we should have an index not including any foreign influences is his own original thinking, or whether he has some statistician, or some authority."

MR MCKAY: "There are quite a number of questions to be answered. A number of speakers have spoken about mortgages and the indexation of mortgages. There are precedents available for those who want to do it, published precedents. So far as the tax implications are concerned, I have given a reference in my paper to an excellent article in the Victoria University Law Review which gives some excellent guidelines on that. The way is ripe for someone to chance his arm. I won't predict what the outcome would be, but the case is arguable there is authority for treating capital adjustment as not taxable.

"Mr Ellis from Australia said he would not advise his mortgagor clients to sign an indexed mortgage. He may operate in a somewhat better mortgage market than is available in New Zealand at the present time. I am told our mortgagors in New Zealand have no option.

"The question of trustees was also raised. The duty of a trustee to do the fair thing by a life tenant and by the remainder. How he does it at the present time is a major problem. The problem is there, and those who practise in country districts where the division of an estate between life tenants and the remainder is more common than in the city are probably much better qualified than I am to offer a solution to it.

"The suggestion of Mr Riddet that there might be a power to invest in land is to some extent a means of coping with that problem.

"The question of how do you get hold of an index that excludes outside factors; the idea is original in that I had not seen it anywhere before I thought of it, but I am quite sure other people have thought of it independently, but the only place a suitable index can come from is an official source, and my plea is that the Department of Statistics should be upgraded and instructed to provide us with more sophisticated tools than it is able or required to do at present. In the meantime, until it does,

and dealing with Mr Geddes' point with the farmer and the difficulties of using some sort of index in that situation, I think you must look at alternatives. You must perhaps organise the widow's income on a basis that is related partly to a proportion of the income of the farm with perhaps some sort of absolute minimum or some modest indexing if he thinks it appropriate to do so. The other and safer answer is a discretion for the trustees. It does rely on the trustees, but at least it is flexible and takes account of the unforeseeable.

"What I would like to come back to overall, however, is the note on which I opened this paper, that is, what I hoped to do was to increase awareness of the injustices of inflation. The point Mr Patterson made so graphically about our weights and measures. It is an injustice. It is going on in our midst and we should be alive to it and endeavour to avoid its effects, and pressing to have it corrected, both through our Courts and our common law, our legislation and economic measures. Awareness is a first consideration and I think we have a duty to do something about it.

"There has been some concentration in the discussion upon the important matter of the unreality of company accounts, which I have referred to, but I would hate to think anybody in the community would go away thinking this is a problem for companies and their shareholders. It is a problem for the whole country because it goes to the health of the economy. The same with the problem of the farmer, because the farmer who has to find this phenomenally greater amount of duty, and the example that I gave of the increase in the amount of cash that had to be found after only two and a-half years. It is all very well to say his farm has gone up in value, the widow can still sell it and she is better off, but the answer is, is it in the interests of this country and our whole economy that farmers' sons should be driven off the land because of this sort of unreality, and this sort of unplanned, unintended, unthought out side effect of policies we should be trying to bring under control?

"I am sorry if the paper has fallen short, as was previously suggested, of some of the leads which might have been looked for. I think some of the leads have to come in particular fields from those who practise in those fields. The ultimate remedies, of course, have got to come from Government. I hope the paper has contributed at least to the awareness of the problem, and if it has done that I hope the voice of the profession will be heard, and in time measures will be taken so that the problem will be solved at its root."

THE CHAIRMAN: "Your Honours, distinguished guests, ladies and gentlemen: It was never my dream that we would wind up with a concrete motion opposing inflation, or as is more customary in Law Society circles, calling for nominations for a committee to try to stop it. But I am grateful, nevertheless, and I stress this gratitude and I am not calling for a vote of thanks in this respect because my instructions tell me not to. But it would not be appropriate if I let proceedings close today without expressing some gratitude to Mr McKay for a paper which has provoked discussion, and provoked branches of our profession I note, and it was one dealing with such a wide and important topic that I felt it would be very, very difficult to discuss from the floor. I am grateful to all those who contributed for overcoming that difficulty. Mr McKay's paper, I think, has done us a service if only it has drawn attention to the difficulty but made it plain it is a professional one which in our sphere we have to try and cope with. He has emphasised the function which our profession readily adopts today, that if it is something which is socially necessary or desirable, and a good thing for lawyers to participate in, then we will do our bit. That is an important aspect, and there is no doubt that like many papers that have been given at Law Society conventions over the years, they trigger off an educational process which is pretty long at times, but I venture to say, in most cases, successful.

"I thank you very much on behalf of the organisers for the discussion which has come from the floor."

THE LAW AND THE POLYNESIAN

By ROBERT LUDBROOK

Robert Ludbrook completed his law degree at the University of Canterbury in 1959 and his Diploma in Sociology at London University. He was admitted as an English solicitor and practised in England until 1966, when he returned to practise in Auckland where he is a partner in the firm of Cairns Slane Fitzgerald and Phillips.

Drawing on the experience he had gained through working in Citizens' Advice Bureaux in London, he initiated Legal Advice services in New Zealand, and he was a member of the New Zealand Law Society Committee which worked out details of the duty solicitor scheme. He is also an honorary legal adviser to the Auckland Committee on Racial Discrimination. In 1974 he was selected to represent New Zealand at the Workshop on Legal Services for the Poor held at Berkeley, California, and travelled on to England to look at the development of Law Centres. He was recently awarded the Bruce Elliott Memorial Prize for outstanding contribution to the profession.

Above the Bench in each Supreme Court can be seen the New Zealand coat of arms. On the right is a Maori warrior. Facing him a young white girl. The symbolism is clear. Everyone is equal before the law irrespective of race, colour or sex. But recently critics have suggested that our legal system is racist—that Polynesians are "less equal" than pakehas. Lawyers and the Courts have been described as the archetypal white male club. The interrelationship between our Polynesian countrymen and our legal system has suddenly become a burning public issue. It has generated more heat than light.

My aim in this paper is to explore the relationship between Polynesians and the Law. I dwell at some length upon the past because we are all captives of the past. I attempt to analyse the present state of affairs in New Zealand and examine the criticisms that have been levelled against us. I make some positive recommendations for the future.

The Law and the Polynesian—this innocent-sounding title conceals two fallacies.

The Polynesian

We see Polynesians as a homogeneous racial and cultural group. But Polynesia means literally "many islands" and these many islands contain many cultures. We speak generally of "the Maori" but a Maori sees himself in terms of his tribe—Ngapuhi, Ngatihaua or Ngatitoa. The differences between a New Zealand Maori, Cook Island Maori, Tongan and Samoan are more significant than the similarities. A Samoan and Tongan find it difficult to understand each other's language, as do a Niuean and a Samoan. Even such terms as Cook Islander or Tongan are imprecise. The Cook Islands comprise a group of atolls and volcanic islands. The cultures of the northern and southern groups of islands are distinctly different. There are significant differences between the inhabitants of different islands in Tonga.[1]

Our tendency to see race relations in New Zealand as a strict Caucasian/Polynesian dichotomy is confusing rather than helpful.

The law

We tend to assume that our law has some universal quality that transcends national and cultural boundaries. The early editions of Butterworth's Fortnightly Notes in 1925 and 1926 proclaimed:

> "Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in Heaven and Earth do her homage."[2]

Whilst we might not express ourselves in such fulsome terms we are, even today, inclined to to forget when we speak of the law that we are talking about pakeha law—a body of laws which derived from the custom and usage of Great Britain, developed in the British social and political climate, and transplanted in New Zealand just over 100 years ago. Throughout our legal history lawyers have exhibited an un-

1 *Pacific Islanders in New Zealand*, R. L. Challis, Dept of Education, Ch 2; *Understanding Polynesians*, Vocational Training Centre, Ch I & II.

2 Quotation from Richard Hooker, *Butterworths Fortnightly Notes*, 7 July 1925 and subsequent issues.

questioning conviction of the superiority of British law and British values. Our first Attorney-General wrote:

> "... It shall be given to the founders of this colony to be also the instruments of preserving a barbarous native race, and of raising them in the scale of civilisation to a level with ourselves."[3]

Yesterday

Just as a reputable legal historian could write about New Zealand legal history between 1640 and 1840 with hardly a mention of Maori customary laws[4] so we tend to forget that the Maori had a viable system of social control and dispute resolution. I wonder how many here today could pass a simple test in Maori law?

Maori society recognised a complex body of customary law. The guiding principles were the concepts of *mana, tapu,* and *utu.* Whilst there were no written laws, proverbs or *ture* were generally accepted as embodying important principles and were frequently quoted as authority in an argument.[5] Enforcement of these rules was effected partly by internal sanctions (eg loss of *mana* or fear of retribution from the ancestral gods for a breach of *tapu*) and partly by external sanctions (eg compensation (*utu*) being demanded or exacted by a *muru* or plundering party). Ritualised forms of dispute resolution had developed based on confrontation, discussion, conciliation and compensation.[6]

Individual ownership of land was not recognised but land was of great importance to the Maori.

Land had a military and diplomatic—but never an economic—significance; it was not seen as a commodity to be sold or bartered. Land conferred status. It might be handed over as a peace offering or by way of compensation for a wrong or as a gift.[7]

This is a very cursory exposition of Maori customary law. The subject is one of great fascination and I hope some of you may be encouraged to delve deeper.

It is ironic now acculturation of the Maori is well advanced and the "barbarous native race" is well nigh "civilised" that our young people are belatedly turning from their own traditional values and adopting many of the values that the Maori have been persuaded to eschew. Many young New Zealanders are now discovering the advantages of living close to the land, communal living, free and open sexuality, the extended family, economic self-sufficiency.

Some day a book will be written of the arrival of the British legal system in New Zealand. This monolithic legal structure was trundled out to the colonies and makeshift efforts were made to adapt it to the needs of an entirely different race at the other end of the world.

It is interesting that the first recorded attempt at law making was in 1835 in the Hokianga where the assembled chiefs and an Englishman, Thomas McDonnell, passed the "Ardent Spirits Prohibition Act" preventing the landing of spirits.[8] Liquor was seen, even then, as a threat to the Maori and forms a recurrent theme in any account of relations between Maori and pakeha. Still today the head of Auckland police speaks of Polynesians having a big drinking problem and being unable to handle the "white man's fire water",[9] and the recent Royal Commission on the Sale of Liquor refers to the inability of Polynesians to cope with our "sophisticated New Zealand drinking culture".[10] The assumption is that there is some failing or deficiency on the part of the Polynesian. What we should be examining is our own attitudes towards liquor.

In 1838 the British Government was genuinely concerned for the Maori people and fearful that they would meet the same fate as the American Indians or the Australian aborigines who had been exploited by European settlers and dispossessed of their lands.

The Marquis of Normanby wrote in 1839 that the British Government accepted that the paramount consideration in the colonisation of

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[3] William Swainson, *Auckland, the Capital of New Zealand* 1853.

[4] N A Foden, *New Zealand Legal History 1642 to 1842.*

[5] *The World of the Maori,* Eric Schwimmer (1966), p 42.

[6] Ibid, Chapter 10 "Law and Order"; *A Show of Justice,* Alan Ward (1973), pp 4-10; "The magico-religious as a jural mechanism in primitive Maori society", M B Hooker, unpublished thesis, Canterbury University 1965.

[7] *The Purchase of Maori Lands 1865-1892,* M P K Sorrenson, unpublished thesis, Auckland University, 1955, p 195; *Primitive Economics of the NZ Maori,* Raymond Firth (1929), pp 381-383.

[8] *Portrait of a Profession,* R B Cooke QC (Ed), p 18; *A Show of Justice,* p 25.

[9] *N.Z. Listener,* "Not so Softly, Softly" interview of Gideon Tait, 23 November 1974.

[10] Report of Royal Commission on Sale of Liquor in NZ, pp 58, 67, 233.

New Zealand must be the welfare of the Maori.[11] The British Government was extremely reluctant to intervene in New Zealand and did so in order to restrain British settlers and save the Maori from destruction. The urgency of bringing British law to New Zealand was a desire to protect the Maori from the whalers, sealers and traders whom Darwin has described as "the very refuse of our society".[12] They defied Maori *tapu,* cheated and stole from the Maori, and abducted Maori women.[13] New Zealand's first historian considered that prior to the Treaty of Waitangi relations between the Maori and the visitors to the shores of Aotearoa had "degenerated to a war of races."[14]

Our first judicial officer was Thomas Kendall, who was appointed a Justice of the Peace by the Governor of New South Wales in 1814.[15] Kendall's judicial functions were to prevent the landing of liquor, to stop the abduction of the Maori people and to curb unruly Europeans. Without military backing he had no means of curbing the lawlessness that prevailed.[16] Thomas Kendall was a missionary who later fell from grace but he was one of the few Englishmen who perceived the richness of Maori culture and religion.[17]

Thus British law was introduced to New Zealand in a spirit of benevolent paternalism. It soon became a story of disappointment, compromise and selling out to political pressures of the white settler. The law, instead of being the protector and friend of the Maori, soon came to by a means of exploitation and expropriation.

Almost without exception, whenever the Courts made important decisions concerning the legal rights of the Maori, the position of the Maori suffered in relation to the pakeha.

The Treaty of Waitangi is an example. The treaty was "sold" to the Maori chiefs on the basis that it would free them from harassment and exploitation by the unruly whites. It would give them the protection of British law yet would enable them to preserve their lands and their way of life. Tamati Waka Nene, before signing the treaty, said to Hobson:

> "remain for us a father, a judge, a peacemaker. You must not allow us to become slaves. You must preserve our customs and never allow our lands to be wrested from us . . ."[18]

In four important respects the promises of the Treaty turned out to be illusory:

(1) *Maoris were soon held to be subject to British law*

The Treaty of Waitangi had given the Maori the "rights and privileges of British subjects". But the Maori had not surrendered themselves to the authority of British law. Few Maoris spoke English and those that did knew nothing of British laws. Yet it was soon decided that the receiving of the rights and privileges of the British law rendered them subject to the same law.

At the trial of the Maori chief Maketu, on charges of murder at the first Supreme Court sitting in Auckland in 1842, Mr Brewer was assigned as counsel to conduct Maketu's defence. Mr Brewer (who had been briefed only an hour before the trial and had not seen the depositions until he arrived at Court) raised a preliminary objection that Maketu had no knowledge of British laws and was not therefore subject to the jurisdiction of the Court. The Judge held that he had jurisdiction and Maketu was subsequently found guilty and hanged.[19]

The matter was placed beyond doubt by the New Zealand Government Act 1846, which provided that the New Zealand Government should be the Government of the Maori in all their relations to or dealings with each other and the English Laws Act 1858 by which the laws of England at 14 January 1840 were deemed to be in force in New Zealand.

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11 EPP 1940 [238], pp 37-42. See also despatch to Captain William Hobson, 14 August 1839, in which Lord Normanby commented, "the white man's progress in the new world has generally been over the bodies of the aborigines".

12 Quoted in *A History of New Zealand,* Keith Sinclair (1959), p 45.

13 Ibid, p 36.

14 Dr A. S Thompson, *The Story of New Zealand* (1859).

15 *Portrait of a Profession,* p 18. It has been argued that Kendalls appointment was illegal. *British Policy in the South Pacific,* John Ward, p 38.

16 *A Show of Justice,* p 14.

17 *The Legacy of Guilt,* Judith Binney (1968) gives a fascinating account of the life of Thomas Kendall.

18 Quoted in *A History of New Zealand,* Penguin Edition, p 69.

19 *NZ Herald,* 28 February 1842. A good account of the trial is given in *Motuarohia,* M Leonard (1959), Ch 5. Peter Burke in an essay "Thoughts on Racism in New Zealand" suggests that Maketu's trial was deliberately delayed one day so that a pakeha, John Hopwood, could be tried—as an example to the Maori people that both races received equal treatment by the Courts.

(2) *In some areas Maoris were denied access to the Courts*

Until the Unsworn Testimony Ordinance was passed in 1844 some Magistrates refused to accept the evidence of non-Christian Maoris in claims against settlers because it was not given on oath.[20]

Where disputes arose between Maori land owners and the Government Land Purchase Officer, the Maoris were deprived of any right of recourse to the Courts. The Government's land dealings were "acts of State", being an exercise of the Royal Prerogative, and the Supreme Court held that the mere assertion of title by a Government Land Purchase Commissioner ousted the jurisdiction of the Courts.[21]

(3) *Maori laws and customs were not recognised*

The British Government intended that native districts should be set up where native custom would have the force of law on the principle that it was expedient that the customs and usages of the Maori be maintained in so far as they were not repugnant to the general laws of humanity. This was enacted in s 71 of the New Zealand Constitution Act,[22] which still remains in force today, but no native districts were ever set up.

In a number of Supreme Court decisions the importance of Maori laws and customs was whittled away. The Chief Justice, Sir James Prendergast, decided in 1888 that marriage according to Maori custom was not recognised in New Zealand law, reasoning that Maoris were British subjects and their relations with each other were governed by the laws of the land and not by customary usages.[23]

In *Wi Parata v Bishop of Wellington*[24] the Chief Justice took the argument further finding that:

> "On the foundation of this colony the aborigines were found without any mode of civil government or any settled system of law and . . . the Crown acquired title to land by discovery and priority of occupation of a territory occupied only by savages."

Both the New Zealand Constitution Act 1852 and the Native Rights Act 1865 made specific reference to the ancient custom and usage of the Maori, but the Chief Justice concluded without hearing any evidence on the subject that no such body of law existed.

The law which set out to give due recognition to Maori custom ended up by denying its existence. But worse was to come. Maori custom was later actively suppressed. The tohunga was central to Maori society yet the church and the medical profession saw him as a threat. The preamble to the Tohunga Suppression Act 1908[25] is clear evidence of the antagonistic and patronising attitude of the pakeha lawmakers towards the Maori:

> "Whereas designing persons commonly known as tohungas practise upon the superstition and credulity of the Maori people by pretending to possess supernatural powers in the treatment and cure of disease, the foretelling of future events and thereby induce Maoris to neglect their proper occupations and gather into meetings where their substance is consumed and their minds are unsettled to the injury of themselves and to the evil example of the Maori people generally."

One is reminded of the Maori who suffered burns to both legs from stepping into a boiling pool. The pakeha doctor and the Maori tohunga both wanted to treat him, but as they could not agree it was decided that each would treat one leg. Needless to say, the leg treated by the tohunga healed more rapidly![26]

The Maori language was similarly suppressed: "The Education Department declared total war on the Maori language . . . generations of school children were chastised for speaking the language learned at their mother's breast."[27]

(4) *Maoris were at first denied the right to vote*

One might assume that the rights and privileges conferred by the Treaty of Waitangi would include the right to vote. But the British Government wavered in its approach to the

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20 *A Show of Justice*, p 66.

21 *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur (NS) SC 72; *Nireaha Tamaki v Baker* (1894) 12 NZLR 483.

22 1852 (UK), NZ Statutes Reprint, Vol 11, p 116.

23 *Rita Peti v Ngairaihi te Paku* (1889) 7 NZLR 235, 239.

24 (1878) 3 NZ Jur (NS) SC 73.

25 1908, No 193. Repealed in 1962.

26 Quoted in Raeburn Lange, "The Revival of a Dying Race—A Study of Maori Health Reform 1900-1918" (1972), unpublished thesis, Auckland University.

27 B G Biggs in "The Maori Language Past and Present" in *The Maori People in the Nineteen-Sixties* (1968), referring to the Native Schools Amendment Act 1871.

question of whether "savages" should be given a vote. The British sense of fairness leant towards giving the Maori people equal voting rights and the Act of 1852 made no distinction between Maori and pakeha. Yet lawyers raised doubts as to whether the Maori should have a vote and the matter was eventually decided in 1859 when an opinion was obtained from the Imperial Law Officers who concluded that the Maori could not vote because he did not fulfil European property qualifications.[28]

The position of the Maori in these vital matters has been summarised:

> "In so far as all existing laws were concerned, the Maoris were to be subject to laws drawn up in a language that they did not understand; in one all-important matter, namely, the ownership and disposal of land, they were not to have the protection of law at all; and in making of new laws they were to have no part."[29]

This seemed a strange result of a policy that guaranteed to the Maori chiefs all the rights and privileges of British subjects.

The Treaty which even today symbolises the coming together of the Maori and pakeha turned out to be, in law, worthless—just a scrap of parchment.

In *Te Heuheu Tukino v Aotea District Maori Land Board*[30] the Privy Council upheld the New Zealand Court of Appeal which had decided that the Treaty of Waitangi had no force in law.

The Treaty, which had been relied upon by pakeha lawyers to support their argument that Maoris were subject to British law, was found by pakeha Courts to have no legal effect when a Maori sought to rely upon it. No wonder it has been described as "worthless and of no effect—a non-treaty".[31]

Living in dreamland

F E Maning described the situation in 1869 "the law is a sham, the Government is a sham, the Parliament is a sham, we are all talking nonsense to one another and making believe we believe each other . . . We shall live in a dreamland until we conquer the rebel natives . . . and when we are absolute masters of the country it will be time enough to talk of technical law and civilised justice."[32]

There was an air of unreality surrounding many of the attempts to introduce British law to the Maori. Some of the accounts by R D Fenton and H Turton, the first Magistrates appointed in the King Country, contain elements of high farce. Because there were no pakeha lawyers available enterprising young Maoris were enlisted as *roias* (lawyers). Everyone entered enthusiastically into the litigation game without really understanding the rules. The occupation of one of the officials recruited by Fenton was recorded as "retired cannibal".[33]

Clarke quotes a case in which a Maori whose wife had been seduced by a settler recovered her in the traditional method of dragging her off by force. He was charged with assault and was reminded that his proper remedy was to bring a damages claim in the Court of Requests for criminal conversation![34]

Maori land

The original expressed intention of the British Government was that white settlers would buy from the Maori only waste lands surplus to Maori requirements. By the Treaty of Waitangi, the Queen granted the Maori full exclusive and undisturbed possession of their lands, estates, forests and fisheries.[35] Despite this, the law soon became for the Maori a process by which they were divested of their land and thus of their status and dignity.

The full story of Maori land transactions has been related elsewhere.[36] The initial lofty ideals and enlightened policies were gradually eroded by compromise, greed and corruption. The history of land dealings between pakeha and Maori is hardly likely to endear the Maori people to British law. One or two instances can be given.

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[28] The House of Representatives decided to seek an opinion from the Imperial Law Officers who advised that tenure or occupancy as understood by English law were required and that Maori customary tenure did not fulfil these requirements. PP 1860 E7, pp 1-7.

[29] *Race Conflict in New Zealand 1814-1865,* H Miller (1966).

[30] [1941] NZLR 590; [1941] AC 308.

[31] A P Molloy, "The Non Treaty of Waitangi" [1971] NZLJ 193.

[32] F E Maning to J Webster, 21 March 1869.

[33] Journals of R D Fenton AJHR 1860 E-1c and H H Turton AJHR 1862 E-5A or read the delightfully written accounts in John Gorst *The Maori King* (1864), Chapters VI and XII.

[34] George Clarke, Chief Protector of the Aborigines in a letter to the Colonial Secretary, 31 July 1843.

[35] Second Article of Treaty.

[36] Eg *The Origins of the Maori Wars,* K. Sinclair (1961), *The Purchase of Maori Lands,* M P K Sorrenson (1955).

By the Native Land Act 1865 the Court awarded an interest in land only to Maori claimants who appeared at a sitting of the Court and proved ownership. Maoris with legitimate claims had to travel long distances to the hearings. The system of notification was haphazard and there was no right of appeal or rehearing for someone who failed to appear at the original hearing. Often claims were decided without the true owner knowing that the matter was under consideration.

Those who attended often lost their rights. No more than 10 Maoris could appear on the title and if more than 10 claimants established their rights they were left to decide among themselves whose names should be recorded on the title. This was a deliberate misinterpretation of s 23, which required land to be *subdivided* until 10 or fewer owners appeared on the title; yet the misinterpretation was never challenged in the Supreme Court. Maori custom was deliberately overridden.[37]

If Maori landowners were unwilling to sell it was a common practice for shopkeepers to allow unlimited credit and then turn round and threaten the Maori with imprisonment for non-payment of debt, persuading Maori owners to sign a mortgage. Mortgage payments were not kept up and the mortgagor foreclosed. There are accounts of Maoris being plied with liquor and persuaded to sign away their rights in land. Many early Court sittings were held in public houses and some pakeha opportunists acted in flagrant breach of the Sale of Spirits Ordinance 1846, which prohibited[38] the sale of liquor to Maoris. Nevertheless, an eminent Supreme Court Judge saw no reason why transactions should be invalidated because part of the consideration had been given in liquor.[39] Land hungry purchasers stirred up trouble between Maoris, supplying guns to the land sellers and refusing arms to those who would not sell.[40]

Land dealings resulted in acrimony and litigation between Maori and Maori, Maori and pakeha. The *New Zealand Herald* in 1883 commented:[41]

> "The working of the Native Land Court has been a scandal to contemplate for many years past, but as the chief sufferers were the Maoris, nobody troubled themselves much . . . The cases went on month after month . . . giving occasion for an enormous waste of money . . ."

During the interminable hearings the Maori owners lived in a European township. They lived on credit and high rates of interest were charged.

> "At the conclusion of the Court they had entirely divested themselves of their land, and had spent the whole of their money . . ."[42]

These squabbles over land had a demoralising effect on the Maori people. They left their agricultural holdings and their traditional pursuits and lived in wretched conditions in the towns. Many became ill and died. They had to pay fees to agents, surveyors and lawyers. Some of the chiefs were involved in continuous litigation to the enrichment of European lawyers and impoverishment of themselves.[43]

In one case which involved a number of Court hearings the lawyers' fees alone amounted to £18,000.[44] One Maori chief is reported to have said:

> "The law has been our ruin. In the times of our ancestors we received no hurt similar to this. Give us back what land is left."[45]

The legal profession

As one looks at legal professional journals through the years one is struck by the lack of interest or concern shown by the legal profession at the plight of the Maori people.

Like lizards scurrying back to familiar surroundings the first lawyers to settle in New Zealand appear to have been chiefly preoccupied in trying to build a little enclave of old England in the antipodes.

The requirements for admission to practice of the law in the 1870s included Latin, Greek, Euclidean Geometry, English Constitution and English Mediaeval History. Candidates were not expected to know anything of Maori custom or language. Even today these subjects are barely touched upon in our law courses. Reading through the *New Zealand Jurist* of the 1870s one observes that the chief concern of Judges and lawyers of that time was with their own inter-

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37 *The Purchase of Maori Lands,* M P K Sorrenson, pp 54, 55.
38 Ibid, pp 56-58.
39 Richmond J in Report for the Hawkes Bay Native Lands Alienation Commission 1873, AJHR 1878 G7 App 3.
40 *A History of NZ,* p 124.
41 *NZ Herald,* 2 March 1883, p 4.
42 Ibid.
43 *The Purchase of Maori Lands,* pp 147, 200.
44 Ibid, p 201.
45 Mohi Rakuraku reported in A McDonald Te Hekenga 1929, p 204.

nal rituals and traditions. The question whether wigs and gowns were appropriate garb was debated.[46] Mr Justice Johnston admonished counsel in Christchurch for wearing coloured clothes under their gowns.[47] There was controversy whether counsel's seniority should be determined from the date of admission in England, or the date of admission in New Zealand.[48]

The legal profession has not thrown up men like Peter Buck and Maui Pomare, who did so much to bring to the Maori European knowledge in the fields of health and medicine and to bring to pakeha doctors and health nurses an understanding of the Maori.

Whilst the great Maori leader Apirana Ngata had a law degree, he worked mainly in other fields.[49]

When one examines the record of the legal profession since the first lawyer arrived in this country in 1840, one cannot but remark on the insensitivity of the profession as a whole to the law as it affects and involves the Polynesian.

It is only in the last five years, and then as a result of outside critics, that there has been a dawning of awareness amongst lawyers that the Polynesian members of our society are at a significant disadvantage in relation to our legal system.

This lack of awareness is by no means restricted to lawyers, but I do suggest that our slavish adherence to British traditions, our unquestioning belief in the superiority of British laws and the cloistered camaraderie of the legal profession have obscured from us the realities. We all take considerable pride in the Rule of Law—yet we have allowed the law to be the particular preserve of the white middle-class male.

Consider the failure of the Maori to secure legal representation in our Courts. Lawyers and Magistrates were closest to the situation. In 1960 Hunn commented that certain Magistrates had noted "Maoris often come to Court with no idea how to plead or defend themselves". The Secretary of Justice of the day called a meeting to discuss this phenomenon and suggested that Welfare Officers might be detailed to appear in the Courts. Hunn reports that the Magistrates and Probation Officers asserted strongly that there was no problem and that if Welfare Officers were appointed it would be resented as "a reflection on the competence of the bench."[50]

Today

Until the last decade it was frequently asserted that New Zealand had the best race relations in the world. In 1960 J K Hunn believed that the Maori people were moving at an accelerating pace towards full integration and that they should within two generations be fully integrated.[51] Lord Denning at the 1966 Law Conference expressed admiration for the way in which the Maori people have been integrated into the New Zealand community and held our country out as a model for all.[52]

In the last five years our self confidence has been rudely shaken. There are a number of reasons for this:

Looking beneath the surface

People have, for the first time, been looking beneath the apparently unruffled surface. To some extent the sudden consciousness of racial issues has been due to overseas influences. J P Ausubel, an American psychologist, was one of the first to point out the inconsistency of the average New Zealander who could in one breath utter self-congratulatory platitudes about our racial paradise and in the next display blatant racial prejudice.[53] Literature has reached New Zealand from England and the United States of America, where much thought and research has been devoted to race relations.[54] Separate departments in many of the universities in the United States are devoted to the study of racial issues.

Statistical evidence

Statistical evidence has recently become available, which has demonstrated conclusively that Maoris and non-Maori Polynesians suffer a disadvantage when facing our judicial system.

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46 2 NZ Jur (NS) 22.
47 Ibid.
48 Ibid, pp 77, 89-91, 137.
49 A useful summary of the life and work of each of these great men appears in Raeburn Lange, *The Revival of a Dying Race.*
50 Report on Department of Maori Affairs, J K Hunn (1960), pp 34, 35.
51 Ibid, p 14.
52 [1966] NZLJ Law Conference Issue, p 167.
53 *The Fern and The Tiki,* D P Ausubel (1960), chapters 6-7.
54 Eg *Racial Discrimination in England,* W W Daniel, Pelican Original; *Race and Law,* A Lester and G Bindman, Penguin (1972); *Race Crime and Justice* (Ed) C Reasons & J L Kuykendall (1972); *White Racism—Its History, Pathology and Practice,* B W Schwartz & R Disch.

In the Justice Department report "violent offending" figures given show that twice as many non-Maori offenders facing serious criminal charges were represented by a lawyer than Maori offenders in the same situation.[55]

At about the same time the Nelson Race Relations Action Group arranged for every Maori appearing before the Nelson Magistrate's Court to be represented by a lawyer. As a result of their efforts 79 percent of Maoris appearing before the Courts were represented by counsel as compared with 19 percent prior to the introduction of the scheme. Not guilty pleas entered on behalf of Maori defendants increased fivefold to a figure equivalent to the pakeha rate. When represented by counsel Maori conviction and imprisonment rates dropped significantly. Many more of the Maoris represented by lawyers were dealt with by way of a fine than had previously been the case. The Nelson group asserted that the so-called Maori crime problem was in fact largely, if not exclusively, a non-representation problem. If Maoris had the benefit of legal representation the apparent high rate of Maori offending was reduced to a level equivalent to the pakeha rate.[56]

In a subsequent monograph, Sutherland and Galbraith have looked at the question of Maori participation in the judicial system. They point out that although Maoris represent 10 percent of our population and over 50 percent of our prison population, only 4 percent of our police, 4.6 percent of our probation officers, 2.5 percent of our Justices of the Peace, 2 percent of our Magistrates and none of our Judges are Polynesian. They argue that pakehas dominate decision making and impose their standards on society as a whole and contend that because of the dominance of the pakeha in positions of authority in our judicial system the Courts do not relate adequately to Maori values and attitudes.[57]

Alan Ward in his recent book, *A Show of Justice*,[58] is critical of the fact that Maoris were not encouraged to participate in the judicial system; they were not installed beside the white man as judges or administrators nor were given positions of authority in the police or military forces.

Many lawyers have reacted so violently to the imputation by Sutherland and others that the New Zealand judicial system is "racist" that insufficient attention has been given to their arguments and the figures they rely upon.

The word "racist" is an emotionally charged term and is usually taken to imply personal colour prejudice or bigotry. Yet the definition consistently used by Sutherland in his writings is:

> "A society is racist when one group views its cultural values, life styles and socio-economic interests as superior to those of other groups and implements these assumptions through societal norms."[59]

Elsewhere he says:

> "The judicial system is racist by virtue of its existence as a pakeha system in a multi-racial society."

According to these limited definitions one can hardly dispute that our society and its judicial system are "racist".

Because of the emotional overtones that surround the term "racist", its use can often hinder rather than help understanding. I believe that on occasions it has been used mischievously and irresponsibly. I agree with Sir Guy Powles who has written:

> "I do not believe that the New Zealand public is sufficiently understanding as yet to give objective consideration to what is meant by the word 'racism'."[60]

He agrees that we suffer from institutional racism but points out that this is a largely unconscious development of institutions and practices which prevent the full development of a multiracial or multicultural society. The term "racist" has become a smear word and the point of what is a serious criticism is often lost in the vituperative cross-fire.

Our Minister of Justice appears to be conscious of the distinction. He has given "loud, clear and emphatic refutation to charges of deliberate racial discrimination by the Magistracy in general or any member of it in particular".[61] But he has accepted "there is some truth in charges that the New Zealand system of justice

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55 Research Series No 2 (1971), pp 34, 35.

56 "Justice and Race: A Monocultural System in a Multicultural Society" (1973), reprinted [1973] NZLJ 175.

57 "Maori Representation in Pakeha Justice" reprinted by NZ Race Relations Council (1974).

58 pp 312-315.

59 From D H Krichbaum *The Christian Century* (1973).

60 Quoted in Care magazine, 4 April 1973.

61 Address to Magistrates' Conference, 6 April 1973.

is racist". He thinks we are inclined to accept that what is good for the pakeha is good for the Maori and wonders whether we do not have an unconscious or unrealised bias.[62]

There is one particular salvo in this battle which I think deserves careful scrutiny. It has been suggested in several quarters that groups speaking out about racial issues are themselves inciting racial disharmony. I do not accept this criticism.

Whilst extravagant language has been used it is usually an understandable expression of the pent-up grievances and frustrations of the groups concerned. It is only through their outspoken statements that we have been shaken from our complacency and forced to re-examine our values. Most New Zealanders now realise that our racial paradise is more wishful thinking than reality.

It is disconcerting that it took a scientist to point out the inadequacies of our legal system. However, one can take some comfort that the legal profession have been eager to take up the challenge. Lawyers have on their own initiative and with the support of their local Law Societies set up legal advice centres in areas such as Porirua, Newtown, Ponsonby, Otara—all areas which have a large number of Polynesian residents. Lawyers in several centres set up and ran voluntary duty solicitor schemes and the profession took the lead in formulating working proposals for the national scheme which is now operating so successfully.

Particularly gratifying has been the determination of the lawyers involved that the scheme should be a real and effective bridge between the Polynesian and the legal system. In Auckland, as a result of the efforts of the lawyers involved, the Justice Department now employs Maori and Samoan assistants to help the duty solicitors and the Courts. Credit must also be given to the Magistrates who have, in most cases, given enthusiastic support and encouragement.

The problem of the disproportionately low number of Maori and Pacific Island people in positions of authority in our judicial system is less a racial question than an educational one.

Achievement of Maori and Pacific Island people throughout our educational system is disappointingly low. In the United States of America they have tackled this problem head on. Some university law schools employ recruitment officers who go out into the community and encourage blacks and members of other minority groups to enrol. The law schools set aside a number of places for students from underprivileged minority groups. I believe we should be doing something similar in New Zealand.

The criticism will immediately be levelled that if candidates for law school or the judiciary are selected upon racial grounds rather than upon merit this will result in some diminution in quality. This proposition is arguable, but in my view, the advantages to be gained from a better racial balance in the profession and in the judiciary would outweigh any diminution in quality.

Closer contact between the races

A third factor that has exacerbated racial tensions has been the closer contact between the races than hitherto. The movement of the Maori from rural to urban areas and the immigration to New Zealand of Pacific Islanders are two of the most significant demographic changes in our recent history. Hunn rather naively believed that closer contact between the races would bring greater harmony.[63] As I see it our good record of racial harmony is largely due to the fact that Maori and pakeha have lived apart. As the late Ralph Hanan has put it, "conflict was absent because contact was absent".[64]

He saw that the movement of Maori and Pacific Island people into our larger cities must inevitably create strains and predicted that unless both sides showed a willingness to adjust more serious conflict would result.

He made the point that:

> "We are not going to get anywhere by pretending that if we ignore problems or deny that they exist, they will go away. Nor does it do service to any race. To admit that there are difficulties, to examine them frankly but dispassionately and to look for solutions is to show neither discrimination nor intolerance."[65]

How apt those words seem today when so many New Zealanders take an ostrich-headed attitude

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62 Press Association report of address to NZ Institute of Directors in Wellington 1974. Also reported in *Te Awatea*, Vol 2, No 2, p 3.

63 Report on Dept of Maori Affairs, J K Hunn (1960), p 14.

64 Human Rights: The Prospect.

65 Ibid.

towards race relations. People who point out the deficiencies of our past and present attitudes are labelled "troublemakers", "intellectuals" or "stirrers".

There have been disturbing signs of late of a reactionary element in our society making statements that can only be described as irresponsible. Our Leader of the Opposition has suggested that offending Polynesians be sent back to where they came from, but does not suggest that offenders of British stock be repatriated to the United Kingdom.[66]

Consider also the intemperate statements of Gideon Tait in his *Listener* interview,[67] of the Minister of Police in his address to police trainees,[68] and the public comment which followed these outbursts. There is a polarisation of attitudes and increasing antagonism between the liberal and reactionary points of view.

Growth of a Polynesian criminal subculture

Department of Social Welfare statistics published in "Juvenile Crime in New Zealand" show that 40 percent of all Maori boys could be expected to face a children's Court by the time they reach their 17th birthday. Only 10 percent of non-Maori boys could be expected to do so.[69]

The figures are of considerable concern. One of the most vivid memories of my recent trip to the United States was a visit to the San Francisco County jail. Nearly all the inmates were black and most had a very deep sense of injustice and of being victims of racial discrimination. We are heading towards a situation in which Maoris and Pacific Islanders will form a distinct criminal subculture in our society. It is impossible for me to analyse the numerous factors contributing to such a situation, but it is a matter of urgent concern.

I cannot accept that in a generation or two matters will resolve themselves. Experience overseas is that inexorably the gap widens. Poverty, educational disadvantage and criminality are interconnected and are cyclical. Oscar Lewis has written of the "culture of poverty", which perpetuates itself from generation to generation through the children, who absorb the basic attitudes and values of the subculture.[70]

Tomorrow

We have to decide what sort of society we want in New Zealand. Even today, there is a great deal of looseness of thinking on this topic. Separation, Fusion, Symbiosis, Cultural Pluralism, Assimilation, Integration. Do we really understand the alternatives open to us?

The *New Zealand Herald* in 1960 thought:

> "The painless absorption of the fast growing Maori population into the economic and social structure of the European is the great problem affecting both races in New Zealand today."[71]

Many of our leaders still see our future in terms of assimilation rather than integration.

Integration signifies cultural diversity in an atmosphere of mutual understanding and respect and leading to mutual enrichment. The aim of integration is to form one nation wherein Maori culture remains distinct and valued for itself. What have we done to move towards integration in our legal system?

If we accept integration as our goal we must acquire a deeper consciousness of Maori values and Maori culture and show a willingness to share power. In terms of our legal system we should be thinking, researching and discussing the issues. We must modify the judicial system so that it has greater relevance for the Polynesian and there is easier access to the legal system at all levels by the Maori and Pacific Islander.

Many of our traditions, rooted as they are in English legal history, should be re-examined. Why, for instance, should we perpetuate the tradition of wigs and gowns? Why do we cling so tenaciously to our pedantry and archaic language. Are these traditions appropriate to a multicultural South Sea Island society in the twentieth century? Are they positively harmful in creating barriers? That the Maori responds to informality is evident from the way in which the Maori Land Courts are conducted.

The time has come when lawyers must resolve to use the law so that it is working for—not against—the Polynesian.

This involves a significant re-orientation of our thinking. I would like briefly to examine two

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66 R D Muldoon, *The Rise and Fall of a Young Turk.*

67 *NZ Listener,* 23 November 1974, p 13.

68 *Auckland Star.*

69 Dept of Social Welfare Report 1973, p 16.

70 "The Culture of Poverty", article by Oscar Lewis in *Scientific American*, October 1966, pp 19-25. Lewis alleges that the subculture of poverty is "likely to be found where imperial conquest has smashed the native social and economic structure".

71 Editorial, 23 May 1960.

concepts that are of fundamental importance in any consideration of racial issues in the United States, and which we should be examining closely to see whether they are relevant in the New Zealand context.

Positive discrimination (or reverse discrimination)

In the United States this concept is fundamental to race relations policy. Where a racial minority group has become socially, politically and economically disadvantaged it is not sufficient to provide equality of opportunity. Once started on a downward spiral the momentum is such that the disadvantaged group continues to fall further and further behind unless positive measures are made to bring them up to a position of true equality.

Desegregation, Operation Headstart, the Poverty programme, the Legal Services programme and other political and social measures have been aimed, with varying success, at narrowing the gulf between the white Anglo-Saxons and the blacks, American Indians and Spanish-speaking American people. In the field of employment, *quotas* have been introduced. All firms employing more than 15 people are required to have a racially balanced work force. This means that employers must positively discriminate in favour of minority groups in order to achieve a racial balance. Many universities also operate a quota system reserving places for members of under-privileged minority groups.

Positive discrimination is not entirely foreign to New Zealand. Schools in this country with a large proportion of Maori and non-Maori Polynesian children have been given special status with smaller classes and other benefits. In the housing field the Department of Maori Affairs has given special advantages to the Maori people. I see positive discrimination as a temporary stage in which an attempt is made by society to reverse the situation of those groups whose status and economic position has suffered because of earlier discriminatory practices.

Proactive programmes

A distinction is commonly made between reactive and proactive programmes in social planning in the United States. The distinction can best be illustrated by an example in the field of legal aid.

To open a neighbourhood law office in, say, Mangere and to deal with the clients that come through the door is an example of a reactive programme—it reacts to the needs of the community.

A proactive programme would seek to identify pockets of injustice and discrimination in the community and would devise and design strategies and programmes to combat these injustices.

In the race relations field our approach to date has been largely reactive. We open a Race Relations Conciliator's Office and investigate complaints. A proactive programme might send out matched pairs—say a Maori and pakeha matched for age, sex, class and education—who would separately apply for flats, motor insurance, hire purchase, car rental. In this way the parameters of racial prejudice could be charted —and once charted positive measures could be devised to combat it. The Race Relations Act has merely sent racial discrimination underground. Many landlords have devised ways of avoiding letting to Polynesians without fear of falling foul of the Act.

For those who accept my general argument that because of the unconscious racial bias which permeates our legal system Polynesians in our community have been in the past and continue to be at a disadvantage, I hope that this paper may have encouraged a determination to avoid the errors of the past and to take positive steps to redress the balance.

As lawyers and concerned citizens what can we do?

First, we must become more knowledgeable, more aware, more sensitive to Polynesian culture. A few examples of areas where cultural differences might lead to misunderstanding and even injustice are:

Family ties

Lawyers working in the Ponsonby Legal Advice centre have noticed that many Maoris and Pacific Islanders come in a family group, all members actively taking part in the interview. Pakehas tend to keep their worries to themselves. Polynesians share them with friends and family. Family ties are all-important to the Maori and Pacific Islander. A Maori expects to share his home, his food, and his time with his relatives. Family support is often uncritical and when one of the family is in trouble with authority the family will close ranks to support and protect him.

Attitude towards authority

D P Ausubel described the attitude of the Maori toward the pakeha as being a mixture of shyness and guarded friendliness. Until a Maori feels he can trust a pakeha he will "tell you in a very courteous and respectful manner exactly what you want to hear".[72] Dr Rangi Walker argues that because three generations of Maoris have been reared under conditions of accommodation and compliance towards the dominant pakeha, Maoris are often *whakama*—that is shy and uncommunicative—when face to face with pakeha authority.[73] It is important to know of these cultural traits when considering an incriminating statement made by a Maori defendant.

Attitude towards property

Whilst most pakehas take pride in acquiring and owning property Maoris derive satisfaction and enhance their status by sharing what they have. If it is raining and he has no coat, it is natural for a Maori to borrow someone else's. The taking of another family's property was a recognised method of redressing real or imagined wrongs in Maori society. A *muru* or plunder-party would take some of the offender's goods in compensation for the wrong.[74]

Negative questions

If you ask a Polynesian witness a negative question he will answer this in the opposite way to a pakeha. Most Auckland Magistrates are aware of this and often require counsel to rephrase questions.[75]

Musu

This is a state to which Pacific Island people, especially Samoans and Niue Islanders, are subject. The person affected will take on a blank expressionless look and will remain silent or answer questions in monosyllables. A state of *musu* can be brought about by shame, guilt or a sense of injustice. A pakeha may interpret this as surliness or insolence or may believe the person is speechless because he has been caught out in a lie.[76]

Reaction to insults

Pacific Islanders are generally most polite to strangers but a slight or insult is considered just as hurtful as a blow. Light-hearted banter or teasing can provoke an angry reaction.[77]

If we are to achieve a legal system that is truly multiracial and multicultural, we must as Judges, advocates or practitioners understand these cultural differences. We must also examine the system and find ways of making it more relevant, more accessible to New Zealanders with a different cultural background to our own. I would like to make some positive proposals.

Summary and recommendations

(1) *Courses in Polynesian culture*—Our police and judicial officers should be encouraged to attend courses in Maoritanga and non-Maori Polynesian language and culture. Whilst in California last year I visited the California Centre for Judicial Education and Research, which runs a two week residential continuing education programme for Judges each year. They also provide audiotape and videotape refresher courses. Our judicial officers should be encouraged to participate in some similar ongoing training programme. Sessions on Polynesian culture could be introduced as part of the course.

(2) Law Societies should take the initiative in organising educational and "consciousness-raising" seminars in which pakeha lawyers could learn more of Polynesian language and culture. These could possibly be held on a marae. Lawyers should be encouraged to attend university extension courses on Maori language and culture—in the larger centres there might be enough lawyers interested to form a separate study group.

(3) *Office procedures*—We should, perhaps, look at our own receptionists, offices and office procedures. Many Maoris have told me that they feel most uncomfortable in a lawyer's office. They are often overawed or humiliated by an insensitive receptionist. One Auckland law firm with a large Polynesian clientele makes effective use of an open plan office, congenial surroundings and staff drawn from a variety of cultural backgrounds. They have banished the cold forbidding atmosphere that characterises most legal offices.

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[72] *Maori Youth*, D P Ausubel (1961), p. 31.

[73] "Assimilation or Cultural Continuity"—essay in *Racial Issues in NZ* (1972) G Vaughan (Ed), pp 58, 59.

[74] E Schwimmer, *The World of the Maori*, p 44.

[75] Sir Guy Powles made this point in an address, "Polynesians and the Law" to the Maori Women's Welfare League, Auckland in July 1972.

[76] *Understanding Polynesians*, p 10.

[77] Ibid, p 11.

There are many ways in which the system can be changed in a way beneficial to the Polynesian.

(4) *Neighbourhood law firms*—There is a need for neighbourhood law firms, especially in areas with a concentration of Polynesians. In Australia a separate Aboriginal Legal Services Programme caters almost exclusively for aborigines. In the United States legal aid offices have been set up specially for the American Indian. Whilst there would be advantages in a Polynesian Legal Services Programme in New Zealand I do not believe that separate treatment in the field of legal aid or other social services is desirable.

I would like to see the neighbourhood law firms forming part of a wider social services team. Lawyers could then draw upon the resources of social workers and vice versa. In London last year I visited a social services centre in North Kensington which housed, under the same roof, local authority social workers, a Citizens' Advice Bureau, a legal aid lawyer, Housing Action and other voluntary groups.

(5) *Civil legal aid*—The civil legal aid scheme should be immediately extended to cover legal advice and any work normally regarded as within a solicitor's practice, eg writing letters, attending a client in prison or in hospital, drawing a will, presenting written submissions to an administrative tribunal. Some Polynesian clients have allowed their affairs to get into such a muddle that it is a Herculean task to untangle them. Very often the matter does not fall within the definition of "proceedings" in the Legal Aid Act. I also believe the Act should be amended to give Legal Aid Committees the power in cases of obvious injustice to grant legal aid, notwithstanding that the cost of bringing the proceedings may be out of proportion to the amount involved. Legal Aid application forms should be simplified. Some clients are so daunted by the financial statement that they lose heart and want to drop the case. When the forms have been simplified they should be translated into Maori, Samoan, Rarotongan and Niuean. Solicitors should have a statutory obligation to bring to the notice of all clients who may be eligible the availability of legal aid.

(6) *Criminal legal aid*—The average rates of payment are significantly lower than those paid under the civil legal aid scheme and those payable under the duty solicitor scheme. This is anomalous and means that lawyers of ability and experience are not undertaking criminal legal aid work. The criminal legal aid scheme should be merged with the civil scheme. There should be a right to a lawyer of one's choice, a financial contribution in appropriate cases and bills to be assessed by the Legal Aid Committee.

(7) *Duty solicitor scheme*—Whilst the scheme is working well it is generally the lawyers with a social conscience who have volunteered their services under the scheme. Often the same lawyers are helping in the legal advice programmes and other community work. Practitioners should accept that they have a professional obligation to pull their weight. Those practitioners who do not participate could be asked to make some financial contribution. Wherever possible, Polynesian assistants should be retained to work with the duty solicitors.

(8) *Race Relations Act*—Our Race Relations Act was hurried through Parliament in 1971 to implement the resolutions passed at an international convention on racial discrimination. It was modelled on the English legislation. The emphasis is on conciliation—no prosecution can be brought by an individual or even by the Race Relations Conciliator, but only by the Attorney-General. I believe that the decision whether to prosecute should lie with the Conciliator and that an individual should have a right to sue in cases where the Conciliator has not brought a prosecution after, say, three months.

There is not sufficient emphasis on the positive side of the work—the promotion of good race relations. We should encourage a proactive rather than a reactive role. Part III of the English Race Relations Act 1968 creates a Community Relations Commission to encourage the establishment of harmonious community relations. The commission gives advice to local authorities and other organisations. It runs conferences and training sessions. There is also provision for research.

(9) *Positive discrimination*—It should be deliberate policy to recruit Polynesian students in our law schools and to secure greater participation by Polynesians in legal practice and the administration of justice.

(10) *Proactive programmes*—Little has been done in New Zealand in the field of preventative law or community outreach. Lawyers in the United States and Britain run talks on a citizen's legal rights and duties. Explanatory leaflets giving a simple exposition of a citizen's

basic legal rights should be prepared in a number of Polynesian languages. In particular programmes should be set up to help immigrant Pacific Islanders acquire some knowledge of the social, political and legal system of their adopted home. In Sweden the government not only provides free language classes for non-Swedish speaking immigrants, but also requires employers to allow their workers to have 100 hours leave on full pay to attend these classes. In the Netherlands large numbers of Indonesian immigrants have been resettled successfully by means of a comprehensive programme involving government and voluntary agencies. Details of immigrants are sent ahead. The newcomers are met on arrival by a reception committee, who help them find suitable accommodation and jobs and encourage them to attend classes in Dutch language and customs, cooking and sewing. Suitable clothing is given to the immigrants and job retraining is provided where needed. How little, in comparison, we are doing for the Pacific Island people who settle here.

I hope that this paper and the practical proposals I have made will provide thought and discussion on a subject that has been for too long neglected by lawyers.

I close by echoing the words of Sir Guy Powles:

> "So much needs to be studied, so much to be done and in this particular field [there is] so little time to do it."[78]

[78] Address to Maori Women's Welfare League, July 1972.

DISCUSSION

Chairman: Mr B S Slane.

Commentators: K H Mason Esq SM, Mr M J A Brown.

THE CHAIRMAN: "The commentators are Mr K H Mason, who is 2 percent of the Magistrates' Bench, and is probably better known in his role as Race Relations Conciliator. His office is in Auckland, and he is commonly known as Mr 'Race Relations' Mason; and Mr M J A Brown is a partner of the firm of Dickson & Co, where he practises in litigation and is widely experienced in criminal practice. Despite his impressive stature, he is only .08 percent of the profession in New Zealand."

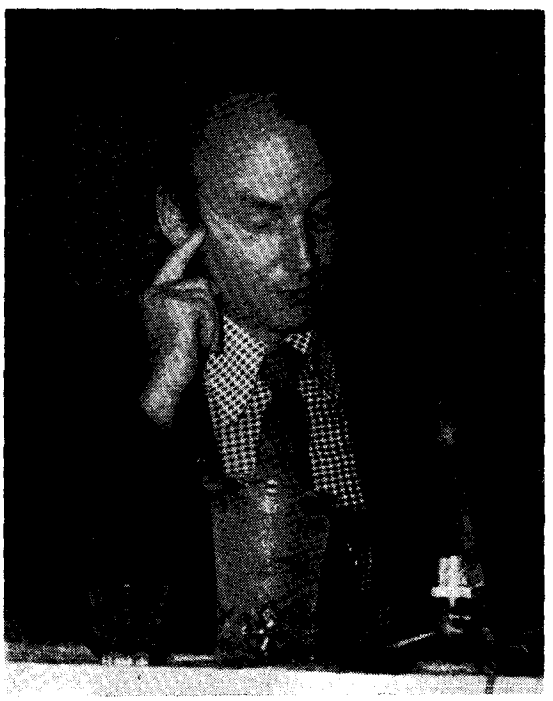
MR J W P WATTS SM (Nelson): "I think I may say that in short Mr Ludbrook's thesis is that in some ways the Polynesian is deprived when it comes to a matter of appearing before the Courts. To a large extent he bases his thesis on a report which has been published in the *New Zealand Law Journal* unfortunately, by a group which calls itself the Nelson Race Relations Action Group. I live in Nelson and I am going to have something to say about this report. I would like you to accept at the outset, even if you do not accept it by the time I finish, that I know to some extent what I am talking about. This report is quite an unsafe document on which to base any conclusions. There are two things that are wrong with it primarily. It was produced by a Committee headed by a Dr Sutherland, and amongst the names of the members was somebody who called himself a statistician. They came along to the Nelson Court and had a junior girl go through all the files, and they produced a lot of figures. These figures are quite unsafe upon which to base any conclusions at all and I will tell you why. It purports to relate to all informations laid in arrest and non-arrest cases, in Nelson, for two years in particular.

"For those of you who are not familiar with this matter, if a person is arrested and is to come before the Court, an information is sworn. If he appears under an ordinary summons and is not arrested, a different form is used. If he is arrested the form is different from that which is used in other cases, in this particular: in arrest cases the ethnic origin of the defendant is stated as either being Maori or non-Maori. In non-arrest cases there is no indication appearing on the form at all. Why this distinction should be, I don't know; but it is a fact.

"This girl went through all these files, and in the arrest cases the ethnic origin, although it may to some extent be a guess, is stated, but the non-arrest cases, which form by far the bulk of the work coming before the Court, is not stated. Nevertheless, the report purports to deal with both arrest and non-arrest cases. This leads me to the only conclusion, that the person concerned was using his or her own knowledge

as to whether the person concerned was a Maori or not.

"The number of individuals who are Maoris who appear before the Court in Nelson is indeed very few, and an error of one or two, or half a dozen, completely distorts the figures. That is a fact. Nobody has bothered to check it; nobody has bothered to ask; we accept it because it appears in print. I ask you all to bear this in mind.



Ronald D Woolf

Mr R H Ludbrook

"There is something even worse than that wrong with this report. For those of you who have not read it, what it purports to show, and the figures are quite convincing, is that for a period of two years, Maoris who were not represented got a rough deal from the Courts. This group arranged—and I think they fairly did it—that every Maori appearing before the Court should be represented, and the figure of Maori imprisonment for that year, if we are to accept the figure, which I find it difficult to do, dropped quite a bit.

"This highlights the danger of taking figures baldly without looking into the background, and to know something about the background you have to know something about Nelson. In Nelson we have almost no Maori population. There are a few families. They get into trouble occasionally, but I don't think they get into trouble any more than Europeans do. There are a few families in Motueka and Nelson, and a few in Blenheim. I have never regarded the Maoris as being a problem there at all, except in one respect. Nelson is a fruit-growing district, and every year we get a big influx of 400 to 500—a floating population; they are not the best type of people from a criminal point of view. As one may expect, certainly it is a fact, a very large proportion of those are Maoris. Every time during the fruit-picking season there were a lot of Maoris appearing before the Court. In the two years covered by Dr Sutherland's report, these Maoris appeared in their usual numbers, but the following year, the control year, was quite different, because in that year the Labour Department decided to import Fijians. Every year now they import somewhere between 300 and 400 Fijians into the Nelson district. In the three years or so this has been happening I have never had a Fijian before the Court. They have their own way of dealing with these matters. This has meant that 200 to 300 Maoris, the floating population type, don't come to the district. This is why the figures for the control year have dropped. I have no doubt about that whatever, because I have checked the arrest figures with the police, and they show the same percentage. In the two years mentioned by Dr Sutherland in his report, the arrest rate was high. In the following and subsequent years, right up to the present time, the arrest rate decreased to 10, 15, 20 percent of what the arrest rate was. This is the reason why the number of Maoris sent to jail in Nelson has dropped—not because they were legally represented in Court."

MR LUDBROOK: "First, I would like to say that the thesis is not based on those statistics supplied by Dr Sutherland. Also quoted are statistics from the Justice Department's report on violent offending, and they say, taking a sample of people facing serious criminal charges, 'Maoris were significantly less likely than Europeans to be represented by counsel. Of the Maori offenders 44.3 percent were represented by counsel, and of the New Zealand European offenders 86.7 percent were represented by counsel, or almost twice the Maori figure'. If one assumes that a defendant gets *some* benefit from being represented by counsel—and that seems a reasonable assumption for us to make

as lawyers—then it seems to me these figures speak for themselves."

MR BROWN: "Essentially the notes I have made were substantially in agreement with his Worship. I have the gravest doubts about statistics. I wish they could do to *my* figure what they do to the figures which are compiled! I was interested in one comment made by his Worship, that the Fijians have their own way of dealing with these matters, which was what I thought was the main thesis of Mr Ludbrook's paper. If it means that the police don't interfere, and they allow them to exercise some sort of discipline—(MR WATTS: "They send them home.")—Well—if that is the way, it seems a fairly crude way, not quite what one would expect of an itinerant population, and perhaps they would be better to be dealt with by the Court. I remember when Dr Sutherland's paper first made its appearance; there was no justification for the gross assumptions and deductions, even if the figures were correct, and there seems to be some reason to believe that they were not."

MR MASON SM: "In his paper Mr Ludbrook says, 'The Nelson group asserted that the so-called Maori crime problem was in fact largely, if not exclusively, a non-representational problem. If Maoris had the benefit of legal representation the apparent high rate of Maori offending was reduced to a level equivalent to the pakeha rate.' Does Mr Ludbrook concur with that view?"

MR LUDBROOK: "No, I do not concur with that view; but nobody knows the answer. I think that is part of the answer. I have no doubt at all that the lack of representation inflates Maori crime rates, but I certainly do not think it is the whole of the answer."

MR MASON: "If he *did* concur with that view, I would like to know what we are doing here discussing the so-called Polynesian crime problem."

SIR GUY POWLES: "One needs to get these things into perspective. There have been one or two warning and opening shots fired already from various prepared positions, you might say. I would like to congratulate Mr Ludbrook on his courageous and forthright paper. It was a pity that in his discussion of the early history of the impact between the law and the Maori in New Zealand that he did not refer to the more halcyon days of the early times. Our first Chief Justice was a man who had a profound knowledge of and respect for Maori custom. It was only when the regime of the gentlemen gave way to the regime of the settlers that trouble occurred between the pakeha and the Maori.

"I think it was a good thing for Mr Ludbrook to bring out the activities of the Nelson action group, and in a sense to record and pay a tribute to Dr Sutherland. The way of the reformer is never an easy one, and sometimes the reformers themselves are difficult people. Nevertheless, I think Dr Sutherland has performed a public service to this country and to this profession. Whether his figures are right or wrong is awfully difficult for any outsider to know, and I am sure that his Worship is much better instructed on that point than I am; but the fact of the matter is that the activities of the Nelson group sparked off an interest, a concern and a further examination within the profession, within the Judiciary, and within the Justice Department, as to whether it was proved that when people were represented they fared better in the Courts than they did when they were not represented; so, as my friend Mr Mason says, it may very well be not a Polynesian problem. That is my own feeling—that it is not really a Polynesian problem, this question of crime, representation and so on.

"Other matters mentioned in the paper, such as land, *are* Polynesian problems. It was clear from what the Lord Chancellor said this morning that this question of representation in the Courts has now surfaced to the high level that it can be the subject of a very good paper here at the Law Conference, and an important part of the Lord Chancellor's address. He said that there are sections of the community that seem to be suffering from a form of malaise; an alienation from the legal system.

"He said there was in Britain a wide concern to secure adequate representation in criminal cases.

"He said there was a need for the recognition of the legal needs of deprived communities.

"That is just what we are talking about. We could go a little further and think of the growing American principle that under no circumstances should a person who is convicted be subjected to imprisonment unless he has been represented. That is a jolly good rule, and I do not see why, if we have the facilities, we can't do it, right now, in this country, if only as a rule of practice.

"I would like to echo Mr Ludbrook's plea for a recognition of the Polynesian culture by the legal system. He says, 'Integration signifies cultural diversity in an atmosphere of cultural understanding and respect, leading to mutual enrichment.' Indirectly he makes the point that if you are trying to secure this mutual enrichment between two different cultures, one of which is more powerful than the other, then you have to foster the other, so that you get a proper balance.

"He then suggests what he calls pro-active measures. Following his line, which I think I agree with, it could easily be necessary as a temporary measure to have special arrangements for the admission of a Polynesian person to places of qualification. Special measures may be needed so that we can have an adequate number of those persons in the various positions. We do not need to go over the figures; Mr Ludbrook has got them.

"Then he makes reference to the Race Relations Act, and with Mr Mason on the Bench I make my remarks very subject to what he would say; but I thoroughly agree with Mr Ludbrook where he says that this Act is negative, that it needs a positive part to it, like the community relations commission in the United Kingdom.

"I have held office as Race Relations Conciliator for two years, and I gave it up because I had certain ideas as to how I felt it should be done, and I couldn't do it and do the work of Ombudsman at the same time. With the greatest respect and appreciation of the services of Mr Mason, I believe he shares my views that he is not in a position to carry out the full duties of Race Relations Conciliator, because of his other duties. I do not believe that the post of Race Relations Conciliator should be held by anybody who has other duties. It is a completely full-time job, and I look forward to the time when Government is able to accept the fact that it is a full-time position, and appoint someone accordingly."

MR J M VON DADELZEN (Hastings): "I do not wish to go into the statistics of the matter, and perhaps I over-generalise, but it seems to me it is important that we recognise that although Mr Ludbrook has pointd out a certain cultural problem, the problems faced by Maoris and Polynesians are basically those faced by others who suffer a disproportionately disadvantaged position on the socioeconomic ladder. That should not blind us to the fact that the Maoris and Polynesians face rather different problems from others in that place on the ladder, because of the cultural differences which they suffer. I would criticise both poles, and I think we have to try and steer our way through the middle. There are those who will allege discrimination against Maoris and Polynsians, purely because they *are* Maoris and Polynesians. On the other hand, there are those who allege that Maoris and Polynesians do, in fact, have a racial propensity for criminal activity. It seems to me that somewhere in between there is a position that says that Maoris and Polynesians are not discriminated against by the system as such, nor do they have any racial propensity to crime; it is merely because of their position as the disadvantaged in the socio-economic field.

"It seems to me there are two things we must do. Firstly, we must attempt to reach *all* of those who are disadvantaged in society, because there seems to be a general malaise, at least in the area in which I practise, which leads to criminal activity because of boredom or drunkenness, and to a certain extent, drugs. This shows itself in prosecutions for disorderly behaviour, unlawful assembly, assault, and a general dislike for those in authority, whether that authority be exercised by the police, the Magistracy or the Judiciary, or even to a certain extent, by us as lawyers, exercising as we do a position of some—if not authority—at least esteem in the course of justice.

"It seems to me, on the other hand, quite apart from educating those who come into contact with us, that we ourselves, as well as Court staff, probation officers, social workers, and others, must be educated. I do not know whether you would recognise, as I do, a certain degree of cynicism on the part of some of our brethren, and on the part of probation officers, social workers and Court staff, but it is there. There is also a lack of concern. It worries me if we become over-sensitive to criticism of the system. It also worries me that there are those who do not recognise that there is indeed something of a problem. Again, we should steer something of a middle course, because a problem there is, but it is not, to my mind, a racial problem; it is something of a socioeconomic problem."

MR BROWN: "I am always surprised how much mileage you get out of this topic of Maori problems and Polynesian problems. Every time you scratch a Kiwi you get an expert!

"Sir Guy Powles appeared to agree tacitly with Mr Ludbrook on several matters. I had

the feeling that he sided with Mr Ludbrook in the suggestion that those who use extravagant language are not necessarily themselves inciting some sort of racial disharmony.

"My only comment about that is, if you are going to make what turn out to be immoderate remarks, and many of these have been made, then there is a responsibility that they be responsible remarks. Even if not inciting any disharmony, it seems to me it is doing a grave disservice to race relations in this country, if people, by remarks, some of which I have heard over the last couple of years particularly, are eroding the good will which is very much the foundation of the excellent race relations which, generally speaking, we enjoy in this country. That is the danger I see there.

"Sir Guy placed upon the paper some blessing, as it were—and he is a man who enjoys such prestige within the Maori community that he can do this, for the suggestion that there should be the appointment—and again it was a tacit approval, I suspect—of officers on a racial basis rather than on a merit basis. It is my submission to you that it has never been the case in the past, and although only 25 percent of the Magistracy is Maori, it has definitely been in the past, appointment on merit. There seems to be some Freudian slip, because the author has not noticed the appointment of Mr Durie as a Judge of the Maori Land Court, which shoots up the statistics, and we now have 16.66 percent of the Judiciary!

"I would prefer to see the way made easier for assistance during law courses—that type of thing. It is a fundamental right that every New Zealander should have the finest people in the Judiciary, whether they be black, white, or brindle. I see this as an inevitable thing, but I still say let it be on a merit basis, as it has in the past. We have an example of this in education; it is a profession into which Maoris have gone for a long time, and now are filtering to the top. The Professor of Anthropology at Auckland University is a Maori; Professor Sorenson at Auckland is a Maori; Professor Winiata down here is a Maori; Professor Mead in British Columbia is a Maori; Professor Kawharu at Massey University. There is a whole swag of University 'bludgers' who have, on a merit basis alone, achieved this. I believe, with the propensity of Polynesians for reproduction, that inevitably we will have more!"

THE CHAIRMAN: "What do you think, Mr Mason, of the last speaker's comment that there was cynicism and lack of concern on the part of lawyers and others around the Courts?"

MR MASON: "I don't think so. Generally, the attitude of the legal profession is one of good will. This is something we find in the race relations field. Mr Ludbrook alludes to this in his paper. It may be that landlords discriminate against Polynesian tenants, simply because they have had an unfortunate experience with them. It is interesting to note that pakeha landlords quite often say, 'We are not going to have Polynesians in this house again. That last crowd we had here left fishheads or mussels lying around the place, and because of that we will not have Polynesians at all'. That sort of approach, of course, is quite ridiculous, because simply because they have had a negative experience with a Polynesian doesn't necessarily mean that all Polynesians should be cast in the same mould; but there is a general feeling of good will amongst members of the pakeha community, and it is a question of tapping that good will in the most appropriate way. It may be that some of the comments that Mr Ludbrook makes in relation to future programmes which lawyers can participate in have a great deal of merit. I think there is room for lawyers to understand even more so than they do at the moment what makes a Maori and what makes a Polynesian tick.

DR A M FINLAY QC (Attorney-General): "I am sorry I am obliged to go to keep an appointment already overdue. I would like to take the opportunity of saying that I have already set in train moves that will result in the appointment of a full-time Race Relations Conciliator, and I am sure the person proposed will give every satisfaction to Sir Guy and everybody else." (Acclamation.)

MR MASON: "I want to try and get this discussion down to basics if I can. As I apprehend Robert Ludbrook's paper, what he is saying is that in the past the pakeha New Zealander has given the Maori a pretty raw deal; he is still giving the Maori and the Polynesian a pretty raw deal, and certain things should be done in the future. Amongst other things he says in the paper, 'They argue that pakehas dominate decision-making and impose their standards on society as a whole, and contend because of the dominance of the pakeha in positions of authority in our judicial system, the Courts do not relate adequately to Maori values and attitudes', all of which sounds very

nice indeed. I would like to know in what way do the Courts fail to relate adequately to Maori values and attitudes. Is Robert Ludbrook suggesting that there is something wrong with the law, for example? If we all agree that the law is nothing more nor less than a code of social conduct which is generally acceptable or unacceptable to the majority, and if he were to imagine that he had the Crimes Act and the Police Offences Act sitting in front of him, in what way should those laws be altered in order to take notice of Maori or Polynesian values and aspirations? If the law should be amended in some way, I for one would be interested to know in what way or ways it should be amended. If it is contended that the law in its present form is satisfactory, then is Robert Ludbrook suggesting that the implementation of the law by probation officers, Judges and Magistrates is ineffective in some way, in that it does not take notice of Maori or Polynesian values and aspirations? If the implementation of the law is in some way ineffective, I should like to know in what way it is ineffective, and what I, as a judicial officer, can do about it."

MR LUDBROOK: "Perhaps I can only illustrate what I have in mind. In fact, I was merely quoting this passage from Dr Sutherland's monograph. I remember quite vividly a case where a Maori girl was charged with theft. She had pleaded guilty, and the Magistrate was not satisfied with her plea of guilty and appointed me took into the matter. I did so and discovered that certainly she had taken these things, but not out of any motive of dishonesty or personal gain, but merely as a form of revenge because the de facto husband of her sister, who had been living in their house, had taken some of her things; they had a row, he left, and she took some of his things with the intention of holding on to them until such time as her own things were returned. She was charged with theft, and pleaded guilty to theft. Thanks to the Magistrate in this case, who suspected there was something funny about it, I looked into the matter, the plea was changed, and eventually the girl was discharged.

"I have listed in the paper a number of areas where a lack of knowledge of Maori cultural values could well give a Magistrate a wrong impression of a situation. A Magistrate could tend to interpret it in terms of pakeha values, and this interpretation may turn out to be completely wrong. I think that is the best way I can illustrate what I had in mind."

MR J M DAWSON (Wellington): "Mr Mason has reached the nub of the problem. With great respect to Mr Ludbrook, he has not entirely answered it. What Mr Ludbrook says in his paper is that we should be giving more power to Maori culture, and I don't think his proposals in any way give any more power to Maori culture. What Mr Mason was looking for was proposals in which the Maori culture can be incorporated into our substantive law, and that is where we have to make a sacrifice. (MR MASON: "That is if we accept that the law is in some way defective.") Mr Ludbrook has suggested that the executive must give some power to Maori culture. It may be the law is adequate for us but not for Maoris, in that there is no recognition of Maori culture. The way that that should be done could probably be best suggested by the Maori."

MR BROWN: "One of the first token efforts, if people are really concerned, and I think they are, could be pronouncing people's names properly and correctly in a Court. It seems to me a gross rudeness—say someone by the name of Bruce Slane got arrested. If he were a Maori, he might get arrested by a detective who calls him 'Slayney' all the way through; he goes down to the watchhouse and is booked in as Bruckey Slayney; next morning he goes to a police line-up where he is described as Bruckey Slayney, and so on; he goes into the police yard and is ticked off and told, 'Go on, Slayney, get into the van.' He is called by the Court crier as 'Bruckey Slayney.' He appears before the Magistrate, who says, 'Have you got anything to say?' It may well be that he thinks, 'Well, if they can't pronounce my name properly, then how will they be interested in some of the other things I would like to tell them about?' He might end up under the probation service as being surly and uncommunicative.

"A lot of our attitudes are essentially 'wasp' attitudes—and this is a fault of all of us—and we pay lip service to the fact that we have a multi-cultural society, but I wonder how many of you have done anything about that other than just saying, 'Yes, we have got it', and 'That's nice, isn't it?', and 'My wife and I enjoyed Fiji'.

"These are attitudinal things. People should be prepared to acknowledge that in our society, if people wish to bury their dead and honour their dead in another way, this is a legitimate exercise in the right to live in this country. It has been all right with minority groups who have been numerically insignificant; the Jewish

race, who have made an immense contribution to our country, have their own life-style, which they practise quietly, and I do not see why Maoris, Niueans, Samoans, Tokelauaus, Rarotongans should not be able to do the same thing, and that some recognition is given to this. I don't mean as far as the Crimes Act is concerned and in, say, the law relating to murder. I do say that perhaps Accident Compensation could have a look at some of these things. A person arriving from Samoa is presumed to know all the intricacies of the Egg Marketing Board notices; if he wishes to drive, it is assumed he knows all about the weighbill limits, and all the other things that we impose upon him.

"Mr Ludbrook is completely right when he suggests that it is a sort of arrogance, and we presuppose that there is a universal quality and marvellous thing about law. The law is going to be criticised so much more in the future by everybody, and this is a good opportunity to look at it and say that it is not the marvellous thing that we all thought."

MR P J TRAPSKI SM (Rotorua): "I am Magistrate from Rotorua, Taupo and Tokoroa, and may I bring greetings, Mr Brown, from the people of Ngati Whakaue, Ngati Pikiao and Ngati Tuwharetoa. I basically agree with what Mr Mason has said about the Magistracy, and what Mr Ludbrook has said about the practitioners, because I think there is a vast difference. I don't necessarily agree at all that the law should be changed to cope with the Polynesian situation. I think there must be greater understanding of the people who violate those laws. In my little neck of the woods, I am very happy to have, and am very privileged to have, among a probation staff of five, two full-blooded Maoris who speak fluent Maori. This is a tremendous capacity and assistance, and I use it to the utmost. In the child welfare situation I have three Maori senior social workers. They also are of tremendous assistance to me in giving the very type of background information that Robert Ludbrook has so adequately put into his paper. This is most important in dealing with the Polynesian people who come before me.

"Speaking of Polynesians, I have told you that my circuit occupies three towns—in Taupo and Tokoroa there are large Island populations, but I never see them. Aucklanders may be interested. I cannot say the same for the indigenous Polynesian. Among my assistants I have some JPs who are Maoris. One of them happens to be the Chairman of the Arawa Trust Board, and a very respected Maori in Rotorua. At my invitation he sat with me one Monday, which is the general clean-up day in Rotorua. I told him that I would not be able to spend any time with him at all during the sitting, but during the luncheon adjournment the hour and a quarter was his. I found that after about 10 minutes he was taking copious notes. I still wonder what was contained in those notes, but nevertheless when we came out for our little discussion session he said, 'Peter, I have two things which impressed me about this morning. First was the number of Maori people who appeared in that criminal Court. I was amazed. I have read, I have listened, and I have been told, but I could not believe until I saw for myself this morning.' He asked me what I thought the percentage was. I didn't have a clue, but I thought it would be about 75 percent. His guess was higher than that.

"I think we have got a crime rate among the Maori population, but I think it stems from a capacity in the Maori to admit when he is wrong so readily. I do not believe that our problem in dealing with the Polynesian, and more particularly the Maori, is the conviction rate. I am concerned about the imprisonment rate, because of the very things that Robert Ludbrook talks about, and the very things that are told me by my probation officers and social welfare workers. They are a different people. They do things for different reasons, and it is those reasons which should be adequately brought out in a mitigation plea by counsel, who should adequately understand, with the help of people like Robert Ludbrook and the proposals he puts to the Society.

"We have all been talking about the problems. I have heard all about the problems, we have read all about the problems. What I would like to see is some solutions. I congratulate Mr Ludbrook on some of the solutions he proposes. I would like to see more Maori and Island probation officers, and real assistance to the Court on the question of sentencing and punishment. This is where the problem lies.

"I find that in Rotorua, for instance, when I have probation reports—and I know something about the economic situation of the person with whom I am dealing—that there is a real economic problem among minority people. Most of them would earn in Rotorua an average of between $55 and $65 a week. Couple that with the idea of perhaps a family of six, seven, eight, to 14, and there are real problems in

coping. Couple that with a propensity to booze, which I can readily excuse because on pay-packet night somebody says, 'Come down to the pub with me' and we have got that $40 or $50 or $60 in our pockets, and all the problems in the world facing us with debts and kids and housing and all the rest of it. I reckon I would get in there, too, and get stuck into it just the same as they do. That is a problem—a socio-economic problem—amongst the Maori people, and I wonder what we are doing about it."

MR B C THORNE (Whangarei): "I would like to hang my remarks on part of the introduction of Mr Ludbrook's paper, where he touches on Maori land. He makes these comments: 'Individual ownership of land was not recognised, but the land was of great importance to the Maori. Land had a military and diplomatic but never an economic significance. It was not seen as a commodity to be sold or to be bartered.'

"I think there has been a tendency for Europeans to complain about the fact that Maori land law differs in many respects from European land law. Most ownership of Maori land does not result from a financial transaction. There is no substitute for Maori lands in the minds of the Maori owners. Much is never owned for economic reasons. It represents their homeland, in a sense which few Europeans ever experience. I mention this to point the need for this situation to be respected and recognised by Government, present, past and future, by lawyers, and by the community in general, in relation to actions which may cut across the traditional uses to which Maori lands are put. I have in mind in particular requirements by the Crown for designation of land as proposed public reserves. In my opinion it is not beyond the ingenuity of man to serve the interests of the public and of Maori owners at the same time."

MR D B THOMAS (Auckland): "I agree with the speakers who say that it is not so much the criminal law that needs changing to protect or help the Polynesian develop, but the need to recognise, as brought out by the last speaker, that there *is* a difference in attitudes and upbringing of Polynesians, in such things as housing, property ownership and so forth. The difficulties which are involved in Court representation, criminal offending, etc, are more socio-economic matters, and not really a racial matter.

"One point in Bob's paper which I would suggest is *not* an appropriate way of dealing with the matter, is the question of neighbourhood law firms. Somebody in a field such as this could very easily develop a cynicism which would not help solve the problem. It would be far better for criminal and civil legal aid to be extended so that the existing qualified people could deal with these problems without off-loading it on to some poor individual who is soon going to collapse under the strain."

THE CHAIRMAN: "I should perhaps say that the New Zealand Law Society has asked the Auckland District Law Society to prepare a specific proposal for a neighbourhood law firm, possibly in the Mangere area. I will ask Robert to comment later on whether there is a need for a neighbourhood law firm."

MR P R SKELTON (Hamilton): "I am from Hamilton, another centre of Maoridom. I want to take up where the last speaker left off on the question of neighbourhood law offices. Before I do that, Mr Brown touched briefly on the fact that he thought it would be a good idea if more assistance was given to Maoris and Polynesians in educational institutions. I remind him that the Law Society itself has a scholarship fund designed specifically for Maori education in the law, and only at the last annual meeting of the Hamilton District Law Society was the chairman calling on people to find applicants for the scholarship. So there it is—there is money available if people want to use it.

"As far as neighbourhood law offices are concerned, I have great reservations about them. I can see in lots of ways the social, humanitarian implications of it, but I think it is the first step —and the Lord Chancellor talked about this this morning—towards socialising and nationalising the legal profession. We have to maintain our independence—our economic independence. Extend legal aid by all means; but I think if neighbourhood law offices get under way in any number at all, you will find that they are not serving the people they were designed to serve in the first place; they will be serving everybody, because once some people start using them, then everybody will wonder why they can't use them as well. This has happened with the medical profession in England, where the medical profession was nationalised under the National Health system. I am told by my medical friends that it is a disaster. There is a White Paper in New Zealand at the present time which the medical profession are most

unhappy about, under which the same thing could occur. I do not know of many lawyers in this country—past, present, and indeed in the future, who would not go out of their way to give what assistance they could to anybody whom they knew was in difficulties or required help. It has been one of the strengths of our profession in the past, and I hope it will continue to be in the future."

THE CHAIRMAN: "I think Lord Elwyn-Jones pointed out that until you set up a thing you do not know whether there is a need for it.

"I now ask Mick Brown to comment on what Mr Skelton has said."

MR BROWN: "I am delighted to hear of the fund. One of the real problems in New Zealand is that people don't know; there is a real breakdown. That is a step which I am very pleased to see.

"In reply to Mr Thorne and Mr Thomas, the question of land is the real problem. Maoris are not complaining about the criminal law and the intricacies of the Police Offences Act; land is the real area where there is a danger of some form of polarisation and conflict. Around the north there is talk of some form of land league. There was a huge meeting in Auckland during the weekend. Land is a unifying thing for Maoris; it is a symbolic thing. The loss of the land is associated with the loss of the language and various other matters which Maoris feel bitter about. I am sure many of you are sensitive to the fact that to many Maoris land has a spiritual and metaphysical connotation, which, if you don't know about, you do not appreciate.

"In the north, of course, there is much-maligned Maori land which has never been developed; everyone pointed at it and said, 'I could put 40 cows on there'. Suddenly you have all become environmentalists, and this land has assumed a much more attractive role, as being something that people realise is unspoiled; and so the claws of the Town and Country Planning Act are now going out. This is one of the very real explosion points that I see myself, and from talks with a large number of Maoris. I know Mr Thorne is very conscious of this. In the north there is a very real danger of some bitterness and frustration arising, because what little land is left has now been taken under this particular piece of legislation."

MR A STANTON (Auckland): "Mr Ludbrook seems to have made the point that there is a problem, at least in Auckland, through the multiracial nature of our population. Those who live in Auckland feel that this is so, whatever may be said, and there are a number of problems. Mr Ludbrook suggested that we should approach this not only with sympathy and good will but also from study and understanding. I don't do much criminal work these days, but a Niue islander whom I have known for 30 years and acted for his family, came to me; he had been in some sort of trouble and been to see a policeman to try and get some sort of help. He was charged with using obscene language. The policeman wasn't interested in what he said and thought he was drunk. There is no doubt he used obscene language. It was the language he had learned when he learned to speak English in the railway workshops. It was rather less bad than our student children would use in telling us something at home in our own drawing rooms. It was the language he would have used in talking to me on something he was upset about. I think this says a good deal. The other thing was, the policeman said he was truculent and suggested he was resentful of authority. I said to the Magistrate, 'He is an Islander, and his non-verbal cues would be different, and the police would not pick this.' This was the Police Magistrate. He had been in Auckland for a good long time, and he said to the man, 'How long have you been in New Zealand?' He said, 'Twenty years' or something—anyway, it was a good long time (which means I couldn't have known him for 30 years, could I?). The Magistrate said, 'Well, he can speak English perfectly well.' When a person creates an impression of being truculent with authority, it is not the words he uses, it is the way he acts, and the way an Islander acts when he is being concerned or co-operative or something is different from the way a European acts; and the policeman had reacted to these non-verbal cues in a way which made him feel frightened and apprehensive. Studies have been done on this, and this is why foreigners tend to be arrested more than other people. I give this as an example of one area in which research and study can be done.'

MR MASON: "We all know that Polynesians are different. Of course they are. What particularly interests me is in what way should we modify the judicial system so that it has greater relevance to the Polynesian—and that is a question from Mr Ludbrook's paper."

THE CHAIRMAN: "I think the point was, do all Magistrates, at all times, recognise these differences?"

MR MASON: "I cannot speak for the Magistrates of the past, but I believe I can speak for the present occupants of the Magisterial Bench. Certainly in the South Auckland area I know their general attitudes, and I believe they can appreciate the difficulties concerning Maoris and Polynesians. I think it is true to say that most Magistrates will bend over backwards to give Maoris and Polynesians a fair go.

"Just as an aside, I recollect in the early 1960s appearing for two defendants in the Wanganui Supreme Court. They were charged with rape. The presiding Judge was the late Mr Justice Leicester. I recollect vividly one comment made by his Honour during the course of his summing up: 'Ladies and gentlemen of the jury, the two persons who appear before you today are Polynesians. You know they have different attitudes, and I suggest you take their attitudes into account when you leave the Courtroom and enter the jury room.' What his Honour was really saying was this: 'These people are different. Bend over backwards to give them a fair go.'

"I recollect another occasion in the Magistrate's Court in Wellington just before I qualified as a solicitor. A young Maori girl was appearing on a charge of theft. I think the presiding Magistrate was Mr Ben Scully. The girl contended that she did not really know that when taking a blanket from a car she was committing theft. Mr Scully had no hesitation in tossing the case out. I think that attitude is the attitude that still prevails, and I would require considerable persuasion before I would adopt a contrary view."

MR J C HENDRIKSE (Auckland): "I refer you to a book by Allan Nixon, called *A Child's Guide to Crime*. He points out that this is not a racial problem, but an educational one—like the early days when the Irish Catholics ended up in jail because they lacked education. I would like you to read it because it is a good book. When I was in Rotorua in the legal section of the Maori Affairs Department, there was a Maori solicitor there, Jack Karaitiana. I taught him some Dutch and he taught me some Maori. Later on, when I tried to speak some Maori to some of those younger people they could not understand it.

"I think you have to be careful that you do not patronise people, as happens in countries like Australia, where people from my country come out with very good qualifications and are being patronised.

"I would like to say something about legal aid. Mr Ludbrook in his paper mentions the fact that if you do not act as a duty solicitor, perhaps you should be made to make a financial contribution. I am one of the few people in Otahuhu that never turns down an appeal to take a criminal or legal aid matter. I take it because I think it is a matter of ethics not to say 'No'. For that reason I have not taken it upon myself to become a duty solicitor. I think I am doing a job already in the Auckland district. Therefore I think you have to be very careful about saying that if you are not a duty solicitor you have to make a financial contribution, because many of us might be doing a heck of a lot for very little reward."

MR B V FITZPATRICK (Otahuhu): "I do not necessarily agree with everything that is in the paper, but I should point out that Otahuhu is the one area where the action is in the wider context; that is, not only with Maori and Polynesian people, but also those with social problems. This was confirmed when the Department of Social Welfare was looking at problems arising from legal aid in a nationwide study. Otahuhu is the only place with a Court in neighbourhood boundaries where there are big social problems. What the paper doesn't go on to discuss, but has been raised by John Hendrikse, is the problem of running economically a city legal office when you are having to service a large number of duty solicitor appointments, a large number of legal aid cases, and a large number of offenders' legal aid. In my office we refer to it as offensive legal aid, because the remuneration is, quite frankly, offensive to the dignity of a solicitor. You cannot do a plea in mitigation, in my view, in under about two hours. You get $13.10. I don't complain about the grading; that is fair; but with overheads you only get something like 50 percent. About two hours at $25 would be $50. You are only getting 25 percent. The Government is giving you a 25 percent contribution which goes to overheads. You are putting in another 25 percent, and you are not getting anything for yourself at all. When you multiply that by the number of demands that must be made, and there are an increased number of duty solicitors, the point Robert makes is that the profession must look very carefully at this, and the point must be made

that it is not just in the area of duty solicitor; it is in the total area of the profession's contribution to this type of work. Also, what must be looked at is that this is a very difficult area to work in if you are dealing with a person who has an alcoholic problem, or some sort of emotional problem. These people take a lot longer to deal with, and this again is a factor which is not at present recognised anywhere along the line. We are facing the problems all the time, and if you are in Auckland you will read about it in the newspapers, because one firm broke forth in utter frustration. This is where the paper is deficient, because this is a conference of lawyers, and we have to look at how the profession can handle these problems, and we are the ones that can tell you where the problems are."

MR CRAIG HORROCKS (Auckland): "I endorse some of the comments relating to legal aid. Mr Mason has asked how we can suggest that the Magistracy might assist a little further. Firstly, I would suggest that the referrals, the actual granting of legal aid, be considerably freer by the Magistracy. (MR MASON: "It is in South Auckland.") In my experience at the Auckland Court, there have been occasions when persons, while not being destitute, have not had sufficient funds, have not even been granted offenders' legal aid, which provides for a not-magnificent remuneration for the lawyers concerned. It is a great problem in my view, that offenders' legal aid does not provide for a time basis, because this means that the persons who are appointed are not prepared to get involved in doing any ancillary work which might be required to really make an effective contribution towards your client's wellbeing after the case is completed. It does not mean that the lawyers are not doing this at present; I am sure they are, but it does tend to discourage you from becoming involved with the doctors or families of the offenders concerned, as the time involved is completely out of proportion to the remuneration. I think this matter is at present being dealt with by Mr Paul Temm QC of Auckland, on behalf of the Law Society, and he is accepting recommendations. In my view this is one very small step, which could make a very big difference to the way the profession services those persons who have insufficient means; and I don't mean destitute. I am confident that it is an attitude taken by the Magistracy, or some members of it, that persons have to be destitute. I mean, persons of insufficient means should have legal representation if it is necessary, and in some cases in serious offences I am sure it is necessary."

MR A SATYANAND (Auckland): "As one of the few people in the room this afternoon who is neither pakeha nor Polynesian, I trust I can be permitted some little licence in the short remarks I intend to make. First of all I agree with his Worship Mr Mason and also with Mr Brown, that there is basic good will in this country in the chemistry of race relations. At the same time I take out of Robert Ludbrook's paper the situation that there is a tendency on our part, as well as on the part of members of the community, to pay a lip service to the principle of equality, whereas we should be taking cognisance of the effect of certain things, as a result of which there are a number of nuts-and-bolts changes that could be made right now, and will need to be made in the future. I refer, for example, to the matter just raised by my friend Craig Horrocks relating to legal aid. I refer to the matter mentioned by his Worship Mr Watts, as to what is a seemingly useless denotation on Court forms of whether a person is a Maori or a non-Maori, not taking into account the other many subcultures that exist in New Zealand society.

"Another nuts-and-bolts thing that has always seemed to me to be quite stupid, particularly in the Magistrate's Court, is that three-carbon form which operates as the Magistrate's note of what has happened to the case, has several copies—one of which is for the Registrar, one for the press, one for the Justice Department computer, but none of which is by right for the defendant; and many of us in the duty solicitor scheme have found this is a rather awkward first base with which to deal with a person in the cells. That is a nuts-and-bolts thing which would be of considerable assistance and has a general relevance to the problem before us.

"I have listed here a number of things that we perhaps think of under this heading of 'effect', which have a different effect on the Maori, and it is here because of my antecedents that I take the licence that I do. The concept that we have that Maori land should be used in a much better way has a different effect on the Maori than on the pakeha, such as has been touched on by Mr Brown. There is a tendency to regard the Maori people in New Zealand as being and as having been great footballers, great singers, great soldiers, and those funny people the tourists come to see at Rotorua; not an acceptance, perhaps, that the contemporary 1975 Maori, though not

yet a stockbroker or a bank manager, or a person with an overdraft, is certainly a person on the factory floor more and more, and in the white-collar job more and more, and sharing the urban situation with the majority of the people in New Zealand.

"There is perhaps something to be drawn from the comment that people refer to Maoris as 'a good type of Maori' or 'another type of Maori', and that comment which was made by an earlier speaker is something, I suggest, which has a different effect on a Maori person than it does on a pakeha.

"The final point I make is under the same general head, that there are many unconscious examples of the way in which perhaps Maori people do feel that the system is against them, or the chemistry of things is not in their favour, whereas that is not, in fact, as has been pointed out by his Worship Mr Mason, the case. The effect that phrases such as 'Maori PT' or 'I'm so hungry that I could eat a Maori boy with ringworm' have on a person, say, of the Maori race, is something that we should be mindful of.

"I welcome Mr Ludbrook's paper as being timely, and the answer, I suggest, if there is one, is to work on the basic good will which I am sure exists."

MR BROWN: "I am as adamant now as I was at the beginning that we cannot be complacent about our current law.

"I think it is negative to say, 'There is nothing wrong with the law, but give me more Maori probation officers.'

"I think there is a genuine need for more educational aspects.

"I think it is almost cruel to dump Samoans and Tongans and various other island groups —and they are separate peoples—just like that, on the airport. I am not suggesting that they be sent back home, but I think we have a responsibility to assist them to learn, and I don't think we here realise the debt we owe to the disciplining of their own church and leaders—particularly in the Samoan community—for much of their good behaviour. There could be benefits from having judicial officers attending at marae anywhere, and it can be a two-way experience. I am prepared to bet hard-earned money that they would find it an interesting and eye-opening experience.

"Throughout the paper Mr Ludbrook makes certain comparison with areas in the United States. I think that is a dangerous parallel. I don't consider it is an appropriate one. There is a story of a Maori academic who went overseas to Africa, America and England, and he found more affinity with the Scottish Nationalists than with any other group."

MR MASON: "Let me preface my final remarks by saying that in my view there is much in Robert Ludbrook's paper which has considerable merit, but time prevents us from discussing the paper in detail.

"I pick up one of the points made by Mr Trapski, who referred to a number of problems in the Rotorua district. With the deepest respect to Peter, some of the observations are by no means new; they were referred to several years ago by Mr J K Hunn when he referred to the so-called vicious circle of Maoridom—*poor housing, leading to inadequate study* facilities; that in turn leading to a lowering of educational standards; that in turn leading to remaining on the lower socioeconomic rung. And it is the lower socioeconomic rung that Peter referred to. But a great deal has been done in that regard. It is generally accepted that Maori housing standards are improving, on a year to year basis there are many more Maoris taking part in higher educational programmes, and I believe there are many more Maoris who are now above the so-called lower socio-economic group; so I think there is considerable cause to be cheerfully optimistic about the future of the Maori. I am not so optimistic about the future of the pakeha.

"Can I also suggest that if, in the unlikely event of us waking up tomorrow morning, and finding that we did not have a television service, a newspaper service and a radio service, the so-called race relations problem in this country would diminish 50 percent overnight. Could I also suggest that if a number of well-meaning but often ill-informed intellectuals were to moderate their sometimes vitriolic observations, then the so-called race relations problem would reduce by another 25 percent overnight. The remaining 25 percent might create some difficulty.

"I believe it is in the interests of a well ordered society that judicial officers should be open to public scrutiny and criticism. I for one would have no objection to that course being followed; but if there *is* to be criticism it should be constructive and not destructive, as we have found so often to be the case. I also suggest that the criticism should be well-informed—so often it is not."

MR LUDBROOK: "I would merely like to deal with the point which Peter Skelton raised in opposition to the concept of a neighbourhood law firm. He suggested it might be creeping socialism. You may remember that the Lord Chancellor said this morning that the law centres in England, which are identical to the neighbourhood law firms in America, were set up to meet what he called the 'unmet need' for legal services. This need has been proved beyond doubt both in the United States and England. In my experience, in Auckland there is a similar unmet need for legal services in certain suburban areas of the city. I am thinking particularly of Mangere, which, as far as I know, has no solicitor serving a very large population, and Otara, which until recently had no legal firm in what is a very large suburban area.

"In Auckland in the last four years there have developed 14 legal referral services, mainly attached to Citizens' Advice Bureaux where people can and do come to get free legal advice. The complaint has been made time and time again by people giving advice in these bureaux that there are some clients whom they just cannot refer on to anybody. The affairs of some of life's social incompetents are in such a muddle that no solicitor, however well-meaning, would welcome them as a client. They would be just buying a bundle of trouble and whatever good will one has, there is a limit; one has to continue one's own practice. The social problems are of such magnitude in some of these areas that even with the best will in the world, it is impossible to look after all these people, and still remain solvent and sane. I believe, and the people who are working in these areas also believe, that there is a large unmet need for legal services. If private enterprise can meet that need, that is fine, but at the moment it is not meeting it.

"People feel threatened by a neighbourhood law firm. There is no need to be; in fact in England and America any 'fee-generating cases' as they are called (any cases which are likely to provide some remuneration for a private solicitor) are referred on. It is only the residual cases which are totally uneconomic for anybody to look after that the neighbourhood law centre would be caring for; so I feel that nobody has any need to feel threatened by this concept. In fact, it has had a reverse effect on private enterprise—it has increased the total amount of business available to private solicitors. Many private firms in England said that after the neighbourhood law centre set up in their area, they received a lot more work from the local community, because people's first port of call was the neighbourhood law firm, and then they were referred on to a private firm.

"There are various other points which I would like to answer, but it would take a long time.

"I would like to say, in regard to Mr Mason's point that nearly all Magistrates have a sensitive understanding of cultural differences. I think he is a little over-optimistic. Some certainly do, but in Auckland a number of Magistrates have been appointed to the city from rural areas; they have had no particular experience with Polynesian people. They soon get some experience, but I still say there is room for a training course where they could be helped to understand some of these cultural variations which I feel are vitally important for them to carry out their function as Magistrates."

THE CHAIRMAN: "Mr Brown has asked me to say that he has arranged a Judges' weekend on the Mangere marae." He then thanked the two commentators, both of whom had made a special trip from Auckland to be present. A vote of thanks was carried with acclamation.

COURT STRUCTURE AND PROCEDURE

By A D HOLLAND

Mr A D Holland commenced his association with the law in 1946 as a law clerk for Dr A L Haslam (as he then was). He completed his law degree at Canterbury University College and was admitted as a barrister and solicitor in 1951. On his return to New Zealand after two years overseas he was employed in Wellington by Leicester, Rainey and McCarthy before commencing practice on his own account in Christchurch. At the end of 1956 he joined the partnership of his present firm, Wynn Williams & Co.

Mr Holland was President of the Canterbury District Law Society in 1973 and served for three years on the Council of the New Zealand Law Society. He is a past lecturer in Commercial Law in the Faculty of Commerce at the University of Canterbury and currently lectures in Advocacy and Legal Ethics in the Law School.

He has had considerable experience in litigation, both civil and criminal, and is on the panel of counsel in Christchurch instructed to prosecute for the Crown. He is also a director of four companies and a member of the Council of the Canterbury Chamber of Commerce.

This paper has been prepared in response to an invitation to raise issues which will stimulate discussion at the conference and subsequently lead to conclusions. Although I accept full responsibility for the conclusions which are suggested in the paper, it is readily acknowledged that many of these conclusions are based on insufficient information and research and that final conclusions should not be reached without further detailed research and investigation. Most will undoubtedly require alteration and many may ultimately be rejected but there is a need for all the proposals to be considered and there is a great deal to be said in favour of the proposal of the New Zealand Law Society that within 12 months there be conducted at the instigation of the Government a study in depth on Court Structure, Administration and Procedure.

The way has been paved for this step by the Report of the Committee on Court Business appointed by the Minister of Justice in July 1973 delivered in May 1974 but it must be emphasised that that Committee was appointed essentially to make interim recommendations and to deal primarily with the opinions expressed by the Supreme Court Judges in 1972 that an undue proportion of their time was being taken up with an increasing number of criminal trials which were described as involving minor offences and which in previous times would have been dealt with in the Magistrate's Court.

Introduction

In the last few months or years much has been written and said on this subject. As this paper is being written four months before it is to be delivered, no doubt much more will be written and said in those intervening months.

New Zealand has been and is extremely fortunate in the calibre of its judicial officers, and although criticisms may be made in this paper there is no suggestion that our present Judges and Magistrates are in any way of a lower standard or are performing their duties in any way less satisfactorily than has been in the past. They are, however, hampered by the system which has essentially developed with insufficient long-term planning and which, while appropriate for the conditions 100 years ago, may have failed to adapt to the needs of present-day society. One wonders whether our pride in the British system of justice which was offered to and adopted by a large part of the free world has not lulled us into a false sense of complacency and whether enough enquiry is being made into the question whether what was undoubtedly great is still great or even appropriate in the light of changed social and economic conditions.

It can hardly be argued that in a democratic society the Government must provide the community with a Court system which ensures the impartial determination of disputes within a reasonable time and without leaving the parties to their own resorts or to violence. The appointment of persons of suitable quality to be Judges will not achieve this object unless along with such appointment adequate Court systems are provided to enable them to perform their function.

Changing attitudes of society are placing tremendous pressure on the Courts. The recognition that no one should be denied access to the Courts because of insufficient funds and the granting of legal aid have emphasised that at least in some respects existing Court systems are

not adequate to cope. It is perhaps not too sweeping to suggest that until recently the Courts and litigation were a "right" of the rich and going to Court was a privilege denied to the vast majority of the population because they simply could not afford it. I do not believe that this was ever seriously the position in New Zealand but we have adopted systems from older countries where this was the case.

With increases in the standard of education, in the standard of living, in the granting of credit and the more sophisticated way of life to which we have now become accustomed, conflict between citizens is more likely to increase than diminish. So long as conflict exists there is no acceptable alternative to the Courts as a suitable means of resolving this conflict. We have grown to accept the independence and integrity of our judiciary and it is important that the Courts should continue to be held in the high regard which they now are or perhaps should be restored to the position of high respect which they previously held.

One wonders whether, when the decision was made to grant legal aid to people involved in civil and criminal litigation, enough attention was paid to the ability of the Courts to handle the changed situation. I do not believe that anyone would advocate the withdrawal of the grant of legal aid but changes in Court structure and procedure seem of necessity to be required as a result. Whether we like it or not, the principal sanction against taking up the time of the Court was the cost involved. To a legally aided person, this ceases in general to be a material factor. Hence, there is no doubt that prosecutions are being defended which would not previously have been defended and that civil litigation is going to trial which would previously have been settled between the parties because of the costs involved.

While one appreciates the concern of the Judges to retain their position and status in the community and recognises the importance of the Supreme Court with its stated reluctance to see a substantial increase in the number of Judges appointed, nevertheless there seems to be no alternative to a substantial increase in the Judiciary as a result of the acceptance by the Government and the people of New Zealand of the principle that the Courts should be open to all, regardless of cost.

I was originally asked to prepare a paper under the heading "Court Structure", but the more the problem was examined the more it appeared to me that there may be no immediate need radically to change the existing Court structure and that although there was undoubtedly too much pressure on the members of the Judiciary substantial relief might be given by changes in procedure.

Delays in Court business

The only major criticism from the point of view of the litigant is the delay and cost in reaching finality once he is involved in litigation. There is no reasoned valid criticism that our citizens do not obtain justice of the highest quality. The serious complaint is the time involved. It is recognised that the position regarding delays in Court business in New Zealand is nothing like as bad as in many other countries in the world. This, however, is no answer. In the Magistrate's Court in Christchurch for October and November 1974, 109 defended civil actions were granted fixtures. Despite the special fixture system the record shows that only 53 were heard or settled and 56 were further adjourned. Of the 109 cases, 40 were commenced more than 12 months previously, six being two years old and three being three years old. This situation arose after many months of concentrated effort to improve the backlog of civil cases awaiting hearing in Christchurch. A test of defended traffic fixtures (12 cases) indicated an average delay of 15 weeks from the time the information was laid until a fixture was granted, and some of those fixtures were adjourned. A test of defended police cases as distinct from traffic (11 cases) indicated an average delay of nine weeks from the date of arrest or the laying of the information. The position has since deteriorated and delays of 12 to 15 weeks are now common.

The position in the Supreme Court as far as civil litigation is worse, as the table below, for the months of October and November 1974 for Christchurch, Wellington and Auckland, shows:

	Average period between date of commencement of proceedings and date of hearing	*Average period between filing of praecipe and date of hearing*
Christchurch— (25 civil actions)	1 year 4 months	3½ months
Wellington— (40 civil actions)	1 year 5 months	2½ months
Auckland— (114 civil actions)	1 year 7 months	3 months

Criminal statistics for the same period in the same Courts reveal the following:

	Average period between arrest or laying of information and trial	*Average period between committal and trial*
Christchurch— (9 trials)	3½ months	1½ months
Wellington— (8 trials)	2 months 1 week	3½ weeks
Auckland— (36 trials)	3 months	7 weeks

The Court of Appeal civil cases heard in October and November 1974 totalled 15. By the time of the hearing in the Court of Appeal an average period of two years four months had transpired since proceedings had been commenced, although the average period from the filing of a praecipe in the Court of Appeal to a date of hearing was just over one month. The average period between the date of the judgment appealed from and the date of hearing of the appeal was one year two months. Figures are not available but it would be reasonable to assume that an appeal to the Privy Council would involve a further 12 months.

At all Court levels it cannot be denied that many litigants are using the Court system for the sole purpose of delaying the time of meeting their obligations. The business community has, to a large extent, lost confidence in the Courts as a method of resolving their disputes because of the delays involved.

It may be a goal of perfection and it certainly could not be achieved immediately but I believe that in order to meet the needs of society a Court system must be devised that, apart from the question of appeal:

(a) Ensures that a person arrested or charged with a crime is finally tried within two months of the date of arrest or the laying of the charge.

(b) Ensures that a civil claim brought in the Magistrate's Court should be finally disposed of within three months of the filing of the plaint.

(c) Ensures that a civil action commenced in the Supreme Court should be disposed of within six months of the commencement of proceedings.

Lawyers, Judges and Justice Department officers may hold up their hands in horror at what appears to be such radical suggestions but it is suggested that any longer period is quite unacceptable to the lay community or would-be litigants. It is up to the Government in my view to ensure that such facilities are available.

How are delays to be reduced and improvements effected?

It seems appropriate to approach the problem under the following headings:

1. Administration
2. Court structure
3. Court procedures
4. Small claims procedures
5. Changes in legal aid policy.

Administration

Both by tradition and constitution the responsibility for the administration of the Courts has been assumed by the Judges and the Magistrates. It is my contention that the responsibility for the provision of Courts and adequate Court systems to enable the resolution of conflicts between citizens, and between the State and citizens, rests primarily on the Government under the Minister of Justice or Attorney-General and that a substantial proportion of the administrative work at present undertaken by the Chief Justice, the Judges and Magistrates should be taken from them to enable them to carry out the task that they are best qualified to do, namely to adjudicate.

It must be rare that the qualities which justify appointment as a Judge or Magistrate also involve the qualities required of a skilled administrator. I adopt with respect the conclusions of the Ontario Law Reform Commission on the Administration of Ontario Courts that:

"(a) First is the notion that the primary role of the Judges in our Court system is to adjudicate. By their training, professional background, salaries, levels of competence and independence, Judges are best equipped for adjudication. They are neither appointed nor trained to administer.

"(b) Our second premise is that the primary goal of the Court system should be to serve the public. This involves both qualitative and quantitative factors. Not only must the decisions of the Court be fair and rendered in accordance with the law (which can be achieved for the most part through the appointment of competent Judges), but decisions must be available without delay and at reasonable cost and convenience to the parties. The maxim 'justice delayed is justice denied' should not require constant repetition. More damage is done to the quality of justice in Ontario by

managerial inefficiencies generated by outdated practices and systems than is done by incorrect decisions of particular Judges. It is the needs of the public that are of paramount concern and not the needs of the Judges or the lawyers or the Court clerks or the government charged with the responsibility of administration.

"(c) A third premise is that sound administration requires adequate resources. Justice dispensed in the courtroom is not something that is spun out of thin air. In addition to Judges, it requires competent lawyers, Justices of the Peace, masters, Court administrators, Court reporters, clerks, special examiners, sheriffs, adequate courtrooms, interview rooms, jury rooms, detention facilities, probation services and a host of other facilities all operating under a sound system of management. Prompt and adequate justice costs a great deal of money. Historically the Ministry of the Attorney-General in this jurisdiction has been relegated to the status of the poor cousin when it comes to laying claim to a share of provincial budgetary funds."

For too long we have accepted that we have a high quality of justice so long as the Judges appointed to the Courts are able, fair and industrious. With the great increase of volume of Court business, the time has been reached where the Courts must not be considered solely as a collection of top legal minds administering justice to the best of their abilities, but as a comprehensive institution involving litigants, witnesses, lawyers, Court staff, and Judges coping with limited financial resources, limited personnel, limited courtroom space, and doing their best amidst extreme pressure for greater service.

Because of this, there is need for a managerial approach to Court administration for which neither Judges nor lawyers are properly trained. What is required will no doubt involve a great deal more expenditure but an examination of the New Zealand Government Estimates shows that expenditure on Courts for the year ended 31 March 1974 totalled $5,395,000, while receipts under the same heading totalled $8,933,000. This "profit" is somewhat illusory because no account is made of capital costs and the receipts include revenue from fines as well as Court fees. On the other hand, legal aid of a net figure of $620,000 appears to be included in Court expenditure. Whether there is a profit or not and whether legal aid should be included as Court expenditure or not, the Government cannot be heard to cry poverty in regard to the administration of the Courts. In relation to total Government expenditure for the year, the expenditure of $5,395,000 on Courts representing .16 percent of total Government expenditure. There is an urgent need for increased expenditure in relation to the administration of the Courts, and while interference with the independence of the judiciary must not be permitted, the judiciary must be relieved of the responsibility for and worries attached to administration.

Consequently, an experienced and highly qualified officer should be appointed to the Justice Department as Court Administrator. He would no doubt have a number of officers beneath him but he and his subordinate officers must be directly responsible to the Minister for Justice in relation to the administration of the Courts. The position or positions would require a great deal of tact, as frequent co-operation would be required with the Chief Justice and members of the judiciary. The Administrator must not in any way interfere with or attempt to influence the adjudicative functions of a Judge nor should he interfere with the right of the Chief Justice to assign individual Judges to hear particular cases or to organise the work of the Judges, but decisions as to the type of business to be conducted at sittings, the provision of adequate buildings, the assignment of Court staff, dealings with the public, the obtaining of statistical information and the presentation of reports as to Court business should be the responsibility of the Administrator. Accordingly, the Minister for Justice must accept responsibility in relation to complaints about the administration of justice and ensure that sufficient Judges, departmental officers and departmental buildings are available to ensure that such complaints are not justified.

Court structure

If Administrative Tribunals and specialist Courts are ignored, our Court structure is headed by the Privy Council, with the Court of Appeal, the Supreme Court (probably now inappropriately named) and the Magistrate's Court (also inaptly named).

Court of Appeal and Privy Council

For many years the abolition of appeals to the Privy Council has been discussed and whatever one's views as to its value it seems inevitable that one day such appeals will be

abolished. Quite apart from New Zealand's national pride and the implied recognition that New Zealand is not big enough nor does it have Judges adequate to be the final arbiter of the law in New Zealand, the expense and delay involved in appeals to the Privy Council hardly seems justified. As at the end of 1973 there had been only 20 appeals to the Judicial Committee from New Zealand since 1958. Of these 20 appeals, 14 were dismissed. This in itself is not a ground for abolishing appeals to the Privy Council but the fact that in most appeals the Crown or statutory and local bodies with public funds are parties may be of significance. Is it not a matter of inference that litigants without public funds have decided that the expense and delays in Privy Council appeals are not justified?

While it is desirable that there should be a right of appeal from most decisions at first instance, there must be considerable doubt as to whether there is any need in the public interest for a right of appeal from such appeal except in the most exceptional circumstances. There should be an end to litigation. Parties essentially want to be assured of a fair hearing and a result according to law. Is the law any more satisfactory in the recent case of *A M Satterthwaite & Co Ltd v The New Zealand Shipping Co Ltd* where the combined judgments of three British law lords were sufficient to restore the judgment of the Judge in the first instance contrary to the views of two British law lords and the three members of the New Zealand Court of Appeal? Similarly, in *Furnell v Whangarei High Schools Board* the views of three British law lords supported the New Zealand Court of Appeal in overruling the trial Judge, but had one of the law lords in the Privy Council been of a different view the judgment of the Court of Appeal would again have been reversed. Although, no doubt, the successful litigant in each case considered the journey worth while, can it really be stated that the law of New Zealand is the better because the three law lords are of the one opinion when there are two of the other opinion?

I emphasise this, not to criticise minority judgments or disagreements as to the law among Judges, but to point out that there is no certainty and although once the majority decision has been given it is the law, it is hard to say that it is clearly the right law when Judges of the highest rank were of the opinion that it was wrong.

New Zealand should be aiming towards having its own final Court of Appeal. It is probable that a Court of three is insufficient finally to decide involved and important matters of legal principle. On the other hand, if the Court of Appeal were required to provide a bench of five for all appeals the ordinary work of the Court would not get completed.

There can be no doubt that under the present system the permanent Court of Appeal is undermanned and there should always be four permanent members of the Court of Appeal in addition to the Chief Justice. Quite apart from the necessity of research and the prompt preparation of reserved judgments, Judges of the Court of Appeal have sabbatical leave, are sometimes ill and sometimes have other duties. It seems inappropriate and administratively inefficient on these occasions to have temporarily to transfer a Supreme Court Judge to the Court of Appeal. A permanent Court of Appeal at present should comprise four Judges, although in general only three should sit at one time. One also wonders if a number of the changes proposed in this paper were adopted whether the office of President of the Court of Appeal might not ultimately be abolished and the Court normally be presided over by the Chief Justice.

I suggest that the decision of the Court of Appeal where the Judges are unanimous and they disallow the appeal should be final. In cases where the Court of Appeal are unanimous in allowing an appeal their decision should be final unless the Court of Appeal or an enlarged Court of Appeal of seven members grants a certificate that a point of sufficient importance is raised to justify a further appeal. In cases where the Court of Appeal are not unanimous, there should be a right of appeal as of right where the matter in dispute exceeds in value $5,000 to a Court which should comprise seven members from the Court of Appeal and the Supreme Court. The Judges who sat in the Court of Appeal should be eligible to sit again to hear the matter reargued. Provision should be given for leave in cases of matters of important principle where the amount involved is less than $5,000.

There is no doubt that the more often a case is argued, the better it is argued. Frequently different counsel are involved and emphasis is made on different points from those earlier relied on or referred to. There accordingly appears to me to be no objection and indeed I consider it desirable that the Court of Appeal

Judges who heard the original appeal should hear the future appeal.

It is accepted that such a proposal will substantially interfere with the work of the Court of Appeal and the Supreme Court but it will provide a final Court of a calibre which must be sufficient to be accepted by New Zealand and the number of times it is required to sit should be rare. If, as a result of these obligations, it required a fifth member to be appointed to the Court of Appeal, this would be no bad thing.

The Supreme Court

There is no doubt that our present Judges are under too great a pressure of work. They are appointed as mature men and carry on in office until 72. It is probable that the retiring age is far too late and should be reduced to 65, but even so there must be relief provided from the pressure at which they are, at present, required to work.

The Judges are of the view that this relief should come by taking from them the obligation to preside over criminal trials involving minor offences. The Committee on Court Business suggests that the right of trial by jury should be taken away from offences involving dishonesty where the value of the goods does not exceed $200, unlawful interference with a motor vehicle, car conversion, indecent exposure, indecent act or performance for gain, unlawful sexual intercourse with a female under 16 where the offender is under 21, wilful damage and a number of offences contained in statutes other than the Crimes Act. It appeared, however, that such changes would result only in a reduction of 5 percent of its present total sitting business and would go nowhere near solving the problem.

Although the question of trial by jury is an emotive issue and people claim it as of right, it is only a right in that it has been granted by Parliament. There have always been petty offences for which no right of trial by jury is given and it is recognised that there always should be. There may well be room for some change in this regard because what was serious in 1900 may well be petty in 1975, but it is hard to accept the suggestion that allegations of dishonesty could ever be regarded as minor offences. Although in many cases it may be boring to preside over criminal trials, it is the most important function carried out by the Judges. The Courts are a protection of the citizens' liberty against the unjustified or unlawful demands of the State or of other citizens. It is essentially in the application and administration of the criminal law that our Courts and our Judges are examined by the public.

The proposal of the Committee on Court Business that there be Crown Courts sometimes presided over by a Supreme Court Judge and sometimes by a Crown Court Judge who might be "a senior practitioner who felt that he had perhaps not the broad talents to cover all fields of judicial work" or "the younger practitioner or Magistrate with special aptitudes" is quite unacceptable because it involves a differentiation in crimes with some criminal trials being presided over by a better qualified Judge than another. It is significant that the report when dealing with a proposal that Magistrates should preside over jury trials says as a criticism of the proposal that:

> "In certain areas of the scheme outlined there would be trial by Magistrate and jury and in other parts Judge and jury, which would lead immediately to the criticism of second-class justice."

Yet when supporting the appointment of Crown Court Judges it refers to the Beeching Committee (Royal Commission on Assizes) Report and the Committee Report on the Court of Criminal Appeal in saying that:

> "Both these bodies predicted that there would be no public realisation in the difference of status. This has, in fact, proved to be the case."

The lack of English criticism is not accepted as a valid argument because it is submitted that the establishment of the Crown Court and Crown Court Judges essentially replaced Recorders who did not have the status of a High Court Judge.

There is a further valid criticism in that the appointment of a Crown Court Judge would presumably be an appointment of a Judge to preside over criminal trials for the rest of his working life. Such an appointment could well affect a person to the extent of affecting his judgment and his impartiality. Some variety in judicial work is considered to be essential.

It is interesting to note that the Beeching Report found it highly undesirable for Judges to remain continuously engaged on criminal work, especially if they are always in one place. New Zealand is too small to permit of specialist Judges and although it is slightly out of context, it is not inappropriate to quote from the Beeching Report:

> "Movement of Judges also has the advantage of ensuring that, if they do occasionally de-

velop idiosyncrasies as a result of the exalted seclusion in which they live, their foibles move with them and do not become a source of irritation or amusement to any one section of the community."

It is accordingly desirable that the Supreme Court essentially retain its present criminal jurisdiction and that although there might be room to eliminate some crimes from those giving a right to trial by jury, it is important for the confidence of the community in the administration of justice that criminal trials of any degree of importance be held in the Supreme Court before a jury presided over by a Judge of the Supreme Court.

The relief which is required in the Supreme Court should come from other sources, namely in procedural alterations which will be dealt with later and in the removal from the Supreme Court of matrimonial jurisdiction.

Within the next two years the time of the Court involved in the hearing of personal injury cases should disappear. This in itself will give considerable relief. It is proposed that the jurisdiction of the present Magistrate's Court should be increased to $5,000, and if this were done and the Magistrate's Court upgraded as is proposed, further substantial relief would be obtained.

It has always been argued that matters of divorce should be retained in the Supreme Court because the dissolving of a marriage is of such importance to the parties and the community that it should be dealt with only by the Higher Court. This view today hardly seems tenable in the light of the substantive legislation reducing the sanctity of marriage, making much easier the grounds for divorce and to a substantial extent eliminating the question of fault. It is significant that shortly before this paper was written Australia had adopted "breakdown of marriage" as the sole ground for divorce and has eliminated fault. It has also apparently adopted special Family Courts but I am not aware of the exact terms of the proposal.

At the present moment matters of separation, guardianship and maintenance and some aspects of matrimonial property are dealt with in the Domestic Proceedings Court but within the overall administration of the Magistrate's Court.

There can be little doubt that in the break-up of marriages the settlement of maintenance, matrimonial property and custody is in most cases resolved at the time of the separation or shortly after but in any event before divorce. In some cases, because of the limitation of jurisdiction of the Magistrates, the conflicting provisions of the Domestic Proceedings Act and the Matrimonial Causes Act and the lack of provision for capital sums in the lower Court these negotiations are made on an interim basis leaving the final decisions to be made on divorce but this would be eliminated in most cases if the total jurisdiction were in the one Court and in any event does not now occur in most cases.

While there would be no need possibly to remove the jurisdiction of the Supreme Court to hear matrimonial disputes there should be concurrent jurisdiction for all matters to be heard in the Magistrate's Court. As has been stated in the Report of the Committee on Court Business, members of the Supreme Court judiciary by the very nature of their position and the more legalistic nature of their work become a little removed from the ordinary day-to-day domestic battles and the Magistrates who are dealing day to day with a wider variety of people in greater numbers more commonly encounter the factual situations which lead to the break-up of marriages.

When the Administrative Division of the Supreme Court was established it was anticipated that the provisions relating to appeals from Administrative Tribunals would be amended to make such appeals to the Administrative Division of the Supreme Court. This is a separate subject in itself but it is a matter of regret that the Government has not seen fit to implement these recommendations in every regard. Administrative Tribunals are daily becoming more and more important in their effect on the citizens and the business community. They make decisions which often have far-reaching consequences. The confidence of the community as to the justice of those decisions would undoubtedly be increased if in more cases provision for appeal to the Administrative Division of the Supreme Court were made. This will increase rather than decrease the load on the Supreme Court but if an increase in appeals to the Administrative Division requires an increase in the number of appointments to the Supreme Court, then so much the better for the administration of law.

Magistrate's Court

If, as stated above, the term "Supreme Court" is a misnomer, then the term "Magistrate's Court" and the term "Magistrate" is quite inappropriate. At present Magistrates exercise civil jurisdiction up to $3,000 which is in excess

of the civil jurisdiction of Circuit Judges in England. They not only preside over but decide the vast majority of criminal trials and can impose sentences of up to three years' imprisonment which in the case of a number of charges being made cumulative could amount to a lifetime. Their jurisdiction has grown enormously from what was previously called "The Police Court" and "The People's Court". Their status has not. It is now proposed to increase their civil jurisdiction to $5,000. Whether or not this is done there is no doubt that there is a great necessity to improve the status of the Court. The first step in this direction, in my view, is the recognition of them for what they are, namely Judges. It is important that no step must be taken which will derogate from the high esteem in which the Supreme Court is at present held, but this does not seem to be a valid argument against improving the position of the Magistrates. The distinction could be easily retained by knighting Supreme Court Judges on appointment rather than the present procedure where normally they work their way by effluxion of time to knighthood on becoming senior puisne Judge or retirement. The use of the term "District Court" and "District Judge" is probably not quite appropriate because there should be no limitation as to districts and for want of a better term I suggest Primary Courts with Primary Court Judges described as "Judge —" as against "the Honourable Mr Justice —".

The appointment to the position must be made a lot more attractive by the removal of a great volume of the routine or quasi administrative activities at present taking so much of the Magistrates' time.

The Summary Proceedings Amendment Act 1973 providing in s 7 for summary procedure for minor offences is a step in the right direction but does not go anything like far enough. This will be dealt with later.

Appointments should be made to the Justice Department of qualified persons to act as Registrars or Masters. They should have jurisdiction to deal with pre-trial conferences, to be referred to hereafter, entries of judgment in undefended matters, judgment summonses or procedures for enforcement of debts, adoptions, approval of minors' contracts, chambers applications and other miscellaneous business.

In Auckland, Justices of the Peace have been used to sit in defended traffic matters. The use of Justices of the Peace is desirable because it enables the laity to take part in the administration of Justice. Careful selection would be required in the appointment of Justices for this purpose and it would be necessary for the Justice Department to provide adequate and proper training. In addition, a qualified or at least trained clerk of the Court would have to be provided. I recommend that at least in the major cities, Justices of the Peace should preside over all defended trials where the defendant is not liable to imprisonment. These steps and the procedural matters to be dealt with later should take a great load of the routine work from the present Magistrates and ensure that the appointment would attract suitably qualified persons.

Small Claims Court

It will be apparent from what is to follow that although there is the greatest need for improvements in small claims procedure, there is no need to appoint a separate or new small claims Court.

Judicial promotion

It has been a tradition in New Zealand (although not in England) that once an appointment is made to a judicial position there should be no promotion. This principle has already been departed from in the establishment of the permanent Court of Appeal and the appointment to the Court of Appeal from Judges of the Supreme Court. Although technically this may be said not to be promotion, in the eyes of lawyers, Judges and the community it can hardly be denied that it at least appears to be promotion.

It is vital that the independence of the judiciary be retained. Although the qualities required by a Primary Court Judge or Magistrate are likely, in some respects, to be different from those required of a Judge of the Supreme Court this will not be so real if the administrative changes proposed hereby are adopted. In order to increase the quality of the Primary Court or Magistrate's Bench, it is in my view desirable that the appointment should not necessarily be a dead end. On the other hand, there must be no promise of promotion at the time of appointment to the Primary Court or Magistrates' Bench, and promotion probably should be the exception rather than the rule. It is hard to conceive that a person at present appointed to judicial office would be influenced in his judgments by political considerations with a view to his personal promotion but every step must be taken to ensure that this does not occur. This could be avoided if a Commission were

appointed to recommend to Cabinet suitable names for appointment to judicial office. The notification of vacancies should, of course, come to that Commission from the Attorney-General but the selection should be made by the Commission. It could be suggested that the Commission should comprise the Attorney-General, the Chief Justice, the President of the Court of Appeal or a member of the Court of Appeal, a lawyer nominated by the Leader of the Opposition and two lawyers nominated by the President for the time being of the New Zealand Law Society. In many cases, this Commission may not need to meet and recommendations could be made by way of telephone discussions but it would have the advantage of ensuring the independence of the judiciary from political interference.

Court procedures

If there be any theme to this paper, it is that the present failings in service given to the public by the Courts are not due to Court structure but to the procedures adopted by the Courts. Although many improvements have been introduced with a view to improving the service given to the public and the consideration given to the litigant, witnesses and jurors, nevertheless too great an emphasis is still placed on the convenience of the Court rather than the convenience of the community at large.

In order to facilitate the speedy and efficient disposal of Court business, it appears that two major principles previously accepted will have to be abandoned. They are the right of the litigant to be represented by counsel of his choice and the attitude of the Court that it is for the parties to refer matters to the Court and so long as the parties take no steps, the Court is not interested in the state of the proceedings.

1. *The right to choose counsel of one's choice*

Because we are a fused profession the vast majority of litigants consult directly the man whom they wish to appear for them in Court. While every endeavour should be made to suit the convenience of counsel when fixtures are being made, nevertheless, it seems inevitable that the excuse that counsel is engaged in another fixture should not be accepted as a ground for an adjournment after the fixture has been made. This has already been held in *Fontainebleau Ltd v Stanley Buildings* [1974] 1 NZLR 46, and it would seem unarguable that the delays and inconvenience to other litigants, witnesses and counsel by allowing such adjournments is a far greater detriment than the so-called right of a litigant to choose his own counsel regardless of whether that counsel happens to be available at the time of the fixture or not. In the lower Courts at least the non-availability of counsel is a frequent cause of adjournments.

2. *The Court's interest in proceedings*

It has always been considered that the Court exists solely to resolve disputes placed before it by the parties and in the event of there being no dispute by the parties, the Court should not interfere. It is the acceptance of this proposition that is responsible for a substantial proportion of the delays. No matter what principles or rules Courts may impose, there is a tendency to overlook the fact that in most civil litigation there is a definite interest in one party in avoiding or delaying having the matter heard. A solicitor's duty to his client often is in conflict with his obligation to the Court, but provided he is not breaking the Rules of his profession it seems hard to suggest that his duty to his client does not prevail.

It therefore follows that the Court should be under an obligation to see that its procedures are not abused and that it is not to be blamed for the delays which occur. Once any party invokes the assistance of the Court by commencing proceedings, then it is the concern of the Court to ensure that those proceedings are fairly and expeditiously conducted. If this principle is adopted some substantial changes in procedure will be required and extra and highly qualified staff will be required in the Courts. When a writ is issued and a defence filed, the action should be immediately allocated to a specific Judge and Registrar. An immediate appointment should be made for the solicitors or the parties to attend before the Registrar to indicate what interlocutory proceedings will be required and at that appointment all appropriate interlocutory orders should be made. There should be no need for complicated forms in relation thereto. Dates should be made for the completion of interlocutory matters and failing compliance with those dates, judgment should be entered or the proceedings struck out as the case may be. At the completion of the time for interlocutory matters, a further appointment should be made for the solicitors or the parties to appear before the Registrar to be called a pre-trial conference. The question of admissions of facts, exchanging of experts' reports, admissibility of evidence, possibilities of settlement or at least reducing the issues in dis-

pute should be explored. If as a result of that meeting no settlement is achieved, a date of hearing should be granted. This should apply, in my view, to both the Supreme Court and to the Primary Court. It will involve a substantial increase in the Justice Department staff and it would be desirable that the Registrars who attend to matters of this nature be qualified and will no doubt take several years to put into force. The profession may well say that it is beyond their capacity. As at the moment it is generally stated that there are far too many law students and law graduates and that there are law graduates looking for jobs, now seems to be the appropriate time to impose a procedure of this nature. Solicitors may well have to employ more staff, and the Justice Department certainly should employ more qualified barristers and solicitors.

Proposed changes of procedure to improve and expedite Court business

1. *Court of Appeal*—At present, three months from the date of sealing the judgment is the time limit for giving notice of appeal from decisions of the Supreme Court. This appears to be much longer than is now required and should be reduced to six weeks in the case of appeals against all final judgments. The present time for appeals against interlocutory judgments should remain. The appellant should be required to file his case on appeal in the Court of Appeal together with a summary of his argument and a reference to all cases to be relied on within one month of the giving of the notice of appeal. The respondent should be required to file in the Court a notice to the appellant of his summary of argument and cases to be relied on 14 days after receipt of the case on appeal. A fixture should then be made. Fixtures should not be made in Court as at present. The Registrar should confer with the solicitors to all parties and endeavour to allot suitable fixtures but in any event the fixture date should be final. There should be no need for a praecipe and cases should accordingly be heard within three months of the judgment being appealed from.

2. *Supreme Court*—(a) The first and most material change in procedure which should be immediately implemented is to adopt recommendations which have been suggested at practically every Law Conference since 1957, namely that the present system of recording evidence by typing it straight onto the typewriter should be abolished. There may be mechanical difficulties with various types of tape recording but if this is so, then in the meantime evidence should be recorded in shorthand. In the vast majority of criminal cases there should be no need ever for the shorthand to be typed out. If a case is expected to take more than three days, arrangements should be made for the evidence to be typed and available daily but in the vast majority of cases which are completed within less than three days, there appears to be no need to type the evidence out at all and counsel and the Judge should rely on their notes. If there is a real problem a shorthand writer can be asked to refer to her notes. It is hard to understand how the Judges who for so many years have been complaining about the pressure of work on them can have endured this archaic system which is now unique in modern judicial systems. My proposition is not supported by statistics or any scientific basis but I believe that by this alone the time involved in the hearing of criminal trials and of civil trials involving oral evidence would be reduced by at least 20 percent.

(b) Although it is a political issue and one which both politicians and Judges seem reluctant to discuss, it seems desirable that with present means of communication and legal aid available there must be much more of the parties coming to the Judge rather than the Judge coming to the parties. I shall immediately lose any support that I might have had from my provincial brethren but nevertheless I believe it must be stated that rather than being proud of the opening of the Supreme Courts at Whangarei and Rotorua, the Government should regard it as a matter of concern. It is certainly recognised that in the light of existing Supreme Courts both cities were well behind and well deserved Supreme Courts but the action should have been taken to abolish the unjustified Courts rather than to build new ones with the administrative staff and expense attached thereto. There is no doubt need for criminal trials to be held in a convenient place near where the crime occurred, but particularly now that personal injury litigation has been eliminated, there is no such need in the case of civil business. Civil sittings of the Supreme Court in the following places should be abandoned: Whangarei, Gisborne, Wanganui, Rotorua, Blenheim, Greymouth, Timaru and Invercargill.

In order to give effect to the principles suggested under *The Court's interest in proceedings,* I would suggest that in addition to the

closing of the above Courts the Registries of the Supreme Court should be closed in the centres of Hamilton, Napier, New Plymouth, Palmerston North, Nelson and Dunedin. When the Judge comes to those Courts on civil business his staff should go with him from the Registry where the Judge resides. This should lead to a greater flexibility and saving in Judges' time, particularly if the pre-trial procedure recommended previously is adopted. The savings of Supreme Court staff in these centres should go somewhere towards the increase and upgrading of the Supreme Court staff that would be necessary in Auckland, Wellington and Christchurch where there are resident Judges and where there should be a number of qualified Registrars. To save expense, filing of documents should be permitted by post without the necessity of an address for service within three miles of the Registry.

(c) The pre-trial conferences or meetings before the Registrar mentioned above should be instituted.

(d) Wherever there is a number of matters set down for hearing in the one day, appointments should be made estimating the time involved so that parties, witnesses and their counsel need not necessarily be kept waiting. A Judge's time is important but so, in the interests of the national economy, is the time of all other parties required to appear before him. As was said in the Beeching Report:

> "We do not think that the provision of some spare Court time is necessarily wasteful, because it may result in very great saving of time and expense, and reduce inconvenience for those using the Court."

A large number of routine matters should be taken from the Judge to relieve him for more important things. The appointment system should apply to matters before the Judge but a fortiori matters before the Registrar.

(e) Bankruptcy proceedings of a routine nature, matters in the winding up of companies and most interlocutory applications should be attended to by the Registrar, who generally should be a qualified man.

(f) As a general rule, interest should be allowed from the date of the commencement of proceedings at a rate slightly higher than the usual bank rate. There has been a reluctance by parties to claim interest and an even greater reluctance by Courts to award interest when interest is claimed. Usually, the result of delays is that one party has for the period of the delay had the benefit of the other party's money. This principle alone should justify the award of interest but it will also have the effect of preventing professional debtors using the Courts as a means of obtaining finance and should be an incentive to prevent delays in litigation.

3. *Magistrates' Courts or Primary Courts*—(a) *Criminal offences for which the defendant is not liable for imprisonment.* Section 7 of the Summary Proceedings Amendment Act 1973 is a step in the right direction but does not go anything like far enough. In every case the information should set out the summary of facts and a standard fine. (This standard fine could vary according to previous offences.) In appropriate cases where disqualification from driving or demerit points is called for this could also be stated. The defendant should be advised that if he wishes to dispute the facts or the penalty he may make submissions accompanying a plea of guilty. If he wishes to defend, then the matter should be set down for hearing in the ordinary way. If he takes no steps, the standard fine and disqualification should be imposed by the Registrar. If he makes submissions the matter should be referred to a Magistrate (Primary Court Judge). If he defends, then in metropolitan areas wherever possible the defended action should be set down before suitable chosen Justices of the Peace with experienced or qualified clerks in attendance.

(b) *Liquidated demands.* Special damages, ie repair accounts and the like, should be regarded as liquidated sums for which default summonses should be issued. In the case of hire purchase agreements and contracts of that like, interest at a rate in the contract, provided it does not exceed 25 percent per annum, should also be a liquidated sum for which a default summons can be issued.

(c) *Small claims procedure.* There should be special procedures in relation to claims of up to $500 which is dealt with in a separate paragraph.

(d) Judgments by default, adjournments, judgment summons, if they are to be retained, or any other methods of enforcing judgments, should be dealt with by the Registrar and not the Magistrate or Judge.

(e) Interlocutory applications, adoptions, approval of minors' contracts and other routine matters, including undefended divorces, should also be dealt with by Registrars.

(f) Pre-trial conferences before the Registrar

as proposed above should be adopted and fixtures should be made with a reasonably accurate estimate of time involved. Fixtures should be made by appointment and not with a number of fixtures set down for the one time on the one day.

(g) *Domestic proceedings.* Matters relating to maintenance and matrimonial property should be dealt with by way of affidavit. Although it would be necessary to allow deponents to be cross-examined, no new evidence should be allowed to be given by a party unless it is given by affidavit. This should eliminate a great deal of irrelevant matters raised in these proceedings and reduce the time substantially. In the case of separation orders, the law ought to be changed so that once a Court is satisfied that there has been a breakdown in the marriage the only grounds for refusing to make a separation order is that insufficient or inadequate provision is made for the dependent spouse, or children, or that it is in the interests of a child or children that no separation order be made. Once the parties have been through the conciliation procedures provided at present, there seems little point in having lengthy hearings as to whether or not there be a separation order. If this change were adopted, then applications for separation orders should also be dealt with by affidavit in the same way as proceedings for maintenance and matrimonial property. Without the strictness of forbidding new evidence, applications for custody could also be dealt with primarily by way of affidavit. A substantial proportion of legal aid money must be spent on domestic proceeding matters at present. This is one aspect of the law where inquiries should be made as to whether the adversary system is appropriate. It might be better to refuse legal aid except for the preparation of the affidavits, to discourage representation by counsel at the hearing and to give the Judge an inquisitorial function that would ensure fairness whether the parties were represented by counsel or not. The inquisitorial approach is already adopted by some Magistrates and one wonders whether in these matters representation by counsel does assist much in the search for justice.

(h) In the case of defended criminal trials it is probably not feasible to have fixtures by appointment, but again care should be taken to avoid setting a large number of cases down at one time.

(i) Interest should be allowed as suggested for the Supreme Court.

Small claims procedures

There is considerable clamour for a small claims Court. There is undoubtedly need for something to be done in respect of small claims but it does not seem that it is necessary to have a separate Court. At the present moment it can probably fairly be stated that a lawyer should advise his client that a dispute involving a sum of not more than $200 is too expensive to litigate. In many cases this could apply to sums in dispute up to $500. Plaintiffs are being advised to abandon claims which appear to be perfectly good at law. Defendants are being advised not to proceed with legitimate defences which they have. Compromises are being made solely for the purpose of avoiding the costs of litigation. It has reached the stage where advice could be given to any defendant to a civil plaint to file a defence because it will be so costly and inconvenient for the plaintiff to pursue his remedies to the full that he will be forced to accept less than he is entitled to.

The demand for a small claims Court has arisen mainly with a view to enabling consumers to take action in respect of defective products but there is need for new procedures to be adopted not only for this purpose but to ensure that contracts and the civil law is meaningful and capable of being enforced.

Suggestions have already been made concerning simplification of procedures for default and undefended summonses. What is required is a new procedure for disputed matters involving amounts up to $500.

There does not seem to be any need to establish a separate Court which would create administrative difficulties and add to expense. There is a great deal to be said for adopting in general the procedures carried out in England and Wales for small claims in the County Court. The suggested proposals for New Zealand would be:

(1) Qualified Registrars should be appointed by the Justice Department who should exercise jurisdiction as arbitrators.
(2) All disputed actions involving up to $500 should be referred for arbitration before a Registrar unless the Registrar of the Primary Court Judge has ordered that the action be heard in Court before a Judge.
(3) By consent of the parties, matters up to $1,500 may be dealt with before the Registrar as an arbitration.
(4) The Rules of the Court should be simplified and specimen forms should be avail-

able so that Statements of Claim and Statements of Defence may be filed by the parties in person.

(5) The Registrar must be trained to adopt an inquisitorial role rather than the traditional judicial role of the adversary system. He should not be bound by the Rules of evidence and there should be no appeal from his findings.

(6) As suggested earlier, there should be a pre-trial meeting before a date or time is fixed for the arbitration, ensuring that the parties have the necessary witnesses and documents available and are aware of what is in dispute.

(7) While no bar should be given against parties being represented by counsel, this should be discouraged. In England and Wales small claims referred to arbitration in this manner do not carry party and party costs and it seems that in most cases the parties conduct their litigation in person or with the assistance of a clerk in a solicitor's office. Accordingly, no party and party costs should be allowed in arbitrations except for disbursements and witness expenses.

It is accepted that this system will not be perfect but it is believed that on analysis, people really want an answer to their dispute after what they consider to have been a fair hearing. Speed of giving the answer and saving in cost justify the lack of perfection. It must be recognised, however, that for the proposal to work effectively the Registrars will require special training and probably a special type of personality. It would be essential to the effective operation of the scheme that there be no appeal, as if an appeal is open, formalities must be preserved. The integrity of the Registrar and the manner in which he carries out his task must accordingly be beyond reproach. It will no doubt be impossible for the Justice Department to provide suitable Registrars for many years but in the meantime there seems to me to be no objection to practitioners being appointed to this position part-time, although this is not a satisfactory long-term solution.

Changes in legal aid policy

It has always been accepted that as a general principle a person who has been unjustifiably taken to Court or required to go to Court should have at least some part of his legal costs paid by the person responsible. (This principle was recognised by the Government in the Costs in Criminal Cases Act 1967 but has not been followed by the Judges and Magistrates in their application of the Act.)

Our whole Court system has been based on the theory that the unreasonable or even merely wrong litigant can be discouraged by an order for costs against him. The theory has no application in the case of legally aided persons as it is only in the rarest circumstances that an award can be made against a legally aided person or the legal aid fund. This adds a new factor to litigation for which the Courts are given no adequate remedy or sanction. Legal aid in civil matters is now available to a large proportion of the community. A plaintiff, once granted legal aid, has nothing to lose by pressing on with an unmeritorious claim. Although legal aid committees endeavour to debar such plaintiffs from obtaining legal aid, it is inevitable that some unmeritorious claims will be supported by legal aid and unnecessarily waste the time of the Court, let alone the expense to which they put the opposite party if he has not succumbed to the somewhat natural tendency to pay the claimant at least as much as the successful defence of the action will inevitably cost him. It may sound reactionary but one must be permitted to wonder why a legally aided person should be put in the privileged position of not having to consider the possibility of an order for party and party costs against him.

The problem is much more real in the criminal field but in civil litigation there appears to be no reason why a litigant should be prejudiced because his opponent is legally aided. Surely the award of costs should be the same whether a party is legally aided or not. If a litigant is legally aided the costs should come first from the legal aid fund but in the majority of cases, in the absence of extenuating hardship, the party and party costs should be recovered by the fund from the litigant. Recovery may be difficult but officers of the department should be available for this purpose. Our whole Court system and structure has been based on the premise that the vast majority of people involved in civil disputes will settle such disputes without going to Court. One of the main impelling factors in that result is the award of party and party costs. The introduction of legal aid has created a privileged class.

In crime, the problem is much greater. It is important that anyone charged with a criminal offence should have legal representation whether or not he can afford it. This is

acceptable to the community because he may be innocent of the charge and is innocent unless or until he is proved guilty. The real question, however, is whether a guilty man is entitled to have had a free trial at the expense of the taxpayer if he is, in fact, able eventually to pay for it.

In the Magistrate's Court a good deal of time is taken in considering applications for legal aid. Would it not be simpler for legal aid to be granted immediately on application without examination of means but on the clear understanding that the applicant may eventually be required to repay the costs paid? Counsel could be assigned at present. Costs in criminal cases should follow the event, regardless of legal aid. If the legally aided person is acquitted his counsel's costs according to scale are paid by the prosecutor. If he is convicted his counsel's costs are paid by the legal aid fund but a recovery is claimed from the criminal. In cases where prison sentences have been imposed, the claim may have to wait until release from prison but should not be abandoned except in cases where, say, three years' imprisonment or more is ordered. A committee should be appointed which would have a discretion to waive recovery in whole or in part or to vary the terms under which the Justice Department seeks recovery. There is no doubt that at the moment a large number of criminal charges are being defended where there is no possible defence. I believe that this occurs because the grant of legal aid has introduced a privileged class. The proposal that ultimately he might have to pay his costs should deter one who at present instruct his counsel to defend, regardless of whether there is a valid defence or not but should not deter one who believes he is innocent or has a valid defence.

Legal aid is recognised as a very separate topic from Court structure and procedure but it has been the cause of many of the problems in Court structure and procedure. I make no apology for suggesting that there are aspects of legal aid urgently calling for review.

Summary of conclusions

1. The Government must relieve the judiciary from responsibility for administration of the Courts and appoint suitably qualified persons to do so.
2. The Court must take an active interest in the conduct of litigation from its inception to ensure efficiency and to prevent the processes of the Court being abused and to prevent unnecessary inconvenience to others.
3. The Court must give more consideration to the public, and the time of litigants' witnesses and others must be considered as well as the time of the Courts and the lawyers.
4. Provision should be made for a permanent and final New Zealand Court of Appeal.
5. Criminal trials in the Supreme Court should be presided over by Judges.
6. The status of the Magistrate's Court should be improved and its civil jurisdiction increased to $5,000. It should have full concurrent jurisdiction in all matrimonial matters including divorce.
7. Substantial relief should be given to Magistrates by the appointment of qualified Registrars to carry out a number of quasi-administrative functions at present conducted by them.
8. Greater use should be made of trained Justices of the Peace with experienced clerks to preside over criminal charges where the defendant is not liable to imprisonment.
9. Procedural changes should be implemented in all Courts to ensure the more expeditious conduct of litigation.
10. The old principle of no judicial promotion should be abandoned.
11. Substantially simpler methods of determining matrimonial disputes should be adopted with the possible discouragement of representation by counsel.
12. Simple procedures should be adopted for the determination of all disputes involving less than $500 and by consent up to $1,500.
13. Changes should be made in legal aid legislation to prevent the legally aided person relying on the fact that an order for party and party costs will not be made against him.

DISCUSSION

Chairman: Mr J F Jeffries

Commentators: Messrs D L Tompkins QC and G V Hubble

MR JEFFRIES: "Mr A D Holland is a Christchurch barrister and solicitor with quite extensive experience in Court litigation. He was a member of the New Zealand Law Society's three-man committee on Court structure which prepared the Society's submissions which were addressed to the Committee on Court Structure chaired by Mr Justice Speight."

MR HOLLAND: "Mr Chairman, my Lord Chancellor, Rt Hon the Chief Justice, distinguished guests, ladies and gentlemen: The paper which I have prepared is perhaps too long and in some respects goes into too much detail. I was, however, conscious of the ease of criticising existing institutions without having to provide alternative substitutes. Change should not be made for the sake of change and new Court structures and procedures should not be adopted unless reasonable grounds exist for believing changes will be improvements. Hence I have felt compelled to go into some detail in support of the proposals which I have made. With the possible exception of the suggestions for the final Court of Appeal for New Zealand there is nothing new in the paper. All the various proposals have been discussed and considered before. Probably in New Zealand they have not all previously been presented in one package. It is, in my view, important that the various issues be studied as a whole.

"The principal purpose of this paper is to emphasise the need for a review of Court structure and procedure in depth with adequate time and adequate resources. I shall later be regretting the absence in New Zealand of a Lord Chancellor, but at this stage I wish to state it is a cause of regret that we have no apparent Dr Beeching. Nevertheless, it is, in my view, imperative that such a review be undertaken by a committee or commission on which men of commerce or other laymen are adequately represented to ensure that the views of the litigants are heard as well as the views of the Judges, the legal profession and the Justice Department. With respect to those members of the committee or other bodies who presented their report in May 1974, a great deal of the impact of their recommendations is lost because the report does not cover Court structure as a whole and was deliberately written with a view to obtaining short term relief to immediate problems rather than to offer long term proposals for reform. I should also add in fairness to members of the committee that some aspects of the report represent a minority view only, but in my paper I have treated the report as being the views of all members of the committee.

"Through considerable publicity last year it is apparent there were conflicts between the New Zealand Law Society and the content of the report. That there were disagreements in principle on certain matters there can be no doubt, but there were undoubtedly more matters of agreement than disagreement. In several respects the proposals in this paper are in conflict with the conclusions of the report, but again there are many more areas of agreement than disagreement. The main aspect in respect of which the New Zealand Law Society and I differ with the views of the Judges as expressed to the Committee, is that the Judges seek to be relieved of what some of them have described as the burden of presiding over criminal trials of a 'petty nature'. It is impossible to define what is meant by a crime of a 'petty nature', but in my view no crime in respect of which a person is liable to lose his liberty could be labelled 'petty'. To the public the law is essentially the criminal law. The fact that jury trials are presided over by Judges of the Supreme Court is important in the eyes of the public in relation to the administration of the law generally and the proposal to introduce a new and inferior Court would not only lower the respect with which the Supreme Court Judges are held in the eyes of the public, but would also lower the respect of the public for the law itself. Quite apart from these factors, it is surely most important that criminal trials should be presided over by Judges of the first order in the hierarchy rather than of the second order.

"I propose that the pressure on Judges' time should be reduced by relieving them of a great deal of their administrative work by improved procedures and relieving them of a great deal

of their matrimonial jurisdiction. This latter proposal may be as abhorrent to some as the removal of a great deal of crime from the Supreme Court calendar would be to me. If this should be the case then the answer must be to substantially increase the number of Judges. With respect to those holding that office, it cannot be accepted that New Zealand is too small to permit this and even doubling the existing number (and no one could suggest that that is now needed) could in no way lower the present high standard of the Bench.

"I have commenced with the Court of Appeal. In my view the demands of society for a speedy answer to litigation and the costs involved have made it undesirable for New Zealand to retain a right of appeal to the Privy Council. There have been proposals for a Commonwealth Court of Appeal, a Pacific Regional Court of Appeal or a right for New Zealanders to appeal to the High Court of Australia or a joint High Court of Australasia. None of those proposals are, in my view, a satisfactory alternative to the Privy Council, and I would certainly not advocate the abolition of appeals to that body except on the basis that New Zealand has now reached the stage where some final Court of Appeal can and should be established in New Zealand.

"Quite apart from the need to give relief to the Judiciary, there is no doubt that existing Court systems and procedures are too slow and too cumbersome. The introduction of the ready list involving the principle that no fixture is allotted until all parties have signed that they and their cases are ready for hearing, may have made administration easier for the Judiciary, the Department and the profession, but it did a disservice to the litigant in creating greater delays before a hearing could be obtained. It improved the statistics of the Court and the Department in showing no substantial delays between the request for a fixture and the granting of one, but it created much greater delays between the commencement of proceedings and the granting of hearings. In most litigation it is in the interests of at least one party to delay a hearing. The ready list system allows too much scope for a litigant who seeks delay.

"Administration of the Court has traditionally been left to the Judges. New Zealand does not have a Lord Chancellor and regrettably I do not see how one could be created. I believe, however, that the government must take a far greater part in and responsibility for Court administration. I do not believe that this will in any way interfere with the independence of the Judges; it must not be allowed to do so. It *will* involve spending considerable sums of money. In view of the paltry percentage of funds spent on the Justice Department this should be no problem. The standard of the whole Justice Department must be substantially raised. As a start the Department should have as its aim that the minimum education standard for a Registrar should be an LLB degree. It will no doubt take years to be achieved. I have made substantial and far reaching proposals by way of reform to the practice and procedures of the Supreme Court and the Magistrate's Court.

"Although the Committee on Court Business was appointed in 1973 because of concern at the pressure on Judges, I am of the view that the greater and more immediate need is to improve the standard and the status of the Magistrates.

"Legal aid is more than mentioned in the paper. It is the introduction of legal aid with its consequent removal of the sanctions of costs for those fortunate persons who are eligible for legal aid more than anything else that has demonstrated the weaknesses in our existing structures and procedures. Not only is there, in my view, urgent need to reform these structures and procedures, there is also urgent need to reform certain aspects of legal aid.

"I have previously expressed the view that no one will agree with or accept all that is proposed in the paper; there must be room for substantial improvements and alternatives in the detail of the reforms proposed. I hope, however, that the discussion will not get too diverted towards detail and will concentrate more on the matters of substance."

LORD ELYWN-JONES (Lord Chancellor of Great Britain): "Mr Chairman, ladies and gentlemen: Four basic questions have been raised in England and Wales over our consideration of Court structures. First, concentration or devolution; do we aim at a Court exercising whatever jurisdiction it is given over the whole country and run from some central administrative headquarters, or at several local Courts, each with its own independent administration and with limited geographical jurisdiction?

"Secondly, overall or split jurisdiction. Do we want the criminal Court or the civil Court with comprehensive jurisdiction in its own field and making its own internal arrangements for channelling the right cases to the right level of

judiciary, or is it better to have an inferior Court with a less senior Judge and limited jurisdiction and a superior Court with a more senior Judge trying only the heaviest cases?

"Thirdly, specialist or comprehensive Courts; should a criminal Court do nothing but crime and a civil Court do nothing but civil, or should the same Court try civil on one day and criminal the next?

"Fourthly, specialist or general Judges; is it better for a Judge to spend all his time on the Bench trying either crime or civil so he becomes a real specialist in one or other field, or should he from time to time have a change of scene and a change of bowling?

"First, concentration or devolution. The trend in England and Wales has in the last two years been towards concentration. This is exemplified first in the Crown Courts which from the beginning of 1972 picked up all the old criminal jurisdiction of Assizes and Quarter Sessions and is now the only Court which can try cases on indictment. Before then there were 224 separate venues for trials on indictment; now there are 92. The same legislation which set up the Crown Court drastically reduced the number of venues for High Court civil actions. There had been 63; now there are 23. Perhaps in the long term most significantly, the same legislation superseded all the old administrative arrangements of the Clerks of Assize and the Clerks of the Peace each looking after his own separate Courts of Assize and Quarter Sessions, and each with his own staff, some paid by central government, some locally. Instead it brought them into what we call the unified Court service, embracing the staff of all the superior Courts and County Courts as well. As a result I have in my department now somethink like 9,000 administrative staff. Whether the trend will continue I do not know.

"We still have a system under which much, indeed most of our litigation comes before Courts of local jurisdiction, and I do not think the processes I have indicated will be reversed.

"Secondly, overall or split jurisdiction. I think we are moving in the direction of overall jurisdiction, and again this is strongly emphasised by the setting up of the Crown Court. The problem is if you have a single Court with exclusive jurisdiction, you have to have some arrangement for seeing not only that cases are sent for trial at the Court centre most convenient for those concerned, but when they get there that the heaviest ones are reserved for the senior judiciary. We have solved this problem largely by administrative arrangements. We have arranged around each Court centre what is loosely called a 'catchment area', so that the Magistrate's Court sitting in that catchment area commit to that Court centre unless there are special reasons for committing somewhere else. If one Court centre becomes overloaded or underworked we simply alter its catchment area by administrative action. Further, the Lord Chief Justice has been empowered to give directions as to what class of case is to go before what type of Judge. These directions are flexible and nobody can challenge the decision of the Court on the grounds he ought to have been tried by a High Court Judge and was tried by a Circuit Judge, or conversely. The effect is that the relatively few cases involving those crimes which are *always* very serious are automatically listed before a High Court Judge. Those which are normally not very serious are listed before a Circuit Judge unless there is good reason to send it before a High Court Judge. Those in the middle range are divided in accordance with directions given by Judges themselves. It is all done by administrative action; it may sound informal, but it works very well.

"As the Crown Court set a pattern for criminal cases which the civil Courts might follow, we have very definitely a split jurisdiction in the civil field. By and large, with some exceptions, county Courts can try civil actions only up to a limited financial level, at present £1,000, while the High Court has unlimited and universal jurisdiction, again with exceptions. This system has both advantages and disadvantages. Its main advantage is obviously a comparatively small case must, unless the plaintiff is prepared to put himself at risk as to costs, be started in the less expensive Court where it will be tried locally. The main disadvantages are that financial limits are apt to be artificial, and that one has to have two separate and overlapping procedures, each of which is rather complex.

"Thirdly, specialist or comprehensive Courts. There is no doubt in the field of what is loosely called administrative law, we have been moving towards specialist tribunals, although this does not mean I am free from pressure to add to the administrative functions of the ordinary Courts. I shall not try to list these tribunals because there are so many, but I believe there are now 57 tribunals with annual case loads varying from one or two to 36,000. I see no diminution in this trend. The most recent ex-

ample, and one which attracted the most attention, is the now defunct National Industrial Relations Court, but the demise of this Court does not indicate any reversal of the trend, because as you will have seen, the government is proposing to set up a new specialist tribunal presided over by a Judge sitting with lay members to exercise an appellate jurisdiction, broadly similar to the appellate, not the first instance, jurisdiction of the dead Court. Although the trend is not perhaps so clear as it has been in the past, I think it is probably still towards the creation of specialist tribunals rather than towards widening the jurisdiction of the ordinary Courts of law, particularly in those fields which impinge on the complex social legislation which successive governments have introduced since the war.

"In this connection I should perhaps remind you, so that you may put what I have been saying in the correct context, that the population density of England and Wales is about 850 to the square mile, compared with a population density here of about 30 to the square mile; you are indeed lucky people. This comparative density of population must be inevitably reflected in the number of issues arising for adjudication in this legislation, hence the need for the multiplicity of adjudications.

"Fourthly and finally, specialist or general Judges. This is by no means the same as specialist or comprehensive Courts, although the two are closely connected. Here the trend is by no means all the one way. On the one hand we do have full-time and part-time chairmen of specialist tribunals who are not by and large professional Judges in other fields. Nevertheless, of the part-timers, many hold several tribunal appointments so they do enjoy a varied diet, and others sit as lay Magistrates. In the ordinary Court there is a tendency to get away from the specialist criminal Judge or the specialist civil Judge. Inevitably some Judges, because of their experience or preference, sit wholly or almost exclusively in crime or in civil, but I think it is right to say that the composition of the circuit Bench is becoming steadily ambidextrous and also ambisextrous, and most Judges prefer this. In the High Court, of course, the Queen's Bench Judges have always been ambidextrous and are becoming increasingly ambisextrous, and I have just appointed a second woman High Court Judge. So they remain as such and in practice many of the Family Division Judges take crime as well as divorce and ordinary civil business when they are outside London.

"So I think, therefore, that the overall picture is that the professional Bench of the ordinary Courts of law is tending to become less specialist, but there is and is likely to continue to be the high degree of specialisation in the administrative tribunals."

MR J T EICHELBAUM (Wellington): "I wish to speak to that part of Mr Holland's paper which relates to the alleged lack of speed in the civil proceedings in our Courts, and in particular in the Supreme Court. No one can deny that a great deal of our civil litigation moves at a leisurely pace, but is it really true to say that we, as practitioners ready and able, are yoked impatiently to a pedestrian pace set by the Courts? I do not believe that that is so, and I do not believe that the statistics which are set out in Holland's paper, nor for that matter personal experience, go to prove this. Nor do I believe that our present Court procedures are inadequate to deal with the situation where one party wishes to force the pace along to a greater extent than the other. Indeed, the proposed new Code of Civil Procedure on which a committee has been working will contain some refinements in this respect.

"But I wish to submit that if we *are* to look at the question of the pace of our litigation seriously, we must commence with an examination of the ingrained habits of our own profession. Is it not something of an indictment that this paper should propose as it does that the control of the progress of litigation should be taken out of the hands of practitioners and made the responsibility of the Courts, a proposal which I might say I should oppose most strongly? But looking at our own professional position and the service we are able to render, can we really claim so far as common law work is concerned, that we are keeping pace with the times? Do we have the methods of research that are adequate? Are we recruiting the number of people into common law work to handle the work properly? Are the people engaged in it carrying a work load limited to a quantity which can be turned over at a reasonable pace? There are other questions of that kind relating solely to our own internal procedures.

"Now I appreciate that these are matters that go outside the scope of the brief which was given to Mr Holland. Nor do I suggest that these questions, if dealt with fairly, are necessarily answered in all respects unfavourably to the profession. But they do lead to the broad question, are we as a profession able to give the modern litigant, be he a businessman

or the man in the street, the kind of speedy and efficient service which he is entitled to expect? I suggest we have to face up to that question, and we would be deluding ourselves if, in trying to grapple with the question of the speed with which we turn over litigation, we confined ourselves solely to the problems which Mr Holland has raised in his very stimulating paper."

MR TOMPKINS: "A premise basic to Mr Holland's paper is that litigants in New Zealand presently suffer an unacceptable level of delay. Therefore alternatives in procedures are required in order to reduce or eliminate these delays. This premise may be arguable, but in my opinion the present level of delay, although not severe, is sufficiently unacceptable to require procedural remedies to be instituted before it reaches the severe stage. I therefore accept Mr Holland's premise.

"Delay can occur in two areas; first, the time from the receipt of instructions or the issue of proceedings until the application for a fixture, and secondly, from the application for a fixture until hearing. Even without supporting statistics, I am prepared to assert that the first class of delay is by far the more significant. Greater delays occur in our offices than occur in the Courts. In some instances these delays are deliberate at the instructions of the client, but more often they are due to inactivity on the part of the lawyers.

"I agree, therefore, with Mr Holland's contention that Court procedures ought to be altered to reduce delays caused by parties or their advisers, but I differ with Mr Holland and agree with Mr Eichelbaum that this does not require the discipline to be taken over by the Judges. The procedure that he appears to me to advocate is likely itself to cause the very delays we are seeking to avoid. I believe that the remedy lies rather in amending our existing procedures by in certain instances imposing time limits that do not now exist, and in all cases by making more severe the penalties for non-compliance. For instance, for many years orders for discovery have probably been procedurally the most effective cause of delays at the interlocutory stage. A party on whom an order for discovery is served will file his affidavit of documents within the time specified in the order, if he knows that failure to do so will result automatically in his statement of claim or statement of defence being struck out. Similarly a party on whom a writ is served will file his statement of defence within the time specified if he knows that failure to file the statement of defence within that time will mean without any further step that judgment is entered for the amount claimed. I can see no reason why an efficiently ordered profession should not be able to comply strictly with time limits imposed by Court rules.

"Now I want to refer to what I termed the provincial centres, a term which I regret in this context includes my Dunedin colleagues. As a parochial provincial practitioner I could not be expected to let pass Mr Holland's urging that there should be wholesale abolitions, not only of sittings at certain provincial towns, but also of Registries in every centre but Auckland, Wellington and Christchurch. This proposal is based on the proposition that greater utilisation of Judges' time will be achieved if litigants come to the Judge rather than the Judge to the litigants. If the only criteria to be applied is the assessment of efficiency judged by ouput per judicial sitting hour, then the proposition may well be sound, but there are other factors. First, there is the principle Mr Holland himself enunciates in his third conclusion, namely: 'The Court must give more consideration to the public and the time of litigants, witnesses and others must be considered as well as the time of the Courts and the lawyers.' His proposal concerning provincial centres is glaringly inconsistent with that principle.

"Secondly, justice needs to be seen to be done, and if this is accepted it must be seen to be done amongst the people, not at some remote metropolitan centre. Thirdly, community involvement in the administration of justice, by such activities as service on jury panels, is as important in a provincial district as it is to a large metropolitan centre.

"The reason behind his proposal to abolish Registries in all centres but Auckland, Wellington and Christchurch is even more difficult to see. Mr Holland, labouring under the disadvantage of practising in a large city, may not understand the degree of rapport that exists between his provincial brethren and their Registrars. This rapport had resulted in flexibility in managing local Court fixtures that would be impossible if counsel in each provincial Supreme Court centre were required to deal with Registrars in Auckland, Wellington or Christchurch.

"An alteration in the present system that would greatly aid the disposal of Supreme Court business in the provincial centres, would be the adoption of the practice of placing a

centre under the control of a single Judge for, say, three or six months. During this period he would be the only Judge to sit in that centre, although, of course, the number of weeks in which he sat would depend on the sitting time required. This would avoid that all too familiar situation of a case unable to commence on, say, Thursday midday, because it is estimated to last two days, and because the Judge will not be back for several months. It would also enable a Judge to assess for himself the needs of the centre for which he is responsible to ensure that excessive arrears do not build up. Our musical chairs system seriously prejudices Court administration in the provincial centres.

"The last topic I wish to refer to is the Privy Council and Court of Appeal. As part of his review of Court structure, Mr Holland proposes the abolition of appeals to the Privy Council. The only specific ground he advances is that these appeals have not produced certainty in the law. I find this criticism unconvincing—the same can be said of any appeal process where there are dissenting judgments given by the Judges of the Appeal Court.

"Mr Holland recognises that abolition of the right to appeal to the Privy Council without its replacement by some other form of second tier appeal would not be acceptable. He therefore proposes that in certain circumstances there be a right, not so much of appeal, but rather of rehearing by an enlarged Court of Appeal of seven including the three Judges whose, or the majority of whose, decision is the subject-matter of the appeal.

"While sympathising with the difficulty, Mr Holland has in finding an acceptable second tier appeal procedure, his proposal would not be regarded as a solution either by Parliament or the public, nor would it be by the profession.

"He justifies his suggestion by claiming that the more often a case is argued, the better it is argued. This may well be so, but even if it is, I doubt whether a Court of Appeal Judge, having heard a case that had been thoroughly and competently argued, is then likely himself to reverse a carefully prepared judgment deliberately arrived at. The enlarged rehearing that Mr Holland proposes could never be regarded as an effective appeal from the judgments of the Court of Appeal.

"This leaves then the alternatives either of abolishing Privy Council appeals without the substitution of a second tier appeal, or the retention of the right. Until an acceptable alternative to the Privy Council has been found, and so far all proposed alternatives have not been acceptable, the right to appeal to the Privy Council must remain.

"There has been a proposal made that would remove most, if not all, of the objections to the existing procedures for appeals to the Privy Council and yet would leave New Zealand with a right of ultimate appeal that would meet almost all criteria. I refer to the indication given by the Chief Justice at the Christchurch conference that he had shortly before discussed with the then Lord Chancellor the possibility of the Judicial Committee sitting in Wellington. His Honour said that he had pointed out that the seven Judges of the High Court of Australia are qualified to sit and that there are normally four New Zealanders who are also so qualified so that with two law Lords from Britain, a Judicial Committee could easily be assembled in New Zealand. This proposal is most attractive. It eliminates the difficulties of time and cost inherent in our using an appeal Court stationed in Britain. It means that there would be incorporated on the Judicial Committee New Zealand and Australian Judges—a feature that would appeal to New Zealanders. Although it would presumably retain its title as the Judicial Committee of the Privy Council, the fact that it sat in New Zealand would better accord with the concept of it being New Zealand's ultimate appeal tribunal.

"It would be interesting to know from his Honour the Chief Justice and from the Lord Chancellor whether this proposal has been taken further since 1972, and with what result."

HON SIR ANTHONY MASON (Judge of the High Court of Australia): "I should like to confess to my trepidation as a stranger in offering my opinions on controversial problems which are domestic to New Zealand. However, perhaps I can call in aid the recent precedent established by Mr Justice Woodhouse—he came to our country and advised us to sweep away at one blow the system of liability for fault and to replace it with a system of compensation without fault liability.

"I should initially like to deal with the suggestion made by Mr Tompkins, that perhaps as a substitute or indeed as an elaboration to the existing appeal to the Privy Council, Privy Council appeals could be heard in New Zealand with the participation of Australian Judges. I think it should be borne in mind that judicial Privy Councillors in Australia are a

vanishing race. Of the seven Judges who presently comprise the High Court of Australia, only three are Privy Councillors and they are the three Judges appointed before February 1972. Since then no appointments have been made of members of the High Court to the Privy Council, and that, of course, is consistent with the announced policy of the present Australian government that the Privy Council appeal from Australian Courts should be eliminated in its entirety. That, I think, poses some obstacle to the adoption of the suggestion made by Mr Tompkins at the present time, in so far as that proposal would involve the participation of Australian Judges who are members of the High Court.

"Of course, an alternative approach would be to constitute an ultimate Court of Appeal involving the participation of Australian Judges and Judges from the United Kingdom and elsewhere, but not in their capacity as Privy Councillors.

"Having said that with respect to the suggestion made by Mr Tompkins, may I come back to the alternative proposal advocated by Mr Holland. It would seem that ingenious though his proposal was to constitute a final Court of Appeal as an alternative to the Privy Council, it suffered from two defects. One was that it involves Judges of the Supreme Court sitting in judgment on their colleagues in the Court of Appeal. This was an undesirable development it seemed to me. Secondly, it involved that the three Judges of the Court of Appeal whose decision was the subject of the Court of Appeal, should sit in the ultimate Court of Appeal when the case was then re-argued. Having had some experience of presenting an argument designed to direct or convince a Judge that his previous decision was wrong, I should think that your proposal would not be greeted with great enthusiasm by appellants in New Zealand. I think it is fair to say that Judges have not yet been noted for their capacity to perceive their own fallibility. It seems to me the suggestion has its disadvantages not merely from the point of view of the appellant but also from the point of view of the Judges. Having sat in one or two cases in which counsel have—I might add unsuccessfully—endeavoured to persuade me that some previous decision of mine was wrong, I found it a somewhat distasteful experience and I think most Judges who have had that experience have found it so.

"That leads me to believe that Mr Holland's proposal would need some modification. Indeed I would think it preferable that instead of calling it an appeal to an ultimate Court of last resort, it would be better so to mould the procedures of the Court of Appeal itself, that when an appeal came before it that was discerned to involve a question of difficulty or a question of public importance, the Court should constitute as a Court of five. Sometimes it is not possible to discern in advance that the question is one of public importance or difficulty, but in those circumstances there is no reason why the case should not be re-argued before judgment is delivered or re-argued before a Bench of five. It would, of course, be necessary to enlarge the number of the Court of Appeal to put into effect that modification of Mr Holland's proposal, but I do not see any disadvantage in doing that.

"One needs to bear in mind so far as the parties are concerned, it is fair to say they should have one right of review of the decision of the trial Judge, but when one comes to consider a second appeal on top of that, I think other questions intrude, particularly questions of public importance. The second appeal is largely, I think, directed to ensuring that the law will be correctly stated by the Courts by the nation's ultimate tribunal.

"One other topic I think I should mention is the subject of judicial promotion. As one who has profited by judicial promotion, I do not see many disadvantages in it. It does seem to me, whilst one must closely safeguard the principle of judicial independence, the principle or the practice of judicial promotion has been adopted in Britain, New Zealand and Australia over a long period of time. Of the last six appointments made to the High Court of Australia, five Judges have been promoted from the Supreme Courts of New South Wales and Victoria. I mention that because it indicates that so far as appointment to high Courts in recent times is concerned, promotion from the lower Courts has been the rule rather than the exception. I agree with Mr Holland that advantages may be obtained in the establishment of a Judicial Services Commission. Mr Holland has suggested that the right of appointment should be vested in a Judicial Commission. Whether the Executive in this country or in Australia would be prepared to sacrifice its right of appointment remains to be seen. I am somewhat sceptical about its enthusiasm for the project, but it seems to me there may well be an advantage in establishing such a Judicial Service Commission and vesting in it a right to be consulted,

and perhaps even a right to veto proposed appointments which did not conform to the standards of the Judicial Service Commission constituted in the fashion suggested by Mr Holland.

"The last remark I wanted to make was with respect to the establishment of an intermediate Court. I notice the paper canvasses the possibility, rejected of course by Mr Holland, that an intermediate Court should be established, an intermediate Court called a Crown Court. Personally, I should have thought from English and Australian experience, if one was contemplating the establishment of an intermediate Court, one would more readily contemplate the establishment of a district or county Court serving between the Supreme Court and the Magistrate's Court. I must confess to some surprise that the proposal has not been examined in the paper or in the comments made thus far."

MR HUBBLE: "I first met Mr Holland about three days ago, but before I met him I asked a Wellington lawyer if he knew him, and he said, 'Yes. He is a stirrer'. I asked an Auckland lawyer if he knew Mr Holland and he said, 'Yes. He loves a fight'. I was a little surprised, therefore, to find absent from Mr Holland's paper the recommendation that we import as the sole and supreme Judge in New Zealand, Idi Amin. Idi Amin has the efficiency and cost factors completely licked.

"I was a little surprised, too, to find absent from his recommendations that we have one Court only with 200 Judges, all of equal status, each presiding over a neighbourhood Court, but located between the neighbourhood law office and the neighbourhood pub, with a procedural recommendation that counsel and clients spent at least two hours in the pub before litigating.

"In New Zealand these have not been seriously canvassed, but four possible alternatives have, and they are these. First, that there should be a separate intermediate Court, which has just been suggested; second, that there be specialised divisions of the Supreme Court with Judges specialising in different fields. A third possibility is the Crown Court, and the fourth alternative mooted seriously in New Zealand is that we simply have more Judges.

"The problem is created, as I understand it, by the right of a New Zealander to trial by jury, often for relatively minor offences. The criminal work load is such that an inordinate proportion of a Judge's time is concerned with dealing with minor crime. The argument is that the Judge is really the referee, the jury really decides the case, and therefore it ought not to require a Supreme Court Judge to deal with it. I do not necessarily agree with that view. As I understand it, in Queensland and South Australia, they have both adopted an intermediate Court approach, and they tell us that this system works. But if one thinks about it, what Australian is going to admit it did *not* work? What is envisaged here is an entirely separate Court, and this possibility was considered by our Committee on Court Business in 1973 and 1974 chaired by Mr Justice Speight and it was rejected for these reasons; in the particular New Zealand context it would have the effect of downgrading the status of Magistrates. Further, in New Zealand there is a logistical problem that an entirely separate Court is envisaged, with separate staff and separate buildings, and there are neither the funds nor the means to do it.

"Against this possibility there is also levelled the criticism that it would appear to offer a second class justice system.

"The second possibility mooted is that recommended by our Criminal Law Reform Committee that there be specialised divisions of the Supreme Court. This is criticised because it could lead to narrowness in the thinking and outlook of the Judges. For that reason it was rejected by our Committee on Court Business, and I would with respect adhere to that view, at least in so far as it applies to the criminal jurisdiction. The third and more topical suggestion is that we should have a Crown Court. What is envisaged here is a Court of criminal jurisdiction within the existing Supreme Court structure in which Supreme Court Judges have jurisdiction, but in addition other suitable individuals known as Crown Court Judges could preside over trials which were straight forward or involved a minor offence. Supreme Court Judges would continue to deal with serious or complicated criminal matters. This is the system recommended by our Committee on Court Business and it is very like the system adopted in England as a result of the Beeching Committee Report, which, I understand, took some four years to prepare. Logistically, as I see it, this system is sound because the entire Court operates within the Supreme Court structure. The criticism that a Magistrate would be forced to downgrade his rating is barely applicable; in any event there is nothing in that to the extent that a few thousand dollars and perhaps a change of name to 'Judge' would

not immediately fix. The criticism that it would create a feeling of second-class justice is, in my view, very doubtful, and should be largely overcome if the Recorder or Crown Court Judge, whatever he is called, is not entitled to give the jury the benefit of his experience. Every one of us who has practised before an experienced Judge in criminal jurisdiction knows how devastating that can be. The point is a Recorder or Crown Court Judge may not have had the breadth of experience of the calibre of the men we have as our Supreme Court Judges, and he should in my view confine himself to a summary of matters of law.

"The criticism that a Crown Court Judge could, over a period of years, develop a distorted view of society could be a valid one, but this could be overcome if there was a system of promotion where he was moved on after a relatively short period, and secondly, if his power to comment was limited as I have already outlined.

"Respectfully, it is my view that the Crown Court system appears to be a very sound one. It appears it would work in New Zealand very well, but from the point of view of the public and probably the Bar, none of the criticisms which I have outlined would apply if the fourth alternative of appointing more Judges was adopted, and this surely would be particularly so if crimes were reclassified as is suggested in the Beeching Report to filter the serious from the trivial."

MR G S ORR (Secretary for Justice): "There is a great deal on which I could, representing the Justice Department, comment on Mr Holland's paper, but I will refrain in view of the time situation from doing so. I want to deal with one or two of the various heads he deals with. Just on the question of delays in Court business, I think there can be no doubt as a result of the development of legal aid and the recently-instituted duty solicitor scheme, that there will inevitably be more delays. Instead of many cases in the Magistrate's Court being heard on the morning they are called, they are now adjourned for a week. This has become a common experience overseas where legal aid facilities have been generated. There has to be some compromise between the speedy disposition of a case and the full preservation of the defendants' or litigants' rights.

"So far as the administration of the Courts is concerned, I must confess it came as something of a surprise to me to read Mr Holland's view that the Courts are administered by the Judges and Magistrates. As Secretary for Justice, I was under the impression they were being administered by our Registrars. I certainly know of at least one Magistrate who has never been in the Court office, nor the Registrar's office. He does not know most of the staff, he goes in and out of the Court by a side door and he must be a genius of an administrator if he is runnig that Court. In the Supreme Court, fixtures are made normally by the senior deputy, and the Registrar is primarily responsible for Court administration. It is true that some Magistrates and some Judges show a disposition to take an interest in administrative matters, and this is a matter which requires some tact on the part of the local Registrar. But as far as the Department is concerned, the man responsible for the administration of any given Court is the Registrar.

"I should say when I came to the Justice Department less than a year ago I was disturbed about the administrative arrangements in head office. At the risk of boring some of the visitors here I want to say a word or two for the benefit of New Zealand practitioners. The Divisional Director of Courts was also in charge of the whole of the head office administration, and was hopelessly overloaded. One of the first things I did was arrange for the appointment of a new deputy Secretary of Administration and concentrated the Divisional Director of Courts to make as his sole responsibility the Courts and Tribunals Division, and he is now fully, wholly and solely occupied on this work. In addition I have arranged to establish a new position of Director of Legal Services. He will be responsible for research and forward planing for better services to the public, for development of new systems and new procedures, and will also have direct responsibility for the law enforcement data system if that proceeds in Wanganui. But that is a new position and I have yet to make the appointment, but I expect it will not be too long and will greatly strengthen our head office in forward planning in the Courts areas.

"We are acutely conscious of the fact that unless we move and move quickly to keep up with the increasing pressures, there could be a breakdown in some areas and we are determined to avoid that possibility. I also agree with Mr Holland's proposal that Registrars could be used more and this will require more training, and this I intend to implement.

"As far as procedures in the Magistrate's Court—and very little has been said about the Magistrate's Court this morning although I

suppose 80 percent of our proceedings are held there and as far as the people and public are concerned it is a very important jurisdiction—we have instituted this year the minor offences scheme. I am told that will comprehend about 70 percent of the total criminal cases in the Magistrate's Court. In Wellington only about two percent are being defended, five percent in Christchurch for some reason unknown, but we hope there will be some subsequent guilty pleas there!

"I have with the consent of the Minister last year entered into discussions with the Technical Correspondence Institute for a training course for Justices of the Peace. There has been considerable resistance in the past in New Zealand to the use of Justices, but we must use this resource, and it is a valuable resource, particularly if they are trained. I envisage justices can be used to deal with all those minor offences which will relieve the Stipendiary Magistrates of a great deal of their existing burden in the Courts, and I hope relieve the pressure and ensure greater expedition through the Courts.

"The other thing which is of great concern to us is the building programme. We are planning for a number of new Courts: a Supreme Court building in Auckland, we need a new Supreme Court annex in Hamilton, we are starting the Court of Appeal in Wellington, we are planning for a new Supreme Court in Wellington and a new Magistrate's Court. We are doing the same in Christchurch (a new Supreme and a new Magistrate's Court), and within 10 years we will need a new Supreme Court in Dunedin. So we are involved really in building new Courts in most of the principal centres which will last for the next 100 years. One of the problems is from the time you start planning until you start building events have overtaken you, one begins to realise there are facilities you should have had. However, the Minister has agreed to the Divisional Director of Courts going to Australia with the architect and a representative of the Law Society, and we will be looking at some of the excellent new Courts in Australia and the facilities provided, and also the recording techniques that are being used there because we are hopelessly out of date in New Zealand, and I agree we should be doing something to improve this. We are determined to ensure the new Courts which are built are adequate for the present as well as the reasonably foreseeable future."

MR W L N SOMERVILLE QC (President, Canadian Bar Association): "I suppose it is appropriate if I comment briefly on the references in Mr Holland's very comprehensive paper to the report of the Ontario Law Reform Commission on this particular subject. I am under two disabilities because we in Canada suffer from the disease of the Western world—the Post Office Unservice in Canada has been in a state of disarray for an indefinite time, and the papers sent to me first class airmail did not arrive, so I only had a belated opportunity to read Mr Holland's paper.

"One of the dubious disadvantages of living in a federal country in these times is that once somebody has a Law Reform Commission every other jurisdiction would not be caught dead without one. In Canada they have been absolutely submerged in a literal avalanche of paper from 11 quarters, and one simply cannot, if he is honest, say that each of these papers has received careful scrutiny.

"With those disclaimers I should make these remarks. The Law Reform Commission in Ontario is, I think, by all accounts well staffed and has been given quite adequate resources, both of manpower and of funds. The Commission spent something over two years in the preparation of this report and received submissions from the Court of Appeal, the High Court of Justice, the County Court and various organisations representing the Bar. In addition they did a considerable statistical study; apropos of that I would make this comment that I did not think you were very hard done by when I read the average times shown in Mr Holland's paper. They would make most of the jurisdictions elsewhere look pretty good.

"The other comment I would have to make is that averages are very deceptive. There are several classes of cases, and I can think of two very serious personal injury cases of which I suppose some remnants formed a part of your average figure, which were delayed purposefully to benefit the plaintiff, and a defendant or his solicitor who insisted upon a trial before it became certain whether the plaintiff would in fact die and require a prosthesis somewhat later would be, though a very churlish and uncharitable fellow indeed, probably an insurance company.

"The second kind of case which produces a long period of time is a serious physical damage. I happen to be engaged in one now, where the shaft of a salt mine collapsed, and the task of finding out why it collapsed in the

course of rebuilding will take at least two years, and nobody in their right mind would suggest you expedite such a case. If you lump those kind of cases into an average you get a very distorted result.

"We have had in Ontario for over 40 years a small claims Court called the Division Court. It has worked very well; anybody can walk in off the street and there are many offices throughout the province. He does not need a lawyer; he can talk to the clerk and the clerk will help him fill in a piece of paper which is the summons delivered, a brief statement of his brief. He pays $10 to $12, and that is all he has to do until he receives a note in the mail—if the mail is operating—when his case will be tried. He does not need a lawyer to try his case—a lawyer may practise there and so may an agent. This deals satisfactorily with the whole wide number of cases which it would be silly to put through the more elaborate procedures that accompany an ordinary trial in a High Court.

"Another thing which must be understood by anybody who peruses this report is we do have an intervening layer of Courts, the County and District Courts, and like other illusory panaceas it produces as many problems as it solves.

"Finally there are two aspects about the Court administration I should mention. The one is that a considerably upgraded administrative function in terms of its power was that universally accepted by the Bench, the Bar and the commission. There has been a very dramatic cleavage as to whom these senior administrators should be responsible. I think the overwhelming opinion in the Bar, and certainly the emphatic opinion of Chief Justice Gale and his Court is that these people should be responsible to the Judges and not to the representatives of the Executive.

"Increasingly in our times the State (ie the Government of the day) is a litigant in one form or another before the Courts and certainly the appearance, and I am afraid sometimes the existence of an undue bending of the will, if the administrators were directly responsible to the political officers is a hazard we ought to avoid at all costs. Secondly, I dissent from the view there ought to be absolute bar to anyone who does not happen to have collected the correct initials after his name to the position of senior administrator in the Court system. Two of the most universally well regarded and efficient administrators in the Courts of Ontario—I think I ought to name them because they are such conspicuously good people, Bill Shaughnessy and Gordon Beddes; Gordon Beddes became the Registrar of the Supreme Court of Ontario, Bill Shaughnessy the Registrar of the Court of Appeal. It would be simply not possible to get two men who did a better job or who attracted more universal acclaim for their efficiency and dispatch and the courtesy with which they did the business. Each of them signed on as a lad of 16 or 17 in the office of the Registrar and worked his way up. So that I think, while I would not bar anybody who went through the business of getting an LLB, I would hate to see you foreclose yourself of a Bill Shaughnessy or Gordon Beddes here.

THE HON SIR MOSTYN HANGER (Chief Justice of Queensland): "In order not to overstep the time limits, I propose to read what I have to say. I think it is axiomatic that nothing but the best talent which is available is good enough for the Supreme Court of any country; anything less is not good enough. Having got the best talent available the question is what you require it to do. One does not employ one's best portrait painter in painting the white lines down the middle of the street. To make use of the best talent to do work for which other talent is available is uneconomic and wasteful. If your Judges are working under pressure, I think we would all agree that is undesirable. Judicial work done under pressure is not as well done as work which not done under pressure, and I also thank it is important to keep in mind that it is as a general rule much more important that a case be decided correctly than that it be decided expeditiously.

"Concern is shown by the author of the paper that the confidence of the community in the administration of justice should not be impaired by any innovations. Two propositions seem to me to be involved; confidence that the innocent are not found 'guilty', and confidence that the guilty are not found 'innocent'. Lawyers have always stressed the importance of the first; I think today a little more attention might be given to the importance of the second proposition. It is the confidence of the community in the administration of justice which is important. I do not feel disposed to weep on the shoulder of the guilty thief whose confidence in the administration of justice has been shattered by the termination of his liberty by a Judge because he has missed out on the chance of acquittal by a jury. Let us be realistic; generally speaking the person who wants a trial by jury knows very well he is guilty.

"I am 67 years of age; many of you are a lot younger. Queensland had an intermediate Court, a District Court, from 1892 until 1921. In 1921 there was some turmoil in Queensland. One of our Judges had been taken to the Federal Court of Bankruptcy and was being paid a salary as a Federal Judge. He was also entitled at that time to a pension from the Queensland government, and while he accepted his Federal salary he also insisted upon being paid the Queensland pension. That, of course, did not please the Queensland Government. In the same year the District Court we had had was abolished. The District Court Judges were removed to the Supreme Court, and in the same year the Judges' pensions were taken away. So obviously there was something seriously rotten in the relations between the government and the lawyers. Just exactly why the District Court was removed or abolished in 1921 I do not know. Having been abolished in 1921, it was restored about 14 years ago. There was some little opposition to its restoration, but it began in a small way with three Judges and has now grown to 14. It has criminal and civil jurisdiction, the civil jurisdiction is in normal cases $6,000, in csaes involving personal injury it is $9,000. In criminal jurisdiction it may try cases on indictment with a jury, of course, in respect of which the maximum sentence that can be imposed for the offence does not exceed 14 years. The great majority of indictable offence trials in Queensland are tried in the District Court. It has proved a most popular Court and the increase of work which has come through it is evidence of that.

"I speak only as one who puts forward the feeling of the people of Queensland with regard to it, and as far as I know the speculative opinion as to the future—and this must necessarily be speculative—that the institution of an intermediate Court might reduce the regard in which the Supreme Court is held so far as I know is not borne out by the views in Queensland, nor from my knowledge of what has happened in New South Wales and Victoria, which has had intermediate Courts for a great many years. Nor do I think there is any such feeling in either of those two states. So far as South Australia is concerned, which recently introduced an intermediate Court, the reason for that was largely the pressure of work upon the Judges of the Supreme Court of South Australia. I have little doubt that the government of South Australia, in introducing the intermediate Court had regard to the experience of the other states of Australia in that respect.

"I have mentioned these matters as a person with some experience in the working of the District Court. I am quite conscious circumstances alter cases, and the circumstances which exist in New Zealand are not the circumstances existing in Australia. I have put forward the information with regard to the working of the District Court in the states of Australia, more particularly in Queensland, merely for your consideration."

MR HOLLAND: "I propose only to deal very briefly and therefore to centre my comments to the New Zealand speakers rather than our distinguished overseas guests. I cannot, however, let the Chief Justice of Queensland go by without stating I am sorry I do not accept for one moment that he is voicing the views of the legal profession in New Zealand over his attitude to specialist Judges and the right of trial by Judge rather than trial by jury. I want to show some of these stirring qualities referred to by Mr Hubble and mention the Secretary for Justice, whom I claim as an old friend. Really, Mr Secretary, it is quite unacceptable to get up as head of that department and say there will inevitably be more delays. I hope, sir, as a result of what has happened here today you will be able to persuade your Minister to persuade the Minister of Finance and the rest of Cabinet that there must not be more delays, and the delays existing at the moment must be reduced. I also find it a great source of regret because, if I may say so, there was a great satisfaction throughout New Zealand when you were appointed Secretary for Justice because of your experience and the fact you had not so long ago been a practitioner. It is obvious that 'not along ago' was 'far too long ago' if you think the Registrars run the Courts. Because that may be the position according to the rules, but in fact we must say to your Department that at the moment the public are dissatisfied. It is particularly true they are dissatisfied in the Court where the Judge is not resident. That is where the worst abuses are going on. You are told you have a case on in three weeks in Nelson; it is down in the list; you will not know until a week before whether you will be heard because there may be a criminal brought to trial, but even a week before you will not know because until the Judge arrives the Registrar is not able to tell you whether the Judge will deign to hear it. It is absolute nonsense to suggest your Registrars are at the moment con-

trolling the Courts, and if I am wrong in that then they are making an awful mess of it. I know I am being a little explosive over that, and I know that is not the general case, but it happens sufficiently in the particular.

"The other matters I wish to deal with were raised by Mr Eichelbaum and Mr Tompkins. Mr Eichelbaum posed the question, 'Are we as practitioners yoked impatiently to a pedestrian pace set by the Courts?' Mr Eichelbaum will forgive me if I say that he has completely lost, or I have been incompetent in expressing my message. My point is that the profession, the Judges and the department have accepted these yokes without realising that they are quite unacceptable to the community. I agree with him that the profession is not under the sense of urgency which I am preaching, but I do suggest that the profession has completely failed to keep up with the demands of society, and at the moment the litigant, be he a rich man or be he a poor man, does not have the confidence that he can have his case dealt with expeditiously and in a manner that will enable the business community to continue. They are running away from the Courts.

"I accept Mr Eichelbaum's and Mr Tompkins' point; it is not the Judges' fault, it is not the Courts' fault, it is far more *our* fault. But we simply cannot accept these delays, and I think we always have to accept that while at the Court of Appeal it is most important that matters be argued fully without any sense of urgency or haste, I still believe we as lawyers get a little too enthusiastic about wishing to achieve what we regard as a perfect result. The average client wants a result and the confidence that he has had a fair hearing. But we tend as a profession to go into detail over matters—obviously we *must* under the adversary system. None of us like losing cases, but somewhere along the line the system has to be changed so that the public have their confidence restored in the Courts as the means of resolving disputes.

"There are many other matters I would like to discuss. I am sorry that small claims Courts have not been discussed; I am terribly sorry that we have heard so much from Judges and nothing from Magistrates. The question of intermediate Courts is a choice of terms, and with respect to the overseas visitors, our Magistrates have never had their jurisdiction sufficiently recognised. They are the equivalent of your overseas intermediate Courts right now, except they do not preside over jury trials. The question of a Crown Court is not the question, a Crown Court or not? The question which really is at issue is, should Supreme Court Judges, who are appointed and must be appointed because they are outstanding lawyers, preside over criminal trials? Let us not get confused by terms. The average New Zealander thinks a Crown Court Judge is a specialist criminal Judge. He is not. As I understand it, with the exception of the Old Bailey, he is a circuit Judge with civil jurisdiction and criminal jurisdiction.

"I could go on for a long while—I must not. I hope we have started something which can be discussed more fully in various areas throughout the country."

THE CHAIRMAN: "I apologise to all those who would have wished to speak this morning, but did not because of the constraints of time. I would like to close this session and extend on your behalf our thanks and appreciation to Mr Holland for a stimulating and innovative paper. Also I would like to thank the commentators, official and from the floor, for their very distinct contribution, that you have made the session this morning so successful. Bernard Shaw told us that, 'Progress depends upon the unreasonable man because he will not accept things as they are'. I do not regard you as an unreasonable man even on Bernard Shaw's terms, but your irregularity by not conforming with accepted rules in some very important areas is refreshing and provocative. Mr Holland also has that very attractive facility of staking out some of his ideas and thoughts on the marshy ground at the perimeter, then setting out his more substantial and important points on the heights and the solid ground of facts and experience. Mr Holland's last solid ground on the very vital issues is often unassailable.

"We are all in your debt for an exciting and stimulating paper."

THE LAND TRANSFER SYSTEM

Problems and Developments Since Frazer v Walker

By F M BROOKFIELD*

Dr F M Brookfield was born at Auckland in 1928 and educated at King's College and Auckland University College. In 1951 he graduated BA LLB and was admitted as a barrister and solicitor. Apart from a period in the mid-1950s in Britain (where he married) he practised in Auckland as a member of the firm of Brookfield Prendergast Schnauer and Symtheman until 1966 when he was appointed a Senior Lecturer in Law at the University of Auckland. He was on leave studying at the University of Oxford from 1970 to 1972 and in 1973 was awarded the degree of DPhil of that University for a thesis on aspects of the necessity principle in constitutional law. He is the editor of the 3rd (1972) edition of Goodall and Brookfield's "Conveyancing" and has been an Associate Professor of Law at Auckland since 1973.

At the 1963 Conference of this Society the late E P Wills devoted a substantial part of a learned paper on the New Zealand Torrens System[1] to the then longstanding controversy on indefeasibility of title: did the registration of a void instrument confer the benefit of immediate indefeasibility upon the person in whose favour, without fraud on his part, the instrument was registered? Or was the title of that person as impeachable as it would have been at common law and indefeasibility deferred until registration of an instrument in favour of a bona fide purchaser from him? Mr Wills argued strongly for the former view, for immediate indefeasibility.

That long controversy has been ended by the decision of the Privy Council in *Frazer v Walker*[2] where immediate indefeasibility finally triumphed. So the case argued for it by Mr Wills at the Twelfth Conference now rests and the commentator on the Torrens System need no longer consider the controversy in detail.

The Torrens System, though successfully bringing about much greater security in title to land than could be got at common law as modified by the Deeds Registration Acts, and simplifying greatly the investigation of title, did not merely by its establishment greatly reduce the overall complexity of law as to title to land. Robert Torrens and his early supporters might have been surprised to see how far the simplification attained by, say, the abolition of constructive notice was balanced by the complications that were latent in the new system. Even now when *Frazer v Walker* has ended the "immediate" v "deferred" indefeasibility controversy, much still remains to be resolved. We may, however, for the purposes of this paper, take *Frazer v Walker* as a landmark if not as a watershed in the land law and restrict ourselves to assessing the importance and the effects of that case and to considering some of the problems, particularly as to the concept of fraud, that have arisen from cases decided since or that otherwise remain to trouble or to interest the land lawyer in his dealings with the Torrens system.

In the considering of these matters it will be borne in mind that for many a practitioner the conceptual difficulties of the Torrens system are, at least at first sight, mostly remote from his daily work. Here he differs from the older conveyancer under the deeds system who, in his lengthy and complicated searches, was in daily contact with complexities which Torrens largely succeeded in abolishing. By contrast the modern practitioner has a far simpler system but one which because of the volume of business fails to work as satisfactorily as it should. His practical difficulties should not be forgotten. But the line between the conceptual, the academic and (what is much the same thing in our context) the technical on the one hand and the "practical" on the other is illusory. In all that we shall deal with there are implications for the daily work of the practising lawyer, some of them of greater some of less importance, but none, it is hoped, without interest.

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[1] "Just How Indefeasible is Your Land Transfer Title?" [1963] NZLJ 269.

[2] [1967] NZLR 1069; [1967] 1 AC 569.

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Indefeasibility and the void instrument

Frazer v Walker : Gibbs v Messer

It is convenient to quote here the description of "indefeasibility of title" given by the Privy Council in *Frazer v Walker*[3].

> "The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registerd proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him."

It was this immunity which, in the view of the board, upholding the doctrine of immediate indefeasibility, is conferred upon the person who in good faith obtains registration of a void instrument in his favour[4]. The facts of *Frazer v Walker* are well known and need only be briefly recalled. The plaintiff-appellant and his wife were registered as proprietors as joint tenants of a farm property. Mrs Frazer executed a mortgage of the property, to people called Radomski, without her husband's knowledge and forged his signature. She got a solicitor's clerk to attest the forged signature, he not knowing of the forgery. The mortgagees in good faith accepted and registered the mortgage and advanced the principal sum. No interest was paid and the mortgagees sold the property in exercise of their power of sale to Walker in whose favour the transfer from them was registered in due course. Mr Walker (as well as the mortgagees) obtained registration without fraud, only learning of the forgery long after registration when Frazer, who had been deceived by his wife throughout, was still in possession of the property.

It is evident that, even if, as the proponents of deferred indefeasibility thought, the title of the mortgagees under their forged instrument was void, the title of the purchaser at the mortgagees' sale would be valid under s 183 of the Land Transfer Act 1952. If one were to reject (as the Court of Appeal did[5]) the argument that s 183 only applied where the transferor was the registered proprietor of the actual estate transferred, no other conclusion was possible. But when the unsuccessful plaintiff and appellant carried the case further, to the Privy Council, the board took the occasion in dismissing the appeal, to affirm that Mr Walker's title was valid not only because registration of the transfer in his favour would have cured (by virtue of s 183) all defects (had there been any) in the title of the Radomskis as mortgagees, but also because there *were* no such defects, the Radomskis' title being good under s 62. Their registration in good faith of the forged mortgage conferred immediate indefeasibility.

It would be fruitless now to discuss whether *Frazer v Walker* was rightly decided by the Privy Council. And there is no real chance that the Legislature will ever amend the Land Transfer Act to establish deferred indefeasibility. So here we may restrict ourselves to clarifying and discussing the outstanding issues in this field, issues which the Privy Council only partly resolved or else did not need to deal with.

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[3] Ante, at 1075-1076: 580-581. As to the relevant literature see especially G W Hinde, "Indefeasibility of Title Since *Frazer v Walker*" in *The New Zealand Torrens System Centennial Essays* (1971 ed G W Hinde) (cited as *New Zealand Torrens Essays*) 33. The establishment of immediate indefeasibility seems assured in the Australian jurisdictions also: *Breskvar v Wall* [1972] Argus LR 205; and see Gim L Teh, *"Breskvar v Wall: the End of Deferred Indefeasibility?"* (1974) 9 Melbourne University Law Review 381. The meaning of indefeasibility is discussed and its limits summarised by Hinde, loc cit, 36-40. Of the specific exceptions made in the Land Transfer Act 1952, s 62, that in s 62 (b) ("as regards the omission or misdescription of any right of way or other easement") has received recent attention in the Courts. It has been held that the exception does not include an equitable easement created after the land came under the Land Transfer Act: *Sutton v O'Kane* [1973] 2 NZLR 304. An easement registered but inadvertently omitted from the certificate of title to the servient land is within the exception: *James v The Registrar-General* (1967) SR (NSW) 361. And see note (FMB) on *McCrae v Wheeler* [1969] NZLR 333 in [1969] NZLJ 605 at 606-607. As to the application of the exception to prescriptive easements, see F M Brookfield, "Prescription and Adverse Possession", *New Zealand Torrens Essays*, 162 at 172-174.

[4] Unless he is a volunteer. Though the principle as stated in *Frazer v Walker* is wide enough to include volunteers, they are almost certainly excepted. See the authorities cited by Hinde (loc cit, 54, n 9), and the discussion of the Australian authorities by Gim L Teh, 9 Melbourne Univerity Law Review, at 393-397, 408.

[5] *Frazer v Walker* [1966] NZLR 331.

First, what authority is now to be accorded to the case of *Gibbs v Messer*[6] which the Privy Council distinguished in *Frazer v Walker* but did not overrule? It will be remembered that *Gibbs v Messer* gave strong support to the notion of deferred indefeasibility. The facts were that one Cresswell, the solicitor for the registered proprietor of certain land, forged a transfer of that land to "Hugh Cameron", a fictitious person, and had the transfer registered. He then arranged a loan on security of the land, "executed" the necessary mortgage by signing it "Hugh Cameron" and himself "attesting" the signature. The mortgage was registered and Cresswell, of course, absconded with the loan moneys. In the ensuing litigation the Full Court of the Supreme Court of Victoria[7] held the title of the mortgagees good, the solicitor having, in the Court's view, assumed the name of Hugh Cameron in the transaction so that the forged transfer was not to a fictitious person but, in effect, to Cresswell under his assumed name of Hugh Cameron. The Privy Council reversed the decision, holding that the mortgage was a nullity, conferring no title even though registered and for value.

Rejecting on the facts the Full Court's theory of the assumed name, Lord Watson in delivering the advice of the board, said[8]:

> "A man cannot, with any propriety, be said to assume a name, or in other words an alias, unless he acts personally under that name, or asserts it to be his own designation. Nothing could be farther from Cresswell's purpose than his assumption of the name of Hugh Cameron; on the contrary, the mainspring of his fraudulent device consisted in representing Hugh Cameron to be a real person, a grazier, who had no connection with himself beyond that of an ordinary client",

and he went on to show that, on the evidence, the mortgagees, deceived by the device, had believed throughout that Cameron and Cresswell were two different people.

Over the period of more than 70 years that passed between *Gibbs v Messer* and *Frazer v Walker*, three views of the ratio of the former case became current. The following propositions (in each of which "a bona fide claimant" means the person in whose favour the instrument in question was given and who registers it in good faith) express those respective views. First, that registration of any void instrument could never give a good title, even to a bona fide claimant; secondly, that registration of an instrument void for forgery could never give a good title even to a bona fide claimant; thirdly, that a good title could never be given, even to a bona fide claimant, by registration of an instrument given in the name of a fictitious person "who" has become "registered proprietor" by purported registration of a forged instrument[9].

It is the third proposition which the Privy Council, in distinguishing *Gibbs v Messer*, has endorsed in *Frazer v Walker*. But, before we consider what the board had to say on the matter in the latter case, it is worth recalling an earlier and somewhat similar explanation of *Gibbs v Messer* given by the Privy Council in a celebrated case which for most other purposes we can (in view of *Frazer v Walker*) now forget, *Assets Co Ltd v Mere Roihi*[10]. There Lord Lindley said[11]:

> "It is said that *Gibbs v Messer* shows that registered titles may not be conclusive even in favour of a bona fide registered purchaser from a registered owner. The case, no doubt, does show that such a case may occur. The case was one of fraud and forgery. A transfer from a registered owner to a non-existent person had been fraudulently procured and registered, and a fictitious transfer from that fictitious transferee to a bona fide mortgagee was afterwards registered. . . . This Board held that, as there was, in fact, neither any transferee from the first registered owner, nor any transferor to the registered mortgagee, there was nothing to deprive the first registered owner of her property—nothing, in fact, on which the subsequent registrations could operate; and those registrations were accordingly ordered to be cancelled.

Turn now to the final explanation of *Gibbs v Messer* by the board in *Frazer v Walker*[12]:

> "The Board was then concerned with the position of a bona fide 'purchaser' for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor. The decision has in their Lordships' opinion no application as

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6 [1891] AC 248.
7 *Messer v Gibbs* (1887) 13 VLR 854.
8 [1891] AC 256.

9 Cf G W Hinde, "Indefeasibility of Title Since *Frazer v Walker*", *New Zealand Torrens Essays* (note 3, ante), 33 at 42-43.
10 [1905] AC 176; (1905) NZPCC 275.
11 [1905] AC 204; (1905) NZPCC 292.
12 [1967] NZLR 1078; [1967] 1 AC 584.

regards adverse claims made against a registered proprietor, such as came before the Courts in *Assets Co Ltd v Mere Roihi*, in *Boyd v Mayor, etc., of Wellington*[13] and in the present case."

One might surmise that the Privy Council in *Frazer v Walker* found *Gibbs v Messer* something of an embarrassment and sought somewhat forcedly to distingiush it. For indeed the merits of the distinction are at first sight hard to discern. When a person forges the signature of a registered proprietor to a land transfer instrument in favour of a real person and the last-mentioned person in good faith registers the instrument, *Frazer v Walker* applies and that person gets an indefeasible title immediately on registration. If the forger chooses to execute the instrument in favour of a *fictitious person* (not himself under a fictitious name) *Gibbs v Messer* operates to render invalid not only that instrument but also an instrument "executed" by the fictitious person in favour of a bona fide real person and registered by the latter. Now it is apparent that anyone relying on the register in practice assumes that the person named as registered proprietor is a real person. If the assumption is correct, a good title is got even though the transfer from the registered proprietor is forged (or void for any other reason): *Frazer v Walker*; but if the assumption is not correct, no good title is got from registering an instrument "executed" by the "registered proprietor": *Gibbs v Messer*.

Yet we cannot suppose that the practice of assuming that a registered proprietor is a real person will cease because *Gibbs v Messer* remains undoubted authority for the proposition that one cannot make that assumption. It is believed that the theory of deferred indefeasibility had next to no effect upon the practice of conveyancers, in the days before *Frazer v Walker* when the wider interpretations of *Gibbs v Messer* and strong dissenting judgments of Salmond and Stringer JJ in *Boyd v Mayor, etc, of Wellington*[14] gave powerful support to that theory. Then a solicitor would have been justified in satisfying himself conclusively that the registered vendor-proprietor (1) was a real person, (2) had in fact executed the transfer (ie, that it was not a forgery), and (3) had power to make the transfer. To requisition for conclusive proof of (1) and (2) would certainly have been regarded as eccentric, as would requisitioning for evidence that the vendor was not a minor for the purposes of (3). No doubt, on the other hand, there were some in regard to (3) who would satisfy themselves that the registered proprietor, if it were a limited company, had the necessary power to deal with its land as it proposed to do. But, on the whole, the precautions which the deferred indefeasibility theory required should be taken by those dealing with a registered proprietor were not taken. *Frazer v Walker,* to the extent that it has narrowed the gap between the law and the everyday practice of solicitors, is to be welcomed.

As we have seen, *Gibbs v Messer* remains to perpetuate that gap, though it operates only in rare circumstances. To comply with the law laid down in that case, as explained in *Frazer v Walker,* one would content oneself with requisitioning for evidence that the registered proprietor is a real person and then thankfully leave unasked the further questions that the deferred indefeasibility theory required.

Two points remain to be made before we leave *Gibbs v Messer.* First, one should not rather scornfully regard the continuing authority of the case as an anomaly resulting from unjustifiable reluctance on the part of the Privy Council to overrule it in *Frazer v Walker.* Whatever the inconvenience in the present context, there *is* a distinction between putting a real registered proprietor on a certificate of title and putting a fictitious one there. This is clearly seen in circumstances where, without fraudulent intent of any sort, a man eccentrically, even crazily, executes a transfer of his land to an entirely fictitious person and has the transfer registered. No one will suppose that the registration is other than a nullity and that, on proof of the extraordinary circumstances, the District Land Registrar could not correct the register under s 80 or s 81 of the Land Transfer Act 1952. But suppose no application for correction is made and that the eccentric registered proprietor goes further. He represents himself as agent for the fictitious person he has placed on the register, sells it on "his" behalf and executes a transfer in "his" name (necessarily "witnessing" the "signature" himself) in favour of "purchasers" who then register it in good faith. Is it not clear that nothing has happened to divest the eccentric registered proprietor of his legal estate? Doubtless, if he has received the purchase money from the unsuspecting "purchasers" he is a trustee of the land for them and, in appropriate in personam proceedings (when

[13] [1924] NZLR 1174.
[14] Ante.

they discover his extraordinary conduct) can be ordered to transfer it to them, after correction of the register. But until he does so, or until a transfer from the "purchasers" to a further party is registered so that s 183 of the Act can operate, the registered legal estate remains in the eccentric. To adopt the explanation of *Gibbs v Messer* given by the Privy Council in *Assets Co Ltd v Mere Roihi,* there has been nothing upon which the registrations (of the "instruments" to and from the fictitious person) could operate.

Now, of course, in *Gibbs v Messer* itself, the fictitious person and the documents in "his" favour and purportedly executed by "him" and entered upon the register were the creation, not of the registered proprietor, but of a forger acting out of fraudulent, not merely eccentric, motives. But this circumstance scarcely weakens the reasoning set out above and which in substance is that of the Privy Council in *Assets Co Ltd v Mere Roihi* in explaining *Gibbs v Messer.*

Secondly, the authority of *Gibbs v Messer* may extend beyond the case of a fictitious person placed on the register to that of the dead registered proprietor. Here we may quote again from the explanation of *Gibbs v Messer* given in *Frazer v Walker*[15].

> "The Board was then concerned with the position of a bona fide 'purchaser' for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor."

Is a dead registered proprietor a real registered proprietor? The point of the question is clear when one recalls the facts of *District Land Registrar v Thompson*[16]. The registered proprietor had died. His estate had not been administered and hence there had been no registered transmission to personal representatives. The deceased's son purported to sell the land and executed in his father's name a transfer to the purchasers which the latter registered in good faith. Sim J, faced with the uncertain state of the authorities, solved the problem by reasoning we need not consider here, adopting the theory of deferred indefeasibility and holding the title of the transferees to be bad. The learned Judge's general acceptance of deferred indefeasibility could not be approved today, in the light of *Frazer v Walker.* But the circumstances were those where, on the narrow applicability now left to it, that theory may under *Gibbs v Messer* still apply. It may be argued that the registered proprietor ceased at death to be a *real* registered proprietor. As was accepted in another context by Hope J in the Supreme Court of New South Wales in *Spark v Meers*[17], there is no registered proprietor between the death of the last one and the registration of transmission to his personal representatives. In that period to suppose erroneously that the name on the register is that of a real and living person may have the same consequences as to make a similar erroneous supposition as to the name of a fictitious person placed on the register. One might, in either situation, trustingly accept as "executed" by the "registered proprietor" an instrument which is not only forged but which could not have been made, and which therefore, under *Gibbs v Messer,* remains a nullity despite registration. A dead registered proprietor, it may be argued, is, for present purposes, as non-existent as one who was never more than a name. Both are essentially fictitious.

Whether or not the decision in *District Land Registrar v Thompson* can be saved on the argument stated above, *Gibbs v Messer* does leave a residual area in which indefeasibility of title is in some sense deferred and not immediate. A routine check by solicitors relying on the register that the registered proprietor, whose transfer mortgage or other instrument is to be tendered, is a real and living person would be justified. But the rarity of the situations making this desirable no doubt prevents such a check from becoming part of professional practice. Sooner or later the *Gibbs* or the *Thompson* situation will recur and a purchaser who has wrongly assumed that the name on the register refers to a real living registered proprietor may well suffer loss as a result. If that occurs he is likely at least to look reproachfully at his solicitor, for all that the chances of the disaster were so slight.

Boyd v Mayor, etc, of Wellington, and the Registrar's powers of correction

It will be recalled that in *Boyd v Mayor, etc, of Wellington*[18] the corporation had obtained

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15 [1967] NZLR 1078; [1967] 1 AC 584.

16 [1922] NZLR 627. For the view here put forward, see also F M Brookfield, "Prescription and Adverse Possession", *New Zealand Torrens Essays* (note 3, ante) 162, 191.

17 [1971] 2 NSWLR 1, 9.

18 [1924] NZLR 1174.

title to land by registration of a proclamation said to be void because by s 15 of the Public Works Act 1908 the consent of the Governor-General in Council or of the owner was required and had not been obtained. But there was no fraud on the corporation's part and the majority of the Court of Appeal held its title to be indefeasible immediately upon registration of the proclamation. The view of the majority was expressly approved by the Privy Council in *Frazer v Walker*. One is, however, struck by the likely or possible difference between the merits of the mortgagee in the latter case and those (at least if they were more fully known) of the Wellington Corporation in *Boyd's* case. There may indeed be a great deal of difference between claiming under an instrument obtained and registered in good faith and under normal conveyancing procedure but later found to have been forged and claiming under a proclamation obtained and registered in good faith but void because a statutory condition precedent has not been complied with. The facts of *Boyd's* case are not clear on the point but in such a case the failure of the local body to comply with the conditions, even though not fraudulent, may well be negligent. If so, may it not be that the title of the local body is "wrongfully" obtained or retained so as to be subject to the Registrar's power of correction under s 81 of the Land Transfer Act 1952? In *Frazer v Walker* the Privy Council made it clear that the power is subject to s 183 and so must be exercised before a bona fide purchaser acquires a title under the latter action; but the board otherwise left the scope of the Registrar's power undefined, noting merely that there is some difference of opinion as to what precisely may be comprehended in the word "wrongfully"[19]. It requires little boldness to suggest that, where a local authority purports to take land by a proclamation which is void because the authority's servants have carelessly not complied with the law and the void proclamation is nevertheless registered in good faith, the title so obtained is "wrongfully" obtained despite the latter circumstance. We shall not pursue further the question of the extent of the Registrar's power of correction[20] but simply note the possibility that, in a future case of the *Boyd* type, the aggrieved owner may be able to invoke that power despite the endorsement of immediate indefeasibility given in *Boyd's* case itself and in *Frazer v Walker*[21].

Can an equitable right become indefeasible?

This question has arisen in regard to a void option to purchase included in a lease and the Court of Appeal answered it affirmatively in *Fels v Knowles*[22]. But that decision rests upon s 118 of the Land Transfer Act 1952 by which what is, apart from the section, an equitable right of purchase becomes expressly a statutory right and therefore, upon registration of the lease, indefeasible. So in *Fels v Knowles* registration was held to cure the possible defect in the conferring of the option, namely that the lessors were trustees with no power to confer it.

But a similar conclusion does not follow with the same certainty in regard to a void option for renewal included in a lease, for there is no section similar to s 118 which can be said, in effect, to transform the lessee's equitable right to a renewed lease into a statutory right. Nevertheless, Finlay J held in *Pearson v Aotea Maori Land Board*[23] that a right of renewal was a proper subject of registration. He said[24]:

> ". . . leases with a right of renewal must be regarded as to the term in the light of a grant of a definitive number of years, with the right in a lessor to add something in the way of an additional term or terms. In that sense the right of renewal is adjectival in relation to the term granted. It constitutes a material qualification of the term, and is therefore something more than a mere ancillary right. It is, in other words, an integral part of the estate shown by the Register as vested in the lessee. Its registration is, I think, in consequence authorised under the Land Transfer Act. That a right of renewal also creates an equitable estate in the land is, in my view, merely coincidental."

So, in *Pearson's* case, Finlay J, following the view expressed by Edwards J in *Roberts v District Land Registrar at Gisborne*[25], held that a right of renewal which the lessor had no power to grant was rendered indefeasible by registration.

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[19] [1967] NZLR 1079; [1967] 1 AC 585-586.

[20] The Registrar's power of correction is fully discussed in the light of *Frazer v Walker* by G W Hinde, loc cit, 51 et seq.

[21] It is to be noted that Professor Whalan would except from immediate indefeasibility (by amending legislation) the *Boyd* type of case. See Douglas J Whalan, "The Torrens System in New Zealand—Present Problems and Future Possibilities", *New Zealand Torrens Essays* (note 3, ante), 258, 277.

[22] (1906) 26 NZLR 604.

[23] [1945] NZLR 542.

[24] Ibid, 550-551.

[25] (1909) 28 NZLR 616.

There must now be some doubt as to whether *Pearson v Aotea Maori Land Board* was correctly decided. This doubt arises from a consideration of *Travinto Nominees Pty Ltd v Vlattas*[26], where the lease and the right of renewal purportedly conferred by it were by statute not only void but illegal in that every party to the lease was rendered subject to a penalty. It was held in the New South Wales Supreme Court, the Court of Appeal and the High Court of Australia that lease and renewal remained void despite registration.

The *Travinto Nominees*' case may be explained as an instance of an invalidating statute overriding the inconsistent provisions of a Torrens statute. But Barwick CJ made some observations[27] about the nature of a right of renewal which seem inconsistent with the views of Finlay J:

> "Though as a term 'indefeasibility' is convenient enough, it must always be remembered that it is the title to and possession of the land or of the interest in the land of which there is a registered proprietor which is rendered secure by the registration. In the case of a leasehold it may be, and frequently is, the case that the extent of the leasehold interest is not merely described by reference to a term of years but must of necessity be determined by reference to the operation and effect of those terms and conditions of the lease which affect or qualify the interest in the land which the lease purports to create. It may be noted that the Real Property Act recognises that there may be terms and conditions in the memorandum of lease: see the Real Property Act, s 53 (3) [Land Transfer Act 1952, s. 118]. These considerations seem to me to result in the conclusion that registration of the memorandum of lease does not ensure the validity of every term and condition of the lease or indeed of the enforceability of every covenant it contains. In my opinion, it must depend on the nature of the covenant and its relation to the limitation of the interest created in the land by the memorandum of lease itself. For example, a collateral covenant tying the lessee to the lessor in respect of some matter of trade does not obtain any validity or consequence simply because the memorandum of lease is registered. The validity or enforceability of such a covenant will remain a question under the general law. The same, in my opinion, is true of the option to renew the lease. It does not mark out the extent of the term created by the lease. It is an agreement to grant a new lease contingently on the exercise of the option and the observance during its term of the covenants of the lease. Whether such an agreement creates an immediate though defeasible equitable interest must ultimately depend on the specific enforceability of that agreement. I agree with the members of the Court of Appeal that the availability or unavailability of the remedy of specific performance if the option were duly exercised will determine whether the grant of the option creates any such interest in the land. I leave on one side as unnecessary for decision in this case the question whether an equitable interest arising on the grant of an option, which when exercised is capable of specific performance, forms part of the interest in the land which the registration of the memorandum of lease protects."

In regard to the last sentence, Barwick CJ found it unnecessary to consider whether *Roberts v District Land Registrar* and *Pearson v Aotea Maori Land Board* ought to be followed because "it is not . . . the fact that the statute made the option void which is of consequence. . . . It is the fact that it made it illegal; and therefore incapable of specific performance, which is the critical circumstance"[28].

But the distinction may not save the authority of *Pearson v Aotea Maori Land Board* if the question there decided by Finlay J comes again before the New Zealand Supreme Court or Court of Appeal. For, as Asprey JA pointed out in the New South Wales Court of Appeal in *Travinto Nominees Pty Ltd v Vlattas*[29], one would have expected a decree of specific performance of a renewal of the lease to have been refused "either in the event that the insertion of such a provision was illegal being prohibited by statute[30] or was beyond power"[31].

The lesson of *Travinto Nominees Pty Ltd v Vlattas* for New Zealand practitioners is, it is suggested, that they cannot with complete confidence rely any longer on *Pearson v Aotea Maori Land Board* and accept without scrutiny

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[26] [1972-73] Argus LR 1153.
[27] Ibid, 1162.
[28] Ibid, 1163.
[29] [1972] 1 NSWLR 24, 40.
[30] Citing *Briggs v Parsloe* [1937] 3 All ER 831, 838.
[31] Citing *Jenkins v Green (No 2)* (1859) 27 Beav 440; 54 ER 173.

a right of renewal included in a registered lease.

II

Fraud

Sutton v O'Kane

Section 62 of the Land Transfer Act 1952, so far as reelvant, provides as follows:

> "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of Part I of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever. . . ."[32]

The protection of an indefeasible title is thus given to the registered proprietor "except in case of fraud"[33]. Section 182, generally abolishing the doctrine of notice so far as it would have affected the purchaser from a registered proprietor, is subject to the same exception.

It has long been settled that "fraud" in these sections means actual dishonesty. In the words of Salmond J in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd*[34]:

> "The term 'fraud' is not here used in its most restricted sense as including merely deceit, nor in its widest sense as including the constructive or equitable fraud of the Court of Chancery. It means dishonesty—a wilful and conscious disregard and violation of the right of other persons."

But what is the dishonesty which amounts to fraud in this context? And does the exception as to fraud in s 62 operate only until registration, so that a registered proprietor who has in good faith taken title subject to certain unregistered rights may thereafter change his mind and defeat those rights by setting up his indefeasible title under s 62?

These questions received close consideration from the Court of Appeal in *Sutton v O'Kane*[35] in judgments which require the most careful study of practising and academic lawyers alike. In the discussion that follows, the judgment of the dissentient Turner P will be preferred to those of the majority of the Court, Wild CJ and Richmond J. But first the facts of the case. Mr and Mrs Sutton (appellants) and Mr O'Kane (first respondent) were neighbours, the Suttons being the registered proprietors of Lot 2 and Mr O'Kane of Lot 1 in a Dunedin suburban subdivision shown on Deposited Plan 11192. Upon the Suttons' certificate of title for Lot 2 there was a memorial that the land was subject to the Dunedin City Council's conditions of consent to the grant or reserving of a right of way over it as endorsed on Deposited Plan 11192. The right of way was shown on the deposited plan as over Lot 2 but had not been created by easement certificate or by grant or reservation. In particular, the easement was not reserved when, by transfer registered on 3 August 1967, the subdividing owner transferred Lot 2 to Mr and Mrs D. That transfer did, however, refer to Lot 2 as being subject to the right of way shown on the deposited plan and the Council's conditions of consent. The Suttons subsequently purchased and took title to Lot 2 by registered transfer which made no mention of the right of way. As to Lot 1, Mr and Mrs O'Kane purchased it from the subdividing owner and took title by transfer registered on 20 September 1967. That transfer did not refer to any right of way appurtenant to Lot 1. In fact a formed drive existed over the part of Lot 2 defined as right of way on the deposited plan. The drive provided the only convenient access to Lot 1 and was used by the O'Kanes with no objection by Mr and Mrs D nor, until some time after they had become registered proprietors of Lot 2, by the Suttons. The latter became registered proprietors accepting that the right of way existed, but, on being advised that there was no right of way, set up their registered title to defeat whatever right of way was claimed. To particularise, the Suttons' fortunate discovery seems to have been that no easement had been registered and that therefore (they were advised and honestly believed)

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[32] It is unnecessary to quote here the exceptions that follow.

[33] A registered title acquired or otherwise tainted by fraud and therefore within the exception is good except that it is defeasible at the suit of those defrauded: *Breskvar v Wall* [1972] Argus LR 205 (High Court of Australia).

[34] [1923] NZLR 1137, 1173. See also *Efsratiou v Christine Glantschnig* [1972] NZLR 594.

[35] [1973] 2 NZLR 304.

that Mr O'Kane "had no legal right whatsoever to use the right of way"[36].

In the litigation that ensued, Mr O'Kane had obtained from White J a declaration that the Suttons held Lot 2 subject to the right of way and an injunction restraining them from interfering in his use of it, but solely on the ground that the right of way, existing in equity only, was protected by s 62 (b) of the Land Transfer Act 1952. In the Court of Appeal all three Judges agreed that the right of way, not having been created by grant or reservation or by certificate under s 90A of the Act, existed only in equity but was not protected by s 62 (b). They differed on the questions posed at the beginning of this discussion. Richmond J held that whether or not the Suttons had been guilty of fraud for the purpose of s 62 was to be answered only at the time they obtained registration and any later change in their state of mind was irrelevant; Turner P held to the contrary; Wild CJ expressed no opinion on the point. But Wild CJ and Richmond J both held (though, as will be seen, for significantly differing reasons) that the Suttons had not in any event been fraudulent; Turner P held that they had. The agreement of Wild CJ and Richmond J on this point was, of course, sufficient to allow the Suttons' appeal, over the dissent of Turner P, who, on the conclusions just stated, would have dismissed it.

Fraud: the time for testing it

Richmond J makes it quite clear that a registered proprietor may be guilty of fraud for the purpose of s 62 so that the indefeasibility of his title is subject to the exception, if he at some time after registration, does, for example, dishonestly prevent "the registration of an interest created by himself"[37]. But as to equitable interests which the registered proprietor has accepted at registration with no intention of defeating, he takes his indefeasible title free of these and may later change his mind and set up his registered title to defeat them. In Richmond J's own words in the context of the instant case[38]:

> "It is accepted that in the present case the Suttons, up to the time when they became registered as proprietors, had been guilty of no such dishonest conduct. For some time after they became registered they acquiesced in the use of the right of way by Mr O'Kane. During that time also it cannot be said that they were guilty of dishonesty. In these circumstances I think that the effect of s 62, according to the ordinary and natural meaning of its language, was to confer on the Suttons a title 'absolutely free' from the unregistered interest of Mr O'Kane. It follows, to my mind, that the Legislature cannot have intended the exception of fraud to apply to a subsequent decision by the Suttons to rely on their registered title. Otherwise the effect of s 62 would be paradoxical. It would confer a title absolutely free from the unregistered interest so long as the Suttons recognised that interest but defeasible in the event of their ceasing to recognise it."

In this Richmond J goes contrary to judgments or dicta in several earlier cases (especially by Prendergast CJ in *Merrie v McKay*[39] and Stanton J in *Webb v Hooper*[40]) and to the judgment of Turner P in the instant case. With respect to Richmond J, his conclusion is indeed an alarming one. It is difficult to see why on the merits one who acquires registered title in good faith accepting the existence of certain equitable interests and later determines to defeat them should be in a better position than one who becomes registered with that intention. However, Richmond J's view, contrary though it is to other authority, rests upon an arguable interpretation of s 62 and must be answered by those who prefer the contrary view of Turner P and the earlier authorities.

First, Richmond J's interpretation of s 62 is difficult to reconcile with the passage in its judgment in *Frazer v Walker*[41] in which the Privy Council qualifies the indefeasibility principle by recognising[42],

> "the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a Court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the Courts of New Zealand and of Australia (see, for example, *Boyd*

36 Ibid, 347.
37 Ibid, 345.
38 Ibid, 344.

39 (1897) 16 NZLR 124.
40 [1953] NZLR 111.
41 [1967] NZLR 1069; [1967] 1 AC 569.
42 [1967] NZLR 1078-1079; [1967] 1 AC 585. As to the in personam exceptions, see L L Stevens (1969) 1 Auckland University Law Review 29.

v Mayor, etc, of Wellington [1924] NZLR 1174, 1223, per Adams J and *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688, 702 per Sir Charles Skerrett CJ."

While it is true that the dicta thus approved refer to trusts and to equitable interests arising from privity of contract between the registered proprietor and another person, there is nothing in either the dicta or in the Privy Council's statement to limit the principle approved to only such trusts and equitable interests so arising as are created by the proprietor after he becomes registered (or, if he is registered as executor, to such equitable interests as he is subject to, under s 123 (2)). Indeed, in *Tataurangi's* case, the fiduciary position of the registered lessee in relation to the lessor corporation arose upon registration of his lease (or rather upon his execution of it) because of his membership of the corporation's management committee. On the literal interpretation of [s 62] urged by his counsel and now apparently favoured by Richmond J his registered leasehold title was indefeasible (he having obtained it in good faith) and subject to no implied trust. But the Court of Appeal held otherwise and set aside the lease even though the lessee had acted without fraud. Skerrett CJ, in the passage apparently approved by the Privy Council, remarked[43]:

> "The provisions of the Land Transfer Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest."

It may be conceded that equitable interests existing at registration and other than trusts are not expressly referred to either by the Privy Council in stating the in personam qualification (though the words are wide enough to include them) or in the words of Skerrett CJ. It would be unnecessary to attempt to include them if the exception as to fraud in s 62 exists to protect them whenever the intention to defeat them arises. But if, as Richmond J supposes, the testing time for fraud is only at registration and never later, may it not be said that one who obtains registered title with such notice (not mere notice) of unregistered equitable interests as would render him fraudulent if he were then intending to ignore them, becomes liable to any in personam claim made to enforce those rights, he having accepted the land subject to them?

So it may be tentatively argued. But the point made is that Richmond J's interpretation of s 62 would render the bona fide registered proprietor's title immune from trusts to which he is subject at the time he takes title. Such a conclusion seems quite at variance with the in personam exception to indefeasibility recognised by the Privy Council.

Secondly, Richmond J's view, if correct, would have a disastrous effect upon the law as to equitable interests protected by caveat. Such interests are not themselves *notified* upon the register and hence the person who becomes registered proprietor with the consent of a caveator does not take subject to the interest protected by the caveat because of s 62 of the Act but because, through the process of becoming so registered with that consent, he has had notice of the caveator's interest such as to infect him with fraud if he takes title intending to defeat it. But if Richmond J is correct, what is to prevent one who bona fide takes registered title, with such notice of an existing equitable interest protected by caveat, from later changing his mind and using his registered title to defeat that interest? May he do that even to defeat an equitable interest created by himself before becoming registered, provided again that the intention to defeat it was formed after he became registered?

Similarly, where, as in *Thomson v Finlay*[44] (of which Richmond J is perhaps impliedly critical) a purchaser by his contract agrees to buy subject to an unregistered lease: is it really the law—contrary to Williams J's decision in that case—that the purchaser after becoming registered can decide to repudiate the lease and use his registered title to do so?

It is respectfully suggested that the view of Richmond J as to the testing time for fraud is vulnerable to the criticisms implied in the preceding paragraphs and that the opposed view of Turner P, supported as the latter is by substantial earlier authority, is to be preferred. Any doubt on the point may be resolved by clear policy considerations. Richmond J's view invites a purchaser to pretend that he accepts his registered title subject to certain equitable interests and later to simulate a change of mind and use s 62 to defeat those interests. It is, of course, not suggested that this happened in

[43] [1927] NZLR, 702.

[44] (1886) NZLR 5 SC 203.

Sutton v O'Kane. But in a similar case in the future it would be easy enough for a purchaser at the time of registration to conceal such an intended deception behind outward acquiescence in the existence and enjoyment of the equitable rights. "The thought of man is not triable, for the devil himself knows not the thought of man"[45]. Chief Justice Brian's dictum, though delivered in a very different context, is a warning against creating situations like the present where a mere change of thought or intention has to be tried.

Fraud and equitable interests

Were the Suttons fraudulent for the purpose of s 62? On this point also the Court was divided, Wild CJ and Richmond J (with White J at first instance) holding that the Suttons were not fraudulent for the purposes of the section, Turner P that they were. It will be suggested with respect that the majority judgments are in error. Fortunately the apparent agreement of Wild CJ and Richmond J is limited to their arriving at the same result. There are important differences in law between them and there appears to be no common ratio decidendi of the majority to bind Courts in the future. The way may then be clear to follow the preferable judgment of Turner P.

The judgment of the Chief Justice may be considered first. His reasoning takes this form[46]: The Suttons were informed by the land agent that O'Kane had a "right of way or legal entry" and accepted that he had. After becoming registered proprietors they discovered that O'Kane "had no legal right at all to go over their land". They then in the light of this discovery changed their attitude. This was unneighbourly; but *not fraudulent,* since they "had assumed that Mr O'Kane had a legal right and no suggestion of an unregistered interest had ever been made". It is not fraudulent "simply to disavow obligations that are found not to exist".

It is clear that the learned Chief Justice is using "legal right" in the narrow sense of registered right. This is surely inappropriate in a context where much hangs on how a layman understands the term. A layman makes no sophisticated distinction between law and equity. By legal right he means a right that is enforceable in the Courts. Whether the right has been made indefeasible by registration is a question typical laymen surely neither ask nor understand. As Turner P[47] and Richmond J[48] agreed, whether the right of way was registered or not made no difference in determining the question of honesty. The obligations in relation to the equitable right of way did bind the Suttons unless they could set up their registered title to defeat those obligations. Hence to reason that the Suttons may without fraud "disavow obligations that are found not to exist" would with respect be to reason in a circle. For (subject to what is said below) the obligations only do not exist if the Suttons have without fraud disavowed them[49].

Richmond J recognises that the question of fraud does not depend on the non-registration of the right of way. In discussing the matter he uses "legal right" or "legal right of access" in the broad sense that a layman would intend and which would include an equitable right. He acquits the Suttons of fraud because[50],

> "[t]here is nothing in the evidence to suggest that at that stage [ie, when the Suttons required Mr O'Kane to cease using the access in question] the Suttons did not honestly believe that Mr O'Kane had no legal right whatsoever to use the right of way. . . . In fact . . . the question whether Mr O'Kane had any legal rights whatsoever seems always to have been the subject of bona fide dispute."

A difficulty about this is that the learned Judge's reasoning puts a premium on wrong legal advice. If the Suttons had been correctly advised, they would have known that an equitable easement had been created. Suppose a case where the equitable right of way has been created by agreement in writing but a purchaser in the Suttons' position is wrongly and incompetently but in good faith advised that the agreement is invalid, accepts that advice and claims an indefeasible title. Here too there is a bona fide dispute as to the existence of the right of way even though the purchaser is quite misadvised. On Richmond J's reasoning the purchaser's registered title is free of the easement. Surely the test of fraud is satisfied in such circumstances or the circumstances of *Sutton v*

[45] Year Book 17 Edw. IV 1. Quoted by Lord Blackburn in *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666, 692.
[46] [1973] 2 NZLR 314.
[47] Ibid, 331.
[48] Ibid, 348.
[49] See Turner P's remarks about circular reasoning of this sort: ibid, 322.
[50] Ibid, 347-348.

O'Kane not by determining whether there was a bona fide dispute as to the existence of an equitable easement but by determining whether the purchaser, knowing the right was claimed, exercised and relied on, intended to defeat it if it were found to exist.

As Turner P showed in the course of his learned and valuable analysis of the concepts of fraud and dishonesty, the instant case was on its facts very different from the superficially similar case of *Waimiha Sawmilling Co v Waione Timber Co*[51] when the existence of an unregistered interest, with notice of which it was sought to bind a purchaser, was in dispute. But there was a judgment of the Supreme Court holding the interest to be invalid. Understandably, in those circumstances, notice of the interest claimed was held not to amount to fraud. But it is one thing for a layman to be permitted to rest easy on the assurance of a Supreme Court judgment that an interest claimed is invalid; and quite another for him to do so on advice merely given him by his solicitor or his counsel to the same effect when parties of whom he is one are in dispute on the point, more especially as the ground for that advice is likely to be that no such right is registered. Turner P's quotation (slightly shortened) from the judgment of Prendergast CJ in *Merrie v McKay* is most apposite[52]:

> "From the statement of facts it is manifest that there is much more knowledge here than that of the existence of an unregistered interest—there is knowledge of possession under the agreement, and of the outlay of money under it. It may be true that he was told by his vendor that the agreement was not binding . . . but if he was so told . . . it seems certain that the only reason given for its invalidity was the fact that it had not been registered."

But one may go further and suggest that the validity of an equitable interest claimed in circumstances such as those of *Sutton v O'Kane*, if in issue, must always be determined quite separately in priority to the issue of fraud in the registered proprietor who seeks to defeat it. If the doubts of the latter as to the existence of the right are resolved in his favour by a judgment determining that no right exists, then of course no inquiry into his state of mind is necessary. But where that issue is determined against him (as in *Sutton v O'Kane*), one ought not to allow the consequent inquiry into his state of mind (to establish his fraud or his honesty) to be confused by any original doubts—now shown to be baseless—as to whether the right had been created.

Turner P is thus able to say[53]:

> "I do not at all forget that [s 182 of] the Act expressly provides that 'the knowledge that any . . . unregistered interest is in existence shall not of itself be imputed as fraud'. But much more is here shown than the mere knowledge of the existence of an unregistered interest. Not only its existence but its nature and extent, and the fact that it was actually being actively enjoyed by the grantee, with the full recognition of the vendors of the property of his right to use it, and the fact that in reliance of the continuance of such enjoyment the grantee had expended very substantial sums of money on erecting a garage accessible only from the way, which must be completely wasted should that way not continue to receive recognition. These facts are much more than knowledge 'of itself'—a *mere* knowledge. . . ."

It would be quite irrelevant to query this passage on the ground that there had been a dispute as to whether the unregistered interest exists. It is enough, in the circumstances, that the interest had been claimed and then judicially held to exist.

Much space—perhaps too much—has been devoted to this discussion of *Sutton v O'Kane*. But it has been thought worth while to attempt to dispel any misconceptions that might arise from the degree of apparent agreement between the Chief Justice and Richmond J. In fact, as has been shown, the grounds supporting their respective judgments in favour of the appellants on the fraud issue differ significantly. So on that issue, as on that as to the time when fraud was to be tested (where Wild CJ expressed no opinion), it is suggested that the way is clear for a Court in the future to follow the judgment of Turner P.

III

Identification of Torrens land: the duty of solicitor for the purchaser

The recent case of *Montgomery and Rennie v Continental Bags (NZ) Ltd*[54] has drawn attention in a startling way to the need for ven-

[51] [1926] AC 101; (1926) NZPCC 267. See [1973] 2 NZLR 333.

[52] (1897) 16 NZLR 124, 127. Quoted [1973] 2 NZLR 334.

[53] Ibid, 333. For the differing view of Richmond J, supported by Australian authorities, as to "mere knowledge' and fraud, see ibid, 346.

dor and purchaser to be in consensus as to the property which is subject to the bargain between them. In particular the case raises the question of the extent of the duty of the purchaser's solicitor to ensure not only that the title is searched from the reference provided by the vendor but that that title relates to the land which the purchaser intends to buy. Plainly the prudent purchaser will in this connection check both the identity of the land and also (which is really part of the identification) the boundaries. But what is the extent of his solicitor's duty in this?

That this question, relevant as it is to the law of vendor and purchaser generally, should be asked in a paper on the Torrens system may cause surprise. But to include it may be justified by the suggestion that in New Zealand, in relation to land under the Land Transfer Act, professional practice in regard to the matter has varied greatly. This may have come about because of the ease with which the typical Land Transfer search is made and the simplicity with which such land is described in Land Transfer instruments. A piece of land that is not limited as to parcels may be described merely by its area, lot number and deposited plan number and certificate of title reference. Its boundaries are guaranteed and the title to it acquired by registration is generally indefeasible. Put aside the complications associated with the concept of indefeasibility and the whole process and culmination of the average conveyancing transaction is — or should be — indeed beautifully simple. To ask, "What if the wrong land is transferred?" is to invite the reply that that would be a disaster indeed but has nothing to do with the land transfer process of acquiring title. But it may be that the degree of simplicity of the Torrens system has led many practitioners to overlook the need for identification, so that accepted professional practice is in doubt.

In relation to title to land generally, R M Stonham has written that[55]

> "[i]dentity is as much a matter of title as devolution. Without proof of the identity of the land sold with the land in the deed, an apparently perfect chain of title, shown by the deeds, proves nothing".

The old conveyancer under the deeds system was continually reminded of this truth by the care with which under that system it was the practice to describe every piece of land dealt with by defining its boundaries and its position in relation to adjoining land. The modern New Zealand practitioner has no such reminder and may perhaps profit from Stonham's assertion (undoubtedly sound) that the same principle applies to Torrens land. Writing of the need for an identification survey he says[56]:

> "This feature is not limited to Old System title. The Torrens System Acts only provide for epitomising and guaranteeing title, without precisely locating the land to which the title applies. . . ."

Further[57]:

> "A certificate of title, under the Torrens system, does not rest upon a pinnacle by itself. . . . Without extrinsic evidence to identify its subject-matter, it has no intelligible meaning. . . ."

These passages need no authorities to buttress them. They do indeed state obvious, if sometimes forgotten, truths.

What of professional practice in the matter? It is likely that many, perhaps the majority, of solicitors provide their purchaser clients with locality sketches to enable identification, when the lot to be bought is one in a new subdivision of vacant lots where a mistake is easy. But fewer, perhaps few, solicitors would do the same when the property purchased is built on, for the vendor is likely to own no adjoining property and an error of identification or mistaken boundary is unlikely. Yet such an error there may be as the case of *Montgomery v Continental Bags (NZ) Ltd*[58] shows. There the street number of a property and its lot number on the relevant deposited plan were confused so that the vendor intended to sell 29 McElvie Street, which was Lot No 23 on a deposited plan, whereas the purchaser intended to buy 23 McElvie Street (owned by a third party and not for sale). Vendor and purchaser signed an agreement for sale and purchase in which the property to be bought and sold was described as Lot No 23 on the deposited plan but the address accompanying the description was 23 McElvie Street. The transaction was a rushed one, the purchaser's solicitor searched the title of Lot No 23 without, however, checking its identity, and a transfer of that lot to the pur-

54 [1972] NZLR 884.

55 *Law of Vendor and Purchaser* (1964) 174. Citing the dictum of Wickens VC in *Brown v Wales* (1872) LR 15 Eq 142, 147.

56 Stonham, op cit, 173.

57 Ibid, 181.

58 [1972] NZLR 884.

chaser was prepared, submitted and executed. The parties "settled", neither knowing of the error, which was, however, discovered before registration of the transfer. For reasons mentioned below, Speight J held that the purchaser was entitled to rescission of the agreement and refund of the purchase price. But we are concerned at the moment with his statement (perhaps obiter) that it had not been proved that "the plaintiff's solicitor was negligent in not taking more steps than he did"[59]. Speight J observed that he had no evidence before him as to what is commonly accepted practice in the profession and disavowed reliance on his own experience as too limited and long ago.

But with respect, the chance of confusion so that the parties are not ad idem as to what is to be bought and what sold, slight though it is, can only be ruled out if a purchaser's solicitor takes the necessary step of checking or, by providing a complete locality and boundaries sketch, enabling his client to check, the identity and boundaries of the property. To adapt Stonham's words, "identity is as much a matter of title as obtaining a registrable transfer"[60], and the purchaser's solicitor should surely see to the former as invariably as he sees to the latter. As to the absence of evidence as to accepted conveyancing procedure, it is suggested that "such evidence is inessential on a point of this kind where the extent of the responsibility of a prudent solicitor in a conveyancing transaction is within the presumptive cognisance of the Court itself"[61]. In any future case where the essential circumstances of *Montgomery's* case are repeated and the liability of a purchaser's solicitor for not checking identity is in question, a Court may well find against him on the ground just mentioned.

IV

Between contract and registration: the purchaser's position

The passing of the legal estate postponed until registration

Under the deeds system, "[c]ompletion consists in the handing over of a duly executed conveyance of the property together with the title deeds to the property on the one hand and the payment of the purchase money or the balance thereof on the other"[62]. Legal title passes to the purchaser simultaneously with delivery of the conveyance. But it is not so in Torrens system conveyancing. Under s 41 of the Land Transfer Act 1952 the estate specified in any instrument does not pass until registration. Consistently with this Speight J held in *Montgomery v Continental Bags (NZ) Ltd*[63], discussed above, that "completion" of the transaction in that case had not yet taken place, because though settlement had taken place the transfer was not yet registered. It will be seen below that the delay between settlement and registration is one which may be to the purchaser's disadvantage. But in *Montgomery's* case it was not so. Speight J was able to order rescission of the agreement for sale and purchase and repayment of the purchase price because there had been no completion. The delay had thus enabled the purchaser to make his belated discovery of the error as to identity of the land before registered title passed to him and it would probably have become too late for rescission[64]. One may respectfully approve but also bear in mind that the purchaser might have lost his advantage had he been dilatory in seeking to register[65].

The purchaser is then benefited by the delay (until registration) in the passing of the legal estate to him under the Land Transfer Act, in that the remedy of rescission is available to him for longer. But this advantage is balanced, if not outweighed, by his vulnerability to notice of equitable interests received after he has paid his money at settlement but before he has got the protection of the register. Section 182 of

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59 Ibid, 887

60 Cf Stonham, op cit, 174. Based on the dictum of Wickens VC in *Brown v Wales*, note 55, ante.

61 *Carly v Farrelly* (1974) (as yet unreported) per Mahon J. The question here was the liability of a firm of solicitors for failing to ensure that purchasers of a building were insured in the period between contract and settlement. The learned Judge decided against the solicitors (second defendants). In support of his approach in the passage quoted in the text above, Mahon J cited *Jennings v Zihali-Kiss* 1972 2 SASR 493 (Bray CJ).

62 *Williams on Title* (1966, 3rd ed), 709, quoted by Speight J in *Montgomery v Continental Bags (NZ) Ltd* [1972] NZLR 884, 892.

63 Ante.

64 The transfer could only have been set aside after registration (ie, after conveyance) in the event of fraud or total failure of consideration. There was no fraud on the part of the vendor in the instant case and Speight J thought it doubtful if there had been a total failure of consideration: ibid, 891.

65 This may follow from the proposition that it is the transferee's business "to get his transfer registered": *Common v Rees* (1890) 9 NZLR 555, 562 (CA).

the Land Transfer Act 1952 and its Australian counterparts have been interpreted as giving protection against notice only when the person seeking to rely on the section has registered the instrument in his favour. This interpretation rests upon the analogy with the common law that served Speight J well in *Montgomery's* case. As expressed by Webb J in *Cowell v Stacey*[66]:

> "Notice of an equitable interest in another given to a purchaser before he had completed his title by procuring a conveyance was sufficient under the old law, and under the new law until a person has completed his title by getting his transfer registered he is just as amenable to notice."

This interpretation is probably now beyond dispute[67] but the danger it poses for the purchaser who between settlement and registration is notified of an equitable interest is obvious. An attempt to remove the danger was made by the New South Wales Legislature in the addition of s 43A (1) to the Real Property Act. This subjection extends the protection against notice to a purchaser who takes under a registrable instrument by deeming his interest to be (for that purpose only) a legal interest. Whether the subsection is well drafted may be doubted[68] but it was certainly intended to ensure that protection against notice should be given at settlement. A similar amendment should, it is submitted, be made to the Land Transfer Act 1952[69].

Competing equitable interests and other problems of priority

Behind the Torrens register equitable interests compete among themselves according to the rules of equity, generally taking priority in order of time, other things being equal. To protect one's equitable interest by lodging a caveat is not a sure way of gaining priority over an equitable interest created earlier, the holder of which has not lodged a caveat. It appears that if, being an equitable mortgagee under an unregistered mortgage one takes possession of the certificate of title, in accordance with normal practice, that may be enough to retain one's place in equitable priority even without lodging a caveat[70]. It is not intended to consider in detail these diffierent problems of equitable priorities over Torrens land and the extent to which caveats protect or affect them[71]. The difficulty is that whereas under Torrens the order of presentation for registration and of subsequent registration is totally and solely important, the operation of equity in relation to the register is flexible and therefore uncertain. Schemes (to which there are some overseas parallels) have been suggested to remove this uncertainty and to ensure that equitable priorities are fixed by order of notification on the register. So Warrington Taylor[72] put forward some years ago a scheme of interim registration (not to be confused with his later scheme mentioned below) to take effect from search and protect the contract for sale and purchase for a fixed period of three months to enable registration of the ensuing transfer. Douglas J Whalan[73] has suggested a scheme of notices of priorities to be lodged immediately after contract and to protect indefinitely the agreement creating the equitable interest and the priority of the ensuing instrument.

The obvious difficulty is that an already overburdened system would have to cope with the further work caused by any such reform as those suggested. But that is, one hopes, not an objection that will too long remain valid. Indeed, such a reform would ensure the maintenance of priority in equity for as long as it takes registration to be completed. The period between presentation for registration and actual registration of, say, a transfer could be as long as the difficulty of the matter and pressure of

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[66] (1887) 13 VLR 80, 84 (Supreme Court of Victoria).

[67] See *Webb v Hooper* [1953] NZLR 111 and the authorities cited by D J Whalan in 'The Position of Purchasers pending Registration" in *New Zealand Torrens Essays* (note 3, ante), 120, 121-122.

[68] Whalan, loc cit, 129.

[69] However, for the admittedly limited effect of such a reform see Whalan, loc cit, 130-131, quoting and discussing G W Hinde, 'The Future of the Torrens System in New Zealand", *The A G Davis Essays in Law* (1965 ed, J F Northey), 77, 125-126.

[70] *J and H Just (Holdings) Ltd v Bank of New South Wales* (1971) 125 CLR 546 (High Court of Australia). See note 71, post.

[71] For a full discussion (to be read in the light of the judgments of the High Court in the *J and H Just (Holdings)* case (ante), see K A Palmer, "Caveats and Their Effect on Equitable Priorities", *New Zealand Torrens Essays* (note 3, ante), 79, 89 et seq. As to the possible effect (in this context) of the direction to the Registrar to enter caveats on the register, in the Land Transfer Act, s 138 (2), see *Osmanoski v Rose* [1974] VR 523.

[72] Warrington Taylor, "Land Transfer Reform: The Safeguarding of Documents between Searching and Registration" [1963] NZLJ 568; and "Interim Registration" [1964] NZLJ 344. Discussed Whalan, loc cit, 131-132.

[73] Whalan, loc cit, 134-137.

business demands, if equitable priority had already been established by lodging of a notice of priority on execution of the agreement for sale and purchase. It is, of course, not intended that anything more than priority of interests would be established in this way. No kind of "indefeasibility" would be given to those interests.

However, the physical difficulty of making entries on the register promptly remains to be solved, whether the entries are of notices of priority or of memorials in respect of instruments presented for registration. As to the latter, the gap between what the law requires and what the profession can be expected to do, having regard to the pressure of business in the major registry offices, has long been serious. Under s 37 of the Land Transfer Act 1952 priority is conferred by order of presentation for registration and it has been held negligent for a searcher to omit to check whether instruments have been presented but not yet entered on the register[74].

To overcome the present crises of backlog Warrington Taylor[75] has suggested an emergency scheme of interim registration by which solicitors would themselves enter memorials on the outstanding duplicate certificates of title and file xeroxed copies of the entries so made in the Land Registry Office. Each solicitor's office would become, as it were, a registry office but the entry of memorials and instruments on the duplicate certificates of title would secure only priority in the order of entry and not the complete protection of regular registration. Interim registration would not validate void or otherwise defective instruments. Purchasers' solicitors (who would ascertain memorials entered under interim registration by searching the xeroxed copies annexed to the register in the Land Transfer office or (primarily) by perusing an abstract of title provided by the vendor's solicitor) could not rely on the memorials along but would have to check each instrument. The scheme is designed for the present crisis only but Mr Taylor mentions the possibility that its advantages (which lie notably in its embodiment of certain features of deeds registration) might commend it as a permanent reform. He does suggest as a permanent reform that caveats and liens should in general require to be entered on the duplicate certificate of title, and reckons the resulting disadvantage to caveators and claimants of liens balanced by the advantage to those who in the ordinary course of business deal with the registered proprietor. Mr Taylor's reforms would increase greatly the extent to which a purchaser could rely on the duplicate certificate of title as reflecting the state of the register.

No new suggestions for reform are made in this paper. No doubt computers and the establishment of a land data bank[76] would so change methods of registration and searching as to eliminate much of the delay caused by pressure of business. But the danger of total reliance on computers has been pointed out[77] and we are not absolved from the need to make the Torrens system as efficient and simple as possible so that it could survive their failure. The suggestions of the writers show that the goal of immediate and attainable reform is an adequate system of notifying interests upon the register without delay. This would need to be supported by a suitable amendment to the Land Transfer Act to protect any person who acquires a registrable instrument bona fide and for value from later notice of any prior equitable interest—a reform highly desirable in itself and already discussed in this paper. But the benefit of rapid *registration* cannot necessarily be expected except in so far and for as long as computers will make it possible. Conveyancers may, on the most pessimistic view, have to expect as part of professional practice the duty of determining whether equitable interests protected by notices of priority have been validly created or whether instruments protected by an "interim registration" system as most recently advocated by Mr Warrington Taylor are in such a form as ultimately (after whatever delay is inevitable) to be (fully) registered under the Land Transfer Act and are also enforceable in equity in the meantime.

Summary: conclusions

Indefeasibility and the void instrument

Frazer v Walker has settled the controversy of "deferred" versus "immediate" indefeasibility in favour of the latter so that generally he who in good faith obtains registration of a

[74] *Re Jackson's Claim* (1890) 10 NZLR 148.

[75] "Land Transfer Interim Registration System—a Proposal for Reform" [1974] NZLJ 206, 231, 262.

[76] As to this possibility, see L H McClelland, "The Land Transfer System—Current Problems and Future Developments" [1974] NZLJ 313, 316. And see J A Griffith, "Automation of a Torrens System as a Prelude to a Land Data Bank" (1974) 48 Australian LJ 40.

[77] "Torrens Teetering" [1974] NZLJ 201.

void instrument acquires thereby an indefeasible estate or interest under s 62 of the Land Transfer Act 1952. But deferred indefeasibility applies if the registered proprietor in whose name the instrument is executed is a fictitious person; so that registration of that instrument confers no title: *Gibbs v Messer.* A similar exception perhaps applies if the registered proprietor in whose name the instrument is executed is dead, as in *District Land Registrar v Thompson.* Where an instrument such as a proclamation vesting land in a local authority is void because a statutory condition has not been complied with, registration confers an indefeasible title: *Boyd v Mayor, etc, of Wellington.* But if the non-compliance is negligent, registration is (it is suggested) "wrongfully" obtained and subject to the Registrar's power of correction under s 81 of the Land Transfer Act 1952 until further registration in favour of a bona fide purchaser or mortgagee.

Whether, as held in *Pearson v Aotea Maori Land Board,* registration of a lease validates a void option of renewal included in it, is now in doubt, in view of the decision of the High Court of Australia in *Travinto Nominees Pty Ltd v Vlattas.*

Fraud: Sutton v O'Kane

The problem of fraud has received close attention from the Court of Appeal in *Sutton v O'Kane* where a registered proprietor who had obtained his registered title accepting that a neighbour had a right of way over part of his land, found that no right of way was registered and successfully set up his registered title to defeat the right claimed. In the view of the majority there was no fraud on the registered proprietor's part since he had not known that no right was registered (Wild CJ) or since there had been a bona fide dispute as to the existence of the right of way (Richmond J). Richmond J also thought that the testing time for fraud was at registration and not later, so a subsequent decision to defeat unregistered rights could not be fraudulent (Wild CJ expressing no opinion). The dissenting view of Turner P is preferred on both points: (a) The exception as to fraud in s 62 is wide enough to include a state of mind arising after registration (but even if it is not, acceptance of the existence of a right over the land at registration may be enough to render the new registered proprietor liable in personam though the right is unregistered). And (b) the registered proprietor cannot without fraud attempt to set up his registered title to repudiate unregistered rights on the ground either that when title was taken it was not known they were unregistered or that there had been a bona fide dispute as to the existence of the right. Knowledge that a right over the land is claimed exercised and relied on is, it is suggested, generally sufficient to bind one who takes title with that knowledge (so that it is fraudulent to repudiate the right), whether the right is unquestioned or is held to exist in appropriate proceedings.

Identification of Torrens lands the duty of solicitor for the purchaser

The extent of the duty of the solicitor for a purchaser to check that his client takes title to the land he has inspected and intended to buy, was considered but not pronounced on in *Montgomery v Continental Bags (NZ) Ltd.* It is believed that professional practice differs widely on the matter, and has been affected by the simplicity of Torrens titles. But nevertheless it appears clear that identity is as much a matter of title as taking a registrable transfer and it is suggested that attending to the first is as much part of the solicitor's duty as the second.

Between contract and registration: the purchaser's position

In contrast to the position under the deeds system where title passes at delivery of conveyance, title does not pass under the Land Transfer system until registration. This difference benefits the purchaser of Land Transfer land in so far as (as in *Montgomery v Continental Bags (NZ) Ltd*) he may have the benefit of the remedy of rescission for longer (until registration rather than until settlement). The difference is, however, to his disadvantage in that one of its effects has been that the Courts have interpreted s 182 of the Land Transfer Act 1952 as protecting a purchaser from notice of equitable interests only when he has obtained a registered title and not before. The resultant danger to a purchaser who is notified of equitable interests between settlement and registration makes it desirable for amendment to the Land Transfer Act bringing forward protection against notice to the time of taking a registrable instrument.

Uncertainties as to the priorities of equitable interests in relation to Torrens land and as to the degree of protection afforded by caveats have prompted suggested schemes to enable priority to be secured by notice on the register. Delays in the making of entries on the register and in the registration of instruments presented have prompted the suggestion of an emergency

scheme by which instruments are entered by solicitors on the duplicate certificates of title to secure priority. It is a characteristic of these schemes that they purport to fix and secure priority only, the validity of instruments and other documents (which are protected in that respect) not being guaranteed and remaining to be ascertained and checked by solicitors on behalf of their clients. The acceptance of this type of responsibility may become an important and necessary part of practice in the future, even though computers (upon which complete reliance should not be placed) may be expected to revolutionise methods of registration and searching.

DISCUSSION

Chairman: Mr H Tohill.

Commentators: Messrs R B G Mahon, L H McLelland.

THE CHAIRMAN introduced the speaker and the two commentators.

PROFESSOR BROOKFIELD: "No one discussing the Land Transfer system can well avoid the phrase 'indefeasibility of title'. The Chief Justice of Australia recently criticised it as 'jargon'. It is jargon, I suppose, but like so much jargon, it is convenient. We would be hard pressed, I think, not to use the term now. But it is with some relief that one can now relegate part of the controversy that surrounds the law of indefeasibility to the past—namely the 'immediate versus indefeasibility' controversy. It exercised the Society 12 years ago when it last discussed the Land Transfer system, but has gone now with *Frazer v Walker* and it is now settled that a void instrument generally gives the benefit of immediate indefeasibility of title to the person in whose favour, without fraud on his part, the instrument was registered. But the Privy Council left that rather extraordinary case *Gibbs v Messer* intact, preferring to distinguish rather than to overrule it. Much of the first part of my paper is an examination of that extraordinary case, now explained and confirmed by the Privy Council, in which the registered proprietor was fictitious, and an instrument purportedly executed by him in favour of a real person claiming in good faith was held to remain a nullity, despite registration of it.

"To defend *Gibbs v Messer,* as explained by the Privy Council in *Frazer v Walker,* may seem something of a Miltonic exercise—an attempted justification of the ways of God to man—or rather, of the ways of the Privy Council to the profession. But whether or not my defence succeeds, as I think it does, or whether or not the inclusion of *District Land Registrar v Thompson,* within the *Gibbs v Messer* principle, is sound, it still is so that *Gibbs v Messer* stands as law, at least in its peculiar circumstances. There is a practical consequence. *Gibbs v Messer* appears to require a purchaser's solicitor to check, or at least to receive some assurance that the registered proprietor from whom title is to be taken, is a real and living person.

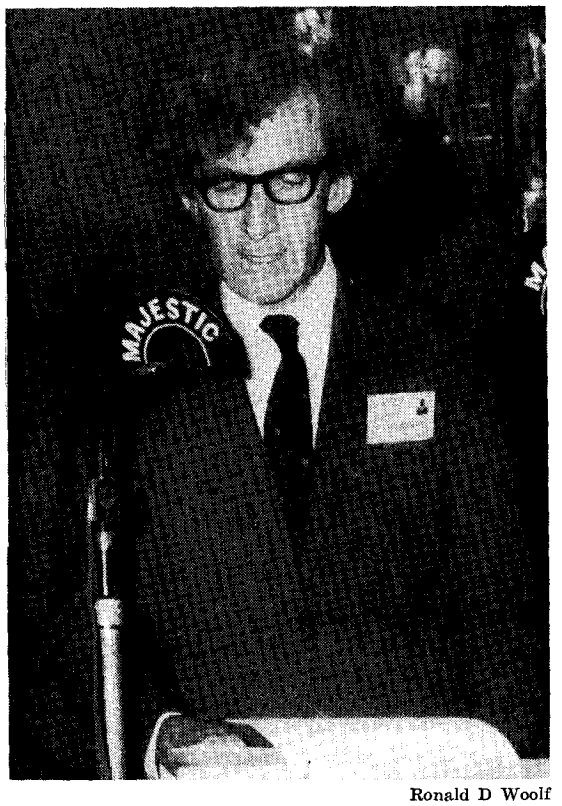
Now, perhaps it would be realistic to say that no purchaser's solicitor is going to make any such check, the *Gibbs v Messer* situation being so extraordinarily rare, and it might be suggested, not worth guarding against. But such a routine check, even though it might be difficult to show that the person who appears on the register is the person purporting to be the registered proprietor now, would have the effect of preventing not just the very rare *Gibbs v Messer* situation, but other circumstances of fraud as well that may more often occur; and that would be a gain. The point is that regardless of on whom it is that the loss falls when there has been fraud, and registration of a void instrument as a result, our concern must be to see that these situations occur very rarely. If it were part of the practice of the profession to make some such check, and to be more particular, the purchaser's solicitor would ask for some assurance. The vendor's solicitor might have to inquire a little bit about a new client. Somebody who comes into the office with a certificate of title in the name of John Smith and says 'I am John Smith'. One should, I think, simply as a matter of course, go a little beyond merely accepting his word for it.

"Turning now critically to *Boyd v The Mayor of Wellington.* If an Aucklander may criticise that case here within the citadel, the

proposition supported by that case is that a local body which in good faith purports to take land by a proclamation, void through its own non-compliance with the law, obtains good title to the land by registration of the proclamation. I think that the extraordinary lack of merit in this is so great that I am very surprised it has not been commented on more. It could lead to results so unfair and unreasonable that I am glad to point to the possibility, and I think there is a possibility, as I explained in my paper, that the District Land Registrar's power to correct the register might be exercisable against the local body, indefeasible though its title might otherwise be.

"Within the topic of indefeasibility and the void instrument—the problem of the void provision for renewal in a lease. Does registration of the lease cure the defect and give an indefeasible right of renewal? I think we have always assumed that it did. *Pearson v Aotea Maori District Land Board* says it does; but I attempt to show that case to be now very doubtful in the light of the reasoning of the Australian Courts in the *Travinto Nominees* case. *Travinto Nominees* is a difficult case to name, actually. The respondent's name is spelled Vlattas, and even when I say it very delicately to the students in Auckland, they tend to dissolve into merriment! The practical consequence of the observations of the High Court and of the Court of Appeal in New South Wales in this, is that the searching or acceptance of a registered lease containing a right of renewal, involves checking that the lessor is within power in granting the renewal—for example, that the lessor, if a leasing authority under the Public Bodies Leases Act is within the Act in any right of renewal conferred; or, and this I am afraid is a more shocking consequence, if the lessor is an individual, a check that he is not a trustee going beyond his powers. I think in the light of the Australian case, we can't count on *Aotea Maori Land Board* being still sound law, and that professional practice does require what I have just indicated.

"In Section II of my paper, on fraud, I have not attempted in any way an exhaustive study of fraud and the Land Transfer Act. That would be a vast task, something not to be attempted in this paper. But I have attempted to look closely at the recent case of *Sutton v O'Kane*. One party buys land, knowing and accepting that a right of way is claimed over part of the land by a neighbour. After registration of his transfer, the buyer discovers the right of way is unregistered, is led to dispute whether a right of way exists at all, and sets up his registered title to repudiate any right of way claimed. All three Judges of the Court of Appeal hold that the right of way has existed as an equitable one, but two uphold the registered



Ronald D Woolf

Professor F M Brookfield

proprietor in his repudiation of it. I have tried to show in my paper the differences in reasoning between the two majority Judges—the Chief Justice and Mr Justice Richmond—leave the way open for the preferred dissenting judgment of Mr Justice Turner to be followed in future. I shall not try to repeat now the summary of my reasoning, but I would say that I view with some respectful alarm the holding of the Chief Justice that one who buys land accepting that a right of way exists over it, can after registration of his transfer, repudiate the right of way because he discovers it is unregistered. Surely to a layman, a right of way—and it is the view of the reasonable layman that we have to take, I think—is a right of way, whether registered, and therefore legal, or unregistered and therefore equitable. For the truth is, I think, when they talk about the intricacies of the land law in the pubs of Kaitaia or Bluff, or even the

sophisticated ones of Wellington, the distinction between rights enforceable at common law and those enforceable in the Chancellor's Court are rarely mentioned.

"Thirdly, the identification of Torrens land —the duty of solicitor for the purchaser. I don't claim to be the first to recall the profession, with all proper respect, to what I see as a clear legal duty of ensuring that a purchaser gets the property he expects. Mr Warrington Taylor, who, I am sorry to say, has not been able to come to the Conference this time, drew attention to the matter in an article entitled "The Neglected Half of Conveyancing" in that excellent publication, the Otago Law Review, vol 1, some years ago.

"My own acquaintance with the problem was from my own experience. When I was in practice I was involved two or three times in acting in vendor-purchaser disputes over identity or boundaries of land, disputes which would not have arisen if the purchaser had been provided with and used an adequate locality-cum-boundary sketch. It is a strange coincidence that in one of those disputes, Brian Mahon, who is on the platform here today, was acting on the other side. Neither of us, I hasten to add, was responsible for the failure to check the boundaries in the first place.

"*Montgomery v Continental Bags* shows dramatically the serious risk that is taken when there is no proper identification by the purchaser of the land he thinks he is buying. When I say 'serious risk' I mean, of course the circumstances are rare where a mistake is going to be made. But then, the circumstances are rare when a house is burnt down between contract and settlement.

It shows the liability of the solicitor for failing to see that the purchaser is covered in that interim period; but despite what Mr Justice Speight said, I think rather kindly, about the profession in *Montgomery v Continental Bags*, I think that a Court, when faced with a decision, which it was not in *Montgomery's* case, would hold the purchaser's solicitor liable for failing to ensure that his client was able to identify what he was expecting to get.

"Fourthly—between contract and registration: the purchaser's position. Here I am content to refer to the brief summary at the end of my paper. We need, I think, a scheme which can only be brought in by amending legislation —schemes like those of Mr Warrington Taylor or Douglas Whalan, referred to in the paper to ensure that however long the process of complete registration may have to take because of the pressure of business, interests in land may, as they arise, be speedily notified on the register and obtain protection in priority accordingly, even if the ultimate protection of complete registration has to be a delayed one."

MR M R CAMP (Wellington): "I wish to direct a question to the Registrar. I would be grateful if he could comment at some stage of the morning on Dr Brookfield's suggestion that the Registrar's power of directions can be used in the *Boyd v Mayor of Wellington* situation, ie perhaps to bring the title back into the name of the original owner in a situation where it is still in the name of the absconding City Council at the time the defects were brought to anyone's attention. I would assume that there has been a negligent taking, as there has been in the *Boyd v Mayor of Wellington* case. I would be pleased to hear what the Registrar thought might happen in such a prospective case."

THE CHAIRMAN: "Perhaps we could reserve that till later. The title of the paper is 'Developments since *Frazer v Walker*', and there may well be other issues that have not necessarily been canvassed by Dr Brookfield and I hope you will feel free to raise those other matters.

MR J L D WALLACE (Wellington): "The title of the address is 'Developments in the Land Transfer System since *Frazer v Walker*'. *Frazer v Walker* was decided at approximately the same time as I joined the legal profession, but clearly the case is of great assistance to the conveyancing practitioner. Professor Brookfield mentions that at least to the extent that the law is brought into line with the current practice of practitioners the decision is to be welcomed. We are indebted to Professor Brookfield for charting out the possible further inquiry that a solicitor should make on behalf of the purchaser, but *Frazer v Walker* has clearly removed many of the problems related to inquiry as to title. The concept of the production of the vendor together with the production of the title in a settlement is an interesting one, and appears to be one of the few remaining problems.

"However, I feel that one of the major developments in the land transfer system over the last few years to the observer has been the arrears of work at the land transfer offices in the larger centres. I wonder whether this results in any way from the possible complacency of the practitioner following on the decision in *Frazer v Walker*, because it appears—and I would like

Mr McLelland to comment on this later—that much of the backlog at the Land Transfer Office can be laid at the door of the legal profession. While I do not have any figures, I understand that the rejection or requisition rate at some of these major Land Transfer Offices is in the region of 20 to 30 percent. It is ironical that a decision which resulted in part from a mistake by a solicitor itself creates protection for other solicitors, because, without wishing to apportion blame for what happened in *Frazer v Walker*, I suggest that the whole matter might not have happened had the solicitor's clerk who witnessed the forged mortgage made sure that he was actually present when the mortgage was signed. My feeling is that the profession has a responsibility to assist in the policing of the Land Transfer Act. We have that responsibility when we are asked to sign documents as correct; and to put my contention in a nutshell—where some of you may think I got it from!—I simply say that we should not allow to occur the possibility which Professor Brookfield cheerfully suggests—that a *Gibbs v Messer* situation will *inevitably* occur again."

MR MAHON: "What Mr Wallace says sums up what the profession believes is the case, and certainly what the public knows to be the case, that we have a land transfer system that we think is perfect, so that when any qualification comes to it, we are astonished, as was the case in *Frazer v Walker*, that anyone would witness a signature and not see the person concerned. That is something that everyone concurs with, but I think what Mr Wallace has said highlights our acceptance of this perfect Torrens system.

"I think it divides itself into two parts. First of all the public has got the same confidence that Dr Brookfield mentioned, from Kaitaia to Kaiapoi, in it; that a person accepts completely that if he has a title no one can take it away except through public works procedures and others, and that it is something that you can rely on. That is accepted to such a wide extent that when the rare cases of fraud come, and they are extremely rare, when you compare the millions of documents that have been processed in the hundred years that we have had a Land Transfer Act. It is a matter of accepting that you cannot have a perfect system at equity; that you have to accept that there are qualifications to it, and I would hope that one of the things that we might now discuss is whether there are some further steps that we can take to avoid the sort of fraud that happened originally, for instance, in *Frazer v Walker*, so that not only is the public perhaps protected, but selfishly the profession is. Just concluding on that point, as practitioners will know, under our own Land Transfer Act there are two sections that deal with the witnessing of signatures. From one we have what the Department accepts as a solicitor or a JP or a postmaster or one of the other known witnesses. There is a further section whereby a person witnessing a transfer or other document can be taxed to say that he knows the person concerned. And it may be that we have grown sufficiently large as a community that whereas ten or fifteen years ago a practitioner might know everyone that came into the office, so there was no question of having an affidavit or a declaration of execution, the stage has now been reached that this should be done. If it was done it may reduce the rare instances of fraud that occur. It is done in one state in Australia by a declaration. It is done in one state in Canada that has the land transfer system by a formal affidavit. I mention that in case that is a point of discussion that arises out of the first part of Dr Brookfield's paper."

MR MCLELLAND: "As a point of interest, a situation similar to *Frazer v Walker* has arisen in the Hamilton registry—so it looks as though we might get a *Frazer v Walker* situation all over again.

"To comment on Mr Wallace's point about the standard of work presented by practitioners and the cause of the large arrears of work that have built up, particularly in Auckland and Wellington over the last few years, I can say that perhaps the blame can be apportioned fifty-fifty. Our Land Registry Offices have worked for a hundred years with the same sort of organisation, the same sort of procedures and systems and so forth, and the time came in Auckland about five or six years ago when those systems and the organisation just was not geared to cope with the volume of work that was being received, particularly the upsurge experienced over the last two or three years. The result was that our arrears of work built up, and when you get that situation, particularly in a large office, it is extremely difficult to overcome it. It has taken us four or five years, really, to bring the Auckland office up to a position of normality, which I am pleased to say it has now reached; and the same with Wellington.

"The standard of care in the preparation of documents is most important. The rejection rate in some offices, as Mr Wallace has said,

is 30 percent. In other places it is lower. With a 30 percent rejection, it means that registry offices have got to receive the rejected work again, and in effect they are being asked to do fourteen or fifteen months' work in twelve months.

"The organisation in Auckland and Wellington, and other offices, has been changed to meet the needs of the day, and I would hope, too, and I am pressing for it, for a revision of the Land Transfer Act to bring that up to present-day standards so that it meets the needs of the day."

MR J F CUTTANCE (Wellington): "My comments relate to part III of Dr Brookfield's paper regarding the identification of the name as regards the physical identification and the land transfer identification. It would appear to me that the liability on the purchaser's solicitor is probably removed by checking at the City Council to find the legal description of some number in some particular street. In most cases one can see that this will result in the correct property being transferred, but not in every case. I know of a situation that has arisen in Wellington at the present time—I do not think any litigation will come of this matter—where a solicitor was acting for two friends buying two own-your-own flats next to each other, and happily, after everything was registered, they found that the people were living in the wrong flats. The person buying one flat had in fact bought the other, and the other way round, but as the matter revolves round the one solicitor, the matter has now been resolved. It could have been that the people were not friends; the property could have been of different values. Then we would have seen some rather interesting complications.

"The only method I can see whereby this problem is going to be overcome is by having a central registry of land, which gives us not only land transfer information, but also physical information re identification of street numbers, and also town planning information. At present one has to go to at least three sources to find out particulars of a property for a client. With the changes in town plans and subdivision of land increasing, this is becoming increasingly difficult and complicated, and it won't be long before some situation does arise where there will be some substantial litigation on this matter.

"My real question is to Mr McLelland, to ask him, is the Justice Department making any moves towards creating a central data bank of land? He is probably aware of my thoughts about this, from the Masterton seminar, and my feeling is that we *should* have a central computer bank of land to supply practitioners with all the information required.

"I would comment that when I mention computers probably 50 percent of the audience would shriek in horror after the efforts they had to put in, to fill in the form for this conference, which required the necessary information for computers, but I would still like to know whether anything has been done along these lines?"

MR M C WALLS (Wellington): "Two points concern me that arise out of the remarks made by Mr Mahon. They relate to *Gibbs v Messer*. I suppose that a solicitor acting for a purchaser is protected against any claims of professional negligence. If he makes a proper enquiry of the vendor solicitor as contemplated by Professor Brookfield, namely that the vendor is a real person who is in existence, and if he has no other information which would lead him to suspect that a person is not in existence. But supposing he does make those enquiries and receives the right assurances? That seems to me not necessarily to protect the purchaser, if the vendor is a fictitious person. That seems to me to be a situation that should not be allowed to exist.

"The second situation, though, is how does a vendor solicitor protect himself, if he fulfills such duties as he has towards the purchaser. Is it really contemplated that he should ask for birth certificates and similar evidence? I imagine that no vendor solicitor would desire to be in the situation of asking for statutory declarations from his clients, even if they were ones who had just come in off the street."

THE CHAIRMAN: "It seems to me that this is part of our social welfare state, and there should be some general insurance or registration to cover the displaced owner, proprietor, or whatever it may be, and that it is not worth legislating for the exception."

MR A E KNOTT (Brisbane): "Those of you who know Professor Doug Whalan will be interested to know that during his period at the University of Queensland he was quite strong on the neglected half of conveyancing, and I think as a result of his remarks during conveyancing, and property law lectures, there is among the younger practitioners a greater awareness than there might otherwise have been of the need to check on the identity. Could Professor Brookfield comment in a little more

detail, if he can, on the problem of the dead or fictitious vendor registered proprietor, and in particular whether he feels that a requisition on title in a strict sense could be framed, by a purchaser's solicitors in that regard. I am not sure whether Professor Brookfield is familiar with a decision of the High Court of Australia in *Godfrey Constructions*, where the Court discussed the nature of requisitions on title. The Chief Justice, in particular, distinguished between requisitions and mere inquiries for information—that sort of thing—and it seemed to me the implication of that was that mere inquiries for information may not constitute requisitions within the sense of the usual type of clause in contracts which can be relied upon in a refusal to settle and to sell."

MR H W THOMPSON (Christchurch): "On the question of indefeasibility of title, I wonder if anyone has considered in detail the encroachment of the Town and Country Planning Act. There we have the position that a title, complete on the face of it, may have a very serious encumbrance. It may be designated for sewerage works, it may be designated for a street, and I have the example at the moment of a property which is designated as a street, or part of it. The result of that, of course, is that the unhappy owner now finds that he can get about one third for his building of what he could get before it was designated.

"Furthermore, the method of designation is not satisfactory. You read in the paper that Lot 3 DP something or other is to be redesignated, and it is very difficult to identify that with a street number and so on. It seems to me that there is room for a great deal of improvement in this direction."

MR R M DANIELL (Masterton): "We all drive our cars as carefully as we do our conveyancing—we all take out insurance. There is negligence insurance. If we are going to have on the one hand the advantages of indefeasibility of title, it seems that the Land Transfer insurance fund, whose name I forget, should be relied on. It should be possible to call on that fund in the difficult cases you have mentioned of forgery etc. I seem to remember that one of the problems in *District Land Registrar v Thompson* was that the person who struck the most trouble was the purchaser's solicitor who certified the transfer as correct; whereas the vendor's solicitor might be thought to have been the one who should have been at risk, because he acted for a vendor whose name was Bill Matenga, as the case may be; but it turned out that the Bill Matenga was Bill Matenga Junior, the son of the registered proprietor. We could go into all sorts of difficult and complicated provisions to cover the cases of the forged instrument, and also the cases of the instrument not being correct, such as *Boyd v Mayor of Wellington;* and while there was a great deal of sympathy with minority judgments there, I wonder if that case came before the Courts today, it might not be affected by the Illegal Contracts Act, and whether the Court might not say, if the Local Authority has missed some small point in the complicated process of taking —if it has waited 38 days instead of 40 days, or something of that sort—the Court might not, under the Illegal Contracts Act, say, 'Well, whatever happens we will support what has taken place regardless of indefeasibility of title or anything else'. This brings us back to the other problem of identifying the land, and I am not certain whether it is in the Law Society's printed form of contract, but there has been, in many printed contracts in this country, a clause by which the purchaser admits the identity of the land with reference to the deeds relating to it.

"I had my doubts in one case, where the survey was not the best, and I demanded that that be struck out. The vendor must have had a bad conscience or something, because he eventually reduced the price rather than strike out that clause. The sequel to that was that we found that the previous five people who believed they had owned this lot of land had in fact been dealing with the title of the house next door. Hence I think we have two problems. The first one is the preliminary agreement which we sign, and if we are going to admit the identity we are in trouble right from the start; and the second problem is to see that the Guarantee Fund is the appropriate fund, rather than the Practitioners' Negligence Fund, because the negligence probably doesn't arise in many of these difficult cases, but the Guarantee Fund stands the cost of indefeasibility of title."

THE CHAIRMAN: "I now ask Mr McLelland to make his general comments on the paper, and discussion can continue after that."

MR MCLELLAND: "Reading through Dr Brookfield's paper, there are three important questions that seem to arise out of it. (1) Is the law in relation to the registration of forged and other void instruments satisfactory as it now

stands? (2) Are the provisions of the Land Transfer Act adequate? (3) Are the Registrar's power of correction adequately defined in the Act? It is the last one, really, on which I would like to elaborate. Mr Camp raised the question as to whether the District Land Registrar should be empowered in cases such as the one that arise in the case of *Boyd v Mayor of Wellington*, to correct the title where the oversight was just surely a matter of administration. I am not very happy, nor are District Land Registrars, on this idea of giving them the general power of correction where there is the matter of title to be resolved. The proper forum for that to be resolved is in the Court, in my opinion. Although I will admit, in a simple case such as *Boyd v Mayor of Wellington*, where some administrative act was not carried out, I can see no harm.

"The compensation provisions, in my view, are not adequate. This has been considered at various times, and I would like to put a proposition to you, just for you to think about: that the power of awarding compensation be left in the hands of the Registrar General of Land, and that there be a two-tier approach to the whole problem. I recognise that if any fixed formula was laid down, in calculating compensation there could be hardship in any particular case, but what I am going to suggest is a two-tiered approach, so that in any case where the Registrar General of Land is satisfied that a deprivation within the scope of the land has occurred, he should be required to offer compensation on the following basis: (a) a sum equal to the value of the property at the time of deprivation, and (b) interest at the rate of five percent on the sum from the date of deprivation to the date of actual payment, less any sums received by the dispossessed owner in respect of the property after the date of deprivation; but with the note that the sole question to be determined by the Register General of Land would be whether a deprivation had occurred. He would not be concerned with declarations of fault or other matters. Compensation would be determined on the basis that I mentioned before. But in any case where a dispossessed owner considers that by reason of some special circumstances compensation would be inadequate to compensate him for the loss he has suffered, he should have the right to apply to the Court for a greater award; but where such a claim is made, the Crown should have the right to appear and be heard; with the note that in cases before the Court, it would be desirable to give the Court a wide discretion, but to discourage 'gold-digging' applications to the Court, the Court should be expressly empowered to award less than the applicant would have received had he accepted the Registrar General's offer.

"I leave that proposition with you.

"At the present time, as you know, claims have to be served on the Attorney-General and the Registrar General of Land, and discussion has to take place with Crown counsel, and it is quite a laborious business at times to get claims settled. This method, in my view, would be much fairer and equitable, and it would overcome a lot of the problems that have occurred as far as compensation is concerned.

"Mr Cuttance, I think, referred to the question of a central land registry, where all matters relating to title of land, land use, could be recorded, and which practitioners would have recourse to.

"A committee was formed about twelve months ago, consisting of myself, and representatives of the Lands and Survey Department, Valuation Department, and State Services Commission, to look into the question of establishing what was called a land data bank. Some progress has been made in this respect, but it would be some time yet before any firm proposals are made public; but a pilot scheme, a very simple scheme, is about to start, taking in the land in Woodville Borough in Woodville County to see just how that would suit a scheme as we have in mind. I can assure the questioner that in due course there will be a central land data bank which contains everything that practitioners would require as far as information on any particular piece of land is concerned. As was said, at present we have to go to quite a number of agencies to check on any particular piece of land. I worked it out once that there were six at least."

HON K C RAMRAKHA (President, Fiji Law Society): "I think practitioners would be generally interested to hear about some of the problems we are facing in Fiji. I just state the problems, without attempting to answer them, in such a short time. We have at present pending in our Courts a most interesting case relating to the Suva City Council. The Suva City Council purported to acquire certain land and obtained a certificate from the Governor in Council that it had duly acquired this land. However, the solicitors did not ensure that the land had actually been transferred to the Suva City Council. We have the Torrens system operating in Fiji. Suva City Council went

ahead, despite the protest of the land owners that the acquisition was not a perfect one and had not been completed, and built a £3 million electricity power station on this site. Negotiations took place, and the owners at that stage wanted £500 a acre, and the Suva Council offered £200 an acre; until suddenly the owners changed solicitors, who then sued the Suva City Council, asking for a declaration that the Suva City Council was a trespasser on the land, and that all the improvements on the land belonged to the two owners. We imported, as Queen's Counsel, Mr Gifford from Melbourne and Mr Tom Hills from Sydney and there was a Court action lasting two weeks in the Supreme Court of Fiji. The Judge is still writing his judgment. Both sides warned him at the outset that they wanted a complete transcript, because they might have to ultimately end up in the Privy Council.

"We then had another case, in which a gentleman walked into a solicitor's firm, with an old lady who was wanting to buy some land from him. The gentleman told the solicitor, 'My titles are deposited with one of the banks in Fiji'. The solicitor accepted his word. He wrote to the manager of the bank an authority asking him to send the titles across to his firm. We have the problem of language there. The solicitor certified at the bottom of the authority that he had read over and explained the contents of this authority to the person who signed it in the Hindustani language, and he appeared to understand what he was saying. The bank received this authority and sent the title across to the solicitor. The gentleman then signed a transfer, and the solicitor signed the usual certificate, 'I certify that this signature is of the person described as purchaser of such and such a place to transfer over' and on the strength of that, the land was transferred to this old lady. Unfortunately the gentleman who had purported to go through this action did not in fact own the land. He took the money, and vanished off to Canada. The real owner sued the lady and the bank. His action against the bank was founded on the allegation that the bank should have known his signature and should not have acted on a forged signature. The Court allowed the claim against the old lady, but dismissed the claim against the bank; so the poor old lady was completely left out in the cold."

"We then have another interesting provision; the practitioners are awaiting somebody with sufficient funds to litigate this right up to the Privy Council.

"We have a very elaborate written constitution in Fiji. People in the United Kingdom don't have a constitution, but when the colony became independent it was given the perfect paper constitution. As one of the last colonies to be emancipated we have suffered a similar fate. Indeed, when we went through the exercise of writing a constitution, we thought a perfect constitution would be a guarantee of democracy continuing in the land. One of the provisions was an elaborate one relating to land. This was designed largely to allay Fijian fears that legislative action would take away their land under an independent government. Section 8 of the Constitution says that no person will be deprived of any right or interest in any property unless the following takes place: the Government is required to take the matter to the Supreme Court by petition. The Supreme Court has to certify that it is reasonable for the Government to take over the land, in some public interest. The Government should pay an adequate compensation, and all the costs.

"The only way that this section of the Constitution can be altered is by a majority vote of 75 percent of the House of Representatives, which is 52 strong; 75 percent of the members of the Senate, which is 26 strong; and including 75 percent of the eight members of the Fijian Council of Chiefs, which sits on the Senate; so the chance of achieving such a majority is extremely remote, unless there is unanimity on all sides.

"A question posed by an earlier speaker arises. The City Council has in many cases, in the town of Suva, classified freehold property as car parks. The City Council says that these are very suitable for car parks. The owners, unfortunately, are left with no remedy. If they want to develop the land they cannot get development permission, so they are caught in a vicious circle.

"I think practitioners who pass through Fiji would do well to look in sometime, and see some of the practitioners there, and learn of some of our interesting problems."

MR MAHON: "I am delighted to hear what our Registrar-General said, because without knowing that, it was the very proposition that I had intended to suggest to the meeting this morning. I quarrel only with one thing—you can get 7 percent on judgments, so perhaps we could have that instead of the 5 percent.

"Mr McLelland has highlighted the essential public right that should exist and will do so by

the extension of this assurance fund. In England, although the same system does not apply, except in three instances, under their land registration rules the equivalent of our Registrar-General has extremely wide powers to award compensation in such circumstances, and he may go further and even constitute himself a Court to decide whether one party or the other is to be awarded a right in the property concerned. I would not suggest we go as far as this, because otherwise we would be destroying our Torrens systems by bringing back equitable principles; but certainly such an assurance fund I am sure would be enormously welcomed by the public and would ensure that in a case like *Frazer v Walker* some proper compensation might be made.

"Having said that, might I now refer to the profession's responsibility, because, quite apart from what the public expects from land registration, we have our own private and special responsibility for the client. It appears from the discussion this morning that there is a wide divergence, for instance, on responsibility of identification of property. I had always taken it as one's complete responsibility, even before the days of photocopying, that every time a client purchased land, you write to him pointing out whether there were any encumbrances, and if there were, saying what they were and sending a locality sketch. I had thought that that was a responsibility that devolved on us all.

"But it appears clearly from the discussion this morning that we are rather apprehensive also of land use, and where our responsibility lies there. I suggest that in most circumstances we have quite a heavy responsibility, and that it would be idle to say to a client who even brings an already-signed contract for the purchase of a commercial property, at least not to suggest to him, that the town planning zoning and ordinances should be checked. At least if we have not got that personal responsibility ourselves, at least we have got one to suggest to our clients.

"So I suggest that it is twofold—that from what Dr Brookfield has so well highlighted, something has to be done to protect the innocent person from the sorts of frauds that occur on so many million transfers. On the other hand, from the paper this morning and from no doubt what the New Zealand Law Society will suggest as a result, there will probably be more defined rules that we will all have to accept, and greater responsibilities on ourselves, so that we do as much as we can to ensure that we have a nearly perfect Torrens system."

MR N SMITH (Wellington): "I believe our system is a very efficient one, and it may be susceptible to improvement perhaps with the data bank or computer idea. If that becomes too efficient it may eliminate some of us from the business of conveyancing! However, the present system as it is, I feel, no matter how we tinker with it, the element of the human factor is impossible to eliminate. As long as we have practitioners on the one side and the land transfer officials on the other, that human factor is, and must always be, present. Mr Mahon's comments as to the duty of practitioners to do their work and their homework properly is a very pertinent one.

"The same thing applies in the Land Transfer Office, and there can be situations that arise on both sides. I recently had occasion where, having had instructions to prepare a quite substantial mortgage, I was at some pains to check the title at the Land Transfer Office on at least two occasions.

"Everything appeared to be in order on the title. Six weeks later I received a requisition to say a caveat was to be withdrawn before registration. Having got over my surprise, I looked on the file, and sure enough there was a photocopy of the title, on the same day it was registered, and no caveat. I went to the Land Transfer Office, got out the registration, and sure enough, there was the caveat.

"The matter was finally resolved, but I was unable to find out how the caveat had got there. It purported to be there some six weeks before it was in fact registered. I finally heard that the officer concerned would be rapped over the knuckles or something, and I was left with $60 of toll calls to Auckland and Palmerston North to try and find it, when the caveat was there in the first place.

"This illustrates the human element. Some land transfer officer had been sitting on the thing and not got it signed up, regardless of the fact that the rest of the documents were there already.

"Compensation may well be relevant to this type of situation, as well as that relating to pure ownership. There may be a situation which puts practitioners at considerable risk, as this would have done. What the remedies would have been, I hesitate to think. There could have been serious repercussions.

"My final comment is that no matter how efficient our organisation, we must always have regard to the human factor."

MR N S MARQUET: "One of the other factors in *Sutton v O'Kane* that is not mentioned in the paper related to the registration of the transfer, and I am delighted to hear the remarks of Mr McLelland. I would like him to heed what I say, that I would like to see a more liberal and benign approach by the Department. In *Sutton v O'Kane*, the first lawyer who made a contribution to the mistake went to the Registry Office and spoke to a clerk there and asked in what manner he could prepare the transfer which was going to reserve the easement, and he said he received a certain reply. He proceeded to include the whole eight words in his document which he thought would reserve the easement. That document was then registered, and subsequently the District Land Registrar himself said that, had he seen the document, he certainly would have queried it. He did not admit that he would have requisitioned it, but he certainly would have queried it. Well now, when we arrived in Court, counsel for the other side, obviously aided by counsel for the Land Registry Office, suggested that the transfer was not a deed, because it had not been signed by the vendor and purchaser. This was undoubtedly true; but the same local District Land Registrar gave evidence that it was not the practice in the registry office to insist on an execution by the purchaser of a transfer. However, you will see in the Court of Appeal judgment that in fact the transfer was rejected as being an imperfect document because it was not so signed.

"I hope that in future, Mr McLelland, in circumstances such as that, the Department will be able to see its way clearer, anyway, to approach the issue of compensation in such a way that the indefeasible rights which we seek to protect in the Act, nevertheless do not take away the right to compensation, which is also in the Act and which, if the figures were given, would show that over the years a very small sum of money indeed, has been paid out of the fund."

MR G P LEVY (Auckland): "A problem has recently arisen in connection with registration of second mortgages where the funds have been supplied by banks. We recently came upon a situation where an individual, possibly bent on a little bit of skullduggery but not really appreciating exactly what had happened, went round a series of three banks. He said he wished to raise money on his house, and in the halcyon days when money was available from banks, they decided in their wisdom to give to individual, second mortgages, and each bank advanced to him a second mortgage advance. This individual went to three different firms of solicitors, and this in fact was a ghastly thing to happen, because, in the end, we all prepared second mortgage documents on instructions from the banks, without realising, of course, that the other was doing the same. We had a call from a very worried bank manager about 3 o'clock on a Friday afternoon saying that he had learned in some way that the individual concerned was borrowing money from other sources, and were we able to be at the Land Registry Office about 7.30 am on the Monday morning to register our documents first. In fact we were third or fourth in the line, and about seventh or eighth were the other solicitors, trying to do the same thing.

"This is a very bad situation which can arise. In fact $18,000 worth of second mortgages was charged on the property, and inevitably the property couldn't quite stand the whole lot! It is a situation which *can* arise, and could arise again, and shows that even though solicitors take all the steps we can to ensure that our clients (in this case, of course, each of the banks) are protected, we are really putty in the hands of a person who is minded to try and defraud us in some way. There is actually nothing we can do. If we are not warned, or take no precautions at all, there is nothing you can do to protect yourself. You do your searches in good faith, there is usually two or three weeks' delay by the time the documents go through and are registered, or requisitioned, as the case may be, but there is nothing you can do. I therefore caution practitioners to make full enquiries to ensure that what they are purporting to receive from a client is in fact truly a second mortgage, or truly a third, as the case may be, but perhaps not truly a fourth."

MR MAHON: "I would like to pose a question which perhaps Dr Brookfield might answer when he sums up in a moment. It is clear in his paper that he supports the minority view of Sir Alexander Turner in *Sutton v O'Kane*. (I am in the camp of the majority.) I would like to ask him, does he not feel that if the minority decision had become the majority decision in that case, the simplicity and the certainty of the Torrens system would have then started to get back to equitable rights from which it was rescued by Mr Torrens all those years ago.

THE CHAIRMAN: "This is as we always understood the law in the South Island:"

PROFESSOR BROOKFIELD: "Replying first to Mr Mahon's comment, yes, I expect it does mean admitting leaving something of the law of equity back to qualify the Land Transfer system. But we already do that. In a number of ways equitable rights are here to stay; they have not been obliterated entirely by the Land Transfer system and it is a matter of judgment as to the degree to which they should be admitted. I cannot say more than that. These are circumstances where the equitable right should prevail, and as much as anything, to any person, it is a matter of balancing the values of the certainty of the system against the necessity to do justice. It depends whether you value the certainty of the system above the particular hardship that may be suffered in the individual case, where the equitable right is denied, or where one balances the values the other way.

"Of the other matters that have been raised, and I hope some of the speakers from the floor will not think me discourteous if I don't identify or reply to them all, but a few remarks are needed—much of what has been said I agree are real difficulties. Mr Cuttance mentioned the land data bank, which could have all the data to enable identification of the land to be provided to the purchaser's solicitor.

"I would point out, however, that we are concerned not only with the identity of the property but the identity of the boundaries; to see that the boundary is where the purchaser expects it to be. Nothing except a physical examination of the land, seeing where the pegs are, and seeing that they square with what the title says, will satisfy that; seeing that the headline is where the pegs indicate it should be.

"The admission of identity in the agreement for sale and purchase: I am glad Mr Daniell mentioned that, because I always regard that with some horror. Some descriptions are so indefinite that no purchaser should sign a form of agreement unless he acknowledges the identity of the land that he is buying with the deeds relating to it, unless he has been able to inspect and check that identity. I do not think the clause should be used to force on a purchaser simply the wrong property, but it could be used to force on a purchaser simply the wrong property, but it could be used against him to prevent him from raising a dispute as to where the boundary is. So many purchasers sign, almost invariably, under circumstances of pressure, where they have no chance to make any physical check of that sort; they have not even been to see their solicitors. I hope, and I have been meaning to ask the Law Society officially, to consider that in future editions of the form those words 'and the purchaser shall admit such identity' should be struck out.

"Mr Walls raised the practical difficulties of identification. I certainly see they are present. I do not know that asking for birth certificates —apart from the fact that it is so difficult and appears unreasonable to the client—would solve this. A check if the vendor to whom an inquiry is directed by the purchaser's solicitor is acting for the client for the first time, and did not act for him when he last purchased and became a registered proprietor, then a check with the previous solicitor who did act, would do it. There are practical difficulties, it might not always work, but it would decrease the possibility of fraud.

"Mr Knott, who mentioned the Australian case—I confess I did not know it, but I would say that where these are inquiries, and not truly requisitionable matters, I just don't know. Our concept of what is requisitionable should expand with the law, if the Torrens system so works in the *Gibbs v Messer* situation, the purchaser won't get a good title, then it would seem to me that enquiries that would ensure that a purchaser does—and that the *Gibbs v Messer* situation won't occur—should properly be requisitionable matters. Plainly, I think, one should give more attention to that.

"I think, anyway, that if the Land Transfer Act were amended to require the declaration of due execution by the vendor which Mr Mahon suggested, and of which there are precedents overseas, many of the difficulties would disappear. The purchaser would be entitled to declaration of due execution by the vendor's solicitor, and the vendor's solicitor would be put on the duty of giving a more than cursory checking of the identity of his client. In fact, he would *have* to make his own check before he could make the declaration.

"I am glad that Mr McLelland feels—and I think I got what he said—that he would exercise his powers to correct the register in such cases as *Boyd v Mayor of Wellington,* and the difficulties when the registrar declines to exercise his power, I imagine one would solve them by taking proceedings for a mandamus. One might have to show that he had exercised his discretion on a wrong principle; but into all that I fear we cannot go this morning."

THE RIGHT TO LIFE

By THE HONOURABLE MR JUSTICE BEATTIE

Mr Justice Beattie was educated at Dilworth School and the University of Auckland, where he lectured in Torts. He examined in this subject for the University of New Zealand. A naval officer in World War II, he played for the New Zealand Services Rugby side in Britain.

In 1964 he was President of the Auckland District Law Society. The following year he took silk and was appointed to the Supreme Court Bench in 1969. He appeared before the Privy Council in 1966 in the case of *Frazer v Walker*.

When in Auckland, he was Chancellor of the Anglican Diocese, Chairman of the Dilworth Trust Board, Treasurer of the Cancer Society and on the executive of the Crippled Children's Society and the Murray Halberg Trust. In Wellington, he is connected with the McKenzie Education Foundation and the IHC Society. He has delivered several papers to Medico-Legal Societies throughout New Zealand.

"For forms of government let fools contest;
Whate'er is best adminster'd is best:
For modes of faith let graceless zealots fight;
His can't be wrong whose life is in the right:
In faith and hope the world will disagree,
But all mankind's concern is charity."
(*An Essay on Man* by Alexander Pope)

It has been stated that an older generation was fond of saying that the best things in life seem to be either carnal, illegal or fattening. I am sure that these impressions have been altered in recent times. Morality is now a very changeable concept. Nothing in life is simple anymore, not even the entering of it or the leaving of it. The difference between life and death was a vast chasm breached in an infinitesimal moment. The two states were opposites. But as transplant surgeons well know they must decide whether what is being kept alive by sophisticated artificial means of resuscitation is still a human being or, put it another way, whether the human being they are maintaining should be considered "alive". That is just one dilemma that later will be examined in this paper on the thesis that death should be redefined. It illustrates that the rigid moral code of a monolithic, Judeo-Christian tradition has been replaced at least in the Western world, by the ethics of a pluralistic society.

When I started to think what this paper might embrace, I was appalled both at the number and scope of subjects it could involve and appalled that I should be presumptuous enough to tackle it. Very early on I formed the view that I would be walking a tight-rope as at least one of the topics, namely abortion, is currently being considered by Parliament together with various responsible groups in this country to say nothing of the press, television and radio talkback programmes. While newsworthiness is not always synonymous with the public interest, the issues of abortion, euthanasia, and to a lesser extent, blood transfusions, suicides and transplants, must always evoke legal and moral responses. A person's right to life must be a mixed question of morality and the law. The relationship which should govern them is a cardinal and perennial problem of jurisprudence. Before a moral precept should be given the force of law it needs, in my opinion, the overwhelming support of the public. For example, few people in this country would make adultery a crime. It can be accepted that, in this last decade particularly, there has been a revolution, in both human values and rights, which must involve decisions in daily affairs and consequently, decisions by lawyers. In 1961, Dr Norman St John Stevas in *Life, Death and the Law* examined the issue from the Christian point of view. He asked whether Christians were entitled to insist that Parliament should further their aims to enforce their standards of morality and social behaviour. He acknowledged that for Christians there must always be a tension between religion and society which can never be finally resolved. This tension, he commented, was especially marked where the forces of traditional Catholicism and English liberalism meet and join. As Abbott J said in *R v Fleet* (1818) 1 B & Ald 379; 106 ER 140:

> "Every person who has attended to the operations of his own mind must have observed how difficult it is to overcome preconceived prejudices and opinions, and that more especially in matters of sentiment and passion."

So, when I turn to examine the law on the matters chosen as bearing on a person's right to life, I observe that, in practice, all serious crimes are also moral offences and the law imposes its specific penalties and sanctions; whereas breaches of the moral code which are not crimes are imposed by the individuals of society in the form of ostracism. In a very brief way I mention that when looking at the existing law or suggested reforms, cognisance must be taken of the difference between Catholic and Protestant attitudes. The Catholic's philosophy, following St Thomas Aquinas, is that all law comes from God, but is manifested either through direct revelation, the divine law, or through human reason, the natural law, whereas (to summarise St John Stevas) the Protestant considered the role of the State was to keep sinful man in check.

I will now consider various topics where the right to life is in issue.

Abortion

From the earliest times some women have sought abortion; but the problem has always been a difficult one, socially, morally, legally and medically. It is claimed that a large number of married women have sought abortion because, having had several children, they feel, for various reasons, they cannot go through with another pregnancy. There are others, not married, for whom a pregnancy spells shame. There is another smaller group, comprising married women who do not wish to have a family—perhaps including professional women. Finally, there are the ill and dying for whom only abortion can offer life. Attitudes to abortion have always varied. The Assyrian Code provided that a woman proved to have "cast the fruit of her womb by her own act shall suffer impalement". However, Aristotle was in favour of abortion to prevent an increase in population numbers. In his *Republic* he suggested compellable abortion where a mother had borne an allotted number of children or where, at the time of conception, the mother was older than 40 or the father older than 55. In Zulu tribes abortion meant death for the woman and in some cases for both of the families of the parties concerned. From the thirteenth century abortion was an offence against the common law. It became a statutory offence in England in 1803. Before then, as Dr Glanville Williams points out in his book *The Sanctity of Life and the Criminal Law*, the legal prohibition of induced abortion was confined to the period after the foetus had quickened, that is, moved in the womb. In 1861, the Offences Against the Person Act was passed. It remained the abortion law of England until 1967. Section 58 provided:

> "Every Woman being with Child, who, with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent shall be guilty . . ."

If the woman died the crime charged was murder, though this was later reduced in most cases to manslaughter. The doctor confronted with the certain death of the mother (eg from renal failure were her pregnancy to continue) was placed in an unenviable position. There was much debate as to whether in certain circumstances abortion might be lawful. This was brought to a head in the prosecution of Mr Aleck Bourne, a senior obstetrician (*R v Bourne* [1939] 1 KB 687). He performed an abortion on a girl of 14, who, when walking past the Guards barracks, had been invited by guardsmen to come in and see a horse with a green tail. She accepted and was violently raped by several guardsmen. The prosecution followed after Mr Bourne invited it. The case is historic for the summing up of Macnaghten J. Undoubtedly he enlarged the existing law by establishing the principle that an abortion was "lawful" if performed by the doctor in good faith to preserve the life of the mother. He added a direction that the words should be construed in a reasonable sense and should be extended to cover the position where "if the doctor is of the opinion, on reasonable grounds and on adequate knowledge, that the probable consequence of the continuation of the pregnancy would indeed make the woman a physical wreck, or a mental wreck, then he operated in that honest belief, for the purpose of preserving the life of the mother." The doctor was acquitted. It can be said that this case was the foundation for therapeutic abortions in England until 1968 and indeed its influence was also strongly marked in those states of the USA where the governing statute made no saving for such abortions.

As to the position in New Zealand, I draw in summary from the article "Abortion in Perspective" by B Littlewood [1974] NZLJ 488. The first statute passed in 1866 without debate was an exact replica of the English 1861 Act. In 1893, the Criminal Code Act reduced the penalty for the mother to a maximum of seven years' imprisonment. At the same time, the offence was extended to every woman who used an instrument on herself, or took any noxious thing whether she was pregnant or not. Our present law is contained in ss 182-187 of the Crimes Act 1961. They read:

"**182. Killing unborn child**—(1) Every one is liable to imprisonment for a term not exceeding fourteen years who causes the death of any child that has not become a human being in such a manner that he would have been guilty of murder if the child had become a human being.

"(2) No one is guilty of any crime who before or during the birth of any child causes its death by means employed in good faith for the preservation of the life of the mother.

"**183. Procuring abortion by drug or instrument**—(1) Every one is liable to imprisonment for a term not exceeding fourteen years who, with intent to procure the miscarriage of any woman or girl, whether she is with child or not,—

"(a) Unlawfully administers to or causes to be taken by her any poison or any drug or any noxious thing; or

"(b) Unlawfully uses on her any instrument.

"(2) The woman or girl shall not be charged as a party to an offence against this section.

"**184. Procuring abortion by other means**—(1) Every one is liable to imprisonment for a term not exceeding ten years who, with intent to procure the miscarriage of any woman or girl, whether she is with child or not, unlawfully uses on her any means whatsoever, not being means to which section 183 of this Act applies.

"(2) The woman or girl shall not be charged as a party to an offence against this section.

"**185. Female procuring her own miscarriage**—Every woman or girl is liable to imprisonment for a term not exceeding seven years, who with intent to procure miscarriage, whether she is with child or not,—

"(a) Unlawfully administers to herself, or permits to be administered to her, any poison or any drug or any noxious thing; or

"(b) Unlawfully uses on herself, or permits to be used on her, any instrument; or

"(c) Unlawfully uses on herself, or permits to be used on her, any other means whatsoever.

"**186. Supplying means of procuring abortion**—Every one is liable to imprisonment for a term not exceeding seven years who unlawfully supplies or procures any poison or any drug or any noxious thing, or any instrument or other thing, whether of a like nature or not, believing that it is intended to be unlawfully used to procure miscarriage.

"**187. Effectiveness of means used immaterial**—The provisions of sections 183 to 186 of this Act shall apply whether or not the poison, drug, instrument or means administered, taken, used, supplied, or procured was in fact capable of procuring miscarriage."

A crucial word in our statute (ss 183-186) is "unlawfully". Sir Francis Adams (*Criminal Law and Practice in New Zealand,* 2nd ed, p 377) states it is obvious that the term requires something more than that the act should have been done with the specific intent to procure miscarriage. In *R v Davidson* [1969] VR 667, Menhennitt J decided that the word "unlawfully" in the Victorian Statute (a replica of the English Act 1861) meant that the Crown must establish either, (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life, or her physical or mental health (not being the normal dangers of pregnancy and childbirth) which the continuance of her pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was, in the circumstances, proportionate to the need to preserve the woman from a serious danger to her life, or to physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuation of the pregnancy would entail. In New Zealand are we sure that the ultimate limit has been set to the creation of exceptions to the use of an undefined word in the statute? Could the word be seized upon in the future to legalise abortion on eugenic grounds, or in cases where the pregnancy has resulted from a rape and is unaccompanied by any danger to the life or health of the victim? I respectfully

agree with the suggestion of Henry J in *Murphy v Gregory* [1959] NZLR 868, 871, echoed by Sir Francis Adams, that it is the business of the Legislature to let its citizens know what acts are unlawful, and not merely to enact that "unlawful" acts are criminal. I should mention that, in England, s 5 of the Abortion Act 1967 in effect defines "unlawfully" as meaning anything done with intent to procure miscarriage and not authorised by the Act.

After *Bourne's* case, therapeutic abortion became more common in both countries. I have read that in hospitals it was the invariable practice to have two senior opinions, often three in writing, and to do the operation quite openly. But doctors who performed abortions in their consulting rooms were in a much more delicate situation. In his excellent book published in 1972—*Abortion—the personal dilemma*—Mr R F R Gardner, MRCOG, comments on the strain to which this exposes a doctor by referring to the criminal proceedings taken against Drs Bergmann and Ferguson, both of high reputation and integrity. Following her acquittal in 1948 of performing an illegal operation, Dr Bergmann pleaded guilty to a separate count—attempted suicide. The case indicated that where serious injury to health is feared, the Court will not look too narrowly into the question of danger to life. It has been stated by an eminent doctor, Mr Cocks, that for doctors working openly and in hospital "this fear of legal consequences is a myth".

For some 30 years after *Bourne's* decision, the trend I have referred to continued but it was an uncertain period. The psychiatric aspect proved difficult. Dr K H Tooley at a symposium held by the Medical Protection Society, London, described the position:

> "At the London Hospital we once looked at the criteria for termination of pregnancy and we were a little disturbed to find that provided you were 14-16 you always had your pregnancy terminated—if you were 16-20 you were a naughty girl and never had it done (this is for single women); that if you already had a large family you had it done—if you were reaching middle life you had the greatest possible sympathy."

It was suggested that some psychiatrists were being used as a social convenience because they wanted to be so used for reasons of principle, seeing the woman in her socioeconomic situation as a human being in need who required help to preserve her life, using "life" in the widest sense of the word. So, prior to the new Act which came into force in 1968, the position in England it could be said, as it now is in New Zealand, was expressed by B M Dickens as being that "good faith on the part of the doctor, and a concurring opinion by a specialist given in good faith on the desirability of terminating a pregnancy, do not in themselves make the operation lawful; there must be a threat to the woman's life or health which is related to the condition of pregnancy, and is capable of expression in terms of physiology or psychiatry. It may be that miscarriages are procured in hospitals where the child is likely to suffer from a substantial disability . . . in such cases, however, the law does not permit the operation, it may merely refrain from interfering". The doctor still has the dilemma in New Zealand when he or she is confronted by an emotional, pleading girl who says she will have an abortion "one way or another"—lectures her on the dangers of criminal abortion and refuses to recommend anyone to perform the abortion but believes her life could be in danger from self mutilation or backyard methods. Some say the real issue involves a woman's right to life and to choose whether to bear children. Her right to life is involved because childbirth involves risks of death. The fundamental right of a woman to choose whether to bear children springs from what is often said to be a right of privacy or liberty in matters related to marriage, family and sex. Perhaps the issue for consideration by this conference is not whether such a right exists, but whether Parliament and the law has a compelling interest in the regulation of a subject which is within its criminal powers. In England, people who could not afford a specialist and perhaps had to undergo the operation in conditions of danger to health provided (as St John Stevas said in his book) the emotional drive behind reform within the Labour Party, Catholics apart, only a handful he said, opposed change. What did the change produce? The principal provisions are as follows:

> "Medical termination of pregnancy
>
> "1.—(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> "(a) that the continuance of the pregnancy

would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

"(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

"(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

"(3) Except as provided by subsection (4) of this section, any treatment for the termination of pregnancy must be carried out in a hospital vested in the Minister of Health or the Secretary of State under the National Health Service Acts, or in a place for the time being approved for the purposes of this section by the said Minister or the Secretary of State.

"(4) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

"Notification

2.—(1) The Minister of Health . . . shall by statutory instrument make regulations to provide—

"(a) for requiring any such opinion as is referred to in section 1 of this Act to be certified by the practitioners or practitioner concerned in such form and at such time as may be prescribed by the regulations, and for requiring the preservation and disposal of certificates made for the purposes of the regulations;

"(b) for requiring any registered medical practitioner who terminates a pregnancy to give notice of the termination and such other information relating to the termination as may be so prescribed;

"(c) for prohibiting the disclosure, except to such persons or for such purposes as may be so prescribed, of notices given or information furnished pursuant to the regulations.

"(2) The information furnished in pursuance of regulations made by virtue of paragraph (b) of subsection (1) of this section shall be notified solely to the Chief Medical Officers of the Ministry of Health . . .

"Conscientious objection to participation in treatment

"4.—(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:

"Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

"(2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

"Supplementary provisions

"5.—(1) Nothing in this Act shall affect the provisions of the Infant Life (Preservation) Act 1929 (protecting the life of the viable foetus).

"(2) For the purposes of the law relating to abortion, anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by section 1 of this Act."

It will be seen there is a distinction between two types of lawful abortion. Emergency abortions are lawful when performed by a medical practitioner who is of the opinion, formed in good faith, that an abortion is immediately necessary to save the life or to prevent "grave permanent injury to the physical or mental health" of the pregnant woman. Other abortions are lawful when performed by a medical practitioner if any two medical practitioners are of the opinion, formed in good faith, that the abortion falls within the terms of the Act and should be carried out. It may then in fact be carried out by a third registered medical practitioner. Apparently nearly threequarters of all abortions in the United Kingdom are performed on the grounds of risk to the physical or mental health of the pregnant woman. As to the family

reference in s 1 (1) (a) it was thought that responsible doctors could and should be trusted to look at the total environment of the family and decide on family considerations. However, the Council of the BMA in 1967 condemned as unethical the termination of pregnancy on social grounds other than when it is in the interests of the health of the mother or where there is risk of serious abnormality of the foetus (British Medical Journal, 6 May 1967). Having read this statute I wondered whether the pregnant teenager, or middle-aged mother who are neither physically nor mentally at any risk, could find their situation changed at all. On the risk of abnormality (s 1 (1) (b)) it must be a substantial risk such as rubella, or haemophilia in both parents and the foetus a male, or where blood group incompatibility between mother and father leads to rhesus factors, or a drug tragedy similar to the thalidomide one, or mongolism which is now readily detectable from an examination of the amniotic fluid surrounding the foetus. These examples are furnished by Alec Samuels, in his paper "The Abortion Act 1967: The Legal Aspects", Vol 9, Medical Science and the Law. It will also be observed that the Act makes no special provision for the victim of a sexual offence, the girl under 16 or the victim of a rape. Abortions in these cases must be justified on the statutory grounds. Furthermore, there is a specific provision subject to s 1 (1) (4) that abortions may only lawfully be carried out in a NHS hospital or in an approved nursing home.

New Zealand readers will obviously be interested in the legal and practical effects of this new Act. In *R v Smith* [1973] 1 WLR 1510, Dr Smith appealed against his conviction by a jury on a charge of using an instrument to procure a miscarriage, contrary to s 58 of the Offences Against the Person Act 1961. His defence was founded on s 1 (1) (a) of the Abortion Act 1967 (mental health). The girl concerned, aged 19, was referred to the appellant by her general practitioner. She was healthy and pregnant. The girl said the appellant made no internal examination but asked why she wanted an abortion. She said she told him she was not in love and was frightened at the idea of childbirth. The specialist asked for £150 in cash. The money being arranged she went to a nursing home and the operation took place. She said at the trial she had seen no second doctor before the operation but the anaesthetist contested this allegation. The trial took 14 days. A distinguished gynaecologist emphasised the need for careful inquiry when the reason for abortion was injury to mental health. In delivering the judgment of the Court dismissing the appeal, Scarman LJ said at p 1512:

> "The Act, though it renders lawful abortions that before its enactment would have been unlawful, does not depart from the basic principle of the common law as declared in *Rex v Bourne* [1939] 1 KB 687, namely, that the legality of an abortion depends upon the opinion of the doctor. It has introduced the safeguard of two opinions: but, if they are formed in good faith by the time the operation is undertaken, the abortion is lawful. Thus a great social responsibility is firmly placed by the law upon the shoulders of the medical profession."

In June 1971 there was set up under the chairmanship of Mrs Justice Lane, the Committee on the Working of the Abortion Act. Its report (in three volumes) was presented to Parliament in April 1974. I have read the report. Its conclusion in paras 605 and 609 is that the gains of the Act outweigh its disadvantages and that the reduction of the grounds for abortion would "increase the sum of human suffering and ill-health . . . A public educated to a more mature and responsible attitude to sexual behaviour and to contraception will be the most sure guarantee that recourse is made less often to the therapeutic abortion of unwanted pregnancies." The Lane report concedes that certain criteria such as mental health, which is an imprecise term, may be differently interpreted by medical practitioners. It accepts that there are some doctors who interpret the Act so widely as to provide, in effect, "abortion on demand". It is concerned with what it terms the "inequality of opportunity" of women who wish to obtain an abortion resulting it appears from the overtaxed National Health Service facilities in certain areas and a more or less restrictive view of the statutory criteria taken by doctors in different areas. It records that in 1972 twice as many abortions (64 percent) were performed in the private sector as on the NHS. This amounted to 41,000 and included practically all foreign women. However, the Committee concluded that the National Health Service has a definable duty to meet the demand, and services should be provided to the extent that patients are not forced into the private section. Since the Act came into force there is a significant reduction in the number of deaths

from legal abortions. The fatality rate in 1972 was 9.6 per 100,000 abortions as compared with 37.0 per 100,000 in 1969.

Notwithstanding its acceptance that the embryo desirably should be destroyed at an early stage, the Committee was not persuaded to favour *widespread* use of a new method known as menstrual regulation or aspiration. The Report calls it "a speculative abortive procedure". It involves the insertion of a tube, or cannula, into the uterus, followed by the creation of a vacuum therein. It is said that it is so simple to apply that certain women's groups wish to run their own clinics. But the Committee doubts whether menstrual regulation falls within the Act and it proposes the Act should be amended to include it, the procedure only being carried out by registered medical practitioners. Additionally, the Committee favours day-care abortion centres for the use of vacuum aspiration, provided pregnancies of up to 12 weeks' duration are involved and proper facilities are provided. In his article on the Lane Report (Vol 37 MLR, November 1974) J Timkin says: "MA is no more than a simplified version of VA, a tea-time as against a lunch-time abortion".

The Committee proposed a more direct way of stopping late abortions. It was recommended "that there should be an upper limit for abortion of 24 weeks gestation and that thereafter every effort should be made to preserve the life of the child." There are also the features of revulsion and detestation experienced by certain doctors at the removal of a foetus which has human form. In rejecting abortion on request the Lane Committee was of the opinion that "it is in the interests of the patient as an individual that the abortion decision be taken by doctors". It also said that some women would find the burden of making their own decision, unsupported, a heavy one. I apprehend some women would reply that they know best what is in their best interests.

A strong supporter of the Lane Report is Dr Janet Irwin, who is involved with student health and counselling service at the University of Canterbury. In the paper she presented to the Medico-Legal Conference at Mt Cook in June 1974, she emphasised the findings I have referred to. She summarised her own viewpoint under nine headings. They read:

"1. There is overwhelming evidence that permissive abortion laws are beneficial to the general health and well-being of women. One is justified in assuming that benefit must extend to their families.

"2. In New Zealand where the legal situation is the same as it was in Britain before the 1967 Act, women are not well cared for when they have an unwanted pregnancy.

"3. The present situation in NZ is discriminatory in that the poor as usual are less able to get abortions although their need may well be greater. The popularity of the DC8 flights to Australia show that women with enough money can and do get abortions.

"4. There is overwhelming evidence that early abortion is safer than pregnancy carried to term.

"5. Restrictive abortion laws tend to make women delay seeking abortion and doctors delay performing them and this increases the risks.

"6. Abortion should never be regarded as a substitute for adequate contraception—but rather as a back-up measure when contraception has failed. Those who are against abortion should join with those who are liberal in working for free availability of contraceptive education and advice to all who need it, with consequent reduction in the need for abortion.

"7. Women who seek abortion in my clinical experience are primarily concerned for the unwanted child for whom they feel they cannot provide a satisfactory environment. They are motivated by compassion as we all should be in our consideration of abortion requests.

"8. There should be no compulsion in any aspect of abortion. No one should have an abortion who does not want it. No one should have to perform an abortion who has deeply felt moral objections to the procedure.

"9. Doctors, and especially gynaecologists, should 'get out of the pelvis' in considering unwanted pregnancy and consider the whole patient in her family and social environment."

There are just as strong medical voices against any liberalisation of the law. Some say the psychiatric sequelae of abortion are virtually unexplored. Others contend we want more conscience and more responsibility governing these matters. The medical profession is therefore under pressure, more particularly when some women consider they should have abortion as of right.

In an article in "Medicine, Science and the Law" (April 1974) Dr T J David points out after investigation of a group of women admitted to hospital that a trade in preparations sold as abortifacients still exists. This finding is not inconsistent, he says, with the evidence that there has been a rise in the number of criminal abortions in urban areas since the 1967 Abortion Act (John & Hackman, 1972). His investigation demonstrated none of these particular hospital in-patients, admitted as gynaecological emergencies, who had used abortifacients had requested or been refused a legal termination, either from a general practitioner or a hospital. If this is true for other women who use abortifacients, then it is submitted it follows that to make legal terminations even more widely available may do little if anything to eliminate the use of abortifacients.

I have endeavoured to trace the history and the law. The more I have read about the subject the more I feel entitled to make the recommendation that any reform of our New Zealand law should only take place after a full and searching examination of the United Kingdom Act and the Lane Report on it. We could perhaps define "unlawful" and we could introduce into the law what I understand to be the accepted practice, namely, the requirement of two medical practitioners as in s 1 (1). Avid opponents of abortion reform must welcome safeguards grafted on to the existing law. In what can be an emotional subject I submit it is vitally necessary to apply a clinical yet ethical approach so that the factions are better equipped to debate the issue.

Blood transfusions

For many years, there was uncertainty in this country when, for example, a blood transfusion was necessary to save the life of a pregnant mother and the life of her unborn child, but the mother had notified the hospital that she did not wish the transfusion for the reason it would be contrary to her religious conviction. Now, by s 126B of the Health Act 1956 (passed in 1961) the unborn child or an infant is entitled to the law's protection. Except by leave of a Judge of the Supreme Court, no proceedings, civil or criminal, shall be brought against any person in respect of the administration by any medical practitioner of any blood transfusion to any person under the age of 20 years by reason of the lack of consent of any person whose consent is required by law. The Judge will not grant leave if he is satisfied: (i) that the transfusion was in the opinion of the doctor who administered it, necessary to save the life of the patient or to prevent permanent injury to his physical or mental health, or to save him from prolonged and avoidable pain and suffering, and that such opinion was reasonable; (ii) that reasonable attempts were made to obtain the consent of the person appearing to be legally entitled to consent to the transfusion, or the circumstances were such that it was necessary to administer the transfusion promptly and it was impracticable in the time available, to attempt to obtain the consent of the person appearing to be legally entitled to consent; and (iii) that in all the circumstances it was reasonable to administer the transfusion. This is a clear example of the State intervening as parens patriae to protect the lives of born and unborn children. It is an open question whether an adult should be compelled to submit to such medical procedures when necessary to save his life. In recent years, in the USA the Courts have refused to order blood transfusions in an adult person who is mentally competent and who does not consent to such transfusions on religious grounds. Perhaps the answer is that the very occasional non-conformer ought to be left alone if that is his wish.

Suicide

Human life is regarded as precious by the State, and accordingly, there have been sanctions imposed in various ways from early times to indicate that self-destruction is wrong. The Hindu and Buddhist philosophies do not unequivocally forbid it, as witness the immolation of monks in Vietnam. Under Roman law, there was no general prohibition or automatic forfeiture of property. In England, however, suicide was condemned under ecclesiastical law and the corpse could be dishonoured in various nasty ways. Up to the eighteenth century, there was also forfeiture of property as part of the view that suicide was a felony. Protestants, particularly Anglicans, have been no less compromising in their condemnation of suicide than Catholics. It was not until the twentieth century that English and American writers challenged the old theology. One was Dr Harry Roberts, who in *Euthanasia and Other Aspects of Life and Death* (London, 1936, pp 31-2) said:

> "Of how many of us is it true that the world or any part of it would be the loser were we to end our citizenship of it? In my opinion, of very few. Anyway, it seems to

me to be a problem for each person to decide for himself, if any problem is to be left for individual solution. It is well that we should look upon other people's lives as their most sacred and their most personal possession; but I doubt if it is nobility of mind that drives us to attach some cosmic and sacred significance to our own."

In New Zealand, until 1961 there was an offence of attempting to commit suicide punishable by two years' imprisonment, but it was not re-enacted in the Crimes Act 1961. Likewise, in the same year in the United Kingdom, suicide ceased to be a crime. We have taken a long time to come to this position, as suicide was abolished as a crime in France after the Revolution, and several other European countries followed suit. It has not been an offence in Scotland. American law is ambivalent on the topic. Some states still follow the English Common Law, since repealed, but they did refuse to confiscate property. Today some American states make attempted suicide a crime primarily as a means of authorising police to prevent it, and to allow them to take immediate custody of the person to prevent further harm. In this country, by the Health Amendment Act 1960 (enacted as s 126A of the Health Act 1956) persons attempting to commit suicide may be committed by a Magistrate to any hospital or institution under the control of a hospital board or to any other suitable place for up to three months, or may be placed by the Court under the supervision of any relative or other person (including a medical officer of health) for any such period. No order is made unless, in the opinion of the Court, the defendant is in need of care or treatment or supervision, or is likely to make a further suicide attempt; and any such order may be subject to conditions as the Court thinks necessary for ensuring the defendant's care, treatment, or supervision. In enacting this legislation, we have followed the suggestion of Larremore, 9 Howard Journal 199 (1956) reinforced by Dr Glanville Williams and Mr St John Stevas.

Aiding and abetting suicide, and suicide pacts, are crimes under ss 179 and 180 of our Crimes Act 1961. I suppose the purist could argue that, as suicide itself is not a crime, then theoretically, aiding and abetting it should not be either. Some American states have taken this attitude but the majority do not. The Swiss Criminal Code provides that whoever instigates the suicide of another, or assists him, is punishable only if he is actuated by "selfish motives". That must be a difficult aspect for a Court. The right to life of depressed persons can be assisted not only by the use of the Health Act, but also by practical steps taken by such groups as the "Samaritans", who deserve every encouragement.

Euthanasia

In New Zealand the hastening of death by medical treatment (or lack of it) is partly governed by s 164 of the Crimes Act 1961, which reads:

> "Everyone who by any act or omission causes the death of another person kills that person, although the effect of the bodily injury caused to that person was merely to hasten his death while labouring under some disorder or disease arising from some other cause."

Then, s 63 provides:

> "No-one has a right to consent to the infliction of death upon himself; and if any person is killed, the fact that he gave any such consent shall not affect the criminal responsibility of any person who is a party to the killing."

The question must therefore be asked whether s 164 would cover death resulting from an administration of drugs known to be likely to produce death, but given for the purpose of relieving pain. The answer would seem to turn on an absence of mens rea.

Some people consider that mercy killing is morally permissible. Euthanasia is a Greek word, meaning happy death. The word is generally associated with the killing of those afflicted by old age, or from advanced malignancies or terminal conditions, or serious physical malformation. One view is that a person is entitled to ask for an end to overwhelming and helpless pain, and that the doctor who provides the relief should be legally absolved from blame. But there are others who strongly contend there are no circumstances when it can be right for one person to take the life of another. Between the two extremes are many of us who have not met the problem at first hand, and who either have not given deliberate and conscious thought to the problems which confront the patient, the doctor or the near relative, or who perhaps vaguely consider that euthanasia might be acceptable in circumstances which are clearly

defined. The first viewpoint was referred to by Sir Thomas More, who in *Utopia* said:

> "When any is taken with a torturing and lingering pain, so that there is no hope either of cure or ease, the priests and magistrates come and exhort them, that, since they are now unable to go on with the business of life, are become a burden to themselves and all about them, and have really outlived themselves, they should no longer nourish such a rooted distemper, but choose to die since they cannot live but in much misery."

Undoubtedly, this was a satirical approach. More was no advocate of euthanasia. Compulsory euthanasia on eugenic or utilitarian grounds was advocated in the ancient world. Plato and Aristotle both believed in the weeding out of defective children. Adolf Hitler brought it in in 1939, and some 275,000 perished in the centres he authorised. In England in 1936 there was formed the Voluntary Euthanasia Legalisation Society whose presidents and members included distinguished doctors and churchmen. Their Bill in the Lords was defeated on more than one occasion. The same fate met Bills in certain American states.

It now seems that, as against those who believe Parliament should clarify the position of doctors practising euthanasia, a greater number feel the law should be left as it is, relying on Judges and juries to leaven justice with mercy when it is appropriate. No doubt we all read of the case in October 1974 when a 38-year-old cousin of the Queen buoyed herself up with hope that the baby she had waited so long for would be normal. The baby was born with an incurable brain disease. She used the utmost love and devotion in drip-feeding the child, who was also blind. Eventually, she fed the baby drugs so that it died quickly and painlessly. Kenneth Jones J, when sentencing her on her plea of manslaughter on the grounds of diminished responsibility, put her on 12 months' probation. Even more recently, a retired surgeon claims in his book that he has practised euthanasia for many years. He has been warned of a private prosecution and accused of fomenting unnecessary worry among elderly people.

In its strict form, voluntary euthanasia, generally speaking, may be regarded as suicide in the patient who consents, and murder on the part of him who administers. In its suggested compulsory form, the patient signs a form before witnesses. The application goes to an appointed referee together with two medical certificates, one from the patient's own doctor, and the other from a specially qualified practitioner. The referee then interviews the patient to ensure he understands his decision. Finally, euthanasia is administered before an official witness by a licensed practitioner. Such a scheme has been criticised as cold-blooded and formal.

Another suggestion from America is to rationalise existing practice, by providing lesser penalties so that reprehensible motives would lead to severe punishment, while humanitarian motives would demand leniency.

Christian teaching condemns the practice and certain Popes and Archbishops of Canterbury have strongly rejected it. Under the Hippocratic Oath, doctors promise to "give no deadly medicine to anyone if asked, nor suggest any such counsel". In spite of these sanctions, it seems many physicians do perform euthanasia in a variety of ways; such as turning off the respirator, or failing to prescribe available treatment to prolong the lives of terminal patients. However, few cases reach the Courts.

I therefore ask these questions. Is euthanasia acceptable to the public at large? Who may give or withhold permission? How is the patient's state of mind to be evaluated? What legal consequences follow from such a death, on contract, insurance, succession? In my opinion, in this highly controversial area of law, no statutory reinforcement of the present practice of "shortening the gap" (as Lord Dawson termed it) in the case of incurable disease as consciously or subconsciously practised, should be made or extended in the absence of a full enquiry from a skilled professional and lay body.

Intellectually handicapped persons

The rights of such people have attracted much attention in recent times. In 1973, the Florida House of Representatives passed its so-called "Death with Dignity" legislation by a vote of 56-50. The legislation permits a patient to refuse medical care, and also permits physicians, together with the family, to discontinue care when the situation is "hopeless" and the individual is unable to make a choice for himself. To this extent the law in that State bears upon the earlier topic of euthanasia. But the proponents of this legislation seek to go further. They have advanced the argument that certain mentally retarded individuals (particularly those severely or profoundly retarded) are ineducable, untrainable, and incapable of improvement;

that they are an economic drain on society, and their lives are not worth living. Their position is expected to lead to further legislative proposals. The contrasting viewpoint strongly held is that all individuals should be recognised as human beings with value and meaning to their lives, and the symptom of mental retardation should never be a justification for termination of an individual's life.

In his paper "The Bioethics of Intellectual Handicap" (1973) Dr Donald Beasley, the National President of the IHC Society of New Zealand, who has achieved an international eminence, referred to a "right to life" case considered by a symposium sponsored by the Kennedy Foundation in Washington in 1971. A newborn mongoloid boy was born with a duodenal atresia. His parents refused permission for a fairly simple operation, saying it would be unfair to their other two (normal) children to be brought up with a mongoloid sibling. The symposium discussed whether the parents had such a right, and whether despite such a refusal the surgeon should have operated. Should the child have been denied the right to modern medicine because he had mongolism? Should the State accept the child? The panel of distinguished doctors, theologians and lawyers was told that the hospital sought the advice of a Judge, who indicated that the Court would not likely overturn the parents' decision under these circumstances. Subsequently the child was put in a side-room, and, over an 11 day period, allowed to starve to death. The hospital staff was greatly upset, but took no action to hasten the child's death. The panel decided that both the parents and the hospital were wrong. A Harvard professor of law suggested that the case should have been turned over to the Courts so that the child could have been made a ward of the Court, who could have ordered the operation. However, the paediatric head of John Hopkins Hospital said legal experts had told them the Courts would not overrule the parents' decision. A psychologist suggested there should be "child defenders" to represent the baby. Other doctors considered that the child's mongolism was quite irrelevant, and one quoted Article 21 of the Declaration of the Rights of Mentally Retarded Persons since adopted by the United Nations, which reads: "The mentally retarded person has a right to proper medical care and physical therapy". Dr Beasley's opinion was that the decision whether a child should be treated or not, rested with the parents, but only after the case for and against treatment had been put as objectively as possible. It was his view that parents almost invariably will look to the doctor for advice and guidance which must be given free of any bias, but recognising the limits of present knowledge. Here again, s 164 of the Crimes Act (supra) must be remembered.

If, therefore, it is considered that all of our citizens are entitled to equal rights, including the right to preservation of life, then the symptom of mental retardation should never be a justification for termination of an individual's life. This viewpoint is well expressed by an American Judge in Maine, when in February 1974 he said:

> "The issue before the Court is not the prospective quality of the life to be preserved, but the medical feasibility of the proposed treatment compared with the almost certain risk of death should treatment be withheld"

and

> "The doctor's qualitative evaluation of the value of the life to be preserved is not legally within the scope of his expertise."

Lastly, the Judge addressed himself to the real issue as follows:

> "Quite literally, the Court must make a decision concerning the life or death of a newborn infant. Recent decisions concerning the right of state to intervene with the medical and moral judgments of a prospective parent and attending physician may have cast doubts upon the legal rights of an unborn child; but at the moment of live birth there does exist a human being entitled to the fullest protection of the law. The most basic right enjoyed by every human being is the right to life itself."

Organ transplantation

Sometimes claims for damages are brought on behalf of comatose accident victims. If a defendant should argue that being irreversibly comatose, the victim was already dead, how would the Court approach the problem? The problem is compounded when because of the continuing march of technology, the sustaining of vital processes is possible for greater periods of time, yet surgical teams may need the organs of persons to sustain the living. Uncertainty over the possibility of recovery may result, it is said,

too often in unreasonable prolongation of life support. Is an individual's "right to life" being properly considered?

Late in 1971, I had the privilege of delivering the Kennedy Elliott Memorial Lecture to the Wellington Medico-Legal Society. I chose as my subject "Medico-Legal Aspects of Organ Transplantation in New Zealand". As both the *Medical Journal* and the *New Zealand Law Journal* were good enough to publish the address, I must assume, perhaps hopefully, that some of you may have read the article. At approximately the same time as I gave the address, Dr Barnard in Cape Town transplanted a heart and two lungs into a Cape coloured patient after a six hour operation which the surgeon pronounced a clinical success. Later that same day the wife of the dead donor indicated that the hospital authorities had not even informed her of her husband's death before his organs were removed, much less even asked her permission for the transplant. The hospital people defended their action by stating that they were unaware the donor was married and that they and the police had tried to locate his next-of-kin before permitting the operation. It was later learned the lady had visited her husband in the hospital the night before he died, and it took local reporters only a short time to locate the donee's relatives. There was very strong criticism of Barnard's actions as being casual. He defended himself by responding that the donor was in a grave condition and would have been dead in a day or two. This vividly illustrates one of the dilemmas in which a surgeon could find himself in this new field. I shall, therefore, in this paper attempt to concentrate on one aspect only and that is the definition of "death" as that term bears on the new medical science. My researches have extended to American and English publications on the subject that have taken place since 1971.

It has been said that "a person dying is still a person living, and he keeps his elementary human rights up to the moment when life becomes extinct". As I mentioned in my earlier address, it was agreed at a conference in Britain in 1968 that no attempt should be made to lay down a legal definition of death, or rules which doctors should observe in reaching what must be a clinical decision; but that, to allay disquiet, vital organs should not be removed until spontaneous vital functions had ceased and two doctors, each independent of the transplantation team and one of them being at least five years qualified, had certified that this condition was irreversible. It was, moreover, essential that the doctors concerned should explain the matter adequately to the nursing staff concerned, especially in those cases where the patient's vital functions were being maintained by artificial means. So, the conference was saying that because the decision is clinical, there should be no legal rules governing it. I said in 1971 this, in broad terms, was also the standard American viewpoint.

As we all know, there have been considerable medical advances in recent years in the areas of resuscitation and, contrasted with that, enormous strides in the area of organ transplantation which requires, in the case of a heart, its removal from the donor as soon as possible after respiratory failure occurs. There is some public apprehension that organs may be removed from persons who might otherwise have recovered. Therefore, it is imperative that the essential requirement of a speedy removal of the organ should be considered in relation to the need for an accurate and precise medical definition of death. So the medical profession says to our profession—furnish us with a definition which will enable us to do our vital work without the threat of an action for negligence or, worse still, a criminal prosecution. To the present time, legal definitions seem to have come primarily from the United States. In *Finch v Edwards* (1947) 239 Mo App 788 "death" was said to mean "departure from life". That does not take us any distance. "Death is the cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood and cessation of the animal and vital functions consequent thereon, such as respirations, pulsations, etc. . . . Death occurs precisely when life ceases, and does not occur until the heart stops beating and respiration ends. Death is not a continuing event and is an event that takes place at a precise time"; *Thomas v Aderson* (1950) 96 Col App 2d 371. I would not think that definition would suit a doctor either. The dilemma is further compounded when, from the surgeon's viewpoint, he has only a few minutes to remove the vital organ such as heart or liver and transplant it. I understand that, using the definitions I have referred to of stoppage of heart beat and respiration, this would mean the stopping of circulation in the donor before the surgeon commenced to remove the organ. From a rather brutally styled article, "When do you pull the plug?" 295 AMAJ 29 (1968), I am informed that at this stage the

vital organ would have already begun to deteriorate, thus significantly reducing the probability of a successful transplant. So the surgeon observing the classical definition of death could watch a patient die, while a potential donor, with no hope of regaining consciousness, was maintained by artificial means until further complications developed and his heart and respiration finally ceased. On the other hand, as Arney says in his article on this topic in Vol 38 Missouri Law Review 1973, a transplant surgeon applying a brain death definition could remove an organ even though the donor's circulation was still being maintained artificially. No doubt this would greatly increase the probability that a transplant would be successful. Prior to the first heart transplant in France, a special definition was enacted to remove any uncertainty about the permissibility of removing a beating heart. In 1968, the French Government decreed a "definition of clinical death" for use with organ donors, based on a flat EEG of 10 minutes' duration which was taken to show that an artificially maintained patient lacks "function in the higher nervous centres". In America, a majority of the medical profession apparently agree that a definition of death based on irreversible loss of brain function must be adopted, but again there is extensive argument over what should be the specific criteria. The common factors appear to be, the absence of spontaneous respiration and muscular movement, the absence of spontaneous respiration and muscular movement, absence of all reflexes, and a flat electro-encephalogram (EEG) reading. The World Medical Association at its meeting in Australia in 1968 drafted these criteria:

(1) Total lack of response to external stimuli, even the most painful that can be ethically applied.
(2) Absence of all spontaneous muscular movements, notably breathing. If the patient is on a mechanical respirator, this may be turned off for three minutes in order to establish that he is capable of breathing himself.
(3) Absence of reflexes. The dilated pupils must not contract when a bright light is shone directly into them. There must be no eye movements in response to pouring ice water into the ears, no muscular contraction of the biceps, triceps, or quadriceps.
(4) Flat encephalogram or absence of brain waves.

This proposal does not require a time limit for the existence of the flat EEG reading, nor does it require a repeat of the tests at any time after the initial examination in order to document brain death.

An ad hoc committee of the Harvard Medical School set up to examine that definition of brain death used the term "irreversible coma" which has received strong support. In essence, the criteria are:

(1) *Unreceptivity and unresponsitivity*—A total unawareness to externally applied stimuli and inner need and complete unresponsiveness; even the most intensely painful stimuli evoke no vocal or other response, not even a groan, withdrawal of a limb, or quickening of respiration.
(2) *No movements or breathing*—At least a one hour observation by physicians is adequate to satisfy this criterion; if the patient is on a mechanical respirator, observation is necessary for three minutes after the respirator has been turned off provided that at the start of the trial period the patient had been breathing room air for at least 10 minutes.
(3) *No reflexes*—The pupil will be fixed and dilated and will not respond to a direct source of bright light, ocular movement to head turning and to the irrigation of the ears with ice water and blinking are absent; swallowing, yawning, and vocalisation are absent.
(4) *Flat or isoelectric electroencephalogram* —Of great confirmatory value; and
(5) All the above tests shall be repeated at least 24 hours later with no change.

The report also flatly states that "the patient's condition can be determined only by a physician".

One area of great difference is the time factor for repeat of the tests—from none to 24 hours under the Harvard Report, which is gaining world-wide approval as offering sufficient flexibility.

I have mentioned these matters, primarily for the lawyers' benefit as, although the doctors may want a legal definition from us, more and more it seems to me we must also rely on help from the doctors to define death. As I said before, there seems to be no single moment of death. In *Tucker v Lower,* Richmond, Virginia, 1972, following the world's nineteenth human heart transplant, a Judge and jury had to face, in a wrongful death action, the issue

of what test should be used to determine the time of death. The Judge, perhaps kicking for touch, resolved his problem by giving the jury a list from which to select the death criteria. I should comment, however, that the Deputy District Attorney for Los Angeles maintains that murder is technically committed in many transplant situations because of the uncertainty of the legal definition of death, no matter how good the motive or how inevitable the death of the donor. In 1970, Kansas (like Maryland since) passed a statute defining death, in an attempt to achieve a solution to what I suggest is the real problem of obtaining organs while protecting the surgeons from civil and criminal liability. It reads:

> "Definition of death. A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and, in this event, death will have occurred at the time these functions ceased;
>
> or
>
> "A person will be considered medically and legally dead if, in the opinion of a physician based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before artificial means of supporting respiratory and circulatory function are terminated and before any vital organ is removed for purposes of transplantation.
>
> "These alternative definitions of death are to be utilised for all purposes in this state, including the trials of civil and criminal cases, any laws to the contrary notwithstanding."

Yet, as R S Frederick II in Vol 51 of the North Carolina Law Review comments, there are some in both professions who fear this law will stultify medical advances and would prefer the Courts to determine the issue as one of fact on a case-by-case basis based on expert medical evidence.

As far as I am aware, no doctor has been convicted of a criminal offence resulting from the removal of a vital organ, but I again mention s 164 of our Crimes Act. In *Re Potter* 31 Medico-Legal Journal 195, 1963, an assault victim was maintained on a respirator until pronounced dead based on the absence of brain activity. The donor's kidney was then removed in a transplant operation. The English jury found the accused guilty of manslaughter and refused to find that the transplant operation had contributed to the victim's death. The Coroner had consented to the removal of the kidney in accordance with the Human Tissue Act 1961, s 1 (5). In California, in May 1974, a lawyer offered as a defence in a prosecution against one, Lyons, who had shot a man in the head, the argument that the cause of death was not the bullet, but the removal of his heart by a transplant surgeon. But the jury found the accused guilty of voluntary manslaughter. A doctor called for the prosecution said:

> "The brain in the 1970's and in the light of modern day medical technology is the sine qua non for death. I'm saying anyone whose brain is dead is dead. It is the one determinant that would be universally applicable, because the brain is the one organ that can't be transplanted."

Dr Gaylin, in his slightly macabre article, "Harvesting the Dead" (Harpers, September 1974) concludes after referring to the idea of wholesale and systematic salvage of useful body parts from new cadavers he styles "neomorts":

> "Is the revulsion to the new technology simply the fear and horror of the ignorant in the face of the new, or is it one of those components of humanness that barely sustain us at the limited level of civility and decency that now exists, and whose removal is one more step in erasing the distinction between man and the lesser creatures—beyond that the distinction between man and matter? Sustaining life is an urgent argument for any measure, but not if that measure destroys those very qualities that make life worth sustaining."

There are, of course, the ethical and religious

considerations. Pope Pius XII stated, "It is for the doctor, and more especially for the anaesthetist, to give a clear and precise definition of death and of the time of death of a patient who dies in a state of unconsciousness."

In England, the Transplants of Human Organs Bill 1974 (not yet passed), authorises the "removal and use for therapeutic or curative purposes of any part of the body of a person who has died". This is not to be done "until the death of the person concerned . . . has been certified by two registered medical practitioners". But the Bill does not define death. Indeed, as Messrs Hillman and Aldridge state in their joint article "Towards a Legal Definition of Death" (1972) 116 Solicitors' Journal 325, "the medical practitioners would have to assert that death had occurred, despite the continuation of respiration and heart action of the patient, whose arrest are the most important criteria by which death is normally diagnosed. To await their arrest would often be to leave it too late for a successful transplant". Thus the Act envisages two kinds of death described by the same term. The contributors finally submit that "irreversible brain damage" should be put on a legal basis.

I can envisage that a removal of a beating heart from a patient could possibly involve the surgeon in an action in tort. If the present situation obtains, where most jurors think of death occurring when the heart stops or breathing ceases or both, then they might well find for a plaintiff. But properly directed on a basis of brain death as the only criterion, the surgeon might well escape liability.

It would be incomplete not to mention the viewpoint of Dr Adrienne Baroness van Till in her paper, "Legal Protection of Human Life; from when until when?" She says that to call an irreversibly comatose patient dead is to make legal that he is used as an organ donor for experiments, but that is contrary to the right of the patient's otophysical integrity. She also claims that however bad the comatose patient is, it is neurologically impossible to prove he cannot have any awareness left. Consequently, he should still be considered a person in the eyes of the law. She ends her paper as follows:

> "The French statesman, Clemenceau, who started his career as a physician, used to say that war is far too serious an occupation to leave it to the generals alone. If he lived now he might say that diagnosing death is far too serious an occupation to leave it to the physicians alone. The concepts of life and death for application in legal practice should be established by the legislator after intensive discussion, and the sooner the better."

Therefore, on this subject, which is a complex and arcane one for lawyers as well as doctors, it is my submission following Baroness van Till, that it is important that the two professions, along with theologians and laymen, provide a definition of death that would remove the uncertainty of the present law, which is unhealthy for society and doctors alike. Whether it should be in the form of a statute, or a code approved by the medical practitioners, could be part of the deliberations.

Summary

At the end of each of the topics, I have endeavoured to make certain general comments or recommendations. I repeat them in brief form.

Abortion—Any reform of our New Zealand law should only take place after a full examination of the 1967 Abortion Act (UK) and the Lane Report on it.

Blood transfusions—The existing law seems very adequate to protect those under the age of 20 years. It is an open question whether an adult should be compelled to submit to this medical procedure to save his life.

Suicide—Our Health Act prescribes powers to assist those who have attempted suicide. Practical assistance to such groups as the "Samaritans" is warmly endorsed.

Euthanasia—What is the public attitude? I have submitted that no statutory reinforcement of the present practice of "shortening the gap" should be made in the absence of a full enquiry.

Intellectually handicapped persons—Should modern medicine be denied to some of them? Who should make the decision? Is this human being entitled to the fullest protection of the law?

Organ transplantation and the definition of death—If it is agreed that the present situation is confused, then doctors, lawyers and others should provide a definition which can either have the force of a statute, or be a code within which the medical profession may act with some certainty.

I end this paper, therefore, by submitting that on all the topics I have placed before you for consideration that we keep our heads as well as our hearts. As Milton said in *Paradise Lost*:

"Since thy original lapse, true Liberty
Is lost, which always with right reason dwells
Twinned, and from her hath no dividual being;
Reason in man obscured or not obeyed,
Immediately inordinate desires
And upstart passions catch the government
From Reason and to servitude reduce
Man till then free".

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DISCUSSION

Chairman: Mr R C Savage QC

Commentators: Messrs J D Dalgety, R G Clough

THE CHAIRMAN: "On the platform we have his Honour Mr Justice Beattie and the commentators Mr Dalgety and Mr Clough. I do not propose to give you a thumbnail sketch of the professional careers of Mr Dalgety and Mr Clough, but I will say one thing about each of them, because it bears upon one of the topics covered by his Honour's paper. Mr Dalgety is the national Vice-President of SPUC—the Society for the Protection of the Unborn Child. Mr Clough is a trustee of the Auckland Medical Aid Trust, perhaps more commonly known as the Auckland Abortion Clinic. No one should feel at all hesitant in making a vigorous contribution to the debate this morning, although I rather doubt if I need to urge anyone to speak vigorously. I only mention it to give a word of warning, no matter how powerful the shots from the floor may be, whichever side of the fence, the counterfire from the platform will match it."

MR JUSTICE BEATTIE: "Mr Chairman, ladies and gentlemen: If my voice should fail me it is not for an excusable reason such as the affliction that Judge Gesell and others suffered, but because last night at an hour when we should have been in bed, there was some singing. If I may respectfully say so, my Lord Chancellor has a voice which would grace an Eisteddfod, either in the Welsh or the Russian tongues. Also I discovered that my brother Mahon has a distinct flair for the lilting Neapolitan love song.

"On the topic of abortion, my recommendations are, and I quote: 'I feel entitled to make the recommendation that any reform of our New Zealand law should only take place after a full and searching examination of the United Kingdom Act and the Lane Report on it. We could perhaps define "unlawful" and we could introduce into the law what I understand to be the accepted practice, namely, the requirement of two medical practitioners as in s 1 (1). Avoid opponents of abortion reform must welcome safeguards grafted on to the existing law. In what can be an emotional subject I submit it is vitally necessary to apply a clinical yet ethical approach so that the factions are better equipped to debate the issue.' I agree with the Attorney-General that so expressed that recommendation appears restrictive. It is not intended to be so. Indeed, I have discussed

my paper with Mr Dalgety and he made the same comment as the Attorney-General. I accept it as a valid criticism of the paper.

"Indeed, the Lane Report cannot be the only basis, and the terms of reference for the Commission of Inquiry that the New Zealand Government is setting up should, and no doubt will, be broadly based. In passing I stress that the members of the Lane Committee were unanimous in supporting the English Abortion Act, which enabled many women who might have had illegal abortions to have lawful ones and from skilled practitioners.

"I observed that the December 1974 issue of the *Australian Law Journal* suggests that the Lane Report may be 'conservative', but consider it will be of value to governments which will introduce legislation based upon the 1967 Act, and that is the thesis of my paper. That the dust on this issue has not settled in the United Kingdom is illustrated by a debate in the House of Commons on 7 February 1975. On a free vote, the MPs voted 203 to 88 to support a private Bill to tighten the law. The Bill was given a second reading. It was decided to refer it to a select committee for sustained scrutiny. Any jubilation among opponents of the present law who believed it opened the way to abortion on demand could be short lived. Dr Owen, the Minister of State Health and Social Security, pledged that decisive steps would be taken to curb rackets and the exploitation of women by grossly irresponsible doctors seeking profit. However, the Minister made it clear that he was against any restriction of the medical grounds on which abortions may be performed. He said, 'To amend the grounds for abortion in a restrictive way when the number of unwanted pregnancies is increasing, and before comprehensive services are available to all who need them, would increase human suffering and ill health, and probably drive more women to seek the squalid and dangerous help of the backstreet abortionist'. It was his opinion that the great majority of private and National Health Service abortions had been justified. The terms of reference of the Select Committee include wide powers to obtain evidence of illegal and unethical practices.

Dr Owen said the Department of Health had made a rigorous appraisal of the way in which private abortions were approved and was convinced the Abortion Act was not working in the way Parliament had intended. After consulting the medical profession, the Government would consider specifying fair fees for performing abortions. Pregnancy advisory bureaux would be more tightly controlled. The Bill seeks more stringent medical grounds for abortions which totalled 163,000 in 1974. Although it does not propose abolition of the so-called 'social clause', which permits thousands of abor-



Ronald D Woolf

Mr Justice Beattie

tion for non-medical reasons, its critics say that redefining the medical grounds would be to make it almost impossible to invoke the 'social clause'. The Bill also proposes a ban on abortions after the 20th week of pregnancy instead of the 28th as at present stipulated under the Infant Life Preservation Act 1929, and to restrict abortions on women coming from abroad.

"The British Medical Association has said that Dr Owen's criticisms were unfair. It stated that the real blame for the situation in the private sector lay with Governments, which had not provided proper facilities for abortions to be carried out under the National Health Service.

"During the debate some interesting comparisons were revealed. Since the new Act came into force the death rate from abortions had considerably dropped. Next, the abortion rate in Britain per 1,000 live births compares very favourably with that in other countries. For 1972, in England and Wales the figure was 154,

in Norway 186, in Finland 337, in Japan 375, in California 369 and in New York 650.

"For myself, I find difficulty in defining the limits to the controversial provision in the English Act, where account can be taken 'of the pregnant woman's actual or reasonably foreseeable environment'. The term 'foreseeable environment' must be elastic. Again, while the Act intended to allow abortion only on 'health grounds', I suppose that a full pregnancy carries more health risks than an early abortion. The 'health grounds' can thus always be supposed to be present. But I have read that one-third of the women who seek National Health Service abortions are turned down. Those who have favoured the 1967 Act contend the figures prove it meets a massive social need. As Mr Justice Lane's committee sensibly commented, no woman has an abortion for fun!

"It is a false impression that the English Act legalised abortion on demand. I have not seen any study in depth of post-abortion morbidity and will await such a survey with interest.

"One of the suggestions in Britain is to tighten the Act by allowing a termination only when continued pregnancy involves 'grave risk', as opposed to unqualified 'risk' at present, or risks 'serious injury', as opposed to mere 'injury', and perhaps by removing the statutory yardstick for assessing risk. In my opinion the decision whether or not to abort must depend on the clinical judgment of the doctors.

"I repeat that those who favour the most restrictive approach deny that women have a right to control their own fertility and would prevent those who seek abortion from acting as they feel right. But those who favour the liberal approach could well argue that they do not seek to detract from the rights of others, except the unborn whose claim to rights is philosophically and religiously a matter of much debate, for they could still act according to their consciences. As the Lane Committee observed, abortion violates the sanctity of life and extinguishes the potentiality of life. But a commentator in England asks, Do the rights of a living but non-sentient foetus exceed those of a woman in all too sentient despair?

"At the beginning of my prepared article I quoted from Alexander Pope, the famous poet who referred in those days in the excerpts I quoted to the right to life. I now wish to quote from another poet who is not Alexander Pope, nor his Holiness the Pope, nor indeed Jeremy Pope. I will tell you the name of the author when I have read the poem, because I doubt if many of you would ascribe to him the motives he uses in this piece of verse. It is called 'Unto us . . . ':

'Somewhere, at sometime
they committed themselves to me
and so, I was!
Small, but I *was*.
Tiny in shape
lusting to live
I hung in my pulsing cave.
Soon they knew of me
my mother—my father—
I had no say in my being
I lived on trust
and love.
Tho' I couldn't think
each part of me was saying
a silent "Wait for me,
I will bring you love!"
I was taken
Blind, naked, defenceless,
by the hand of one
whose good name
was graven on a brass plate
in Wimpole Street,
and dropped on the sterile floor
of a foot-operated, plastic waste-bucket.
There was no Queen's Counsel
to take my brief.
The cot I might have warmed
stood in Harrods shop window,
When my passing was told
my father smiled.
No grief filled my empty space.
My death was celebrated
with two tickets to see Danny La Rue
who was pretending to be a woman
like my mother was."

—*Spike Milligan.*

I turn to organ transplanation. The *British Medical Journal* issue of 1 February 1975 carries an article reporting on the shortage of organs for clinical transplants. Four hundred and fifty kidneys a year were being transplanted in the United Kingdom, whereas about 2,000 people a year needed transplants. Among the factors responsible for the shortage was apathy in the medical profession, ignorance among the public and fear among doctors that by being involved in organ operations they may be contravening the law with its present uncertainty of interpretation. Finally there was hostility from relatives who might think the doctors were hastening the death of a potential donor.

"It is thought that the Human Tissue Act 1961, and we have a New Zealand equivalent, could be liberally interpreted to prove that, if in the time available a genuine attempt was made to contact anyone who might be expected to throw light on any previously expressed wish of the deceased, and on whether any spouse or relative objected, authority could be given for the removal of the organs in question.

"I turn to death of the brain—to bring matters up to date. I refer to an article where the extreme example of the victim of the guillotine would be perhaps helpful. It seemed nobody would consider the body, when the head is severed, to represent an individual living being, yet the body could be resuscitated and the organs kept alive for a considerable period.

"The Committee in Britain considered that there was a need to accept a person was dead when it was established he had suffered an irreversible cessation of brain function, and was incapable of spontaneous respiration."

MR CLOUGH: "Just by way of opening I feel it is ironic that the paper should be entitled 'The Right to Life' when there is a large sign over the theatre door advertising the film 'Death Wish'. My feeling is that this paper, 'Right to Life', has missed a point. I do not see how you can talk about reforming the law until you know what the law is, and nobody in New Zealand knows what the law is, and this is a concern of everybody, particularly in the law profession I believe. The law is supposed to be contained in s 182 of the Crimes Act.

"I am convinced that s 182 does not refer to abortion at all; it refers to the killing of a viable foetus, an unborn child, which may or may not be born prematurely. 'Abortion' refers to the situation where it is premature expulsion of the contents of the uterus. So that what law on abortion we do have is contained in s 183, which, of course, has that word 'unlawful'.

"Parliament has decided some acts of abortion are apparently unlawful, but has not deigned to tell us what they are and that has concerned the Courts and the legal profession ever since—just trying to interpret what Parliament means.

"In my research I have found four possible or likely interpretations of the law as it stands, any of which would produce very little result when applied in any factual situation. I would like to mention them to you to show you what state the law actually is in. The first interpretation I have is that abortion is lawful where it is necessary to save the life of the mother in its strict literal sense. To obtain that interpretation the Courts have interpreted that word 'unlawful' in referring back to the proviso in s 182 which provides that an unborn child may be killed to save the life of the mother.

"The second interpretation is that adopted in the *Bourne* case, which most people are familiar with, which says abortion is lawful where the condition of pregnancy will make the mother a physical or mental wreck. It interprets the word 'life' in s 182 in a slightly more liberal sense. The third possibility, and this is one which has not been considered by the Courts and is not very well known, but is in many ways a better and more logical argument than that taken in the *Bourne* decision, is that there is a common law right to abortion where that abortion is performed prior to the viability of the foetus. Several academics have written on the subject and researched the history of the common law, and they say under the common law there was a right to abortion prior to viability where the abortion was performed in accordance with acceptable medical practice. The situation was if the woman happened to die in the course of the abortion, the practitioner was liable on a charge of murder. Where the abortion was performed in a manner outside accepted medical practice or after viability it was prohibited by the common law, but otherwise the common law said nothing about what could be done, apart from imposing a penalty where it was done in a prohibited manner.

"If that is the case then obviously the interpretation of the word 'unlawful' in the Crimes Act 1961 is that the common law right subsists. It is a principle of statutory interpretation that where there is a common law right, the statute which may remove it is interpreted strictly to allow it to continue where possible. That is a much better interpretation, a more logical interpretation of the word 'unlawful' than the interpretation referring it back to a prior section of the Crimes Act, which really it has nothing to do with.

"That is an argument that has not been canvassed by a Court, by the way.

"The fourth possibility is that an abortion is lawful where a practitioner has an honest belief on reasonable grounds that it is necessary to prevent serious danger to the life or physical or mental health of the mother. That is the result of a line of cases, starting with the *Bourne* case and moving on to the latest case, the *Davidson* case in Australia, and that came

down to the interpretation of what the law is at the present time. That last interpretation is the one likely to be adopted in New Zealand. I say likely because fortunately or unfortunately, I do not know, none of the cases, including *Davidson*, is in any way binding on a New Zealand Court. But even if we assume that that interpretation is the one that could be followed in a New Zealand Court, and as I say they are not binding, we do not know, a New Zealand Court could follow any one of the other three I have mentioned. Even if it is the interpretation followed I suggest it affords no adequate guidance to anybody, least of all the doctor and his legal adviser, and of course the woman concerned.

"Let us consider the situation for a moment. *Davidson* said there must be a serious danger to the life or the physical or mental health of the woman. What do the words 'serious danger' mean. In England it means a substantial risk which could be interpreted to mean more than a real possibility. We have the option of serious danger meaning a 'real possibility', a 'probability' or a 'high probability', all of which interpretations would produce very different results when applied to particular facts in situations before a doctor. Does this word 'serious' appearing before danger also apply to the words 'life or physical or mental health'. Does the word 'serious' just apply to the degree of risk or to the degree of harm that would seem to ensue. That is not clear, on a common-sense interpretation 'serious' would only apply to the degree of risk. So if there is more than a mere possibility of risk to physical health in any minor way exceeding the normal risks of childbearing then we are entitled to perform an abortion. What it may be, of course, we cannot be sure; it must be more than a mere possibility of risk of substantial or serious harm which, of course, is a different matter altogether.

"What do we really mean by harm to physical or mental health anyway. The World Health Organisation recently brought down a definition of health which defined it as a state of complete physical and mental well being. If that is the case not many people have ever had a healthy day in their lives.

"The situation is that even if we accept the *Davidson* interpretation, we do not know what the law is. There is a tremendous grey area which provides no real guidance to the doctor at all and applied to individual cases we are really in trouble, and we must appreciate the dilemma the doctor is in if he tries to make a decision. What about the woman who says she will abort herself, but otherwise appears to be quite healthy and mentally stable? If there is a possibility that she will abort herself that is a matter of concern and could cause danger to her physical and mental health. What about the single girl? Surely there is a real possibility there may be mental disturbance to a single girl who may have to bear a child in our society. There is a real possibility of mental disturbance—enough—we don't know. What this situation results in is an open door to exploitation. Some doctors interpret the law in one way; others in another. The result is that some women get an abortion and some do not whether they are legally entitled to it. The amount of money you have and who you know to some extent is what counts. Parliament has said abortion is lawful on some occasions, but it won't tell us when until after we perform one—and if we happen to be wrong, quite unwittingly we render ourselves liable to 14 years' imprisonment. That is a totally unacceptable situation. It is an indictment of Parliament, and I think it is also an indictment of the legal profession. Surely there is a duty on the legal profession to ensure Parliament says what it means, particularly in criminal legislation where high sanctions are imposed. For some reason this law as it stands has been on our statute books for 100 years with nothing having been done. I think the Courts and the legal profession have allowed Parliament to abrogate its responsibility and to leave it to the Courts to make an absolute mockery of statutory interpretation and common sense for that matter, in trying to arrive at an interpretation which is appropriate to our present times. I do not think we can allow it to happen. Our job is to put the matter right back in the lap of Parliament and ask Parliament before we talk about reform, to tell us what it really means.

MR DALGETY: "Mr Clough's line was really predictable. He said in opening that his Honour had missed the bus, and then he went on to be critical of the Courts, the Legislature on this issue of interpretation. Before we get to any issue of interpretation you have to have a basic knowledge of where you stand on principle, and that is where his Honour took his starting point. Where does society stand in principle on the major issue of the right to live, and where does it stand in the unique situation, because it is unique to the right to life where we have the mother on the one hand and we have the unborn child in her womb on the other?

"His Honour said in his paper that for moral and legal reasons it was essential that we protect the right to life, and he justified that on a broader basis. I agree there are compelling moral and legal reasons per se which justify his Honour's approach. However, in view of the way the debate has developed, I would prefer to take Mr Clough's point about the interpretation of the law, because his Honour did make a recommendation of it, and perhaps briefly then say something about my stand in principle.

"Mr Clough says that the law in New Zealand is vague, and that if it comes to an issue for a doctor or a lawyer there are problems in knowing where we stand. That type of statement has been made by him, and those who support him at various places throughout the country. With respect there is no substance to it.

"Those of us who have taken an interest in this matter are familiar with *Bourne's* case where McNaghten J, as he then was, considered those words of the life of the mother and gave them what he considered a reasonable legal interpretation to cover whether she would become a physical or mental wreck. That decision was considered in this country in 1951 and it was considered by no less a Judge than F B Adams J. He cited *Bourne's* case with approval on this question of 'unlawfully' and found that the onus on the Crown did not only work in favour of the medical practitioner where there was a case of abortion, or an alleged case of abortion, but was a case the Crown had to meet with everybody. *Bourne's* case had a general application. So the Justice Department put out an interesting and very helpful publication in 1968 where they dealt with a number of issues of crime, and in that book they also took the view that *Bourne's* case would be applied in this country, so the only statement of principle we have had adopts *Bourne*.

"As far as I personally am concerned I can live with that, morally and legally.

"Now, when I hear a voice such as Beattie J's, and indeed F B Adams J after his decision speaking with some reservations about unlawfully, saying there could be doubt as to whether *Bourne's* case did apply in New Zealand I having heard that voice am happy to accept the Judge's recommendations that we appropriately codify *Bourne* into the statute.

"The suggestion that as a consequence of this vagueness and so forth, this has created problems for doctors and lawyers, it is good if you want to go out there and in the environment stir up some need, stir up some fire and so forth. It is a bit like talking about pregnant ladies filling the DC8 aircraft to Sydney every day. That type of contention was made to the Royal Commission established by the first Labour Administration in the McMillan Report of 1947, and it was rejected out of hand.

Might I come to this issue of principle which I consider so important, and here I do agree with his Honour, but let me put it to you on selfish grounds alone. In today's pluralistic society, where in my view with respect to the Judge, there are no common ethics and are unlikely to be any in the present climate of opinion, I prefer in the final resort to go down to the basic ethic or precept of the pluralistic society, self interest, when I consider my right to life and the right to life of my children and those close to me. In that environment I am prepared to accept a restriction on my right to freedom which may harm my neighbour's right to life, because I want the same reciprocity. On that selfish platform, if you look at your own position you can find a justification for fighting any attack on the right to life, and certainly the attack which is so easily made on the unborn child. Let me conclude on what I believe would be the position if you let the right to life be attacked in any form, whether or not it be the unborn child (and anybody who denies that is their neighbour is really ignoring that that is them, because after all that nine months is all part of our life cycle, and in fact a lot of us emerge somewhat earlier) —anyone who accepts an attack there, or an attack on the handicapped child is accepting a basic attack on the integrity of the right to life. It is my view once this world-wide attack which is concentrating on the unborn child is successful, we will move on and deal with the handicapped and the lame and the maimed, and we will move on and deal with the more sophisticated forms of euthanasia, then we will become more selective about who shall live and for how long, and who will breed and how many. At that point in time who is not to say it will not be your right to life, or your child's right to life which has become expendable."

MR J S O'NEILL (Dunedin): "I speak as the proud father of a very cherished handicapped child. All people agree abortion is killing, but there seems to be disagreement about what is being killed. I want to refer to the Slaughter of Stock, Game and Poultry Regulations 1969,

the regulations under the Meat Act. You will find there that no person will slaughter cattle, horses, goats or swine unless and until they are rendered insensible by methods prescribed, and they remain so until death supervenes by bleeding. No dressing of the animal may take place until death has been certified by the failure of any reactions to stimulus, either of heart beat or brain wave registration. The unborn child also feels pain, its heart beats at 18 days, and it can cry with air condition at 12 weeks from the time of fertilisation of the ovary. This has been recorded where air was infiltrated into a woman's womb.

"It may be suggested I am raising an emotional point, but when one is speaking of animals, and there is provision now to tighten the regulations regarding the slaughtering of animals, one is speaking of a more humane method of killing these animals, but when it comes to speaking of the unborn child one is apparently becoming emotional. The self-poisoning method of abortion is cruel as other methods of abortion are. The child takes one hour to die, at least; it dies of salt poison by cerebral convulsions, and its skin layer is burnt off. They are known as candy apple abortions. I am not suggesting we should bring in regulations for the killing of our unborn children. I am suggesting we should stop the nonsense or the fiction that it is necessary to kill our unborn children at all. There are no medical grounds today for abortion. The inconsistency is shown when one looks at the blood transfusion regulations where there are very tight provisions for protecting the child who needs a blood transfusion, but we have no protection against the abortionist. A clinical and ethical approach I agree with, but which doctor's ethics are we going to use? The death rate may have dropped from abortion, but there have been 163,000 deaths in England of unborn children in 1964.

"I feel and I endorse heartily what Mr Dalgety has said. Unless we have a right to life of the unborn child which is enshrined in the sections of our statute, and unless this is upheld, there is no right to life for anyone."

MR CLOUGH: "I have said nothing about what I think the law should be, so perhaps I should do so, although I am not prepared to say how we should reform the law when we *do* know what it is. I am prepared to talk about what I think it should be. I feel that the interests of the community in interfering in the abortion area have changed very greatly since the time when abortion legislation was first introduced. I think even in the last 100 years changes just in our physical and medical environment have been so great we should be re-examining all legislation in these fields to see if it fits in with our social goals at the present time. I think if we do compare our social goals now with the social goals 100 years ago when abortion statutes were first brought in, we will find they will be very different, and community interest makes them very different indeed.

"A major reason for the first law against abortion was the need to protect women. In those days when abortions were carried out there was almost a certainty of death on the part of the mother, but some doctors were prepared to carry them out as much for money as for necessary experience. That circumstance has certainly changed. We have had a continuing liberation of women over the last 50-60 years. Women are now considered to be able to be responsible to make their own decisions in all sorts of fields and not to have the role of a wife and mother only. Society 100 years ago had a vested interest in children; children were needed for the plants in the industrial revolution; but now we have a major population explosion. Now the community does not so much want children, but wanted children. The new principle should be that every child as far as possible should be a wanted child.

"Considering its total concerns today, many people are saying the community should have no interest in regulating and prohibiting the grounds for abortion at all. I do not agree with that; I think even today the community interest is to ensure where an abortion is carried out it should be carried out as early as possible. Abortion is much safer in the early stages of pregnancy and the community should also ensure it is as early as possible, and that we do not have delivered prematurely live babies who suffer from the consequences of prematurity. The community is still concerned to protect the living, to protect the viable foetus, the unborn child, and s 182 as we have it should remain as far as I am concerned.

"I suggest the community interests today can be met by removing all restrictions on the grounds of abortion at least in the first three months. Viability is round about the six months, and after that time abortions should be restricted on some more concise promulgation of the *Davidson* principle where there is a probability there will be serious mental or phy-

sical harm to the woman. I think a law along those lines would meet requirements and the desires of the community at the present time."

MRS A E GAMBRILL (Auckland): "I have been obliged in the last few days to defend the profession against a criticism that in respect of a paper in particular affecting women, the Law Society has not asked a woman to comment on such a paper, yet it has asked Polynesian members to comment on Mr Ludbrook's paper. I ask the Society to be sensitive to this criticism because there is an increasing fashion for women to point the finger at what they consider to be discrimination. I say this because I have been very fortunate in the profession and have not felt any discrimination from my fellow practitioners.

"I believe abortion is a political issue, and not really a legal issue. I regret that so much of the discussion today has centred round this topic rather than all the other matters raised by the Judge's paper. I do not feel it is up to the profession to be making a decision on the right to abortion. It is up to New Zealanders to make statements individually, and we should wear our individual hats and not seek to use the profession to deal with this matter.

"Abortion is a social, and secondly a medical problem, and it is not for the Law Society to lead in this situation. It is for lawyers to administer the law as it now is, and for the Courts to deal accordingly.

"I am worried that the moral and philosophical issues are being dressed up as legal issues and we may be using this to determine something which is really moral and a legislative issue."

MR G B FERROW (Sydney): "Unless you will prevent me I would like to make a brief point on the topic of euthanasia. The point I wish to make about euthanasia is that we should never forget that in this century two great powers have practised euthanasia. One of those powers was Nazi Germany and the other power is Communist Russia. We should never forget when we talk about euthanasia, all of us here are probably thinking of mercy killing. When the Nazis and the Communists spoke of euthanasia they were concerned with eugenic laws and concerned with a double issue—the destruction by extermination of certain racial minorities, both in Germany and at the present time in Russia, and secondly in Germany, the destruction of those members of the German population considered to be too big to be of any use to greater Germany. It is frightening to me that the two countries which have contributed so much to the development of western civilisation have suffered, and in one case still suffer, governments which practise these extraordinarily frightening policies. On the question of abortion I am not a Roman Catholic. I have not been involved in any movements pro or against abortion, and I take issue with the last speaker. I want to address three brief comments from a lawyer's point of view. First, it has been a proud boast of England and English countries for several centuries that English law protects the individual. There has never been so great an attack upon that fundamental principle as has been embodied in proposals to legalise the destruction of unborn children. There will be people here who differ from me on this point, but my own belief is that the unborn child *is* a person who should have equal rights with those of us who walk and talk.

"The second point is that the Lane Report has been spoken of favourably. Recently there was a good deal of coverage in our press concerning two journalists who posed as a husband and wife and went about visiting various abortion clinics to test the truth of the claims that were being made that the law was being upheld. In the opinion of these two journalists, the Lane Report was a shoddy whitewash of a shoddier situation. Eminent medical authorities in Great Britain have gone on record as saying the great bulk of doctors who practise in these abortion clinics are the dregs of their profession. That statement is on the record of eminent leaders of the medical profession in the United Kingdom, which has not been contradicted. When we talk about having a properly qualified doctor certify the destruction of somebody's life, we might remember in every barrel there are one or two rotten apples.

MRS I STANTON (Auckland): "I am here at this conference as my husband's wife. However, at a conference with such emphasis on social law, I would like to speak as myself as a practising social worker. I was very relieved to hear Mr Justice Beattie say at the beginning that he did not only want us to look at the Lane Report. The Lane Report has some useful things to say, but it seems to me it makes some very peculiar suggestions, and we must also remember there has been a change in the law in other parts of the world.

"Your enthusiastic reception of Judge Gesell on Saturday morning emboldens me to suggest we should look to the United States. Abortion

has been reformed there in many States as long as it has been in Great Britain, and the famous Supreme Court decision two years ago means it has been reformed in the whole country now for over two years. I am going to restrain myself and not get enthusiastic about all the incredibly interesting results which have come out of their reform, and speak only of one. The one I would like to look at is the one Mr Justice Beattie talks about when he quotes directly from the Lane Committee: 'It is in the interests of the patient as an individual that the abortion decision be taken by doctors.' He goes on, I imagine to refer to the report: 'It also said that some women would find the burden of making their own decision, unsupported, a heavy one. I apprehend some women would reply that they know best what is in their best interests.' Naturally, I agree with him on that last one. It is on this particular point we want to and must look to the American situation. There have been a number of references at this conference to the fact it is International Women's Year, and regrettably most of those references have been jocular ones. I am delighted to know you think some of us are ornamental. I think some of you look pretty nice too. But I could wish we would also look at the solution of this problem of the heavy problem of making this decision in another way. The solution of the women's difficulty is perhaps solved from some people's point of view, by removing the decision making from her altogether. I would suggest a better solution to this problem, which is to support the woman in making her decision, and it is when we look at the American situation we find this is done. In many abortion clinics in the United States counselling is available for the woman to make her decision.

"I am quite sure in a group of lawyers I do not need to sell to you the concept of a client arriving and needing help in making a decision. In the abortion issue this is a way that is being used of helping a woman to make a decision. She needs a counsellor, frequently a woman, trained in this area to help her make her decision. I submit that this is a proper way of dealing with this situation, and it seems to me a group of lawyers should be very much behind this way of dealing with the great problem of who is going to decide whether a woman should have an abortion or not.

MR DALGETY: "I really have been looking forward to this because I thought Mrs Stanton might have a word or two to say to us today. I am not quite sure whether I should try to bat it down the wicket, or hook it over midfield. Let me say, Mrs Stanton and I agree on one thing and it is an important thing; I do not believe the pregnant woman in New Zealand now has been getting a fair deal for a number of years. I believe our approach to her problems, and they are real, has been too fragmented, too lacking in money, and too dependent upon social agencies. I believe if nothing else—and I am sure a great deal else will come, but if nothing else comes out of this controversy—Government, Parliament, will give a much higher priority to the needs of the pregnant woman than was the position if women had not made the challenge that they have.

"Having said that, let me say that to me the American experience is a disaster. There is so much good that comes out of America, but as far as those Supreme Court decisions are concerned, not only are they bad law, they really follow a line in social consciousness which is difficult to justify. Let me give you one example, where the Supreme Court struck down a similar law to our own in the capital city of Washington. Within seven months of the decision they had 17,000 abortions. The following year they had 30,000 abortions. In Washington prior to the decision they had had 500 therapeutic abortions each year over a period of five years. What is more horrifying, and this is where we have to look at ourselves and how we can all be conditioned by this process, a Professor Hersh with quite liberal views on abortion undertook this study. He went round 31 doctors to ascertain how they were applying the law after this decision. Of those 31, four were Catholics and were not performing any abortions. The other 27 had only performed a few therapeutic abortions prior to the decision. All of them were performing a minimum of 100 or a maximum of 600 a year. Put aside your morals. These were men whose whole life had gone a certain way and they changed overnight. To me it is frightening that that could develop."

MR J M VON DADELSZEN (Hastings): "As lawyers we are familiar with the need to be objective. Thus we must read widely and be fair and compassionate in our consideration of this particular issue, and we must recognise those who take sides, sincerely hold the views which they propound, and their integrity and personality should not be subject to attack. This is a matter which concerns me consider-

ably because there are elements of this within the community already, and as lawyers we ought to resist them.

"One can note with pleasure the fact his Honour has mentioned in his paper in two places the need to keep our heads as well as our hearts, and secondly, he considers that this tends to be an emotional subject. Then we must beware of the attitude of the media.

"This paper is on the 'Right to Life'. It is true the debate has thus far been directed only to one issue, but the media presented it on television and in the press as an 'abortion debate'. That attitude indicates a certain degree of bias because there are those who are opposed to the status quo who tend to be newsworthy, whereas those in favour of the status quo tend not to be newsworthy.

"The second point I would like to make is that there is a need to be up with the play in modern medical knowledge. I understand one of the Judges in the Washington case which went to the United States Supreme Court acknowledged after the decision that the Judges ran out of time and stopped somewhere in the Middle Ages in their consideration of the medical evidence. That is an appalling indictment of any judicial system. One can only hope their computerised method of assessing judgments did not hurry them into assessing their decision in that way. Things have changed, particularly in the last 10-15 years with the study of foetology. I think medical science now says whatever is in the womb from conception is human, and it is a question of defining what this human something is. I would ask that we be very wary of drawing a line at any arbitrary point. In Britain they have drawn the line at 28 weeks, which is the medically accepted point of viability, but children have been born at 19 weeks and viability is but a measure of sophistication and nothing else.

"The second thing which is interesting is they are now talking about reducing the time when abortion can be permitted to 20 weeks, which is the generally accepted average age at which the unborn child quickens. Here again this is entirely arbitrary; that point of quickening is only when the mother is aware of movements which have been going on for some months prior to that.

"Any inquiry engaged upon this subject must be cognisant of modern medical science, whereas last century in particular modern medical science was way behind what it is today.

"I would like to ask some questions, first of Mr Justice Beattie in respect of the *Edlin* case in the United States which seems to have been misconstrued and misreported in the press; then could we have the views of all the panelists on what the Government should do. We know what Beattie J has recommended, but we are not entirely clear on what Mr Dalgety or Mr Clough recommends."

MR JUSTICE BEATTIE: "The *Edlin* case was where a Boston jury this year apparently decided that a foetus between 22 and 26 weeks was a 'person' when Dr Edlin performed an abortion on a teenage girl. The doctor was convicted of manslaughter. He claimed the foetus was not sufficiently developed to survive normally. The prosecution said the doctor killed the foetus which was capable of life outside the mother by delaying its removal from the womb after the umbilical cord had been cut, and the nursing staff said the doctor deliberately looked at the clock for three minutes to ensure that would happen."

THE CHAIRMAN: "At the end of this session I will get Mr Clough and Mr Dalgety to answer those questions that were raised."

MR A E KNOTT (Western Australia): "While I endorse much of what Mr Clough says, I tend, too, to feel the point has been missed. Whatever our views on specific issues are as lawyers, we have a very real responsibility to contribute to the framework of the debate and point out the implications. The central issue which faces us is we are talking about the criminal law, and what is the role of the criminal law in these matters, and also what is its effect. It seems to me it is not enough to say the foetus is human life, which I acknowledge even though I feel there should be very few legal restraints criminally on abortion. The law of damages is also relevant, and I strongly reject the contention that we should signify our disapproval of conduct by making that conduct criminal. There is also, as far as abortion is concerned, the question of effectiveness. I think it is very clear very harmful effects result from making criminal law in this area.

"We live in a time of rapidly increasing diversity of values, world views and ethics. If we accept that it is legitimate to use the criminal law in these areas we will create tensions and bitterness in our society, apart from needless suffering to individuals which will threaten the institutions we profess to be attempting to preserve. I think it is very dangerous to allow the

criminal law to become a legitimate weapon in these areas, and if we do so it just becomes a matter of who has the numbers and the political strength to impose strong sanctions on other people.

"I do not question the integrity of people who take a different view to me. I think it is one of the roles of the lawyers to try to find common ground, and my experience of people who take all ranges of views on this issue is that they all have a genuine concern for family life and a genuine interest in the welfare of the child."

MR E T ALTY (Oamaru): "If we look at mankind as an international family, and if we believe the black baby is just as significant as the white baby, we would see throughout the world today there are millions of these precious children who are starving to death, while in New Zealand we can enjoy the luxury of a debate on the issue of the unborn foetus. The proposal I submit for your consideration is that we should allow those who want abortions to have them in the first three months of pregnancy. This is the important bit; I propose for each life that is taken in this way the people of this country through the government should take effective steps to lift an existing child from the degradation and poverty it knows, and accept the full financial responsibility for ensuring that child, whether in this country or in the country of its origin, enjoys the opportunities that are denied to its brother in the international family. I appreciate this proposal raises 100 questions for which answers would have to be found; I appreciate that it would impose on this country a massive financial burden, but if you believe as I do that our continued occupation of this planet depends on our ability to safeguard our national resources and control population growth, we must now begin to set an example that other countries with problems of population and food, more acute than our own, might begin to follow."

MR N R CARSON (Sydney): "As I am bade to dine with Mr Justice Beattie tonight, I must first congratulate him on his paper.

"I have acted for some dozen or so doctors in the last few years, charged in relation to this matter. You might be interested in the experience of New South Wales. Some years ago there were a number of clinics or doctors who were perhaps looked down on by the rest of the profession who did perform abortions for substantial sums of money, which people thought was illegal. There were also allegations of police corruption. The Government formed an abortion squad of some 20-30 police who went round raiding doctors' surgeries, breaking down doors, stealing their records, and investigating the records they found in this way. They wondered, for example, whether an 80 year old woman with a prolapsed uterus had had an abortion. That squad has now been disbanded.

"I think there were three cases that went to trial against doctors. The only one which succeeded was one against a doctor who had referred the woman to an unqualified person. I think the experience, in my view, is that no jury will send a doctor to jail for performing an abortion. That seems to be recognised now by the Crown in New South Wales. There are about half a dozen of these cases hanging fire, but they seem to have given up.

"What is happening is that instead of women going to these clinics and doctors, the abortions are being done openly in public hospitals. Whether that is a good or bad thing I am not attempting to say now, but there is a certain irony in that because of the activities of this squad (which was engineered by people with a strong view against abortion) there are now abortions being performed quite openly in public hospitals.

"I understand prosecutions are starting here and this has become a live issue here now, and it might help to give you the benefit of the advice of one of our experienced QCs, who was asked, 'How do you run an abortion trial?' Sir Jack Cassidy said, 'When you see the jury writing down his telephone number, you know you have won.'"

MR R FEIST (Wellington): "I am one of those who has changed from some years ago a position of being anti-abortion to supporting it. I find it inconsistent that we have on our criminal law books laws which make the woman a criminal just as much as those who perform the operation, yet society does not prosecute her. Why should the doctor be a criminal and prosecuted if the woman is not? I think society implicitly recognises that the woman is not a criminal, and therefore it does not prosecute her, and I do not think the doctor who performs the abortion in good faith should be a criminal either.

"When you come to the individual cases and you are going to support the life principle, I give you five women round your desk. One is a 15 year old school girl who is pregnant; the next a 19 year old woman who asserts she has

been raped; the next a 22 year old woman who has had rubella in the first month of her pregnancy; the next a woman in her mid-30s with four children who has completed her family and does not want another child; another in her late 30s with an alcoholic husband and three or four children, who is pregnant again. These are five human beings, each with one thing in common—or four with one thing in common—an unwanted pregnancy. (The one with rubella did not have an unwanted pregnancy, but she now wants to terminate it.) Now you are forced to make a decision—society is forced to make a decision—which is going to label some of those women and their doctors criminals, and some not. If you are concerned with the right to life of the foetus you have to say to each one of them, 'You cannot have it at all'.

"I would like to see those opposed completely to law reform come out and advocate that it should be tightened up; if it is wrong because it is murder and it is wrong for everyone and there is no justification for it. Those opposed to abortion generally nevertheless grant exceptions. You can't have it both ways."

MR DALGETY: "I will try to have it both ways, if I can. There is no logical reason why in the situation in *Bourne's* case you cannot make an exception. All of those who are knowledgeable on the subject know the logic is based on the self-defence of the woman, and in that situation being able to kill the unborn child. That is where I say I take my stand and morally and legally I find it a consistent stand, and trust that in that situation you cannot have it both ways, but let me put it back to Mr Feist, if in fact we follow his thesis through what I understand he is advocating here today is that there would be no right to life recognised for the foetus at any stage during the period it is supposed to be having its sanctuary in its mother's womb. If that is where his logic would take him, then I am most surprised if Mr Feist in all honesty would stand there.

"Let me take our friend from Sydney briefly. He has dozens of these fellows he is acting for. That seems to be a good financial interest if I might say so; however that is just a tilt. There is some better news from Sydney he did not bring, which is in the New South Wales Legislature about a fortnight ago, legislation was introduced to put an end to the clinic proliferation which has taken place in his state.

"Finally, let me come to the question put to Mr Clough and myself on where we stand on the issue politically. That is a fair question. I make two points. Firstly, there is a Bill in Parliament now which is the only real expression we have had of public sentiment on this issue, or the known public sentiment on this issue in Parliament, which is Dr Wall's Bill, which would restrict therapeutic abortions to public hospitals. That was put into Parliament and debated in August of last year. Nineteen members spoke from both sides of the House and only two members spoke against it; the Attorney-General gave it a guarded welcome, and the member for Clutha, Mr Gordon, felt the Bill's principles were right, but it should also have been done through the private hospitals too. That is the only expression we have had from Parliament, that is *for* the status quo and to *protect* the status quo.

"The Labour Administration has promised that Bill will get a second reading and that is a priority, and the first thing I wish to see done on the political scene, and I am sure the Labour Caucus will permit it is that second reading debate. If Dr Wall's Bill is carried, I believe Government should legislate to give effect to it. It will permit each Member of Parliament to say where he stands on fundamental issues, and I think we are all entitled to that.

"Secondly, the Government has announced it proposes to have an inquiry into these issues. I was pleased to see the Attorney-General disagreed with his Honour on saying the Lane Report and the United Kingdom Act was the starting point, because it cannot be, because the Lane Report was not even permitted to deal with the basis, the philosophy of the United Kingdom. Nor would I be satisfied with an inquiry restricted to abortion, restricted to contraception, sterilisation. I think all round this room I would be surprised, wherever you took your stand, that you do not agree with me that the problems we face in the sexual relationship field with our children and with our adults, with the whole adult community are much wider than simplistic answers or more abortions, more public appeal for sterilisation, and putting more contraceptives in our children's hands.

"I hope that the inquiry of the Labour Administration is much broader based, and in this field there is something we can teach Australia. Very recently they decided to establish a Royal Commission there on Human Relationships between men and women, and by and

large I find the terms of reference very satisfactory, because they are very broad, but there is one omission, that despite all the knowledge in Australia and the fact a private member's Bill to try to liberalise the law was defeated by 98 votes to 23 in May 1973—despite that, in the terms of reference there is nothing to cover the status of the unborn child, the protection it should be afforded in law, and the likely consequences for the community if we follow a trail where we do not give the appropriate protection. I would like to thank his Honour for this paper and the terms he gave at this time, because I believe it will dominate legal conferences for decades to come, because in the human family, my friends, these issues his Honour has spoken about are the life and death issues, and we as lawyers cannot afford to stand aloof from them."

MR CLOUGH: "In my opening remarks I said nothing about what I thought the law should be, and frankly I do not think it is relevant, and I am disappointed that some people have been prepared to stand here and get involved on this old debate.

"In my role as a lawyer I see our function is to find out what the law is, and whether what we have of the law is clear enough. We should talk about the consequences of the various problems that have been mooted; whether they are practicable legally, whether we can write them down concisely and give people reasonable directions on what the law is. It is not our function as lawyers to get involved in the emotional debate on abortion or no abortion.

"Mr Dalgety has told you what he would like the law to be. Unfortunately we cannot say what the law is. He referred you to the case in New Zealand of *Anderson,* which apparently was supposed to have followed *Bourne,* and this was a case in 1954 which in passing mentioned the judgment in the *Bourne* case. It is a Supreme Court case; it is not binding on any other Supreme Court Judge and certainly it is open to anyone, and since *Anderson* many cases in England and Australia have extended the *Bourne* principle much further than certainly the Judge in *Anderson's* case envisaged.

"We cannot say what the law is in New Zealand; that should be a concern for lawyers. And we should be doing something about it, particularly when the law we have renders people involved liable to up to 14 years' imprisonment, and the woman involved up to seven years' imprisonment. We have an obligation to Parliament to put the matter back on its plate and to ask them what it means, and by all means when it has told us *what* it means, let us look at reform. Let us have an inquiry, if you like, to see what the law is, and once we know what it is, ask whether it is appropriate to our social goals at the present time. Once that is done I think we should also be considering much more than just abortion. I agree with what Mr Dalgety said on this; we should be considering abortion in a package, in a policy of sexual responsibility in general. It should be not the first line of defence, but the last line of defence after full knowledge and education in human relationships and sexual matters in general, and after free contraceptive advice is available to everyone. We have the shocking position in New Zealand of the highest illegitimacy rate in the Western world, and perhaps—we do not know—fairly restrictive abortion laws. And that is not satisfactory to anyone."

ADMINISTRATIVE LAW: THE VANISHING SPHINX

By THE HON MR JUSTICE COOKE

Mr Justice Cooke, LLM (NZ), MA, PhD (Cantab), is a Judge of the Supreme Court and the Administrative Division. He practised as a barrister from 1955 to 1972, taking silk in 1964. He was a member of the Public and Administrative Law Reform Committee, and was Chairman of the Commission of Inquiry into Housing, 1970. He is a member of the Inner Temple and a former Fellow of Gonville and Caius College, Cambridge. He was the editor of "Portrait of a Profession", the centennial book of the New Zealand Law Society.

As I was saying in 1960, you would not find the title Administrative Law in Halsbury's Laws of England or the index to the Law Reports. The subject has been evolving in our law for about four centuries only, as is suggested by the earliest citation made by Lord Morris in his review of authorities in *Ridge v Baldwin* [1963] 2 All ER 66: *Bagg's case* (1615) 11 Co Rep 93b. And as Lord Reid pointed out in *Ridge v Baldwin*, we do not yet have a developed system of administrative law. Lord Wilberforce makes the same point in another context in *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1974] 2 All ER 1128. But there have been some advances since 1960. Not least, from one point of view, *Ridge v Baldwin* itself—though that case is more accurately classified as a restoration of older authorities on natural justice, temporarily eclipsed. In this paper I shall set down some general impressions about these advances and some glimpses and conjectures regarding what may lie ahead. The size of the subject and the nature of the occasion demand generality. Conveniently so, for after the judicial year the long, sun-filled days of the Christmas holidays do not impel towards exact scholarship.

To go back to the starting line, then, the Incorporated Council of Law Reporting for England and Wales evidently continue to regard the subject as not yet quite ready for recognition; contrary, of course, to the practice of our own Reports. Messrs Butterworths have gingerly broken the ice, by giving it at least a separate heading in the index to the All England Reports, though so far only a few cross-references appear thereunder. Most notably, however, the very first title in the fourth edition of Halsbury is Administrative Law. The late Professor S A de Smith and his colleagues compiled an admirable text, drawn partly from other titles in the third edition. One such source was Crown Proceedings, and not to be overlooked is the contribution thus made by Sir Hubert Parker and Mr H A P Fisher, as they then were. Professor de Smith's own successful book is now in its fourth edition. The shorter Australian work, Benjafield and Whitmore, can also be helpful, especially as searching for Australian authorities on any subject is so time-consuming. Professor H W R Wade's commentaries in the Law Quarterly Review and elsewhere have been not only superbly written but influential: see, for instance, *Herring v Templeman* [1973] 3 All ER 569, 585, per Russell LJ delivering the judgment of the Court of Appeal. In our own country writings of importance include those of Professor J F Northey, who has succeeded Dr J L Robson as Chairman of that well-balanced watchdog, the Public and Administrative Law Reform Committee.

Turning to the work of the Courts, the major advance has been the movement away from the redundant formula and the shibboleth. In 1960, like others, I was concerned that too much weight was being attached to a few recent restrictive decisions given in England. Those decisions showed a tendency to seek to solve a case concerning the validity of a challenged exercise of statutory power by ascertaining whether the power fell within some ill-defined and probably indefinable concept. Distinctions were sought to be drawn by applying labels such as executive or administrative, on the one hand, and judicial, quasi-judicial, quasi-lis, acting judicially, on the other. It must have been rather like seeing whether a case could have been brought within one of the old Forms of Action at common law. Perhaps it marked a similar stage in the maturity of the system. The conceptual approach often did little more than gratuitously obtrude a distracting question into a problem difficult enough already. Political scientists and others may draw rough general distinctions between legislative, executive and judicial functions; written constitutions may

make it necessary to try to work out such distinctions more precisely; but ultimately there are no hard-and-fast lines. There are only decisions of varying degrees of generality taken after procedures of almost infinite variety. Even some pre-1960 judgments commonly regarded as progressive gave currency to incantations. In *R v Northumberland Compensation Appeal Tribunal* [1952] 1 All ER 122, where a decision was quashed for error of law on the face of the record, much reference was made to Lord Sumner's observation in *R v Nat Bell Liquors Ltd* [1922] 2 AC 128, 159, that the effect of statutes authorising short-form records of summary convictions was to disarm the exercise by the Court of Queen's Bench of its certiorari jurisdiction. "The face of the record 'spoke' no longer: it was the inscrutable face of a sphinx." At the 1960 Conference I suggested that the *Northumberland* case was a simple example of failure by a tribunal to exercise its true jurisdiction, and that the face-of-the-record doctrine had been invoked triumphantly but unnecessarily. A similar argument could be advanced about later cases in New Zealand dealt with under the same doctrine, such as *Straven Services Ltd v Waimairi County* [1966] NZLR 996 and *Wellington Club v Carson* [1972] NZLR 698. Of course, this is not to deny that the doctrine is convenient in that (at least in the absence of a privative clause) it suffices to find error of law on the face of the record, regardless of whether that error goes to jurisdiction.

But nowadays one hears much less of the sphinx—or of those redoubtable traders, Nathan Bell and Nakkuda Ali. As regards the substantive law of jurisdiction there has been the momentous House of Lords case of *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208. That decision resolved a long-standing conflict in the authorities by holding that an error goes to jurisdiction—and so is not protected by a privative clause—if a tribunal misconstrues the provisions empowering it to act, so that it fails to deal with the question remitted to it and decides some other question; or if it refuses to take into account something which, on the true construction of the statute, it is required to take into account. Omission from the face of the record would not matter, though obviously it might not be easy to *prove* the error then. The main speeches, which one cannot do more here than summarise very briefly in that way, were delivered by Lord Reid, Lord Pearce and Lord Wilberforce: three Law Lords who have been leading figures in the development of English administrative law in the period under review. Indeed one would respectfully suggest that Lord Reid's greatest judgments may well have been in the field of administrative law; and that no small element in their quality has been steadfast adherence to simple principles. According to a short account of Lord Reid's career in *The Times* of 14 January 1975, of all his judgments he himself is proudest of *Ridge v Baldwin*. The article is headed, a trifle invidiously, "The one Judge we will really miss". As to the *Anisminic* doctrine, clearly if an error of law goes sufficiently to the root of the decision of a statutory body, it is redressable. We have the authority of Lord Denning MR for a similar view about errors of fact: *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 All ER 949. And there is only a fine shade of difference, if any, between these propositions and a general rule that a decision may be set aside for material or substantial error. One suspects that in the end there may sometimes be a delicate but crucial question of degree: some no doubt deliberately cryptic statements by Lord Wilberforce in the *Anisminic* case suggest as much. If so, there is no more reason to be alarmed about the situation than about many other familiar areas of law. A thought prompted by the case is that it is high time that all privative clauses were repealed. Their efficacy is limited. They do not in fact prevent people dissatisfied with decisions from resorting to litigation. The Court's discretion and the terms of the Judicature Amendment Act 1972 ensure that purely technical or formal points are unlikely to succeed anyway. In these circumstances why should Parliament bother about protecting wrong decisions?

In substantive administrative law the other leading case has probably been *Padfield v Minister of Agriculture* [1968] 1 All ER 694, also a House of Lords decision. A statute was open to the interpretation that the Minister had an unfettered discretion as to whether to refer complaints about the working of a marketing scheme to a committee of investigation. The Minister refused to refer a complaint of regional discrimination made by certain milk producers. Or, to speak with due accuracy, by the owners of the beasts. He gave as a reason, among others, that the complaint raised "wide issues". As an explanation for inertia this may have been all very well in psychiatry, or even

politics, but it was held bad in law. Mandamus went to require him to consider the complaint according to law. Lord Reid said:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and the objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court."

It need hardly be said that this process of construction, involving a probing beneath the surface of the words of the Legislature, does not necessarily mean a decision adverse to the Executive or the administrative authority, as witness the ASLEF case already cited and *Brigham's Creek Farms Ltd v New Zealand Milk Board,* decided by our Court of Appeal on 25 September 1974. What it does mean, I think, is that modern Courts are readier to go to the heart of administrative law issues. This they can do effectively only if the objects and spirit of the legislation are understood and applied. I hope and believe that the days when the Courts could fairly be criticised for unduly restrictive statutory interpretation have passed.

In matters pertaining mainly to procedure there is now a long line of authority to the effect that, as Sir Thaddeus McCarthy P said in delivering the judgment of the Court of Appeal in *Lower Hutt City Council v Bank* [1974] 1 NZLR 545, 548, the requirement of fairness is to be applied to administrative actions as well as judicial functions "if the interests of justice make it apparent that the quality of fairness is required in those actions". In other words, one goes straight to the question of fairness—which may be called a synonym for natural justice—rather than beginning with an attempt to classify the power. Most of the other authorities are collected in the judgment in *Bank's* case, but it is not without interest to note also that, according to some explanations of the approach, something subtly more than statutory interpretation is involved. Thus in *Wiseman v Borneman* [1969] 3 All ER 275 Lord Reid said:

> "For a long time the Courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

And in his speech in *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278, Lord Wilberforce spoke throughout in terms of questions and principles "of administrative law". The matter is put in more traditional language by Lord Hailsham LC in *Pearlberg v Varty* [1972] 2 All ER 6:

> "Despite the majestic conception of natural justice on which it was argued, I do not believe that this case involves any important legal principle at all. On the contrary, it is only another example of the general proposition that decisions of the Courts on particular statutes should be based in the first instance on a careful, even meticulous, construction of what that statute actually means in the context in which it was passed. It is true, of course, that the Courts will lean heavily against any construction of a statute which would be manifestly unfair. But they have no power to amend or supplement the language of a statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the statute accords him. Still less is it the functioning of the Courts to form first a judgment on the fairness of an Act of Parliament and then to amend or supplement it with new provisions so as to make it conform to that judgment. The doctrine of natural justice has come in for increasing consideration in recent years, and the Courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases."

However the matter be explained in theory, two things are plain. First, the Courts will lean towards interpreting a statute so that in its procedural provisions it may manifestly be seen to work fairly. Secondly, they do not need labels for this purpose; though sometimes labels may be convenient as a kind of shorthand, as in *Jeffs v New Zealand Dairy Board* [1967] NZLR 1057, where the Judicial Committee, per Viscount Dilhorne, upholding the dissenting judgment of Sir Alfred North P in the Court of Appeal, spoke in terms of a duty to act judicially in the determination of zoning applications. But in that context what was

meant was a duty to act fairly by hearing the interested parties rather than relying merely on a committee's report not setting out the evidence. A sign of the times is the attitude of Lord Widgery CJ. The case of *R v Hillingdon Borough* [1974] 2 All ER 643 was about a question having some relation to natural justice but far from identical therewith: namely, when certiorari lies. A local planning authority in granting development permission had imposed conditions, as to accepting tenants from its own waiting list and other matters, designed to pass over to private developers some of its responsibilities as a housing authority. This was held to be so unreasonable as to go beyond anything Parliament could have intended. The writ was granted, the Lord Chief Justice saying that it was immaterial that the planning authority did not have a duty to act judicially: certiorari would issue to any body with jurisdiction to determine the rights of subjects. In New Zealand an application for review under s 4 of the Judicature Amendment Act 1972 would have been appropriate. The English Courts seem to have achieved a rather similar result without legislative aid.

The trend, promoted most openly by Lord Wilberforce, for administrative law to acquire approaches and principles of its own is strikingly shown by what the House of Lords have done regarding Librium and Valium. This is the *Hoffmann-La Roche* case, already cited. The Monopolies Commission had recommended drastic reductions in the prices of the tranquillisers, after an inquiry during which the manufacturers declined an invitation to suggest a basis on which their current research costs in the whole drug field could be allowed for in the price of these established drugs to a lesser extent than hitherto. The Secretary of State made a statutory order, approved by resolutions of both Houses of Parliament, adopting the prices recommended by the Commission, which apparently included no allowance at all for current research costs. The manufacturers contended that the order was invalid for breach of natural justice, in that the Commission had not disclosed its intention of considering no further allowance; and also that the order contained an element of penalty for alleged overcharging in the past. The Crown was granted an interim injunction (and without an undertaking as to damages, estimated at £8 million) compelling the manufacturers to adhere to the lower prices pending determination of the validity question. For present purposes the interesting point is that traditionally an order in excess of jurisdiction has been described as a nullity or void, and in *Ridge v Baldwin* the House had said the same about orders in breach of natural justice. The Privy Council had found difficulty with this view in *Durayappah v Fernando* [1967] 2 All ER 152, the result there being some reasoning described by Lord Wilberforce in *Hoffmann-La Roche* as "puzzling" and by Professor Wade in 90 LQR 438 as "unintelligible"—a nice illustration of the difference of epithets fit for academic and judicial use respectively, according to the best models. In the tranquillisers case their Lordships made a great clearance by treating terms such as null, void and voidable as best confined to private law. In administrative law a statutory order will be treated as valid and must be obeyed until set aside on application made by someone having a legitimate standing to question it. At all events this is so if, as Lord Radcliffe had said in 1956, "it bears no brand of invalidity on its forehead". The speeches of Lord Reid, Lord Wilberforce and Lord Diplock appear in principle to be capable of application to all orders or administrative decisions made ostensibly under statutory authority and free from manifest error on their face. So the sphinx rears its head in new territory. The importance of the case is enhanced by Lord Wilberforce's hint that the possibility of damages for loss caused by invalid administrative decisions, a remedy given by "more developed legal systems", may require examination in the future. It may be added that the merits of the dispute were evidently canvassed quite fully before the House of Lords; and the view of their Lordships that the appellants' case was far from strong on the merits permeates the whole decision, furnishing an instance of the readiness to get to the substance of administrative law issues to which I have already referred.

Can the result of these various advances be summarised in any general propositions? I think there has been some gain in the certainty of the law. As to remedies, certiorari will now lie, in the discretion of the Court, in respect of virtually any decision affecting individual rights. As to natural justice, prima facie there is a right to a hearing if misconduct or negligence is alleged; and in all cases ambiguous indications in a statute are apt to be interpreted in favour of the right. On the other hand there is a leaning against importing the right as regards mere preliminary determinations; and the more general the operation of a decision or order,

the more difficult it will be to persuade the Courts to hold that fairness requires individuals to be given a right to object not specifically provided by the statute. (For a list of some other situations where prima facie there is a duty to afford a hearing, I beg to refer to [1954] CLJ 17.) The qualification relating to emergencies has been clearly recognised. That is to say, if immediate action is really essential, a stopgap order may be made without the hearing that would otherwise be required, provided that an adequate hearing and review follows in due course. As to the substantive law of powers, if orders and decisions are apparently valid on their face they are effective until proved invalid by a litigant with locus standi; but if a truly significant error can be demonstrated, setting aside will probably be open, notwithstanding any privative clause. And in deciding whether a statutory duty exists, more weight is now given to the policy of the relevant legislation considered as a whole. These are not negligible advances.

In a lecture to a Public Administration class, revised and perhaps bowdlerised to make it suitable for the legal profession in [1974] NZLJ 277, Dr D L Mathieson presents an argument against the doctrine of administrative fairness. He pleads compassionate grounds. In his opinion it is "unduly difficult for a lawyer to advise a particular power-holder what he must do in order to be sure that his decision will not be upset in the Courts . . . how to act so as to be sure that any litigation will be forlorn". While respecting that opinion, I doubt whether the task is more difficult than, for instance, advising a private client whether he can obtain a specified departure from a district scheme or whether he can contrive to make a will Judge-proof despite the Family Protection Act or transactions Commissioner-proof despite s 108, Mark II. And in dealing with such questions I suspect that the Courts should not be swayed any more by sympathy for Crown counsel and their clients than by sympathy for private practitioners and their clients. It may well be that a different judicial attitude would be appropriate if it appeared that the question asked by the power-holder had been on different lines: "Please let me have your opinion on how I should go about reaching a solution of this problem which on balance will be the fairest to all concerned". But possibly the life of the adviser in the corridors of power is not like that.

In New Zealand case law, although we can look back on *Okitu* in 1953 as creative, the more recent developments have been largely derivative. Not so New Zealand legislation. Passing reference only must do here, as the subject is not directly relevant, to the Parliamentary Commissioner (Ombudsman) Act 1962. There can be no doubt that the Ombudsman's investigatory functions are a valuable safeguard against bureaucratic mistakes at certain levels, and this despite the fact that his ultimate weapon is sending a copy of his report and recommendations to the Prime Minister and thereafter reporting to Parliament if he thinks fit. It is of interest to note from the report of Sir Guy Powles for 1974:

> "The number of formal recommendations made was only nine. It should be emphasised that a formal recommendation is made only when, in the case of a complaint considered justified, the department has not either remedied the matter of its own accord or failed to respond to the persuasive, and sometimes repeated, arguments from my office. Departments did act in this way in 105 cases. Of the nine cases left, the formal recommendations were accepted and acted upon in six cases. Of the remaining three, one (or rather a series of recommendations made as a result of the second investigation into complaints from Paremoremo Prison referred to at page 11 of my report for 1973) has been subsumed in Ministerial action, one is still under consideration, and in one the acceptance was too late to permit of any remedial action."

Extension of the Ombudsman's functions to local organisations being considered by a Parliamentary committee in the recess. In England they are quarrelling about the Government's proposal to have separate Ombudsmen for central Government and local authority matters. The argument cuts across party lines. Points made include the risks of having conflicting decisions and bewildered citizens. At the time of writing the Government's departmental advisers are reported to regard these risks as worth running.

More directly relevant is the establishment in 1968 of the Administrative Division of the Supreme Court, composed at present of four Judges, Sir Richard Wild CJ being one. In 1960 I suggested a supreme administrative Court, including lay members. I was a party to the subsequent recommendation of the PAL Committee for the creation of the Division. On balance

I am inclined to think that this solution was better. It integrates the jurisdiction with the existing legal system. Further, the work load of the Division, whose primary function at present is to hear appeals from administrative tribunals where specific statutes so provide, certainly does not yet justify more than a part-time Court. In some fields Governments of the day have refrained from providing for an appeal to the Division, or have limited the scope of the appeal, on the advice of the Department concerned, instead of following the advice of the Law Reform Committee. It is not for me to comment on that. What one can say is that in the work of the Division a particular point is made of expedition. One would perhaps hope that a somewhat distinctive style of approach might develop, though this is more debatable. Some observers thought that the decisions on appeals from the Broadcasting Authority, which were required by the Broadcasting Authority Act 1968 to be heard and determined on the curiously-worded statutory fiction "as if the decision of the Authority had been made in the exercise of a discretion", were unduly restricted to legal and technical points. But the Division was feeling its way over controversial ground. What a shame it is that broadcasting development in New Zealand has been so dogged by political and doctrinaire thinking! No party has been prepared to seize the golden opportunity of calm and unfettered independent consideration by a Royal Commission. These comments are made in deliberately general terms because in such a matter it would not be fitting for me to attempt a comparison of the problems and performances of different Governments.

Lay members or assessors may sit with the Judge in the Administrative Division in certain classes of case, the most common being land valuation cases. To express a purely personal point of view, I have found them helpful on some more technical points, especially in assessing certain aspects of the evidence of professional valuers. In such cases as I have sat in, we have all had no difficulty in agreeing at the end of the evidence on the general lines of the decision; although where we have decided to award compensation there may have been no case in which our two or three initial figures were the same. So I would say that lay members can play a significant part in cases where the mysteries of other professions may be important.

The other general statute which should be noted here is the Judicature Amendment Act 1972. Some of its wording was borrowed from Ontario, but it too is the result of a recommendation by the PAL Committee; and it need be no secret that the names of Professor Northey and Mr D A S Ward could be particularly associated with this reform. Broadly speaking the Act is aimed at simplifying procedure by introducing in the public law field an application for review as a substitute for claims for mandamus, prohibition, certiorari, declaration or injunction. Incidentally, one gap has been disclosed by *Thames Jockey Club v New Zealand Racing Authority,* decided by the Court of Appeal, affirming Perry J, on 13 December 1974. An advisory recommendation made to a Minister pursuant to statutory powers is not within the scope of the Act, even if certiorari would lie to quash it—for which possibility reference was made to the judgment of Sir Garfield Barwick CJ in *Brettingham Moore v St Leonard's Corporation* (1969) 121 CLR 509. The reason is that such a decision does not "decide or prescribe" anyone's rights. The statute should be tidied up by an amendment making an application for review available wherever the older remedies lie at common law. In this paper I have not said much about specific New Zealand decisions of latter years. To praise the efforts of one's brethren would be to paint the lily. To criticise might be to strike a blow for liberty and equality, but clearly not for fraternity. Still, it seems permissible to mention that the Court of Appeal found the considerable discretion vested in the Court by Part I of this Act useful in formulating its declaration in *Auckland Medical Aid Trust v Taylor and Others,* decided on 10 January 1975. And it may not be out of place to give a respectful hail of welcome to that decision and also to *Attorney-General v Cooper* [1974] 2 NZLR 713, showing as they do that whether compulsory entry is to dig in land for gravel or in files for evidence of illegal abortion; the warrant must not be too general. I would also mention the interesting judgment of White J in *Karamu Land Co Ltd v Attorney-General* [1974] 2 NZLR 583, where the Judge used two new statutory powers—to direct reconsideration and to make interim orders—in a manned designed to clear up a possible confusion that may have arisen in the brucellosis testing of certain bulls. Or, more accurately, uncertain bulls. The cases against the Dairy and Milk Boards, together with *Padfield v Minister of Agriculture* and the *Karamu* case, give modern administrative law an engagingly rural air. Bovine does not seem quite the right

adjective. Be that as it may, the more pertinent point for our purposes is that the *Karamu* decision did not depend on any finding of invalidity. There is potential in this Act.

With regard to particular statutory tribunals, some points of general interest deserve mention. The Town and Country Planning Appeal Boards have been strengthened, if one may say so, by the appointment of Mr A R Turner SM as Chairman of the No 1 Board. To have as head of such a tribunal a lawyer with such experience of and interest in the subject in practice and otherwise is rare. It is agreeable to record that the case made by Mr R I Barker at the Rotorua Conference in 1969 for more realistic rights of objection to the compulsory acquisition of land has been recognised, albeit very cautiously. The Boards now have recommendatory functions in such cases. The Licensing Control Commission, its major work done, seems but a shadow of its former self. O my Goulding and my Barnett long ago! The Broadcasting Authority has come and gone. The office of Transport Licensing Appeal Authority has been filled by six different men from time to time in less than 10 years, Judge Archer having occupied the position twice and four of the others being former Stipendiary Magistrates. There is an Industrial Commission and an Industrial Court instead of the Court of Arbitration, and as Judge of the new Court Mr R D Jamieson has added yet another hat to his variegated wardrobe. One or more Taxation Review Authorities, each consisting simply of a barrister or solicitor of not less than seven years' practice, replace the three-man Board of Review: Mr Lloyd Martin, the former Chairman, has thus gone solo. Where more than $1,000 tax or duty is at stake there is now an appeal in fact as well as law to the Supreme Court; but in practice the machinery of the Act and the attitude of the Commissioner and his advisers have enabled cases to be brought before the Court in the first instance fairly readily.

I think we may be said to have reached a stage when, in general, the procedural machinery and principles of substantive law available to the Courts are reasonably adequate to enable justice to be done in administrative law. There is ground for contending that some further rights of appeal to the Administrative Division should be granted. If more certainty is desired in case law, a firm adherence to Lord Reid's approach would provide it. One of the few decisions in the field since 1960 by which for my part it is very difficult to feel satisfied is our own Privy Council case of *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705. And there Lord Reid dissented. One knows that the suspension of a school teacher when charges of neglect of duty and inefficiency had been laid was not final. One knows that the statutory disciplinary code was open to the inference that no sort of hearing was intended before such a suspension. But the code was also open to other interpretations, as indicated by the opinions of the two dissenting Law Lords and of Speight J at first instance. In such a context I should have thought that before allowing the public ignominy of suspension to be validly imposed the Courts might have insisted on some elementary attempt to investigate what the accused had to say.

In the statutory disposition of judicial work and the like there are some paradoxes. Disputes under the Matrimonial Property Act usually require broad exercises of discretion, and hardly ever can all the relevant facts be found with any confidence. Not much law is involved. (I know about *E v E.*) A women's leader says that Judges are chauvinistic—I am not sure whether all or only the Auckland ones. The average appeal to a Town and Country Planning Appeal Board is more important to the community. The facts can be thoroughly elicited, especially when the local authority's planning officers and any consultants retained by the other side have done their homework well. Troublesome questions of law arise. Sex hardly comes into it. In an ideal world a mixed board of men and women, presided over by a lawyer, would deal with the matrimonial property disputes, subject to a perhaps limited right of appeal to the Supreme Court; and the Supreme Court would deal with the planning appeals. The example could be multiplied. But those who make these arrangements have to do their best with the personnel available—or coaxable—and the structure inherited. While there has been no difficulty in resisting calling this paper *Room for Complacency,* it does not seem necessary to be a radical as in 1960. Which may be just as well, because if rumour is correct Mr Holland has cornered that market.

DISCUSSION

Chairman: Mr J D Gerard.

Commentators: Messrs N S Marquet, R G Gallen.

THE CHAIRMAN: "The paper will not be read. However, in the instance of this paper, you are not deprived of hearing the voice of his Honour, Mr Justice Cooke, because it is to be heard in every line of his paper, as you read it through for yourselves. In the beginning he starts off airily, "As I was saying in 1960 . . .". The paper has been prepared by him because in 1960 he delivered to the Wellington Conference a paper on the same topic, and his present paper brings up to date the consideration of that very important section of our law, the importance of which has been demonstrated by the fact that I think in every paper that has been delivered to this Conference, the comments on it have to some extent impinged on the matters raised in his Honour's paper. If any of you are inteersted in the development of Mr Cooke from 1960 to the present day, just as he has dealt with the development of administrative law, I recommend you to look at his photo on page 129 of the 1960 volume of the *New Zealand Law Journal,* and you will see a 'sweet' is the word that comes to mind—photograph, and you see him before you today. Without more ado, I ask his Honour to address you briefly on the contents of his paper."

MR JUSTICE COOKE: "I think you implied, Mr Chairman, if you did not exactly say it, that whatever appearance I may have borne in that old photograph, I now stand before you sour—and that is not without a measure of truth. It is said that all comedians would like to play Hamlet. I would like to abandon pontificating at these conferences in one way or another about administrative law. When the steering committee requisitioned the present paper, the maxim which came to mind was, 'Nemo debet bis vexari pro eadem causa', which means, 'Have a heart!' Moreover, the requisition and the way in which the scope of the paper was defined, entailed the rather distressing experience of re-reading what I had said in 1960. Rather to one's surprise, I found that I still agreed with much of it. True, it was rather disrespectful of the judiciary, but 15 years' more experience have convinced me that I was quite right about that!

"If I might now turn to something more relevant to the subject-matter of the present paper, may I refer to the day when your wife and I went to the toy department at Harrod's and afterwards took lunch. That was in 1972. It was one of the days during which you were arguing before their Lordships of the Judicial Committee of the Privy Council, the case of *Furnell v Whangarei High Schools Board*—an important case in administrative law.

"What you said on returning is with me to this day. Unless my memory is at fault, your ipsissima verba were: 'Unless they are going to allow this appeal they are the greatest bunch of confidence tricksters that have ever sat on the Bench'. Alas! It was to prove that only Lord Reid and Viscount Dilhorne were not members of the 'gang', so administrative law has had its setbacks in those 15 years; but by and large I submit to you that it has progressed reasonably well. We have had the four great House of Lords cases—*Ridge v Baldwin,* establishing the right to a hearing before a man or woman can be penalised for alleged misconduct; *Padfield v Minister of Agriculture,* establishing the duty of the Courts to ascertain the purposes inherent in an Act of Parliament, even if not expressly stated therein, and to ensure that the Executive, at however high a level, in implementing the Act, acts in accordance with those purposes; and establishing the right of the citizen to have the true meaning of an Act of Parliament determined in the end by the Courts rather than by an administrative tribunal or party; *Hoffman v La Roche,* establishing the right of the Executive to insist that orders made apparently under statutory powers be obeyed unless and until the Court holds them invalid. To take one of the Lord Chancellor's happy expressions, those are paraphernalia of modern administrative law, and in New Zealand they are supplemented by two major Acts of Parliament—the Act of 1968 establishing the Administrative Division of the Supreme Court, and the Act of 1972 providing a simple procedure for the judicial review of administrative decisions.

"I do not say that the right decisions are always made in administrative law cases. In a sense, in a democracy there are no right de-

cisions; there are only the results thrown up by a rather untidy system of checks and balances, and the personal equation necessarily comes into it. Not all Judges, naturally, are as interested in probing beneath the surface in administrative law cases. What I do say is that we now have a reasonable armoury of principles and procedures to do justice in the field of administrative law.

"Where next? What is the future for administrative law? There are three approaches calling for consideration. First, there is what might be called the 'blood and thunder' syndrome. We all know—or at least all lawyers know—that at conferences such as this a great deal is said which on subsequent analysis turns out to have little of real significance in it—like the tins which Mr Patterson referred to in his paper, which on opening prove to be so much larger than their contents.

"The approach to which I am now referring may be exemplified by a sentence which may ring a bell with some of you—'Lawyers are apt to take too narrow a view of their duty to the community; there is the duty to our clients, but there is also the duty to our country in a broader sense—to help to guide it amid the pitfalls and dangers of a changing age.' That is taken from the first paper delivered at the first of the 16 conferences of this Society in 1928. It is an idea which has been recycled and in one shape or form has received some publicity at each of the succeeding 15 conferences. It is true that lawyers can contribute in a distinctive way to the definition and analysis of social policy, but the task of the Courts, of course, is not to formulate social policy not to push causes, but amid the clashes of opinion and of interest, to try to provide an institution in which citizens, whatever their views about political and social issues, may place confidence on which they may rely for fair, objective and efficient adjudication, which is something different from policy-making.

"I thought, if I may say so, that that point was put very well by Mrs Gambrill in what she said from the floor this morning in the discussion upon my brother Beattie's paper.

"So much for the 'blood and thunder' syndrome.

"The second approach is that of the Bill of Rights, and Mr Singleton cited the other day Lord Justice Scarman's recent espousal of this solution. How sad it is that in the home of the common law, civil liberties are apparently thought to be so imperilled that forward-looking people such as Lord Justice Scarman in influential positions are turning to this doubtful expedient. It is true that it has some support in New Zealand, notably from the International Commission of Jurists, but even this morning's discussion on 'The Right to Life' demonstrated that a Bill of Rights, a written constitution, is likely either to consist of misty generalities or of something upon which there could be no agreement. If that is right, we are left with the third approach, which in the present context may be called the Gesell line. I suggest in retrospect, that the Chapman Tripp Centenary paper may be seen as one of the focal points of this conference. Writ large, the Gesell line is also the judicial philosophy of Lord Reid, to whose approach I have made some references in the paper.

"The Gesell line involves, in essence, a kind of statutory interpretation combining a full understanding of the spirit and specific provisions of the Act of Parliament in question, with a willingness to be somewhat constructive in applying the Act to individual cases, so as to satisfy as nearly as possible the generally accepted concept of justice in the community—a concept which becomes increasingly more sophisticated as the community matures and becomes increasingly urbanised. This approach involves, too, developing the law, albeit gradually and carefully, and only after the existing law has been mastered.

"In the matter of future developments we may have valuable things to learn from the Federal Courts of the United States. You will remember that Judge Gesell referred to three main specific cases to illustrate his thesis. Two of those, the cases of the freeway in the park, and the breaches of trust regarding the miners' pension fund, would appear to be examples of well-settled principles of law, or the application of well-settled principles of law, recognised in this jurisdiction as in the United States. One has little doubt that those cases would have been decided the same way in this country and with our advantages in the size of our population, probably a good deal more speedily. But the fascinating part of the Judge's specific examples was the reference to class actions for damages. There have been hints in some of our leading administrative law cases, one recently by Lord Wilberforce, and one in 1963 by Lord Radcliffe in the Privy Council, of the possibility of awarding damages for the consequences of invalid administrative action. This is a matter which has not yet, so far as I am aware, come before the New Zealand Courts in any major way, and I must be guarded in what I

say about it. Even Judge Gesell's own explanation of the case, in the time available to him, obviously left many questions upon which one would seek an answer. Those 1,200 unlawfully arrested demonstrators—how did they cut up the $12 million which the jury awarded to them? Was it truly a case in which equality was equity? Were they really able to sink their



Ronald D Woolf

Mr Justice Cooke

differences at that point? And so forth. I believe that that case goes further than any case in New Zealand, where our rules for representative actions have been applied.

"We may, too, have something to learn from France, from the jurisprudence of the Conseil d'Etat. There, too, it appears that the belief which Judge Gesell to some extent denigrated in his speech, that in the United States all depends on the written constitution, is largely fallacious. The Conseil d'Etat, which is the ultimate administrative Court in France, applies certain general principles—principles générales du droit. Some of these come from one or other of the dozen or so constitutions which the French have had since 1789, but other apparently are discovered to exist from time to time within the breasts of the members of the Conseil d'Etat, and represent, one suspects, much the same sort of approach as the Judge told us about on Saturday, and as I have suggested Lord Reid has applied over the years in the House of Lords. But if you do take anything from the French system, one trusts that it will be Gallic logic rather than the Gallic attitude to the question of the celerity of proceedings.

"I agree with what was said by Mr David Williams in the discussion on that paper, that much depends on the courage of counsel, and, one would add, on the industry of counsel.

"I come to wave no banner at you, but it seems to me that the future of administrative law is one of quiet and careful progress along some such lines as I have mentioned."

THE CHAIRMAN then introduced the two commentators.

MR GALLEN: "Mr Justice Cooke set out in his paper to survey changes in the attitude of the Courts towards administrative decisions and decision-making between 1960 and the present day, but I think you might agree with me that an element of satisfaction runs through the paper, and indeed comes through to some extent in the learned Judge's remarks this afternoon.

"He refers during the course of the paper to the fact that now, with the advances that have been made both in the Courts and legislatively, there has been procedural machinery and the principles of substantive law which may be said to be reasonably adequate to enable justice to be done in administrative matters.

"It is rather strange, having come to that conclusion, to consider that during the course of this conference there has not been one single paper where there has not been some element of criticism of administrative action of one kind or another, where there has not been some degree of dissatisfaction with the way the administration rubs up against the lives and rights of the ordinary citizen. It is for that reason that it is interesting to hear his Honour speak to us about the directions which he thinks administrative law in relation to the Courts may take, and it is on one small aspect of that on which I wish to comment now.

"In *Lower Hutt City Council v Bank*, reference is made to a criterion of fairness—a concept which has respectable judicial antecedents, and in fact has been referred to in at least two of the House of Lords decisions to which his Honour referred. That concept has already come in for some criticism, particularly in the article written by Dr Mathieson which appeared in the *New Zealand Law Journal* at [1974]

NZLJ 277, for whom it might be said that the sphinx has not vanished, but reappeared on the other side of the Bench. There is some truth in that kind of argument, because it is difficult sometimes to assess in advance what kind of attitude one is going to receive for the imaginative approach of counsel which was called for, I think on Saturday, and in different terms by his Honour today.

"Mr Justice Cooke, in considering the concept of fairness, rather cavalierly dismisses it by saying it is to be equated with natural justice. He did not develop this aspect of his paper, but it is an extremely interesting one, which has some philosophical aspects to it, which could give the kind of fuel which the imaginative lawyer we have been talking about may need. If 'fairness' is merely a synonym for natural justice, it is difficult to see why the Court of Appeal used it. Natural justice, after all, has been used in a considerable number of cases, and had a fairly well accepted meaning. I suggest to you that the use of the term 'fairness' is intended to and does go beyond the rather rigid concept of natural justice which had been accepted by the Courts over the last 30 or 40 years.

"On the other hand, of course, natural justice itself is a concept which has been by no means exhausted. For a number of years it has been used in situations where it was confined to fairly narrow procedural requirements. People who were required to make administrative decisions had to make them in particular ways. In some circumstances it was held to even have some bearing on the nature of the person making a decision, but it was not always as confined as that. In *Ridge v Baldwin,* referred to by his Honour, the first case that Lord Reid used in his summary of the authorities was *Bagg's* case. *Bagg's* case was interesting both in fact and in law. Mr Bagg was a burgess who fell foul of the mayor and council of his borough through what was reported as being insulting behaviour. He referred to the mayor in terms which would not be parliamentary even today, and backed it up by turning his back and making suggestive movements of his posterior. As a result of this the mayor and other burgesses disfranchised him, and he wasn't prepared to let it go, so he took the matter before the Court. He was fortunate enough to come before Lord Coke. During the course of his paper Mr Justice Cooke was rather at a loss for an appropriate adjective in describing administrative law matters. He rejected 'bovine' for obvious reasons. Might I suggest that in the circumstances 'culinary' might have had a suitable meaning? Lord Coke went a long way, in deciding *Bagg's* case, beyond what he needed to, and during the course of his decision which he later used as the basis of a statement in his *Institutes* (at 11 Co Rep 986): 'To the Court of King's Bench belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanours extra-judicial tending to the breach of peace or of repression of the subjects, or to the raising of faction, controversy, debate or to any manner of misgovernment, so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law.'

"That is an extremely sweeping statement. There are judicial authorities suggesting that the power and jurisdiction of the Court does not go anywhere near as far as Lord Coke suggested. Nevertheless, he said it, it has been repeated, and the case in which it was said might reasonably be regarded as a current authority; and if that is taken in conjunction with concepts of fairness, one might feel that the well of natural justice has been by no means exhausted. and that imaginative and perhaps courageous barrister who was referred to in discussion on Judge Gesell's paper may well find there the sort of ammunition which he needs to come before a Court in the sort of situation with which we have been concerned over the past few days, and not least in the matters raised by Judge Gesell. That point of view, as Mr Justice Cooke points out in the paper, has already shown signs of materialising, and he referred to the decision of Mr Justice White in the *Karamu* case, although asked by counsel to make a decision according to the reports on the rather general terms of the subsection which relates to the earlier powers under the prerogative writs, chose to base his decision, in requiring action to be taken, on the rather wider provisions of subs (5); and as Mr Justice Cooke points out in the paper, this would indicate a very considerable potential in the Judicature Amendment Act; and that, taken with the matters to which I have already referred, suggests that we have by no means reached the end of the road regarding administrative law, and there may be more exciting things to come. My friend, Mr Marquet, has some remarks to make on the more specific aspects of administrative law."

MR MARQUET: "I have only two points to

make, and for the benefit of President Castle, who will not be able to follow me without his agenda, I propose to take them in arithmetical order, so I will deal with point one first: (1) Is to comment just briefly on the question of fairness and natural justice. I will do so only by referring to some of the words of the writ of certiorari, quoted in the paper, that the Court should do right according to the custom and the law of England. What 'right', according to the law and custom of New Zealand shall we see fit to be done?

"I applaud the indications which Mr Justice Cooke at least sees in the recent decisions for administrative law in New Zealand.

"From there I turn to the first specific point, and this comes from my only slight acquaintance with some of the administrative tribunals, and in the main that of the Town and Country Planning Appeal Board. The present structure provides for an initial hearing and an appeal, but in my view, in many instances the appeal hearing is the only disinterested hearing that the party has. The Crown, public and local authorities, have preferment in many instances, and the nature of the Act or relevant legislation precludes a hearing on the merits in the first instance and also limits the area of such debate on appeal. I would not suggest to you that the faces of the chairmen of any of the Boards can be in any way compared with a sphinx. On the contrary, Mr Turner and the other chairmen are at great pains to ensure that such debate as may take place is full and free; indeed, I would regard him in the context of administrative law as a talking, or speaking, boxer; but the right of appeal which is given, and the scope of the inquiry, is severely limited by the present legislation, and in my view merits consideration for enlargement so that the right of an individual can be met against the great claims of the State.

"Now, Lord Reid, in the comment referred to by Mr Justice Cooke, reminds us that judicial discretion should be used for both the policy and the objects of the Act. It is thus in town planning matters; and I am disappointed that the Board has, in some decisions, it appears to me, to have set itself against, or limited its jurisdiction, in adjudicating on matters of council or public policy as the Board sees it. I believe the Board can and should weigh the merit of public right and private interest, if I can use those words.

"I was particularly interested by the reference by Judge Gesell to his Court staying the motorway, referred to a moment ago by Mr Justice Cooke. I would take issue with Mr Justice Cooke there, because, as I understood Judge Gesell, he said that his Court stayed the motorway because the Authority had not given sufficient consideration to an alternative route, or the alternatives available.

"In some of the recent decisions of the Town and Country Planning Appeal Board, the Board has said that it personally is not able to consider the merits of competing views relating to the siting of any particular motorway. I believe that the Board should be able to, because the Board is well equipped to do so if it is allowed to do so.

"I think also that the present right of appeal could be indicated. A simple amendment to the Act would allow the Board, if it was so minded, to allow a right of appeal to the Administrative Division of the Supreme Court in certain cases where the Board certifies that the matter at issue is of such public or private interest that it warrants further consideration on appeal.

"Again also, it seems to me that there should be no reason why there could not be a right of appeal if the Administrative Division of the Court of Appeal sees fit.

"Next, the same type of provision could well, in my view, apply to the licensing authorities —Motor Spirits, Liquor Licensing, and so on; and just to show that I have read some of the cases and can speak with particularity, the *Thames Jockey Club* case also illustrates that the 1972 amendment referred to in the paper should likewise be amended to add words such as 'affects the right of the individual', rather than limiting it to as it is now, in the statute, to 'decisions'.

"I would think that if our society is of the view that the ancient right which is contained in the Court of Appeal judgment is to be retained in the new procedure, then there should be no problem in amending the law in the way in which I have suggested.

"My final point relates to an extension of the right of review under Part I of the Act to embrace domestic tribunals. I don't know, but I rather suspect that Mr Justice Cooke is sceptical, and I am quite certain that Dr Mathieson thinks it is irrelevant to the present argument.

"Lord Chief Justice Widgery, cited in the paper, said, 'Certiorari would issue to any body with jurisdiction to determine the rights of subjects', and the heading of Part I of the 1972

amendment to the Judicature Act is at best a single procedure for the judicial review of a statutory power.

"Not long ago, there was a great attempt to remove the right of injunction from the industrial sphere, and this has already been alluded to at the conference earlier. My point is simply this: that in the interests of fairness and the interests of the State as a whole, the procedure for exercising the supervisory power which the Court has, should cover domestic tribunals as well as statutory tribunals, and in particular I include such bodies as employer associations and, of course, trade unions and other organisations which often exercise a much greater power over the individual than any State agency.

"I am not suggesting that the Courts in any way should interfere with the role of the Industrial Court, but I am suggesting that the supervisory powers which the Court has to redress wrongs and statutory excesses should, with equal measure, apply to all domestic bodies which, by contracting or otherwise, have authority to determine the rights and powers of so many people. The Act provides a simple and speedy procedure for the resolution of such disputes, where the body concerned fails to apply the policies of fairness in interpreting and administering its own charter."

SIR GUY POWLES (Wellington): "I have a very diffident approach to this question of administrative law. I also have nostalgic memories of the conference of 1960 when one might say that the Ombudsman egg was laid, but still one does not know how the institution which I have the honour to represent fits into discussions of administrative law, if at all. So my mind is a sort of humble questing mind on this occasion; I would like to know does the institution belong in this field, or doesn't it? We have had some very excellent papers produced by the Public and Administrative Law Committee of the Law Commission, and from reading those papers no outsider would ever gather a hint of the fact that there had been, throughout the time of those papers being written, an operative institution of Ombudsman in New Zealand; and Mr Justice Cooke, for whom I have the very greatest respect, also says in his paper that it is not directly relevant. Well, yes, one could sort of agree that it is not directly relevant to some of the issues raised by the learned Judge in his paper, but it is more directly relevant, I think, to some of the broader issues that have been raised perhaps by one or more of the commentators. It is a very interesting thing that the Ombudsman is enabled by statute to form an opinion with reference to an administrative act on a series of really quite specified grounds, and these grounds are pretty wide; they cover in some way, it seems to me, a legal attempt to define what is in effect natural justice. And when one bears in mind the fact that this particular Act in 1962 was drawn by some of the foremost legal brains of that day—and incidentally I might say this today, because one of the fathers of the statute was none other than the then Solicitor-General, Mr H R C Wild, QC. The interesting thing is that this particular criteria—I won't weary you by going through the section—this section has been copied almost word for word in almost 10 or a dozen statutes in other parts of the world, so I think the criteria in that section are worthy of consideration when one is wondering how perhaps Courts would look at them.

"Mr Justice Cooke has said that modern Courts are readier to go to the heart of administrative law issues. I am sure he is right; but I wonder how *far* into the heart they are still able or ready to go?

"The question of fairness was brought up by one of the commentators. One of the grounds on which an Ombudsman may form an opinion is that, in his view, a particular decision was wrong—just plain wrong; and that incorporates quite a number of attributes of fairness and unreasonableness and so on. I just wonder to what extent there is some sort of dichotomy in this particular situation.

"I only put these ideas forward because administrative law, the vanishing sphinx—I am not quite sure whether it is vanishing because it has ceased to be inscrutable, or whether it is vanishing because it doesn't exist any more; but in any case, whether or not administrative law is a vanishing sphinx, it has occurred to me to ask possibly whether we might not have on the horizon an emerging sphinx which has a Scandinavian name."

DR MATHIESON: "Lest I be thought to be a reactionary in these matters of administrative law, may I commence by saying that I very much agree with Mr Marquet about the need to transform the Judicature Amendment Act 1972 into a piece of legislation which deals with remedies in a comprehensive way and not in a partial way; and the extension of that Act to include domestic tribunals, ie, tribunals with constitutions which do not derive from statutes

—was one of the suggestions which I have placed before the Administrative Law Committee, along with other proposals that that committee is at present considering, and it will be interesting to see what it comes up with.

"Many of the points made by Mr Justice Cooke would probably be accepted by those who have practised in administrative law. Let me take one example to which the commentators have not so far referred. It is indisputable in my view, that privative clauses have only a limited efficacy. If part of the purpose of the mechanism is to produce adjudication that might reduce litigation in the Supreme Court over matters that have been pronounced upon by our statesmen and competent tribunals, then that purpose is surely not being realised today.

"With the assistance of the *Anisminic* case, it is only errors of law, on the face of it, that now do not go to jurisdiction, in the wide *Anisminic* connotation of the word. It is those being advanced in an application for a judicial kinds of things that are effectively barred from review.

"Mr Justice Cooke, perhaps too modestly, in this connection, illustrated this in one of his own judgments—and I refer to his Honour's own reported judgment in *Car Haulaways* and the Court of Appeal, counsel and the Judges all accepted his Honour's judgment as correct on that point.

"In my experience, very few undertakings are so poverty-stricken as not to be able to muster an alleged jurisdiction in the *Anisminic* sense.

"So that the litigation proceeds, in practice, in the majority of cases, without any statutory imposition. I would not wish, for my part, to defend the retention of privative clauses to protect the majority of statutory tribunals. At the same time, I think that a proper balancing of the various elements of public policy involved, may justify incorporating a privative clause into an enactment, in exceptional cases. One possible example would be a case where secrecy was one of the essence of the particular tribunal's function; but there should be no universal self-denying ordinance in placing a veto on privative clauses.

"Mr Justice Cooke discerns a readiness by the Courts (and I quote the paper) to get to the substance of administrative law issues. I hope that his Honour will be able to assure me that this is not an obscure way of praising the tendency which exists in many minds, it would seem, to treat an application for judicial review as though it was the exercise of a right of appeal.

"Mr Justice Cooke thinks that there has been some gain in the certainty of the law as a result of certain judicial advances. I resist the temptation to elaborate on the proposition of the word 'advance' as question-begging. I feel obliged to disagree, however, with the proposition that there has been some gain in the certainty of the law.

"In my view, uncertainty as to what the law is, particularly in the field of natural justice, has increased, is increasing, and ought to be diminished. Of course, some uncertainty is inevitable, just because each statute is different, and the paper certainly does not exaggerate in referring to procedures of almost infinite variety; but at the moment there is almost complete uncertainty, in my judgment, about what one would have thought were elementary points of general principle in the natural justice area.

"To give some examples: Is fairness really a synonym for natural justice? I was glad that Mr Gallen raised that question. The paper says the two expressions are synonymous, but if one looks at the cases, there are no more than conflicting straws in the wind on that general proposition. It may be, but we are not sure, that administrators have a duty to act fairly and that that is something appreciably less than natural justice.

"Again, with reference to the *Furnell* case, which contains the idea of a code in administrative law, what are the criteria of a code which, if it exists, precludes the Courts from importing judicial procedural rights? Or again —another fundamental question—what are the relevant criteria of a fair decision? How wide is it legitimate to look? These general issues affect decision-making, I suggest, in a wide variety of statutory contexts, and there are no clear answers to the questions. Am I alone in feeling concerned about the uncertainty that presently pervades natural justice issues, and incidentally, I suppose, makes the work of the Courts rather more complex because argument is lengthened?

"The paper itself supplies many examples of important points that are valid in administrative law. The Courts, it is said in the paper, 'lean towards interpreting a statute so that in its procedural provisions it may manifestly be

seen to work fairly', and again, 'there is a leaning against importing the right as regards mere preliminary examinations'.

"Then there are Lord Wilberforce's dicta in one case, and his no doubt deliberately cryptic statements in another case.

"If applying labels was a sign of adolescence in administrative law, presumably in the period which ended round about 1960, I suggest that the law as to natural justice still has a long way to go before it reaches a satisfactory maturity. A mature law of natural justice could be expounded in terms of clear principles. Their application might be difficult, but their existence would be much clearer than, I submit, it is today."

MR JUSTICE COOKE: "I do not think it would be proper to endeavour to reply in detail to a few points made by the speakers, but I would like to assure Sir Guy Powles that there was certainly no intention in this paper in any way to diminish the importance of the office which he graces. If he were to refer to the paper itself, it would be found that I referred to the Parliamentary Commissioner (Ombudsman) Act 1962—which no doubt should be amended to read: 'The Parliamentary Commissioner Ombudsman or Phoenix Act 1962'—and said that there can be no doubt that the Ombudsman's investigatory functions are a valuable safeguard against bureaucratic mistakes at certain levels; and I adhere to that statement."

CONFERENCE CONCERT



Ronald D Woolf

Trial by Jury

The law did itself proud by celebrating the 16th triennial conference of the New Zealand Law Society with a "Champagne Concert" by the New Zealand Symphony Orchestra and, as they used to say, associate artists.

Music, lashings of champagne during the interval, a dazzling floral display in the full hall, the scales of justice hanging overhead as a flock of ceiling mobiles: add a centenary performance of Gilbert and Sullivan's "Trial by Jury" and law-dy you had the lot.

The five soloists (Graeme Gorton, Emily Mair, Anthony Benfell, Bruce Carson, and Maurice Taylor) with the New Opera Chorus and the Orchestra, made the celebrated G and S breach of promise case a jolly romp. But it was the confident conducting of Oswald Cheesman that gave the performance style and dash.

One had the impression that many of the legal fraternity had not adequate enough precedents to form a judgment on the Tchaikowsky Concerto case. But even the least experienced among them must have sensed that the playing of Michael Houstoun was something out of the top drawer.

Since we last heard Michael Houstoun he has become technically more assured, more of musicianship priorities and, no less important for a concert artist, has acquired even more of a flair for presenting his music.

This was Czech conductor Martin Turnovsky's first appearance with the orchestra. He is obviously a first-rate conductor. Already in his short association with the players he has established a rapport which gave Michael Houstoun a sympathetic, sensitive accompaniment. This was notable, incidentally, for enchanting flute playing by Nancy Luther in the well-known slow movement theme.

Douglas Lilburn's "Festival Overture" sounds as fresh a bit of festivalia as it did in its first New Zealand performance 20 years ago. OWEN JENSEN (With thanks to Mr Jensen and the *Evening Post*).

RARE EARLY MAORI SIGNATURE



Evening Post

Depicted is a chief's signature on an 1840 land deed exhibited at the Alexander Turnbull Library. Only about six examples are known of an entire moko (facial tattoo) being used as a signature. In the deed a Sydney merchant purported to purchase about 1,000 square miles of North Canterbury for £60—the area running for 43 miles north of Banks Peninsula and stretching from the sea to the Southern Alps. Moko were often used before the mastery of writing was common, but usually on a small and abbreviated scale. The chief actually drew on the document upside down.

Call Me Madam?—In this year of Women's Lib, at one of the social functions a rather aggressive lady lawyer tackled the Lord Chancellor of England, Lord Elwyn-Jones, demanding to know when, if ever, a woman might expect to hold his post. Came the retort courteous—that in fact Henry II had appointed his wife, Eleanor of Aquitaine, as Lord (Lady) Chancellor in the 12th century. Admittedly, this was the only occasion on which an incumbent gave birth while on the Woolsack.

THE PRACTITIONERS' DINNER



Evening Post

A toast from the top table (from right to left): Sir Richard Wild, Mr L J Castle, Mr M J O'Brien QC, Lord Elwyn-Jones, Dr Martyn Finlay QC (both obscured), Mr J F Jeffries et al.

The Practitioners' Dinner was held in the flower-bedecked Town Hall, with practitioners being waited on by handchosen handmaidens, who received an enthusiastic toast from the "top table" (depicted above—the demonstration from the lower echelons was far less inhibited). After dealing with a menu set against a background of early Wellington (and on which the Town Hall site would fall well into the waters of Port Nicholson), and after accounting for copious quantities of 1970 McWilliams Cabernet Sauvignon and 1973 Montana Pinot Chardonnay Special Bin No 70, the assembly of upwards of 700 coped with the following speeches as they turned their attention to cigars and brandy.

The Judiciary

MR. O'BRIEN: "I extend a special welcome to two past presidents, Mr McGrath and Mr Tong. Mr Tong is going to Nairobi in a few weeks' time, to attend a meeting of the Bar Association, and we wish him well.

"The first toast tonight is to the Judiciary and it is in the hands of Lester Castle, the President of the New Zealand Law Society. For those of you who do not know, he is a member of an old practising family firm of solicitors in Wellington. It is not as long-established as that old firm of Hawkins & Co of Hertfordshire, which was established in 1591, and it is reported that somebody turned up a few years ago and asked for Mr Hawkins and was informed that he died in 1877. It is also recorded that in that town, a newly appointed vicar came to the firm and called upon the solicitor. He was welcomed with open arms by this gentleman, who wondered why he had not visited some of his better flock before. He was told that the souls of solicitors were in greater jeopardy than the souls of other professional men.

"This gentleman was a conveyancer, and of that type of person it was once said, it was a subject that Coke himself supposes, to be at least as old as Moses.

"It is also recorded by Sir Edward Fry, that the conveyancer is free from the noise of the Courts and remote from the pursuits of his fellow men; he breathes a highly rarified and transcendental atmosphere. A toast to the Judiciary could not be in the hands of anyone better qualified."

MR CASTLE: "Mr Chairman, Lord Chancellor, Chief Justice, Mr Attorney, Ladies and Gentlemen: It is my privilege, on behalf of the legal profession, to propose this toast, and in so doing, and in the spirit of the occasion, I quote Edmund Burke: 'I know many have been taught to think that moderation on an occasion such as this is a sort of treason'. There will be many who are enthusiastic subscribers to that sentiment. For myself, I trust I shall be moderate both in content and duration.

"I welcome what may be described as a galaxy of judicial talent from virtually the four celestial quarters of the globe, leavened, if I may use that term without offence, by their New Zealand terrestrial brethren. We all keenly appreciate your presence at this conference; we look forward to your continuing contributions to it.

"As a solicitor, as Mr Chairman has said, I feel a customary diffidence in discharging my obligations, for it was one, Hudson, called to the English Bar in 1605, who wrote: 'In our age there are stepped up a new sort of people called solicitors; unknown to the records of law, who, like the grasshoppers of Egypt, devour a whole land'. It is probably true to say that times have changed sufficiently to permit the solicitor to share the land with his barristerial brethren.

"At times such as these, we welcome the opportunity of sharing the festive board with all members of the Judiciary and thus have the opportunity of speaking to them freely, not only among ourselves, the members of our profession, but of and with them, as fellow men.

"It was the late Lord Justice Birkett, in a speech on the art of advocacy to the Lawyers' Club of Toronto in 1957, who referred to the tradition that the Bar should have the licence to speak freely amongst themselves, and he told the story of the deaf Judge, the deaf plaintiff and the deaf defendant. They were all deaf. The Judge took his seat on the bench; the plaintiff and the defendant came before him, and the Judge said, 'You will begin'. The plaintiff, who had never heard a word—neither had the defendant—seeing the Judge's lips had stopped moving, said, 'My Lord, my claim is a claim for rent'. Of course the defendant never heard a word, neither did the Judge, but the plaintiff's lips had stopped moving, and the Judge turned to the defendant and said, 'What do you say to that?' So the defendant, who had not heard a word, said, 'My Lord, how can that be, when I grind my corn at night?' Of course, the plaintiff never heard a word about this, and neither did the Judge, but he saw that the defendant's lips had stopped moving, and said, 'Well, I think this is a most typical case, but I see no useful purpose in reserving my judgment. As I have formed a clear opinion, I propose to give expression to it. I have come to the opinion that she is your mother, and you will both maintain her.'

"So the licence to speak freely of the Judges is pretty ancient. Equally can it be said that in a true democratic society there has always been a licence to speak freely of the executive. Some say there is a tendency for the executive to consider itself above the law. We do well to remind ourselves that the great principle that the law is above the executive re-emerged at the Restoration, and was confirmed at the Resolution of 1688, precisely to establish the principle that the law was above the then King James II. That mediæval idea of supremacy of the law as something separate from and independent from the will of the executive became the Palladium of our liberties, and has had a profound effect on society and habits of thought.

"Our profession, then, has a continuing responsibility to ensure that the security and independence of the Judiciary is maintained inviolate. All Judges are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country and all other countries here represented. They stand equally between the executive and the citizen.

"I am indebted to one, J W O'Reilly, for the following:

'I ain't one to grumble and complain,
It's just as cheap and easy to rejoice.
When God sorts out the weather and sends rain,
Then rain's my choice'—

as I had the temerity to say to the MCC team on their departure from these shores some three weeks ago. We can all be philosophical about

the rain; however, we cannot afford to be philosophical about any erosion of the independence of our Judges and Magistrates, or any suggestion that the executive, or any group, is above the law. (Voices, Hear, Hear.)

"'The law,' says Anthony Sampson, 'more than any other profession, is imprisoned in its myths and shibolcths, and while the bankers preserve their traditions and solicitors tie up their thick paper in pink tape, their protective role has become increasingly irrelevant to the great corporate world outside. On the other hand'—he goes on to say—'one cannot forget that in spite of their maddening habits, lawyers —ie the bench and bar—in the widest sense have maintained the incorruptible British system of justice.' This latter comment is as pertinent to the nations who had judicial representatives at this conference as it is to New Zealand.

"We of the Bar salute you of the Bench, and in so doing I ask you, my colleagues, to rise and honour the toast to the Judiciary, coupled with the name of Lord Elwyn-Jones."

MR O'BRIEN: "Lord Chancellor, before calling on you to reply, I am mindful of the fact that you had a complaint to make this morning, and said to you that we are ready to be of assistance at all times, and that we are also prepared to apologise for mistakes and that true contrition involves doing things to the maximum. Because of all that, I have had a new identity tag made, which reads, 'Lord Elwyn-Jones—*Wales*' and I now present it to you.

"When your predecessor, Viscount Kilmuir, was here in 1960, the then Editor of the *Law Journal* commissioned a poem from Eileen Duggan which was published in the conference issue of that *Journal*. I will read just the latter part of it to show you something of our feeling towards yourself—and your office—and I mention before I start that I deliberately did not read this earlier because of the possible effect of the last two lines:

'As Keeper of Queen's Conscience and the Seal,
You stand between the people and the Throne;
In causes above all the wonted Courts
You are its ears. Your chair's a sack of wool,
No back, no arms to your unresting seat
Which warns that you are commonalty's tongue.

We have wool-growers here, vowed to the fleece,
As England was in days of hanse or guild.
Our very clouds repeat the bursting bales,
But our main staple is our liberty,
As it is yours, so we salute the bale
With what it stands for in integrity.

And welcome you, fit follower of men
Like Becket, teaching mercy by his death,
And More who spurned the gauntlets lined with gold.
Lord Chancellors within our coasts are rare.
We toast and, after drinking, break the glass'."

Reply

LORD CHANCELLOR: "Not so very long ago, Mr Justice Stable began a criminal trial, when one of the jurors put up his hand and said, 'I don't want to sit on this jury this morning.' The Judge said, 'I cannot release you until you tell me the reasons why I should do so. What is the trouble?' He said, 'My wife is going to conceive this morning.' The Judge said, 'It may be that what you are seeking to tell me is that your wife is going to be confined this morning, but whether you are right or I am right, it would seem to be an occasion at which you should personally be present.'

"This is certainly an occasion at which I am delighted to be personally present, and to have the honour of replying on behalf of a positive galaxy of the Judiciary to the toast which has been so generously proposed towards us. I am bound to say that the reception it received made me feel I was back in Cardiff Arms Park, but I have made a pact with the Chief Justice which was solemnly and publicly recorded this morning never to refer to the fact of what happened at Lanelly two years ago.

"It is a great privilege to me to say just a word or two of my own sense of gratitude as Lord Chancellor for the outstanding contribution that New Zealand Judges have made to the work of the Privy Council in particular, and I am especially delighted that the President of your Court of Appeal, Mr Justice McCarthy is now engaged to assist us in London, and I hope that before very long we can persuade your own Chief Justice Wild to join us in our tasks there. (Cheers.)

"It is certainly very gratifying to find the excellent relations that apparently exist between the Bench and the Bar in New Zealand, but, of course, as you have indicated, Mr President, in your delightful speech, a certain

amount of forensic disagreement is tolerated between us; and it was illustrated by counsel who was addressing the Court of Appeal at interminable length, and the President of the Court said, 'Really, Mr Smith, you must credit us with knowing something, you know.' He said, 'My Lords, that was the mistake I made in the Court below.' Of course, sometimes counsel are driven to measures of what I can only call slight desperation. There was one somewhat pompous counsel who thought that he could do good with a High Court Judge who was a High Church man, and he began his submission as follows: 'My Lord, in this case I appear for the plaintiff—a God-fearing limited liability company.' And it was the same counsel who appeared before a Judge who hated to do accounts cases, and as you know, we have the institution of the Official Referee to which a Judge in trouble is able to consign such hideous prospects. But on this occasion the counsel in question had the ultimate misfortune of all counsel—his client died on the morning of the case, which, of course, is a dreadful misfortune to all concerned. He said to the Judge, 'My Lord, I have to acquaint your Lordship with the fact that the plaintiff in this action has been called to the Great Account.' 'Very well,' said the Judge, 'let it be referred to the Official Referee!'

"A difficulty of our task, perhaps, as Judges and counsel, is the problem of communication, and what we sometimes forget in the flood of our eloquence is that what is important is not what is said, but what is received.

"There was a great performer on the northern Circuit, Mr Noel Goldie. He reminded the Court of Appeal when he cited from a case in which he was a mere junior and his name was referred to, and said, 'That was before I received the accolade'. On this occasion he was appearing for an unfortunate lady in an accident case who had suffered damage to the occlusion of her upper and lower jaw, and he said, 'My Lord, never again will my client be able to bite her bottom with her top teeth.' At which stage the Judge said, 'And can you, Mr Goldie?'

"Of course, another problem that Judges have in sitting on cases is when it becomes apparent that counsel before them is needed in an adjoining Court. I do not know whether that happens in New Zealand; whether you



Ronald D Woolf

A pensive Mr Nick Miles studies his "Early Wellington" menu to a background of banter from Messrs Graham Miller (left) and John A Burns.

have clashes in your engagements. Now that I have ceased to be a practising member of the Bar I hope you will avoid that sort of thing happening. The occasion which gave rise to this particular incident was a trial before Mr Justice Swift, Rigby Swift to all who affectionately knew him at the Bar. Counsel in the case before him was an Arthur Ward, who was in all the cases in Birmingham, and he was appearing on this occasion in a case where the plaintiff had suffered an accident which had caused double vision. Arthur Ward was leading him through the details of the effects of the injury, and he had explained that he had double vision, and the Judge said—having observed that at that moment of time that Arthur Ward's clerk was tugging at his gown indicating that he was wanted in the next Court—'Can you say that you can see two of everything?' 'Yes, My Lord,' he said. 'And does that mean that you can see two Mr Arthur Wards?' 'Yes, my Lord,' he said. 'How very fortunate; one of them is wanted in the adjoining Court!'

"Another of the problems which Judges have is when counsel quarrel with each other in Court. I hope it never happens in New Zealand. We had one or two on my circuit, and you will not be surprised to know that I practised on the Wales and Chester circuit, and there, I am bound to say, although with some of one's opponents one buried the hatchet, one had an awful sense that it was buried in a shallow and well-marked grave. On the Wales and Chester circuit, we had an immensely fascinating diversity of cases, some of a somewhat agricultural character, and Nathaniel Thomas made an immortal opening in a case at Chester, in a certain type of case, when he said, 'My Lord and members of the jury, on a sunny afternoon, on 12 August of this year, the complainant in this case, in a meadow by a river, was quietly grazing.' I am sure that was not at all understood by any non-agricultural person in this country; but there is no doubt that from time to time Judges do feel that perhaps counsel are going on too long, and recently, when I sat in the Supreme Court in Massachusetts on a brief visit. I found there they had a remarkable technique of dealing with counsel whose argument had ceased to appeal. Not only are the seats supplied for the Judges there capable of turning round, they are also capable of tipping right back, and I gather that counsel when they have lost the Court, lose the ball behind the horizon! That must be a very disconcerting experience. But again, Rigby Swift was trying a case when he had no jury and was being harangued by counsel. He said, 'Mr Swift, there is no jury, you know; you need not harangue me in this way,' but on the haranguing went, at which point Rigby turned to the usher and said, 'Usher, switch on the light above the jury box. Mr Swift doesn't believe me!'

"Of course, it is only fair to state that counsel, too, allege from time to time, without any shred of justification, that Judges talk too much. Indeed, we had one case not so long ago which went to the Court of Appeal where *both* the appellant and the respondent were complaining that the Judge had denied them a fair trial by talking too much.

"Indeed there was one Judge who shall be nameless who sat in a Chancery position whose Court was called the 'Din of Iniquity'.

"But one of the great joys of the profession of the Bar, from which I not so long ago departed after many happy years in this wonderful profession we belong to—a profession of privilege, of joy and responsibility—one gets strange rewards—not speaking of the sordid matter of fees, of course.

"I appeared, in the course of my present job, for the Ocean Islanders, in certain international litigation in which I just escaped being their respondent Attorney-General, myself having ceased to hold that office just in the nick of time—and I went to call upon them with my junior and my instructing solicitor in a small island in the Fiji group where the Ocean Islanders now live. They were converted to Methodism at the beginning of the century, and as I stepped on to the landing stage with my instructing solicitor duly following me, the little brass band struck up to welcome me, 'Oh, God, our help in ages past'!

"But there it is—the time is long past when I should have sat down, otherwise you will be inclined to say of me, as was said by the artist Sickert on one occasion, of someone who had stayed too long and talked too much, 'Do come again when you have a little less time.' So I can only end by saying what a great joy it is to be back in New Zealand again and to resume delightful friendships that I established 10 years ago, and I hope to continue them in the future. Long may these friendships continue."

The Visitors

MR R S V SIMPSON (Wellington): "Mr President, Lord Chancellor, ladies and gentlemen: This conference has been run by the computer.

The Committee has had very little to do. All it has to do is to feed into the computer the information and out comes the answer. All the decisions have been made, and, in fact, the decision as to who the speakers were to be tonight was made by the computer. The computer was sensible enough to realise that the President of the NZ Law Society should propose the toast to the Judiciary; it was wise enough to realise the Lord Chancellor should reply to that toast; but it had a great problem with the toast of 'The Visitors'.

"We all have numbers; we all have computer numbers; you all have computer numbers; you have received print-outs. My number is 521, and I know there is a great danger that these numbers and all this information will be sent to the computer centre of the police force at Wanganui, and I invite the Attorney-General to assure us that these records will be destroyed. After all, the Lord Chancellor is here. He has a number and all the information about him will be available to the police and to Interpol.

"Anyway, in selecting the speakers for this toast, I understand the number of the speaker selected for the overseas visitors is 577. I received a letter from the President which said, 'Dear 521, Will you propose the toast of the visitors?' and I wrote back and said, 'Yes. Thank you very much, 521 will do that, but who are the other speakers?' and I got the answer that said 577 and 674, and I wrote back and said, 'Who were 577 and 674?' and I was told they are very good speakers and very pleasant fellows, and I said, 'More details!' However, what happened is this, and I will tell you the truth, as far as this fellow here, Tony Osborne on my left, who is a lovely man —I only met him tonight—as far as he is concerned, they fed into the computer the nationalities, the characteristics of the various nationalities of our visitors. They fed the information in about the Australians; they fed the information in about the English, the Scottish, the Welsh, the Irish, the Malaysians, the Japanese, the Indonesians and so forth—all of them—and said who would be the best man to speak, to reply to the toast 'The Visitors'. The computer came up very quickly and said, 'An Irishman who has kissed the Blarney stone.' Then they said, 'Who will that be?', and the computer said, 'A chap called William Anthony Osborne', and here he is on my left. He is a good man and comes from a place called Naas. I said to him, 'Where is Naas?', and he said, 'It is on the 52nd parallel latitude north.' I said, 'It is an astounding thing because you actually at Naas are living on top of the bottom of New Zealand. If you were in the Southern Hemisphere you would be living on the bottom of New Zealand at Campbell Island, because Campbell Island is on the bottom of New Zealand and is on 52° latitude south.' So he really is a New Zealander.



Ronald D Woolf

Mr R S V Simpson

This fellow Osborne made two conditions when he accepted the toast. He wrote to the President and said, 'I will accept this invitation to speak, but first I must have much brandy before I speak.' (I have seen to that, because I have been drinking orangeade and letting him drink my brandy, so he is in good shape.) 'The other condition is that the audience must be mellow.' So if you are not mellow for heaven's sake drink up, because this chap is an Irishman and that is his condition for speaking. He likes the two R's—rugby and racing.

My friend 674 down the other end is a New Zealander, and we fed the information about the New Zealanders, other than the Welling-

ton District Law Society practitioners, into the computer. All the qualifications of all you men here were fed in, and the computer was asked, 'Who do you think we should have?' The computer said, 'We must have a Far Downer'. And if you don't know what a Far Downer is, a Far Downer is a man who comes—and it is all Irish to me—a Far Downer is a man who comes from Northern Ireland, and the fact is that 674 is Brian McClelland from Christchurch and his forbears were Far Downers—they came from Northern Ireland—it is all Irish to me. You would think a Far Downer would be a South Islander, and he is a South Downer—and would be a Far Downer. So here we have Brian McClelland replying for the New Zealand visitors and he comes from the city of Christchurch, that lovely city with the town hall, two cathedrals and Hagley Park.

"Then it came to the selection of the man who is proposing this toast, and the members of the Wellington District Law Society fed in all the information about the members, their qualifications and so on, and the information said he must be able to tell about six stories—the Lord Chancellor told about eight. What happened was this. The computer erred, or the programmer erred, and the words 'sex stories' got into it. Immediately out popped my name, and the reason why my name popped out is that for four years I was Chairman of the Indecent Publications Tribunal. For four years I was steeped in sex, and that word sex was mixed up for six. For four years I steeped myself in reading pornographic, lustful novels. For four years as Chairman of that Publications Tribunal dealing with indecency, dealing with lust, dealing with cruelty, dealing with violence—dealing with sex—dealing with all those things, and furthermore, not only reading pornographic literature, but listening to gramophone records. I had to listen to bawdy songs I used to sing when I was a student at university. I let that record through. And then, last but not least, my father was a very strict man. In fact he was a lawyer, and he said you will never have a comic in my home, and when we slipped one in he would burn it. For four years I have been reading comics on sex, violence, lust and cruelty.

"So that is the reason I am here, because of a grave error. 'To err is human, to forgive divine'; but I don't forgive that bloody computer.'

"Anyway I have this task of proposing this toast to visitors, which I am delighted to do. I propose this toast on behalf of the members of the Wellington District Law Society, which comprises members from the Wellington Metropolitan area and the Wairarapa. When you go to the Wairarapa you go over the Rimutakas where there are signs 'Beware of wind'. Nowhere else have I seen 'Beware of wind'. I have seen 'Beware of the dog', but not 'Beware of wind'. The Wairarapa is a lovely farming area, but I am disappointed that the weather has let us down for this conference; that there is no wind. After all, it is bad luck, because on 150 days of the year in Wellington we have gusts up to 40 mph; 30 days in the year we have gusts up to 60 mph; and what have we got now?—nothing. We have been let down and we have even got the House of Parliament in session.

"Anyway, on behalf of the District Law Society I am proposing the toast to the visitors, and they comprise the overseas visitors who have come from so far to this country, and we are so delighted to have them here. I think this is a lovely country, and Tony Osborne thinks it is lovely. It has lovely pastoral lands, and when we reflect we have three million people. And for each New Zealander there are 20 sheep, two cattle, two fowls and one-sixth of a pig. Six babies are born each hour in New Zealand, and each baby inherits 20 sheep, two cows, two fowls and one-sixth of a pig.

"Then in proposing the toast to overseas visitors we have that old chestnut about Aucklanders, and I wasn't going to say it, but I will because I saw Mr Foote, the President of Queensland, speaking to the President of Auckland, and he is 651. They were talking together about a constitutional issue and I know what it is. They don't know that I know, but I know what it is—that Queensland wants to secede from Australia and Auckland wants to secede from New Zealand—it is the Queen city and it wants its own queen. They want to secede together, therefore they were discussing constitutional issues.

"Then we have another marvellous group, a group I like tremendously, and they are 45° south. There is Cromwell, Queenstown and Pukeuri, which is just north of Oamaru. Then we go through to Dunedin, which is the Gaelic word for Edinburgh, through to Invercargill and right down to Campbell Island. All that is 45° south and why it is so special these days is that they make whisky. In 1848 the barque *John Wickliffe* left either London or Scotland and brought immigrants of Scottish descent to Dunedin, to Otago, and they brought with

them a recipe, a marvellous recipe, a secret recipe, and they preserved it for years, as these Judges and Magistrates know, by distilling 'Hokonui'. 'Hokonui' is a lovely whisky which is illegal; it has a skull and crossbones on the bottle. For generations these marvellous Scottish people from 45° south have preserved this recipe, making whisky out of the lovely waters of the South Island. Now there is going to be import control on whisky, I think that these friends from Dunedin have got something, and they are my friends. They are 'The Visitors', plus the rest.

"Let me mention another group of visitors, the Australians—our cobbers. They like to call us their cousins, but I don't think our relationship is quite as close as that. We are very fortunate indeed, if I may say so, that the legislation of passports and identification cards has not been passed yet or we may not have had so many of them over here for this conference. Australia is a beautiful country. In the burning heart of Australia it is really beautiful—Ayers Rock and all round there. It is a great country and they have some great men, and they have had three lawyers in politics of great distinction, Robert Menzies, Gough Whitlam and Bob Hawke. Bob Hawke is a great unionist, and he was on the committee of one of the industrial unions and the general secretary became sick and went to hospital. A telegram came from the committee to the sick secretary, 'By 19 votes to 18 votes we wish you a speedy recovery'.

"Anyway, our leaders have been discussing the balance of trade with Australia, and I hope it will become a better balance and the definition of a well-balanced Australian is one with a chip on both shoulders. We love them all, we welcome them and they are our brothers.

"I must refer to the Englishmen, and I must refer to the President of the Law Council of Wales, Mr Singleton. There is something serious—this is not an occasion for serious speeches—but want to strike a serious note about the UK at the moment, and I want to give some advice. The tragedy is that the MCC were thrashed by the Australians in the last series of test matches, and the advice I would give is that they ban women from going into battle with the English cricket team. The players took their wives with them into battle. Do you know what—those wives were rushed into the cricketers for 21 days during the course of that tour. You could well imagine when these fellows were batting, and they wondered how much ration they had left and how their concentration must have been really broken. My advice is that Mr Singleton should take back that they should not be allowed to take their wives into battle with the Australians, and the other advice I give is their bowlers must become fast—and the only way to beat the Australian fast bowlers is to give them a better pill than what the Australians have.

"Well, we have Canadians here. We are delighted; they have all been welcomed. We have the President of the Fiji Law Society; we are delighted to have all these representatives; the representative of the Japanese bar with whom we have a close relationship. We have two things in common with the Japanese —earthquakes and a lovely mountain.

"I welcome you all and I am going to ask you to stand and charge your glasses and drink the toast."

Replies

MR BRIAN MCCLELLAND: "Mr Chairman, My Lord Chancellor, Your Honour the Chief Justice, distinguished guests, ladies and gentlemen: I learned that. I asked Maurice O'Brien what I had to say. But let me say that in my long life I have addressed a number of unlikely looking juries, but all I can say in self-defence is I had no right of challenge tonight. I have never seen a tougher bunch. I only hope you have enjoyed the dinner as much as I have, so you will bear with me.

"When I was first told that I was to reply on behalf of the New Zealand visitors I naturally thought it was because of my good looks and natural charm and humour, and I thought perhaps tonight was, in the modern idiom, to be the 'eloquent and castle' night—and then I thought. I had a word with the Chief Justice, because being at the top table you can't hear what anyone else says. This is the nearest I will ever get to the Court of Appeal and it is a great encouragement really. You can't hear a word of what anyone else says, so you follow very well and I am going to nod off very soon. Then I thought, surely if there is going to be a reply by the visitors to Wellington the obvious person to reply on behalf of the Wellington visitors is one of the resident Judges, because they so seldom come here, but apparently, according to the rules, that is not allowed. They are all in Wild's Flying Circus, and there was no resident Judge here long enough to be asked if he could. And if he could the boss would say no he couldn't, so that was taken care of.

So then it became, to me at least, something of a personal dilemma. 'Why me?' And as I have said, I thought of the obvious reason, but perhaps that is not right. So then I thought, let's have a look at this letter directed to me because there used to be some old world charm and courtly grace in New Zealand. Not any more. You simply get a letter directing you to reply on behalf of the visitors. Then I saw who signed it. There was O'Brien, there was Shanahan, there was McGrath, and the person who is going to follow me is the President of the Irish Bar Association. So it became obvious even to my slow thinking that they had to have an Irishman. Maurice Casey was out, because after his remarks at the Bar dinner, Ballantynes wouldn't hire him a suit. So it then became either Kevin Ryan or myself. Apparently there was trouble with television, and Maurice O'Brien, in his dual capacity as President of the NZBC or whatever he is, said he would not release him tonight. After all, you have to have some North Island barrister on TV every night, so they had to fall back on the deep South, and that was me. So I am proud to be able to speak on behalf of the poor South Island, which in this day and age really only know you North Islanders by your visits on the television news, and let's face it, day after day we are told how the solicitor, Mr So and So, thinks he has a case, his counsel does too, and next week we will see a thrilling instalment of the life history of one of the North Island barristers.

"You know really, Lord Chancellor, if I might say so with respect, you are very fortunate to be here tonight yourself. This is true. O'Brien, Shanahan and McGrath decided their first pick would be Lord Devlin, until they discovered he was not in fact the father of Bernadette, and you will notice tonight when you had your fish there was no 'Paisley' sauce.

"But, you know, they are a very impartial bunch, because I understand there was almost a draw between myself and Kevin Ryan, and so they asked Barry O'Regan to be the impartial judge, and for reasons best known to himself, which I will ask him to put in writing later and I will frame, he decided it was to be me.

"To visitors to New Zealand it must seem a little odd when you come here you find our Chief Justice is called 'Wild', our Solicitor-General is called 'Savage'. We have amongst our Judiciary (and I am allowed to say this because Mr Castle told me I could—I am allowed to say this, the Judges are our friends, tonight, not ever more but tonight I am) Mr Justice Beattie, Roper, Speight, and (if that is not enough) who should our Secretary for Justice be but Orr G. And if the rumour is correct, and we all know at the Bar who is going to be our next appointment, we are going



Ronald D Woolf

Mr Brian McClelland

to have, if I am not mistaken, our own Judge Jeffries before long. That must strike overseas visitors at least as being somewhat unusual. It is an odd way of selecting judicial preferment; it was not always so. I am old enough to remember the days when we thought we were going to get a permanent Court of Appeal. This was really something in those days. It was like the new Canterbury Supreme Court. It was going to happen. We were going to have people really appointed permanently to the Court of Appeal. The trouble was they built—and overseas people, please go and see our Court of Appeal. It is something worth seeing in Wellington—a Courtroom with a ceiling of 5 ft 1 in. Sir Richard won't mind me saying this because it was before his time, otherwise he wouldn't have got the job; but we were faced

with this little tiny Court, 5 ft 1 in high, no air, no windows, no nothing, and on the top table tonight for the last time ever, I can assure you—so what could we do.

Now there was dear old Sir Kenneth Gresson. He was about 5 ft. There was Sir Alfred North, 4 ft 11 in, but who was to be the third? In those days Lance Tompkins was not on the Bench. He became a very good half-back later, but at that stage there was no third for the middle row. Who was to be third? And for the first time ever, and it has never happened before or since, I don't suppose it will ever again (you short fellows don't get ideas of grandeur) they had to find someone who would not be required to get into the Court of Appeal on all fours. In those days, and I am going back a few years, that was considered important. So for the first time ever they appointed—they will never do it again I am sad to say. I thought my chance had come but I am a little too tall—for the first time ever they appointed, straight from the Bar, Sir Timothy Cleary, who was 5 ft 1 in. So for the first time this lavish Court of Appeal—go and see it, you will be amazed—was opened and there straight through, Sir Kenneth, Sir Alfred and Sir Timothy—upright! Well, they were a pretty good front row. Some of them did better than others but, nevertheless, there they were. We had Lance Tompkins at halfback (a bit slow on the wings some of us thought) but there was always Sir Francis Adams as fullback.

My Lord Chancellor, you as a Welshman will understand that it is terribly important to build your team, and we were proud of them as they swung out on occasions such as this with the band playing and so on. There was our front row, little chunky men with a quality halfback, a fullback who was always fullback, but he had his qualities too, but shorter lineout forwards.

Now we have Quilliam J and Roper J—as lineout forwards tremendous, and we have got the Chief Justice, who need I say, plays at centre.

"Now, of course, we have a new Court of Appeal going up, I hope a little more swiftly than the Canterbury Courts will—they were started in 1937—but, nevertheless, it will happen, not in my lifetime. So, you short fellows, don't get ideas of grandeur—there is room for us all, I hope. I am trying to shrink, but height isn't now really the sole deciding factor. After all, New Zealand is known for its ability to change and innovate change in the law. You only have to ask Sir Owen Woodhouse. He will tell you about that. Now we have a pretty good team. Some of you as selectors, as we all are, have this or that selection, but it doesn't really matter now. We can have the more normal size people if we can only get a Court of Appeal to hold them, and perhaps now the idea of a permanent Court of Appeal is changed, I wouldn't know, but at least we cannot say now XYZ you are too tall; you cannot make it. We can say *you* can do it for a week. *You* can do it for a week, and if *you* come back from Dunedin, *you* can do it for a week. Have you ever heard John White speak recently? He speaks broad Scots because he has been in Dunedin for so long.

"As a visitor to Wellington I would say, you Wellington practitioners don't know what advantages you have. Here you have the most terrifying airport in the world. Flying in, if you are lucky, it is blowing from the north so you fly over the *Wahine* wreck. If you are unlucky, it is blowing from the south—you go over that awful graveyard, and then turn in and come on to the tarmac. Just imagine (Wellington people don't understand this)—you are sitting there in the plane and you are wanting an adjournment with the Chief Justice, and you are lurching and swaying all round the sky. Is it better simply not to land at Rongotai? Or should you land and say to the Chief Justice, 'My plane is dead?' Or alternatively, as you pitch and toss in the air over Rongotai you suddenly remember you are in front of Sir Alec Haslam and you have forgotten to put on your black shoes. That is a *real* problem for the out-of-Wellington visitors, I can assure you.

"When I was told to make the speech I thought I had better, after all these years, see what Wellington is all about, so I was interested to hear the little I could from Dick Simpson. He was complaining about the signposts in Wellington, and I agree entirely. So here I am. I was asked to speak and I don't really know very much about the Wellington Province. So I drove on New Zealand Day up to Napier, and I thought I will take in the beauty of the Wellington Province—no signposts. The only signpost I saw was one which said 'Bust Bridge', but other than that there was nothing. I got over this extraordinary hill you have got up there, and as Dick said, it said 'Beware of wind'. What a fatuous sign in Wellington. What do you do? Do you locals have an anchor in your car? Do you have a parachute? What do *you* do? 'Beware of wind'—I ask you! So I thought when I come back I will go and ask your President, Mr Maurice O'Brien. So I went to try and find him. Not

unnaturally he is in the McCarthy Building. However I found him there and it simply said 'M J O'Brien'. No 'Barrister', no 'QC', but underneath it had 'Dry Riser'. Apparently that is something he has recently acquired, but that is the sort of sign I found. I got to Napier and there it said 'Beware of low-flying aircraft'. Again, no clue to the unwary of what you *do* with the low-flying aircraft. So really, it doesn't help us much. We feel like Dad and Dave when we come to Wellington, and really, please could you arrange with somebody in control—could you give us a few clues as to what we do when we have wind or see a low-flying aircraft?

"I am getting old and I can remember dear old Len Leary, who is almost my age now. And I thought, tonight we have got to keep up with the times a bit. We can't drag our feet. Somebody told me the other day that 40 percent of our practitioners are under 30, and that frightens me stiff. But you have to try and keep up, and I had to look at some exam. papers the other day and there it was, the question of rape, and that is something that I have a little knowledge of from the dim and distant past. The answer was, 'before the Crown can succeed, you need two witnesses, both present at the same time, who will sign their names'.

"In the last 12 months in this country we have had a somewhat alarming performance. Mr Justice Speight I know, and probably some of the others share this view, thinks that Judges really should not be bothered with anything other than piracy and treason. They are all too clever and too busy to be bothered with anything short of that. So we turned on our own treason trial under the Official Secrets Act or something like that, just to show he was right. Of course he always is. Before he could start he had to get a certificate from Dr Finlay, who I understand if the Government gets back in November, will become the first Lord Tannochbrae. After that I think I am going to be the next Attorney-General, but don't you worry about that. Anyway, we all know that the head of our security police is Brigadier Gilbert. That is common knowledge. And despite the way Mr Justice Beattie is glaring at me, I want to tell you who his assistant is, or was. I think you ought to know this, because Mr Justice Beattie, I am sure, won't make a martyr of me. But you see I would not have known this except I happen to have an office in the building in which the secret police are stationed in Christchurch, and as I went past their secret door I heard them singing, and they were singing, 'We'll run them in, we'll run them in'. Having given you that clue it is quite obvious—Gilbert's assistant is Sullivan.

"How fitting it is in a country like ours which has the widow of a Prime Minister, paid for and escorted to the funeral service by a television comic, that we should have our security police run by Gilbert and Sullivan.

"I must wander on and I am finishing now, but to those of you (and I am speaking now to the young people)—to those of you who have done economics in your law degrees, and there will be some, and as a result want to save the remaining milk in your bottles, don't despair. I understand there is a new sort of bag which has been invented which will prevent the little bit of milk in your bottles from spilling over. It will stay upright and won't spill. And for your edification the name of that new bag is a 'sutchel'. To those of you who are as old-fashioned as I am, you can carry on carrying your back in your billy.

"Now just if I may on a more serious note say quite sincerely (and I mean this as an outsider to Wellington, 'outsider' in the sense I am terrified of flying into it and I never win when I get here), we all from outside enjoy you Wellington practitioners, every one of you. To Maurice O'Brien particularly, your President, who is known to us all as a kind, delightful man. He says what he means and thinks—let me give you one example. Not very long ago I had a job from an oil company and I spoke to Maurice and he said, 'I wondered how the hell you got that job, but on reflection I think I know the answer. You are usually three sheiks in the wind.'

"To Maurice, who is the most sincere, delightful person we all know, we say thank you. To Lester Castle, the New Zealand President, who I understand after this conference is going to change the spelling of his name and become an historic place, again I say, on behalf of you all, thank you very much. It is a delight always to come to Wellington—once you get on the tarmac. We all have friends here, you are all delightful, and thank you so very much from us all for making us so welcome."

MR OSBORNE: "This is 557 reporting from this end of the top table after quite an evening. You heard the Chairman say earlier that my condition of speaking was that there should be liberal quantities of brandy and port served. As far as I can see I have got the main section of the brandy and port, so at five past twelve it is not fair that I should keep anyone here

too long. My duty is an easy and pleasant one. It is simply to respond to the toast which has been proposed on behalf of the overseas guests present in Wellington for this conference. I know I speak on behalf of many distinguished guests—many, indeed all of whom are more distinguished than I am; but it is indeed a privilege and pleasure, and I might say unique, for me to speak for and on behalf of the Lord Chancellor and Mr Singleton, the President of the Law Society, and this is particularly true for an Irishman. From our part of the world we have a representation from Wales, a representation from England, and from Ireland. You may wonder why there is no Scotsman present. The reason is a simple one—at the moment all the Scottish rugby men are up and down Murrayfield, preparing for the visit to New Zealand next month, in the hope that we will redeem part of the glory we lost in the All Blacks tour of last year, and mind you, I think they may prove their point.

"The decision by our Society to send someone to New Zealand came about by reason of the fact that we had received an invitation quoting names like O'Brien, Shanahan, McGrath, Casey, O'Connor, and many more, and it was decided it was about time we came out to New Zealand to see if these gentlemen were 'autentic'.

"Having spent one very pleasant evening with Mr Justice O'Regan, I can assure you, either they are all genuine, or they have spent the last two months reading everything published in our country. I have heard more about all the old kings of Ireland and people I have never heard about from his Honour over there, and may I say that I have had the pleasure of listening to them and hearing something which I cannot claim, that they are the direct descendants of Saint Patrick.

"Seriously for a moment, there is no real need for me to say that our decision to travel to New Zealand—to us it is a very long journey—and the decision of all your overseas guests to come here to your conference, has been more than worth while. The excellence of your hospitality is legendary, but the excellence of your hospitality has exceeded all expectations. That in itself is one very good reason for coming here. I have enjoyed many occasions, and I can truthfully say that I have enjoyed the last few days in Wellington, and for that reason I thank Mr O'Brien and all the people who have worked so hard to make a success of the functions we have had before this evening, the function this evening, and the functions we will enjoy in the next few days.

"Everyone of us sometimes speaks of the common law, but however deep the common law might be for the majority of us, it has not had all that happy an existence; and on the way out I was reading Mr Justice Megarry,



Ronald D Woolf

Mr W A Osborne (Ireland)

which contains all those delightful gems of legal wit, and contains so much of the basic jurisprudence that we all know so little about, but he relates a case that was heard by Mr Justice Moore many years ago. It was a case relating to indecent assault. I do not know how common that sort of prosecution is in New Zealand—I hope it is not too common—but at this particular trial the defendant decided to defend himself. In the course of the cross-examination of the unfortunate girl who was involved and who had gone to the accused's orchard and had stolen apples, the accused posed the following questions and received the following answers:

" 'I caught you picking apples from my trees in the orchard, didn't I? Yes, sir. That wasn't the first time I caught you picking apples, was it? No, sir. When I caught you before I told you what I would do to you if I caught you

again, didn't I? Yes, sir. And that is exactly what I did to you when I caught you the next time? Yes, sir.' His Honour, feeling that justice should not only be done but should be seen to be done, decided he should warn the accused, which he did do, by saying, 'Now, my man, I want to give you a serious caution. Don't go on telling girls that you find in your orchard that you will do the sort of thing that you were seen to do, because if you do, you will soon have no apples.'

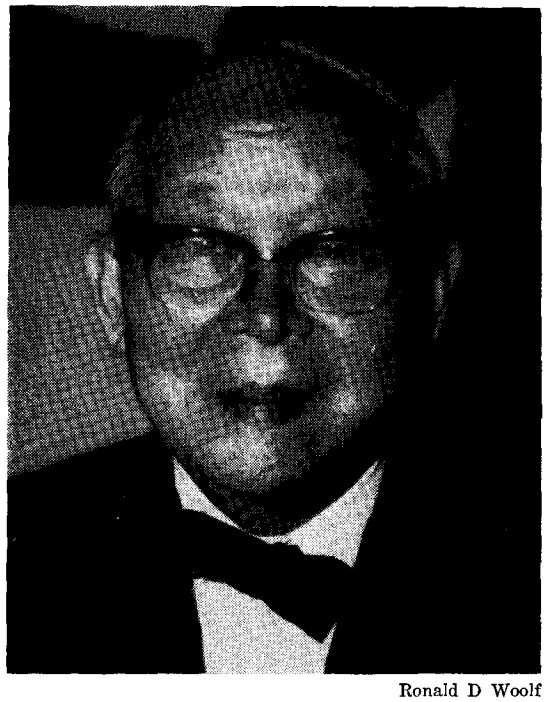
"I see that here this evening you have many distinguished and honoured guests. Speaking on behalf of distinguished guests reminds me of something I read recently in one of our law journals. It related to a case which was being heard in County Cork. It was late in the sessions, and Friday evening, and the Judge, who was in charge for the entire week, was very conscious of the fact that unless he caught the 7.15 train back to Dublin he would miss the attributes of his own home for the night. The accused was charged with stealing hens from a poultry farm, and having heard the case for the prosecution and the case for the defence, the Judge turned to the jury and said, 'Gentlemen of the jury, it is late and we are all tired. Could I say just this, that if I were a hen, and the defendant were around. I would roost high.'

"There are a number of people here this evening who roost reasonably high, but what part of the poultry farm I am not sure. They may be just the ordinary chicks, they may be of the male fraternity, but I hope they have enjoyed themselves as I have.

"It simply remains to say that my task has been an easy one; your hospitality has exceeded my expectations, which reminds me of a comment made by the late Brendan Behan, that Irishman whose drinking habits were reasonably well known, and who, in reply to a query from a reporter, 'What are your drinking habits, Mr Behan?', replied, 'Quite simple. I drink twice a day. When I am t'irsty, and when I am not.' While I am not afflicted with the problem of the late Brendan Behan, if I continue to accept the hospitality—and I am sure my fellow guests feel likewise—we may well return with the affliction, because when we say 'No', apparently the reply should be, 'When I am thirsty and when I am not.'

"This morning the Chancellor paid a tribute to our association, for which I am grateful. There are many people here this evening who have come to Wellington for what is a most useful conference—a conference where we can meet each other, which from the point of view of law is important, and from the point of view of contact between people is equally important, probably more so, and on behalf of all the guests I would like to express our appreciation of the excellent hospitality which has come out of your concern for our welfare, and on that note I ask you to charge your glasses to drink a toast to the New Zealand Law Society."

FROM JAPAN



Ronald D Woolf

Dr Nabuo Naritomi, representing the Japan Federation of Bar Associations, a life member of the International Bar Association and an honorary member of the American Bar Association. Dr Naritomi extended an invitation to attend the LAWASIA conference to be held in Tokyo next September.

THE LADIES' RECEPTION



Ronald D Woolf



Ronald D Woolf

Pictured at the Ladies' Reception are (left) Mr Graeme Dowling and Mr Brian Carmody, President of the NZ Academy of Fine Arts, with Mrs L J Castle; (right) Mrs F C Arulanandom (Malaysia) with the Chairwoman of the Ladies' Committee, Mrs M J O'Brien.

While practitioners attended the dinner on Friday night, their ladies viewed the Graeme Dowling Collection of Original Graphics. The exhibition was presented by the NZ Academy of Fine Arts in conjunction with the NZ Law Society.

Four hundred and eight women attended. While the idea of so many women en masse may not appeal to some, it would have been inhospitable for the conference organisers not to arrange some entertainment while the men were otherwise occupied. And this showing was a most happy choice.

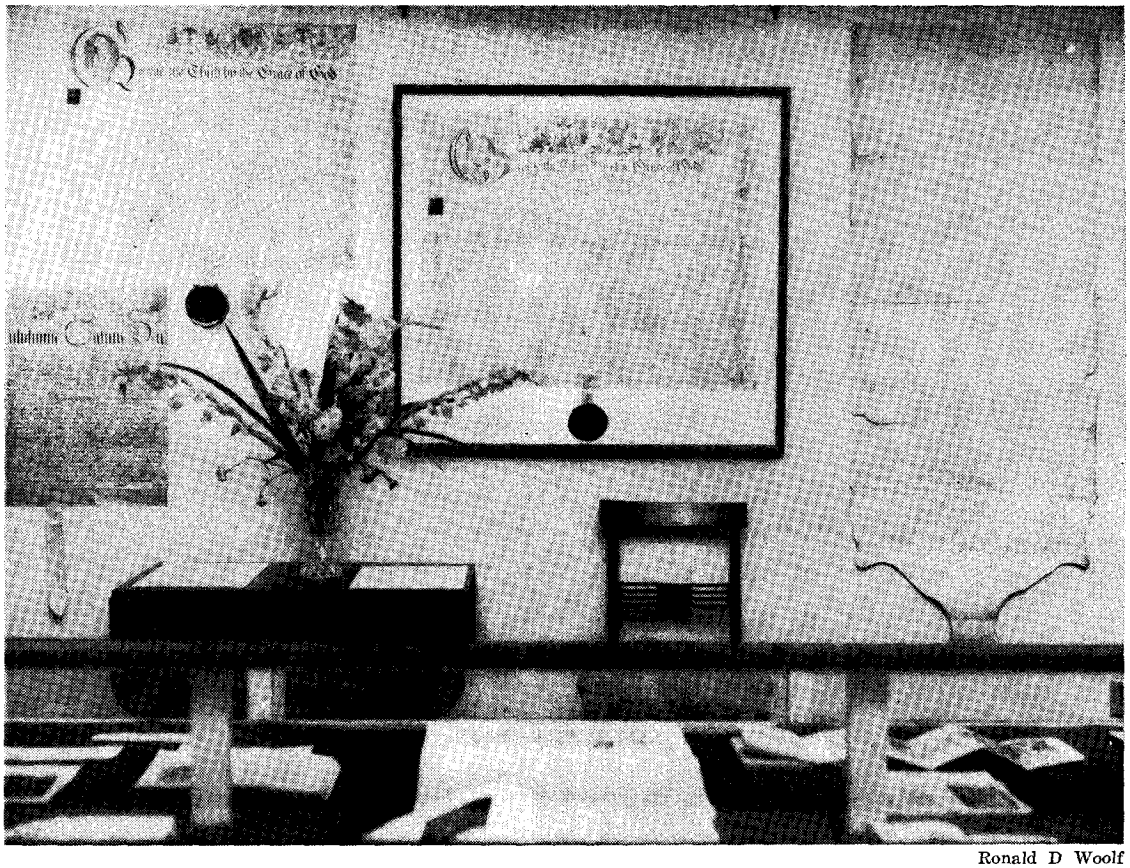
Mr Dowling is a well known Wellington fine art collector and dealer and chose the collection of contemporary European graphics during a recent visit to Europe. A wide range of modern graphic design was covered in the collection. Superb modern framing, also imported, complemented each work. Law Society visitors had the first viewing and opportunity to buy. Many did.

Prices ranged from $58 for an Alistair Grant etching to $395 each for five Victor Vasarely signed silk screens. One of the exhibition's advertised highlights the Salvador Dali etching, "King of Aragon", found guarded favour, while the Australian Sydney Nolan's screen print, "Kelly II, 1973", one of his famous Ned Kelly series sold quickly.

A NZ Symphony Orchestra Quartet provided the background music, but unfortunately their melodious sounds were at times lost among the animated conversation of so many.

The champagne supper was provided by well known restaurateuse, Madam Louis. The champagne was superb, and this, together with the excellent exhibition, ensured a most pleasant evening—MDT.

THE JURISTS AT TURNBULL



Ronald D Woolf

Pictured is part of the special exhibition mounted at the Alexander Turnbull Library for the duration of the Conference.

Throughout the conference the Alexander Turnbull Library mounted a special exhibition, with large plastic panels suspended from the ceiling to dramatically display legal documents ranging from the 16th to the 19th century. Most were in Latin and of English origin, but of special New Zealand interest were Edward Gibbon Wakefield's marriage settlement of 1818, various early land deeds and the actual Treaty of Waitangi documents.

Also exhibited were colourful examples of the work of George Cruickshank (1792-1878), the political caricaturist, social satirist, ardent advocate of temperance, and illustrator of such books as Dickens' *Sketches of Boz* (1836) and *Oliver Twist* (1837).

This was the attractive setting for a sherry party given by the New Zealand Section of the International Commission of Jurists, attended by some 200 members and guests.

MR BISSON: "It is my pleasure to welcome you here tonight on behalf of the International Commission of Jurists. Our President, the Rt Hon the Chief Justice, Sir Richard Wild, has been able to spare only a few minutes with us tonight, and has asked me to apologise for his early departure to another engagement. On his behalf, as well as my own and that of the council, I welcome you here tonight, and hope you enjoy this function.

"It is a pleasure to welcome those who are members of the ICJ, because we wanted you to have an opportunity to meet together. We also welcome those who are not yet members of the ICJ, because we want you to have another happy memory of the Wellington Conference, and we hope that what I have to say shortly to you about the International Commission will arouse your interest in it.

"I am particularly grateful to the Alexander Turnbull Library for allowing us to use the library as the venue for the sherry party. The Chief Librarian, Mr Traue, will speak to you shortly on the work of the library, and on behalf of the International Commission I thank you for the use of your attractive premises and for the work you and your staff have done in presenting this interesting display. We have enjoyed it very much indeed.

"I also thank the New Zealand Law Society for allowing us to include this function in the programme for the conference, and also for the team from Wellington, particularly the secretary, Douglas White, for all he has done in making the arrangements for this function, and we have a strong team of law students who are volunteer workers behind the bar.

"The International Commission of Jurists, since its inception in Berlin in 1952, has been seeking to represent the conscience of lawyers throughout the world, fighting for the promotion of human rights through the rule of law, and that is as brief a way as I can put it for the purpose of this meeting.

"The headquarters are in Geneva, and it has built up an unparalleled reputation for impartiality and fearless independence.

"An indication of this can be drawn from the fact that the Secretary-General from 1963-1970, Mr Sean McBride, was awarded the Nobel Prize for Peace, not only for his own contribution, but as a reflection of the work he was doing for the International Commission of Jurists.

"The British section of "JUSTICE" was formed by the Lord Chancellor, who has graced us with his presence at the conference, and who has been able to spare a little time to attend this function. We are delighted to have him here and perhaps he may add a word or two later.

"I was pointing out that as the founder of the British Section of the International Commission, you have indicated in that way the worth of this Commission, because we know that anything with which you have been associated is something we hold in the highest regard and respect.

"Governments have been the principal offenders in suppressing human rights. We hear of extreme cases overseas of arrest and detention without trial, of the torture of suspects, of secret trials by military tribunals, of sentence of death and prolonged imprisonment for political suspects if not convicted. All these add up to government by intimidation and the rule of force. Therefore it is left to non-governmental organisations such as the International Commission to bring pressure to bear and to do what they can to restrain governments, and hence this Commission has played its part in that direction, and its success—although it has not always been successful—has earned for it a consultative status with the United Nations, the Council of Europe and other international bodies.

"Outside of that field of work it has played a part in other directions. For example, it was one of the first organisations to take up and spread the idea of the Ombudsman, and we are very proud to have as one of our Vice-Presidents, Sir Guy Powles, the Ombudsman in New Zealand. We are very proud, too, to have with us tonight Mr Smithers, who has recently been appointed the Ombudsman of New South Wales. We congratulate him on this appointment.

"As for the New Zealand section, it goes back 13 years and of its present activities the first one I would like to mention is in the field of protection of privacy. There was an international conference known as the Nordic Conference, at which international jurists were asked by the Commission to examine the scope of the right to privacy, and they said that the right to privacy is of paramount importance to human happiness, and should be recognised as a fundamental right of mankind. It is with that thought in mind that our section has worked over the last two or three years in producing two Bills dealing with different aspects of the protection of one's right of privacy, and we have introduced these Bills to successive Ministers of Justice, so far without legislation having been enacted. More recently we have made two submissions at the invitation of the Minister of State Services, for legislation being now drafted, with relation to the Law Enforcement Data system being set up in Wanganui, and in our submissions we have advanced all possible safeguards that we have yet been able to devise for the protection of the individual, because we view with grave concern computerisation of information related to private individuals in case that information might be wrong in any respect, might be used without their knowledge, and by people who should not have access to it.

"I am standing here with the Treaty of Waitangi at my back, and another thing we did recently was to examine the Treaty of Waitangi Bill. This sets up a tribunal to consider

claims by any Maori who feels he has been prejudicially affected by any Act or policy or action of the Crown, where there is an inconsistency with the principles of the Treaty. This tribunal, if it finds that such a complaint is well founded, can recommend to the Crown that compensation be paid or that the prejudice be removed, if it is not too late for it to be done.

"We have made submissions which commended the motive, in the interests of the Maori people, but we took the opportunity to go further and proposed that all New Zealanders should have an executive means of safeguarding their civil rights, and to this end we proposed a commission of civil rights. This would review the whole field of civil rights and also have the power of publicising and educating the public as to their civil rights, and would supplement the various individual tribunals which have a limited jurisdiction, such as the Race Relations Conciliator, the Ombudsman, the Waitangi Tribunal (if it is set up) or the Privacy Commissioner, and creates that safeguard as well.

"Another matter under our consideration is whether there should be a written constitution or Bill of Rights for New Zealand. That we have managed in the past without one, does not prove that there is no need for one now. It could also mean that there would be no beneficial advantage from a written constitution or Bill of Rights.

"With the discussion that arose out of Judge Gesell's paper, we feel that we in New Zealand very often have recourse to Parliament for redress of our grievances, rather than to the Courts, as is done in the United States. There are obvious dangers and limitations in looking to Parliament for redress of these grievances. I feel we should have remedies in the Courts, and if we had a written constitution or Bill of Rights this would create a new jurisdiction for the Courts to play their part in the protection of our interests which goes to the protection of our institutions and our fundamental human rights.

"Mr Singleton, President of the Law Society, quoted from the address of Lord Justice Jarman, and it seemed that he made this very point in his paper, so our section will be giving consideration to this particular point.

"We have with us tonight his Honour Sir Arthur Woodhouse, one of our Vice-Presidents, who in an address to the Society, made a number of suggestions. One in particular was that human rights goes to human dignity, and that the procession of petitioner and witness on undefended divorce cases, is a humiliating, if not degrading, experience for them to participate in, and so the section has taken up this matter with the thought that undefended divorces should be granted without appearance in Court and be granted by affidavit evidence, and we hope that something of this sort will emerge in that direction.

"I would like to go on in some detail, but I do not wish to detain you very much longer. The work of the Commission is a task above all for lawyers. The Commission appeals to every lawyer who cares about human rights, as all lawyers should, I feel, and show their support for the principle of the rule of law and the work of the Commission by becoming a member of this section. The Secretary will be pleased to supply you with application forms. I know that Lawasia got in with a hard sell yesterday, and we may not have quite the same 'bait' which Mr McClelland offered, but we shall certainly give you a warm welcome, if what I have said interests you in the work of the Commission, and in particular of the New Zealand Section.

"I have very much pleasure in welcoming the Lord Chancellor and inviting him to grace us with a few words."

THE LORD CHANCELLOR: "It is a great pleasure for me to be present and to see what an admirably flourishing body the Justice Section in New Zealand manifestly is. I was involved in the early creation of the International Commission of Jurists in Berlin, very nearly 30 years ago, with Shallcrass and Foster and some American friends and others, and it has become a very significant institution for the protection of the individual and of human rights. It is really a strange thing that it seems to have affronted and offended almost every government, to say nothing of the eastern world, and it has shown no discrimination in its choice of target on any basis on the nature of the flag or colour or religion of the offender. As you were saying, Mr Chairman, it really is a grim thought that when Voltaire was writing centuries ago about the 'pending end of torture' as an instrument of policy, that probably torture has been prevailing in the last 25 years more than at any other time in human history.

"I was privileged to go out to South Africa for the treason trial for the International Com-

mission of Jurists and to write one of the early reports, and I also attended on behalf of the Commission the Sharpsville massacre inquiry. One of the services rendered by the Commission is the sending out of individuals to sensitive spots where their very presence can achieve so much. I remember going out to Poland to Potsdam and one felt that the presence of the representatives of the International Commission there made all the difference to the outcome of the trials. It is a sort of international presence and is a very valuable thing to the lonely men who fight the battle of freedom where freedom is in a state of oppression, so I am delighted, therefore, that the Commission itself prospers. The present General Secretary is an old friend of mine, Niall McDermot, who was in the Government. If I may depart for one moment from seriousness to an incident in which Niall was involved: during the opening of the House of Commons proceedings each day, the Speaker goes in procession, and as he reaches the central lobby, everyone present responds to the police inspector's call, 'Off hats, strangers'. Everyone takes off his hat. As Niall was going away, another MP shouted to him, 'Niall!', and all the American tourists fell to their knees.

"Coming to the functions of our branch of JUSTICE, it has a remarkable record for the production of brilliant reports. One of the secrets of the success, and I am sure it applies here as well as in the United Kingdom, of the branches of the Commission in our various countries, is that it is all-party. I was the treasurer of JUSTICE for an interminable length of time—and I hope you have a more successful extractor of financial support in your branch than I was able to be—but this is a very important feature of the existence, and the influence indeed, of JUSTICE. I know that the reports JUSTICE has produced, at least some of them, have had an immediate legislative effect in our country, for instance, in regard to contempt of Court. It was as a result of a JUSTICE report that the long-standing right to appeal against a conviction and sentence for contempt came into being. Its supporters have had a very considerable influence over very conservative governments from time to time, which is, of course, an excellent thing. I say that even though at the moment I am perhaps a poacher turned gatekeeper, I do not know for what length of time; in the old days to get rid of a Lord Chancellor you had to send knights with swords, but in these days his name at the top of the ballot paper or a telephone call from No 10 Downing Street is a more humane method. I have total confidence in the value of the work of JUSTICE, and I recapitulate the brilliant reports which have been produced by it; it is manned by leading members of the Bar, and by solicitors of distinction, and by academics. Some of the work that we do is intervention in individual cases. That is always a bit difficult, and I don't know whether you do that. One needs to exercise very great discretion in that field, otherwise you get into all sorts of trouble, but its impact in one or two cases where the issue of identification has been crucial, and it is in that field that I suspect the greatest miscarriages of justice have occurred and do occur and are likely to occur; and there, in one or two remarkable cases, with the intervention of our secretary, Tom Sergant, who is a persistent pursuer in this field, we have had great successes. Thank you."

MR J E TRAUE (Chief Librarian): "I am honoured to accept your invitation to speak briefly about the Turnbull Library. The Turnbull Library has a long and honoured tradition of mixing at its social gatherings appropriate quantities of mental and alcoholic stimulation. I am pleased that the International Commission of Jurists is upholding that tradition. I am informed by the organisers that the alcoholic stimulation this evening will be long and traditional; your chairman and our distinguished guest Lord Elwyn-Jones have provided us with mental stimulation adequate for most audiences, but I wish to plead precedent. The traditional Turnbull mixture is one of speeches to two of alcohol; may I beg your leave to redress the imbalance brought about by the more robust sherry being offered tonight, and address you for six minutes.

"The Alexander Turnbull Library belongs to a species rare in these Southern Oceans: it is a genuine, fully-fledged research library. The natural habitat of the research library is at the centres of civilised societies. We may not have the magnificent plumage of the British Museum, the Library of Congress, the Lenin State Library, the Bibliotheque Nationale, or the fine feathers of Harvard, Yale or the Huntingdon, but we have enough feathers not only to be clothed but to look respectable in international company. They, the international crowd, may murmur when confronted with our collection of the literature relating to New Zealand, our

kiwi feathers as it were, 'How quaint', but our research collections on the Pacific and John Milton have earned their respect.

"Research libraries are created wherever a society has a body of records from the past and that society shares a belief that the experience of the past is relevant for the present and the future. A research library nourishes scholars, writers, all those who are concerned with transmitting the lessons of the past. It was the home of J C Beaglehole as it was the home of Elsdon Best and before that of the scholars who used Alexander Turnbull's private library. A research library like Turnbull, a society's expression of its belief in the value of the records of the past as a guide to future action, is clearly an appropriate institution to accommodate a body of lawyers, and the young men who chose this library as a venue for tonight showed a nice sense of occasion.

"They were probably unaware of how much the legal profession has contributed to this library. Heinrich von Haast gave the scientific papers of his father, Sir Julius, to the library and £1,000 to the Alexander Turnbull Endowment Trust. The Trust has recently discharged part of its debt to Heinrich by the purchase in London last year for £5,000 of the original 12 John Gully watercolours commissioned by Sir Julius in 1862 to illustrate his important paper on glaciation in the Southern Alps. Other lawyers have given books, manuscripts, money and their skills to the library. Daniel Riddiford was a foundation member of the National Library Trustees Committee for Turnbull and served that Committee and the Endowment Trust from 1966 to his death last year. I hope to announce in the near future the donation to the Library of the papers of several members of your profession who have attained considerable eminence in public affairs.

"In recent years a significant development has been the deposit of certain categories of non-current, non-sensitive records of legal firms in the library under carefully negotiated conditions of access. I propose to encourage this development and would welcome the opportunity to discuss the matter with other legal firms. Most of you will find it difficult to appreciate the substantial research value of old legal records. You will have to take my word for it as an expert witness. I have seen the ecstasy on the face of a local historian shown a sketch map drawn a hundred years ago for a property transaction long since forgotten. Details available nowhere else on the location of houses, roads, bridges; the details of boundaries and names of property owners; the names of localities, streams, hills, which have long since disappeared from the record. From a fat and dull but meticulously detailed trustee file an economic or social historian can extract so much information on the economic climate and the structure of domestic life.

"Alexander Turnbull said that he hoped that his books and manuscripts would 'assist future searchers after truth'. As lawyers well know truth is a plant of paradise and the seeds have never flourished beyond the walls. A great deal of evidence will be required to enable scholars to grapple with the truth and some of this evidence will exist in files in lawyers' offices. May I suggest that with over 100 years of history behind us lawyers could well consider whether their obligation to the client could not in certain circumstances be tempered with a recognition of their obligation to the historical record. I recognise that I am putting my head in the lion's mouth making such a statement before the New Zealand Section of the International Commission of Jurists. To raise such matters at a time when the right to privacy is under so much discussion may well be tactically unwise, but the matter is, when so many old legal records are being destroyed, a matter of such importance, that I am bound to raise it with you.

"When I compare librarians with lawyers, yours seems to be a profession favoured by the gods. We are stuck forever in the trough of detail but your minds of necessity must encompass the abstract and the concrete, the heights of principle as well as the cosy corners of precedent and rote. I have endeavoured to give you some nourishment for the higher centres and now propose to turn to the safer levels of the statute law. The list of statutes relating to the Turnbull Library that I am bound to draw to your attention is brief. The National Library Act 1965, s 26 (2) defines the purposes of the National Library, of which the Turnbull Library is a part, as charitable purposes. The Alexander Turnbull Library Endowment Trust deed of 1934 sets up a charitable trust recognised as such by the Charitable Trusts Act 1957. Both bodies are thus charitable bodies for the purposes of the Estate and Gift Duties Act 1968, and that very important s 6 of the Land and Income Tax Amendment Act 1972, "Relief for charitable purposes". If you require a rule of thumb, may I suggest 'Library materials (manuscripts, books, pictures) to the library; cheques to the Alexander Turnbull Library Endowment Trust'."

LAWASIA LUNCHEON



Ronald D Woolf

LAWASIA stalwarts (from left) Mr Justice Arulanandom; Mrs L F Beck; Mrs F C Arulanandom, and luncheon organiser Mr L F Beck.

LAWASIA held a luncheon at the James Cook Hotel on Saturday 5 April, which was as successful as it was well-attended.

MR B MCCLELLAND: "Today we are honoured to have some of the original founders of LAWASIA; we have, in particular, Mr Justice (Fred) Arulanandom, hereinafter called Fred; he joined LAWASIA and became a Judge. We have Sir John Kerr, who is now his Excellency the Governor-General of Australia; we have Sir Denis Blundell, who is now his Excellency the Governor-General of New Zealand, so there is something in joining LAWASIA. I myself am one of the foundation members. I am pleased to be able to tell you after last night I have been appointed Resident Magistrate in the Chatham Islands. I have the privilege of asking the President of LAWASIA, Mr Soelistio of Indonesia, to talk. We have a representative of Japan, Dr Naritomi, who is the host of the LAWASIA Conference in Tokyo in September of this year, then Fred is to say a few words; that will go on until probably 5 o'clock!"

MR SOELISTIO (President of LAWASIA): "Mr Chairman, Lord Chancellor, distinguished guests, my dear fellow LAWASIA members, ladies and gentlemen: It is always refreshing to receive new evidence of the foresight and the wisdom of lawyers, and particularly to be convinced of their ability to actually achieve what politicians and statesmen so often only talk about. That is why many forms of comprehensive political and economic grouping within all regions have been suggested from time to time. It has been the lawyers, I am proud to say, who have created a strong regional body for their profession, the Association of which I have the honour to be the president was formed in Canberra in 1966 at a meeting of lawyers of 18 regional countries. Its objects include the maintenance of the rule of law, the advancement of legal education and the promotion of content among the lawyers within this region. Amongst the distinguished delegates to the 1966 conference were the present Governor-General of New Zealand, Sir Denis Blundell and my predecessor as President of LAWASIA, the Governor of Australia Sir John Kerr. It seems to me that such a precedent exists that governors-general are appointed from among the leaders of LAWASIA, and I wonder if that is true the Chairman will some day appoint me as the Governor of New Zealand as well.

"LAWASIA now has over 2,000 individual members and 46 member organisations in 26

countries right throughout the region from Iran in the west, Japan in the east and New Zealand and Fiji in the south. It is governed by a council of representatives from member countries and the present executive comprises of councillors from Indonesia, Japan, Singapore and Korea. New Zealand's distinguished council members are today's chairman, Mr Brian McClelland, who as well as being the winner of the international award of the year 1975 for—you may guess—frank after-dinner speaking, and you have to remember also your distinguished member, Mr David Tompkins QC.

"LAWASIA has held three major conferences of members in Kuala Lumpur in 1968, Manila in 1971 and Jakarta in 1973. At the next conference I hope there will be a large number of New Zealand lawyers and it will be held in Tokyo in September this year. LAWASIA produces the only law journal serving the needs of lawyers throughout the full region, and carries out research, certain projects, appeals, credit and security in legal systems of member countries and family law.

"Two of LAWASIA's most recent contributions deserve special attention. First, at the 1973 Jakarta meeting LAWASIA Council created a Judicial Section, membership of which is limited to those persons holding judicial office to enable them as Judges to discuss amongst themselves problems concerned with the administration of justice. The first meeting of this section will take place at the September conference in Tokyo. Secondly, LAWASIA created a legal aid standing committee to exercise on a continuing basis the provision of legal aid in member countries, and this is such an important and in several countries such a delicate issue, that it was felt necessary to have a permanent committee capable of reviewing the development and carrying out the studies and making specific recommendations in this vital area. For the future, I hope LAWASIA will be able to establish a LAWASIA scholarship system for post-graduate law students, and is considering the creation of a LAWASIA Foundation to finance its expanding activities.

"Mr Chairman, the region in which we live is faced with numerous and serious problems the magnitude of which I think we are just beginning to realise. A strong regional association of lawyers concerned with the maintenance of the rule of law, and in particular with the political question of the independence of the judiciary is making a worthwhile contribution to the solving of this problem.

"The more people who are acquainted with other legal systems than their own the greater tolerance will arise amongst us and eventually the greater similarity within the systems will result in ultimately strengthening our cause for



Ronald D Woolf

Mr S H Soelistio, President of LAWASIA

stable peace and our call for better trade relations in Asia and the West Pacific, and with your support, I am sure, and your initiative it might prove not to be an impossible dream at all.

"I wish to thank the New Zealand Law Society for the attention it has accorded LAWASIA through this conference. I am very grateful for this and I look forward to strong continued support of LAWASIA by members of the legal profession in New Zealand. Such support is, of course, consistent with New Zealand's active interest in and contribution to the development of this region. I wish to thank members of the legal profession in New Zealand bers of the LAWASIA Committee of the New Zealand Law Society for arranging this excellent luncheon, and I am sure the task has not been an easy one, but they have carried it out with great efficiency.

"Last but not least, I would like to express my sincere gratitude for the hospitality I have

received during my stay here from your distinguished President, Mr Castle, the organising committee of your splendid conference and from the many, many friends I have acquired during this conference. New Zealand with its beautiful landscape and its wonderful people is a place in the sun which I will never, never forget. Thank you very much."

MR MCCLELLAND: "May I express my personal gratitude, particularly to Lance Beck and his wife who have done so much; David Tompkins and Peter Penlington have also done an enormous amount. It is not easy to run a function like this with people who are scattered all over the country, but they have done a magnificent job and I am personally very grateful to them. I should also mention how delighted we are to have Ken Smithers and his wife here. I omitted to mention him as one of the 'success people' of LAWASIA. He was one of the foundation members and he is now the Ombudsman of NSW, so do join, won't you!"

DR NARITOMI: "I deem it a great honour to be allowed to address to you a few words as a former President of the Japan Federation of Bar Associations.

"I should like to begin by expressing my cordial gratitude for the invitation to our Japan Bar Association from your Law Society. It is a great pleasure for me to offer congratulations on your 16th Triennial Conference, which is quite a success and enjoyable.

"Secondly, we welcome all of you to the LAWASIA Conference to be held this September, 16-19 at Tokyo as foreign guests who presumably are curious to come and find the unfamiliar dreamland situated at the opposite side of the world from your country. We are preparing in Japan such a charming LAWASIA Conference in the Conference Room, Imperial Hotel.

"Now here I should like to relax for a while to recover from the fatigue of earthly toil and moil. Thank you."

MR JUSTICE ARULANANDOM: "Mr Chairman, ladies and gentlemen, I rise with some trepidation on this occasion because windy Wellington has given me a touch of laryngitis, but I understood from my learned friend Lord Elwyn-Jones that I am not alone in this predicament because apparently Chapman Tripp also imported laryngitis—Judge Gesell also has laryngitis. Again we are in very good company, because as some of you might know, Caesar, after the sacking of Carthage, arrived at the palace of Cleopatra and knocked on the door and wanted to be let in, and some minion said, 'Hold on, sir', and went into the boudoir and came back and said, 'The Queen cannot see you, sir.' Caesar said, 'Go back and tell the Queen it is Caesar.' The minion went back again with a hurrying and scurrying of feet and he came back and said, 'My lord, the Queen cannot see you. She is in bed with the laryngitis,' and Caesar said, 'To hell, tell her the Emperor of Rome is here. She can't be in bed with a bloody Greek.'

"However, I said I rose with trepidation; one was my laryngitis, the second was my feeling of inadequacy. The ladies were not privileged to be at the dinner last night, but those of us who were there had gems of wit and wisdom showered on us, and after listening to those speeches last night no man can feel adequate when he is asked to speak. And I am reminded of another story . . .

"This was of a very wealthy New Zealander who wanted to have the best equipment for skin diving, so he went to this shop and said, 'Give me the works; money is no problem.' So he was equipped with fins here, fins there, fans there, fans here. So, fully equipped after having spent about $5,000, he went in and started diving, feeling very proud that he owned the whole domain under the ocean where the lesser people without equipment could not go. So there he was at about 100 ft swimming away happily, and he saw one cheeky fellow without any equipment also there. He said, 'This is funny. I have spent $5,000 to come 100 ft below, and this cheeky fellow is also here.' So he went down further to 150 ft, but this cheeky fellow followed him. He was getting very exasperated, very frustrated and went down another 50 ft, to 200 ft—this fellow followed him. He had special writing equipment and wrote, 'I spent $5,000 to get to this level. You spent nothing. Why are you diving at this level?' and the fellow wrote back, 'I'm not diving. I'm drowning!'

"In spite of my trepidation, in spite of my feeling of inadequacy, I get strength from seeing the faces of my friends in New Zealand. They give me the moral and spiritual and psychological strength to speak in New Zealand. Their happy faces, the smiles I see, will give me courage to meet the worst enemies in the world.

"I think of Rotorua with a bit of nostalgia. By that I am not only remembering those nocturnal escapades we had in the thermal swimming pools, but Rotorua has been meaningful to Malaysia in the context of LAWASIA. One of the purposes of LAWASIA is to enable lawyers to understand what is going on in other parts of the world and perhaps by that knowledge to benefit—an extended benefit. I, on behalf—well, I cannot say I am on behalf of the Bar Council because I am no longer a member of the Bar—but when I came to Rotorua I discovered one thing. We Malaysians, as a result of the colonial tradition, were great international lawyers; we belonged to every international organisation, but we never did anything at home. We never had a national law conference. But when I was at your Centennial Law Conference I realised how purposeful your national law conference was. I studied the mechanics and machinery of your organisation of this triennial law conference, so when I went back I sold the idea to the Bar Council—and we have one up on you because we are biennial not triennial.

"The idea was sold in 1970, the first conference held in 1971, the second in 1973 and the third this year in 1975. The national law conference, which would not have been thought of if I had not been fortunate enough to be invited to your law conference in 1969. So there I lay a tribute to the New Zealand Law Society, because by way of LAWASIA you have made a solid and viable contribution to the progress of law in Malaysia, because now the law conference in Malaysia has become permanent. It will be a biennial law conference and it will not stop there. We have to put on record that the thanks must be due to the New Zealand Law Society.

"For me to say thank you to Mr Soelistio, the President of LAWASIA would be presumptuous, but as he has told you, the two new developments in LAWASIA are legal aid and the Judicial Section. As far as legal aid is concerned, Malaysia is very happy we have introduced it. All the lawyers are happy and are making more money.

"The judicial section—I hope you will all be kind to us Judges—we lead a very lonely life. I hope you will keep it in mind when you organise special functions for the Judges.

"Whatever may be said for the serious purposes of LAWASIA, we cannot escape from the facts that LAWASIA makes friends. White, brown, yellow or black, we become friends through LAWASIA. Our conferences give us the venue to meet, to mix. Here I am sitting with Lance Beck as if he is my long lost brother. I meet lots of friends—David Tompkins, Brian McClelland. Where would we have had the opportunity to meet and make these friends if it was not for LAWASIA? So if nothing else justifies it, the good will, the friendship, the understanding among various people of the world, even those who unfortunately live in the frozen fingers of New Zealand, and not in the tropics as we do. It is not our fault; we are just born there. LAWASIA gives us the opportunity to meet, shake hands and have a cup of good cheer. If nothing else justifies LAWASIA I would say this opportunity to make friends is justification enough.

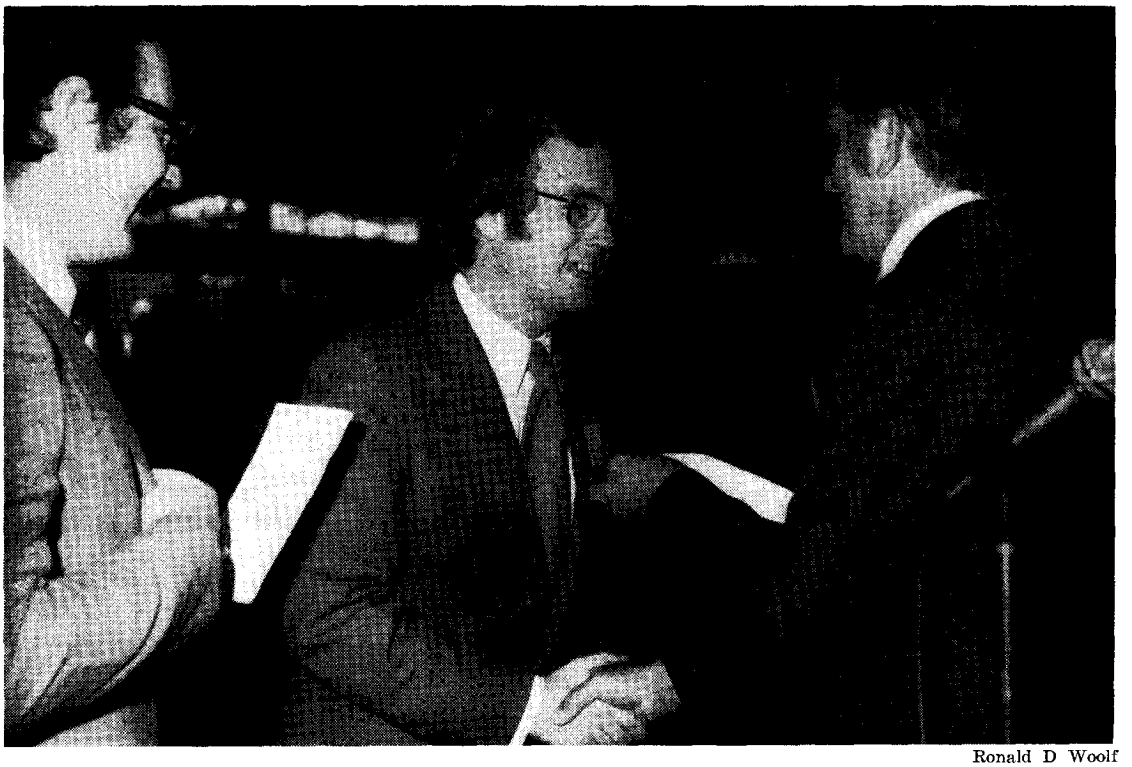
"LAWASIA does lots of serious things and Mr Soelistio has told you, but we had a secret Gallup poll about the behaviour of lawyers from LAWASIA. This is very secret, but I am only sharing it with you all because we are friends here—a Gallup poll was done about lawyers who belong to LAWASIA and the question was, 'What did you do immediately after sex?' and the answers were garnered in. Five percent said, 'Immediately after sex I have a smoke'; the next 5 percent said, 'Immediately after sex I have a drink'; the next 5 percent said, 'Immediately after sex I read a book'. The remaining 85 percent said, 'We go home'.

"The next thing we want is for you to join me to endorse my statement that we want the 1977 conference in New Zealand. Don't be frightened. We will come. LAWASIA needs you. May I invite you all to join me in expressing thanks to Mr Soelistio for his address upon LAWASIA?"

MR MCCLELLAND: "Fred, I can imagine you with the judicial wig and gown on, but thank God you have done for us what you did at Rotorua. You have made us aware at least of *some* of the things that LAWASIA stands for. We still remember you learning the mechanics of our conference in Rotorua, and we are glad you have passed on those mechanics to the Malaysians.

"Ladies and gentlemen, thank you very much for coming. We are all very grateful you did turn out in such numbers. We do hope some at least of you will take the opportunity of joining LAWASIA, and we hope a number will go to the Tokyo conference in September, because there are a lot more friends there. Mr Soelistio is there, and you will love them all."

THE CLOSING CEREMONY



Ronald D Woolf

Joint Conference Secretaries, Mr F M Shanahan (left) and Mr J. J. McGrath, receiving presentations from NZ Law Society Vice-President Mr R B G Mahon.

The Closing Ceremony was held in the Overseas Passenger Terminal, where the conference had opened informally five days before.

MR O'BRIEN: "We have almost reached the end of the conference. I thank you all for coming, and hope you have thoroughly enjoyed yourselves. I wish you Godspeed on your journey home."

MR MAHON: "At the commencement of the conference we were reminded of what Sir Francis Bacon said, that we were the debtors to our profession. It is my pleasant duty this afternoon to discharge a debt from the profession and from all those who have attended the conference to John McGrath and Michael Shanahan.

"Before I do so, I first of all say, and it is a pleasure to speak knowing that you have the unanimous support of everyone in the audience, that we are grateful personally, administratively and in every other way, for the tremendous effort that they have put in as adjutants, in conjunction with General O'Brien, to make the conference a success. I have attended quite a few conferences, as many of you have, and I do not know of any other conference that has been as well organised as the present one.

"Perhaps I could conclude by remembering with you all a passage which I read some years ago of Ernest Hemingway's *For Whom The Bell Tolls.* A general in charge of the attack, suddenly before the night, wonders whether he has done everything correctly, and envisages the infantry going out, the engineers having the bridges ready, the artillery, and the ammunition trucks, all the other paraphernalia and administration of war, and then he suddenly realises that he has already set in motion everything that has to be done for the morrow. John McGrath, Michael Shanahan and their able

general, did this for us before we came, so that if anything had gone wrong, or been incorrect, with 1500 people there was little that could have been done to correct it. Nothing needed to be corrected, and we are their debtors."

MR MCGRATH: "It is my understanding that the joint secretaries are recognised as 'most apparent' in assisting the Chairman of the Conference Committee and his members in organising a law conference. I say 'most apparent', because in this conference, in any event, we have been helped by a large, wonderful team.

"Before the last war, I understand it was practice to have only one young lawyer as an organising secretary of a law conference. The joint secretaryship started in 1947, and the then joint secretaries were the then Mr H R C Wild and the then Mr J C White. Speaking at the close of that function, Mr Justice White, as he now is, referred to the fact that what previously, before the war, had been done by one, was now being done by two. He said this was a modern trend. His Honour also said this had sprung from a strong desire of himself and our now Chief Justice, not on any account to do any overtime. As we are constantly reminded, overtime is now something they constantly live with.

"When Michael Shanahan and I, some months ago, first read those words, we were, if I may respectfully say so, very much impressed with the good sense of them. We spoke to Maurice O'Brien and managed to persuade him and his conference committee that it would be appropriate if the work traditionally done by the joint secretaries could be shared out by the appointment of 20 conveners, and we did, in fact, appoint as a conference committee 20 conveners to do everything the joint secretaries traditionally have done. They have taken care of accommodation right through to travel and tours, and if I may say so, have done a wonderful job.

"After assembling those 20 conveners, we still found there was an amount of work distasteful to us to be done, that of compiling lists—a list for every function—and as you know we brought in a computer, which took care of that, and we had nothing to do ourselves. Now you know, those of you who have been kind enough to observe, just why the joint secretaries look so relaxed and are enjoying themselves, and quite clearly have nothing else to do during this conference.

"There are one or two other people I would like to mention—above all our conference chairman, Mr Maurice O'Brien. Throughout the two and a half years we have been organising the conference, he has insisted that detail be observed to the utmost, and if this conference has been a success it is primarily due to his efforts and to his charge of the whole organisation.

"There are one or two others that I would like to mention. The first is Neil Thompson of Christchurch. He was one of the joint secretaries of the 15th Triennial Conference in Christchurch. He was a particular help to us, and of course, few things are harder to put up with than the irritation of a good example! But that was made easier for us, because Neil provided us not only with his time and consideration, but also a thick file of precedents for us to follow.

"We would also like to thank Miss Frances Parker, Secretary of the Wellington District Law Society, and her assistant, Mrs Troup, both of whom helped us tremendously.

"There are many other things I could say, Mr Chairman. However, as I look round all these people here who were at the ball last night, may I say your eyes keep interrupting me.

"I thank you, Mr Mahon, for your very kind words, and in conclusion, may I say that assisting with the 16th Triennial Conference has been a great pleasure to me and to my wife."

MR SHANAHAN: "It is a great pleasure to me today, at the conclusion of this the 16th conference of the parliament of lawyers, to enjoy the right of last reply. I have enjoyed this conference because I think all of you have enjoyed it too. The first conference of New Zealand lawyers was held 47 years ago almost to the day, when in 1928 that brave band of Canterbury practitioners joined together against the trepidation of a number of members of the profession to form the first conference of New Zealand practitioners. Indeed, it was thought to be a subversive effort, not only in parts of the South Island and by the Council of the New Zealand Law Society, but indeed by district societies throughout New Zealand.

"The organiser of that first conference, and indeed the first secretary, was a Mr W H Hunter, who did a fine job. Late registrations were received by telegraph; the dinner was supplanted in those days by a bridge evening. I am pleased to say we have not had the opportunity of serving you that way on this occasion. It was

at the conclusion of that very successful conference that the then President of the New Zealand Law Society, Mr K C Gray, removed the apprehension that the profession had been suffering under, that this was a subversive movement, and extended the wing of kindness to those practitioners, and said that henceforward this conference will be the conference of the New Zealand Law Society. Then was born the origins of our gathering here today, and then was born and conceived the secretariat which today has become the two-headed work horse of many previous conferences.

"This is an opportunity to extend a few words of thanks to a number of people who have served you well and have provided inspiration to John and I in our job as secretaries. First of all, I would like to thank the President of the New Zealand Law Society, Mr Lester Castle; his inspiration and his kindness and that of his wife, to both of us, his tolerance and encouragement, have been an inspiration to us, and I think to all of us here today and to those who have left.

"To my chairman, Mr O'Brien, kindly referred to as General O'Brien, I endorse what has been said. It was at the early hours of the morning, and indeed it became earlier and earlier, that the plan of attack was formed. As the conference approached it was not 7 o'clock that he was raising the joint secretaries from their beds, it was 6.45, or even earlier, and the only way of escape was an early rise. But we enjoyed it all, and Maurice's attention to minute detail has been the key to the success of the organisation of the conference. It has been a pleasure to work with him, and I hope I am going to continue to enjoy that pleasure when we get down to signing a few cheques. To Mary, his kind and loving wife, also thank you, for her inspiration and help also over that same period of time, and more latterly as chairwoman of that galaxy of talent, the ladies' committee.

"Thanks have already been conveyed by John to our conveners for doing such a superb job, and I think it would not be out of place to mention thanks that we all feel to Michael Houstoun, who so specially put himself out to come and join us here, and I think he rendered our hearts to heaven with that wonderful music.

"John and I would like to thank John Hicklin and our secretaries Helen Bradshaw and Anne Keogh for the sterling work they put in. Thank you."

MR G E BISSON: This is not the first time I have spoken at a closing function of a New Zealand Law Conference. The last time was at a conference in Napier in 1954 as a joint secretary, and there comes to mind a story which came out of that conference which I would like to tell you about, and only hope that nothing similar took place here. One of the delegates at the Napier conference, on arriving at his hotel—he was alone—saw a likely looking young woman in the foyer, so with a bit of inspiration on the spur of the moment he registered as 'Mr and Mrs'. His plan worked until he presented himself on his final day to get his account, which ran into several hundred dollars. He pointed out he had only been there four days, and they said, 'Yes, sir, but your wife was here six weeks before you!'

"It is my pleasure to express on behalf of you all a very sincere vote of thanks to the authors of the eight splendid papers which we had the pleasure of hearing, considering and discussing during the business sessions of the conference.

"I would like to mention the names of the authors of the papers, because they are well known to you: Mr Patterson, Mr McKay, Professor Palmer, Mr Ludbrook, Mr Holland, Professor Brookfield, Mr Justice Beattie, and Mr Justice Cooke.

"We have been wined and dined in a lavish style, but the real fare of the conference has been the business sessions. These sessions have been outstanding, I feel, because they had a blend of the technical with the topical, and gave rise to a lot of productive discussion. The papers were outstanding in quality and interest, and were masterpieces of scholarship in themselves. In addition, the authors contributed much by their introductions to the discussion and by the replies which they generously gave.

"I include in this vote of thanks the chairmen of each session, and congratulate them on their efficiency, and indeed, tact, in handling the situation in the limited time available.

"I also include in this vote of thanks the commentators for the fine contribution which they also made. The papers were selected by Mr Richardson and the conference committee, and I am sure you will congratulate them on their choice, and also in the arrangements made for them to be printed and circulated to us in advance, and the arrangements which were made for the actual commentaries for the discussions. I think these worked very well, although I would make one comment, that I

think if the paper is of a controversial nature, we need less in the way of commentary from chosen commentators, and more in audience participation, as opposed to the technical papers, where I think the skilled contribution of commentators is very valuable.

"The papers were challenging, stimulating, and instructive; but I think we should also make them productive, and I can assure you that the New Zealand Law Society will do the follow-up for you. If there are any of you who are a little disappointed that you could not make a greater contribution yourself, that could still be done, because you need only write to the Secretary of the New Zealand Law Society, or of your own motion, bring any matter you think fit forward through your District Law Society, and I know that any further contribution of that sort would be very much appreciated.

"So, I now have the pleasure of moving a very sincere and warm vote of thanks to the authors of those excellent papers, the chairmen and the commentators."

(The vote of thanks was carried by acclamation.)

MR SOMERVILLE (Canada): "It has fallen to my lot, happily, to say on behalf of your guests over the course of this conference—other than those from Australia—how delighted we have been with the reception we have received here. To make a true confession, Denise and I have fallen in love with New Zealand and New Zealanders, and I am sure from what I observe of the others on whose behalf I have the honour to speak, that the same may be said for them.

"This conference, from the opening session, where there was that absolutely superb breath-taking display of flowers, the like of which I have never seen, even coming from Canada, right through the piece, the organisation and the content of the meetings was excellent, the hospitality we received was absolutely overwhelming; I think all of the guests would want me to say your conference was marked by both elegance and style, and certainly I shall take back to Canada the warmest memories of the time I have spent here. I hope as many of you as possible will come to our shores, and if any of you happen to be in Canada at the end of August, we have a convention of a similar sort being held there, and I hope to inspire my confreres with following your good example, because you have a conference only every three years. I think that is an absolutely marvellous idea. We are stuck with one a year, and it is like hitting yourself on the head with a hammer, because you feel so good when you stop.

"In any event, we have all had a wonderful time, and I do so thank you for that, and to tell you that in our opinion this has been a great meeting."



Ronald D Woolf

Mr W L N Somerville QC (Canada)

MR O'LEARY (Australia): "I am grateful indeed for being allowed a couple of minutes in which to say thank you very much indeed from all the Australians who have attended this magnificent conference. As you know, all Australians love coming to New Zealand; we love making and re-making friends across the Tasman, and we have had a truly wonderful time here. I endorse every word that Bill Somerville has said about this conference. I have been to many conventions and conferences in this and other parts of the world, and I have not been to any conference anywhere where the standard of papers, the standard of discussion, comment, the speeches, have been higher than at this conference, and I am delighted to have this opportunity just to say thank you to you all.

"We are hoping to see some of you at our convention in Canberra in July, and it is only fair that we get some of our own back on you, entertainment-wise, and if our convention approaches anything like yours, we will be more than happy."

MR CASTLE: "I hope that throughout the last few days the names on the legal letterheads that we see so often have indeed become warm personalities, and that you have had the opportunity of developing each of the personalities at this conference. It is not for me to reiterate the thanks that have already been passed in so adequate a manner, but I am mindful, as Mr O'Brien said on Friday, which seems almost 10 years ago, that this was International Women's Year, and may I say how you ladies have graced this conference. We have all been delighted, and indeed, to quote Sir Thomas Lund, 'For myself I have been entranced at the way you have all looked each other over with microscopic carelessness'.

"In that context then, and with a good deal of nostalgia, I declare this 16th Triennial Conference of the New Zealand Law Society closed."

The gathering concluded with the singing of *Now is the Hour.*

THE BALL



Ronald D Woolf

The Ball was held in the Wellington Town Hall, which was decorated so spectacularly as to render it unrecognisable, even to local practitioners. The music from assorted bands and the gourmet supper made the event an altogether unforgettable occasion for the 1,300 guests. Pictured is Mr Bruce Slane, enjoying Mr Bruce Thorne's appraisal of Mr Doug Gerard's new hairstyle.

THE LORD CHANCELLOR'S FAREWELL

LORD CHANCELLOR: "Mr President, ladies and gentlemen: May I in turn express my regret at having to leave so soon, and my thanks for the wonderful hospitality and the reception I have received in this country. I was told in New York recently that they serve drinks between drinks, and my experience of the hospitality here is that you know of no such interval.

"It has been a great privilege to have read the papers for your conference and to have attended the vigorous debates you have had. This is no time to recapitulate any of the ground, but I could perhaps make one brief comment on the discussion about the juries. As you may have suspected I practised on the Welsh circuit and it used to be said on my circuit the juries of Wales are against crime, but they are not dogmatic about it.

"You know also of the famous Limerick Judge who, in the face of an unexpected acquittal, told the defendant, 'You leave the Court without a stain on your character, except you have been acquitted by a Limerick jury.'

"Let me say on this issue I am completely committed to the view that the juries are an essential palladium of our liberties and that history has shown their importance in safeguarding the rights of the individual, and I would certainly support nothing to diminish that basic principle.

"I want to conclude by saying it has emerged so clearly to me since I have been here of the great deal that we in the United Kingdom can learn from you. If there is any matter upon which we can be of any assistance to you or any material, reports and legislation we can provide, I shall be delighted to assist in any way to see that the material becomes available to you immediately.

"Thank you again for the most wonderful way you have received me."



Ronald D Woolf

Pictured arriving at the Ball are (from left): NZ Law Society Vice-President Mr B. L Stanley and Mrs Stanley, with the Law Society President, Mr E H T Singleton, and Mrs Singleton.

SPORTS PRIZEWINNERS

Bowls

Winning team in Triples tournament: R Morgan (Wellington), C A I Sanders (Auckland), G Joseph (Wellington).

Squash

Winner of Knock-out Championship: A S Fairbairn (Wellington).
Runner-up Championship: P J Hale (Wellington).
Winner of Plate: V R W Gray (Wellington).

Tennis

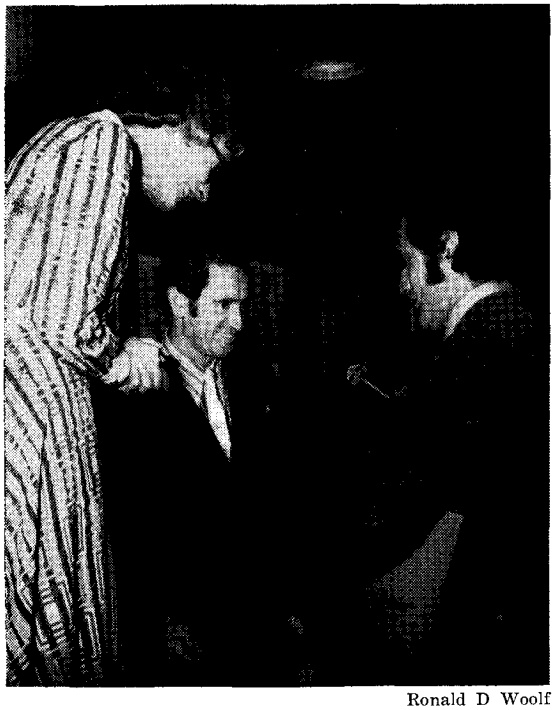
Winner Men's Tournament: R. D. Guy (Wellington).
Runner-up, Men's: J H Durkin (Wellington).
Winner, Ladies' Tournament: Mrs P Hanning Wellington).
Runner-up, Ladies': Mrs J Kerr (Wellington).

Golf

Joint Winners of Combined Stableford for *Law Journal* Cup (Presented by Butterworth & Co in 1929): J E Thomson (Sydney); J N Simpson (Wellington).
Runners-up: R A Armstrong (Wellington); R N Gillespie (Wellington).
Winner Single Stableford (Hutt): R R McLean (Wellington).
Runner-up: A Middleton (New Plymouth).
Winner Single Stableford (Heretaunga): M F Hobbs SM.
Runner-up: P K H Smyth (Wellington).

Ladies' Golf

Winner Single Stableford: Mrs F Holland (Christchurch).
Runner-up Single Stableford: Mrs J Wylie (Wellington).



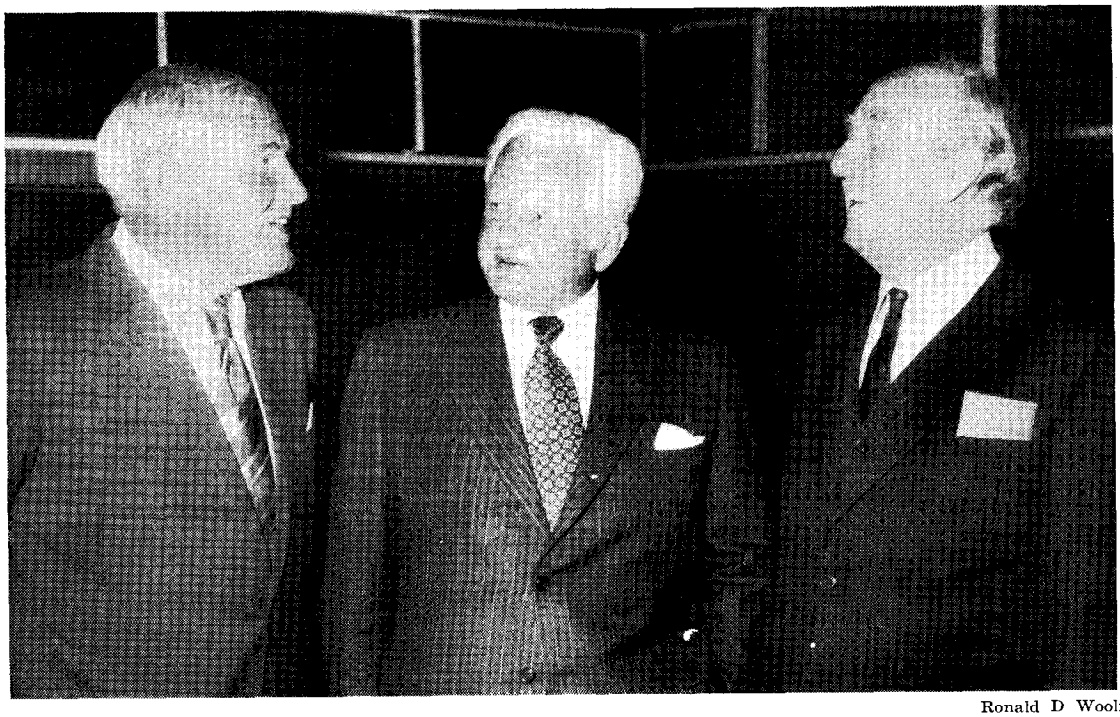
Ronald D Woolf

Mr Alf Fairbairn (right) receiving his prize from Mrs L J Castle and Mr Barry Boon.



Ronald D Woolf

Miss Farideh Namazie, Singapore Law Society



Ronald D Woolf

His Excellency Sir Denis Blundell, Judge Gerhard A Gesell and Lord Elwyn-Jones.



Ronald D Woolf

An elated Michael Houstoun acknowledges a standing ovation.



Ronald D Woolf

Mr Ken Mason SM (seated) commenting on Robert Ludbrook's paper.

LAWASIA'S INDONESIAN EMBASSY RECEPTION

An event which is almost certainly a first for a New Zealand Legal Conference took place at the White Heron Lodge—an ambassadorial reception. It was held on Sunday 6 April by the Indonesian Embassy to enable senior members of LAWASIA in New Zealand to meet their president, Mr Soelistio, SH of Jakarta. The Ambassador himself (Mr Soetikno) was temporarily in Jakarta but the Charge d'Affaires (Mr Supangat) and his charming wife were delightful hosts; they were assisted by members of the Embassy staff. The hospitality was more than generous and those privileged to be invited greatly enjoyed it.

The gathering was graced by the presence of the Chief Justice, who was able to find time to attend the reception between his Judges' meeting in the afternoon and his dinner for their Honours in the evening. Several other New Zealand Judges were able to attend, as was the ever popular Mr Justice Arulanandom from Malaysia.

Other guests included Mr Brian McClelland of Christchurch, one of the three vice-presidents of LAWASIA and members of the LAWASIA Committee of the New Zealand Law Society, Mr Lance Beck, the Liaison Officer between LAWASIA and the Embassy, and his Legal Executive, Mrs Barbara Uren who, by happy coincidence, is also secretary of the Wellington Branch of the New Zealand-Indonesian Association.

During the reception Mr McClelland presented to the Embassy, on behalf of all LAWASIA members, a finely carved piece of Celebean ebony. It combines depictions of the Garuda (Indonesia's national symbol) and the traditional Ramayana legend. It was suitably inscribed in both English and Indonesian.

The innovation of an Ambassadorial Reception (particularly by that of a member of LAWASIA) must do much to advance the cause of LAWASIA in New Zealand where it is, of course, already very strong.—LFB.

THE ROLL CALL

Distinguished Overseas Guests

The Right Honourable the Lord Elwyn-Jones, QC, Lord High Chancellor of Great Britain

Judge Gerhard A Gesell, United States District Judge for the District of Columbia, United States of America

The Honourable Mr Justice Mason, Judge of the High Court of Australia

The Honourable Sir Mostyn Hanger, Chief Justice of Queensland

The Honourable Mr Justice Arulanandom, Judge of the High Court of Malaysia

The Honourable Mr Justice Selby, Chief Judge, Family Division, Supreme Court of New South Wales

Mr S H Soelistio, Indonesia, President of Lawasia

Guests from Bar Associations and Law Societies

ENGLAND AND WALES

Mr E H T Singleton, President, The Law Society

CANADA

Mr W L N Somerville, QC, President Canadian Bar Association

FIJI

Hon K C Ramrakha, President, Fiji Law Society

IRELAND

Mr W A Osborne, President, Incorporated Law Society of Ireland



Ronald D Woolf

Hon Mr Justice Selby (New South Wales)



Ronald D Woolf

Mrs N Naritomi (Japan)



Ronald D Woolf

Hon K C Ramrakha (President, Fiji Law Society)



Ronald D Woolf

Mr & Mrs L J Castle

JAPAN

Dr Nabuo Naritomi, Past President Japan Federation of Bar Associations

AUSTRALIA

Mr K F O'Leary, President, The Law Council of Australia
Mr J J Neill, President, Law Society of Australian Capital Territory
Mr A H Loxton, President, Law Society of New South Wales
Mr J A Dawson, President, Law Institute of Victoria
Mr S C H Foote, President, Queensland Law Society
Mr G D Brown, President, Law Society of Tasmania
Mr A E Blanckensee, Vice-President, Law Society of Western Australia

SINGAPORE

Miss Farideh Namazie

New Zealand Judiciary

The Right Honourable Sir Richard Wild, Chief Justice
The Right Honourable Mr Justice Richmond, Judge of the Court of Appeal
The Right Honourable Mr Justice Woodhouse, Judge of the Court of Appeal

Hon Mr Justice Macarthur
Hon Mr Justice Perry
Hon Mr Justice Speight
Hon Mr Justice Roper
Hon Mr Justice White
Hon Mr Justice Beattie
Hon Mr Justice Quilliam
Hon Mr Justice McMullin
Hon Mr Justice Mahon
Hon Mr Justice Cooke

Hon Mr Justice O'Regan
Hon Mr Justice Chilwell
Hon Mr Justice Casey
Hon Mr Justice Somers

Mr F W Bremner, SM
Mr W F Brown, SM
Mr H J Evans, SM
Mr M F Hobbs, SM
Mr J E Millar, SM

Mr G P Monaghan, SM
Mr F G Paterson, SM
Mr J K Patterson, SM
Mr G J Seeman, SM
Mr D J Sullivan, SM
Mr P J Trapski, SM
Mr W J M Treadwell, SM
Mr J W P Watts, SM
Mr W M Willis, SM
Mr D B Wilson, SM

His Honour Chief Judge K. G. Scott, of the Maori Land Court
His Honour Judge E T J Durie, of the Maori Land Court

Distinguished New Zealand Guests

The Honourable Dr A M Finlay, QC, Attorney-General for New Zealand
Mr R C Savage, QC, Solicitor-General for New Zealand
Mr G S Orr, Secretary of Justice
The Right Honourable Sir Alexander Turner
The Honourable A. L. Tompkins
Sir Guy Powles, Ombudsman

Overseas Registrations

GREAT BRITAIN

Mr R N D Hamilton, Northwood, Middlesex
Mr David Owen (Private Secretary to the Lord Chancellor)

AUSTRALIA

A E Barkell, Sydney
I J Beder, Melbourne
R E A Brook, Brisbane
G D Brown, Hobart
N R Carson, Sydney
J S Catomore, Melbourne
D J Crossan, Canberra
P T Crouch, Brisbane
J A Dawson, Melbourne
P S Dean, Alice Springs
K S Edmunds, Canberra

K M L Emmerson, Melbourne
G B Ferrow, Sydney
A J Fisher, Melbourne
S C Foote, Brisbane
M L Foster, Sydney
E G Freeman, Perth
J H Gebbie, Perth
D H Geddes, Sydney
A F Genders, Adelaide
R A Green, Canberra
F J Hoffey, Sydney
J W Hudson, Tasmania
J P Kelly, Brisbane
W R Killin, Brisbane
G H Kirby, Brisbane
A E Knott, Brisbane
B S Lamrock, Penrith
F J Lillas, Burnie
A H Loxton, Sydney
J F Mant, Sydney
C P McCubbery, Brisbane
N R McDowell, Sydney
K F O'Leary, Canberra
F J Potter, Adelaide
M K A Rhodes, Moree
J C Richards, Melbourne
G H Roberts, Townsville
K Smithers, Sydney
W G Stainlay, Murwillumbah
G Sten, Sydney
F E L Stewart, Melbourne
G R Taylor, Sydney
K J Thompson, Melbourne
J E Thompson, Sydney
C J Thomson, Adelaide
Mrs K M Trevelyan
G I Walsh, Melbourne
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J W Hudson, Burnie
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Mr Foss Michael Shanahan

Mr F M Shanahan, one of the Joint Secretaries for the 16th Triennial Conference of the New Zealand Law Society, was born in Wellington in 1940. He was educated at St Patrick's College, Silverstream, and Victoria University of Wellington from which he graduated LLB. Mr Shanahan was Chairman of the Victoria University of Wellington Law Faculty Club in 1965 and 1966 and Chairman of the New Zealand Law Students' Association in 1966. Since 1967 he has been a partner in the firm of Rainey Collins Armour and Boock. Earlier this year he was elected to membership of the Council of the Wellington District Law Society having previously been Secretary of the Wellington Medico-Legal Society from 1969 to 1973. His previous experience in conference organisation included the position of Organising Secretary of the first New Zealand Medico-Legal Conference, held at Wairakei in 1969.

Mr J J McGrath

Mr J J McGrath, one of the Joint Secretaries for the 16th Triennial Conference of the New Zealand Law Society, was born in Wellington in 1945 and was educated at Wanganui Collegiate School and Victoria University of Wellington. He graduated LLB in 1967 and LLM in 1969. He was President of the Victoria University of Wellington Students' Association in 1966-67 and of the New Zealand University Students' Association in 1968. Between 1967 and 1969 he was a member of the Executive of the National Youth Council and a member of the National Development Council's Advisory Council on Educational Planning.

Since 1969 Mr McGrath has been a member of the Council of Victoria University of Wellington, elected by the Court of Convocation. He is a partner in the firm of McGrath, Robinson & Co which he joined in 1970. The senior partner is his father, Mr Denis McGrath, a former President of the New Zealand Law Society.

THE CONFERENCE IN RETROSPECT

By MR LESTER CASTLE, *President of the New Zealand Law Society (originally commissioned by* The Dominion*).*

New Zealanders, it is sometimes claimed, love conferences and conventions. Lawyers are no exception. Where they are able, a high proportion turn out for seminars to help them practise better. Typically, they attend for a Saturday or weekend, work hard on case studies or set problems, and play hard during the evening. When they gather once every three years for the New Zealand Law Society's Triennial Conference, one might expect a similar pattern. Even so, the 740 who attended and participated in the working sessions of the 16th Triennial Conference was indeed gratifying.

When one works 60 hours a week, there's always a temptation at a conference to play golf rather than talk work. Yet virtually all of those present, and many wives too, attended the business sessions throughout. Even after the practitioners' dinner that went on until well after midnight, there were about 1,000 people the following morning to hear Judge Gerhard A Gesell.

The subjects chosen for the conference—and the interest in them—demonstrate lawyers' concern for social issues and for shaping the law to meet social needs.

The conference brought together a wealth and diversity of experience. There were guests from some 10 overseas countries, including six overseas Judges and the presidents of 10 overseas law societies. Seventeen of New Zealand's 21 Supreme Court Judges were there. So were the Attorney-General, the Solicitor-General and

the Secretary for Justice. The Lord Chancellor or Great Britain, Lord Elwyn-Jones, came—only the third Lord Chancellor to visit New Zealand—and the president of LAWASIA, Mr S H Soelistio, of Indonesia.

Lord Elwyn-Jones pointed out that, in Britain, there is a permanent staff involved in legal research and law reform. We envy him. Surely we in New Zealand should no longer rely for research on the voluntary unpaid efforts of busy practitioners, senior public servants and members of law faculties. New Zealand is probably the only developed Western country so served. We need a full time permanently staffed research body—if not to replace our Law Reform Committees then certainly to support them. Canada and most of the Australian states as well as Britain are served by full time research lawyers. The New Zealand Law Society believes that the pervasiveness and influence of law in society warrants a much greater research effort than is now possible. To these views, the Lord Chancellor lent support.

Lord Elwyn-Jones also supported the establishment of neighbourhood law offices as extensions of legal advice bureaux, such as those run by lawyers voluntarily and free of charge in many of our cities. Neither goods laws nor good Courts are of any value if people do not have effective access to legal advice and legal remedies, he said. In this belief, the New Zealand Law Society has already commissioned a study of how a pilot neighbourhood law office might be established in the Auckland region.

At the conference many people other than the authors contributed information and criticism. Many people spoke from the floor—Judges, Magistrates, the Attorney-General and Minister of Justice, the Secretary for Justice, overseas guests and perhaps 100 New Zealand lawyers in private practice.

We all listened and learned. Some of us learned that Magistrates must understand the way minority groups think if they are to judge them well—and that lawyers who have clients from minority races must understand, too, if they are to represent them well. Similarly, it was made apparent that there are many traps for the unwary in land and property transfers.

Personally, I learned in discussion with presidents of Australian state law societies that a three-tier Court system now operating in all states except Tasmania is working well. The New Zealand Law Society has to date opposed the introduction of an intermediate Court between the Supreme Court and Magistrate's Court. In my view there is room for a close examination of the benefits and disadvantages of the Australian state three-tier system.

The learning is not yet over. Within the profession and elsewhere, there is on-going consideration of the topics. The substantial agreement reached by the session on dangerous products and the consumer, that a product safety commission should be established to protect the public, has attracted Government interest.

The New Zealand Law Society's council and executive committee are to consider edited transcripts of all the discussions. Many opinions, however were not heard because of limits on time—or for the good reason that some 2,500 lawyers did not attend the conference. Their views on key issues will be sought. I hope that the New Zealand Law Society and district law societies will foster workshop and small-group discussions on the papers. Matters of social and legal significance warrant the widest possible discussion within the legal profession.

In retrospect, I consider that the most rewarding feature of the conference has been the comments of many young lawyers that they have discussed mutual problems with others not previously met, and that they have been enthused with the concern engendered by the papers for the well-being of the community at large. I hope that this concern, which I know to be widespread, will ensure that the legal profession continues to safeguard the rights of the individual and the community that lawyers are educated to serve.

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The Ball was held in the Wellington Town Hall, which was decorated so spectacularly as to render it unrecognisable, even to local practitioners. The music from assorted bands and the gourmet supper made the event an altogether unforgettable occasion for the 1,300 guests. Pictured is Mr Bruce Slane, enjoying Mr Bruce Thorne's appraisal of Mr Doug Gerard's new hairstyle 572

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