The New Zealand
LAW JOURNAL

19 AUGUST 1975 No. 15

INTER ALIA

Contempt breeds contempt

Contempt of Court should properly fall within the purview of the committee to report on defamation, pertinent as it is as to what can be published and when. Indeed, the Phillimore Committee in Britain recently suggested that some contempt of Court proceedings could more appropriately be dealt with under the law of defamation.

Be that as it may, waiting for the report of the Committee cannot be allowed to delay legislative reversal of the recent decision of Mr Justice O'Regan in *R v Mihaka* (Current Law para 775) which held that there is no right of appeal in respect of a Magistrate's order for committal for contempt. There the appellant had been committed for "wilfully and without lawful excuse" disobeying an order of the Court in the course of a hearing. It was held that the finding of "contempt committed in the face of the Court" is not subject to appeal from either the Magistrate's Court or the Supreme Court, except that there is a right of appeal against sentence from the Supreme Court—but not from the Magistrate's Court.

Mr Justice O'Regan expressed difficulty in finding any reason why this should be so, and drew attention to the need for legislative amendment, at least to give a right of appeal against sentence.

Contempt in the face of the Court is, of course, a difficult matter as the Court is accuser, witness, finder of fact and imposer of sentence. These difficulties can be compounded by the circumstances in which an alleged contempt occurs, and by the consequences on the Bench of an accused's behaviour. That there is a wide area for misunderstanding is an understatement.

While contempt should preferably be dealt with at a later date and before a different Bench, this is not always practicable.

What is essential is a right to a dispassionate review. At present there is none.

Protecting passports

The New Zealand Section of the International Commission of Jurists has taken up the question of ss 3 and 4 of the Passports Act 1946 with the Minister of Internal Affairs.

Its Chairman, Mr G E Bisson, wrote that the Act vests in the Minister "an absolute and unfettered discretion" to issue, renew or cancel passports and suggested that New Zealand give a lead to a number of other countries by legislating for a right to a passport. He noted that both the International Convenant on Civil and Political Rights 1966 and the Fourth Protocol to the European Convention on Human Rights recognise the right to leave and to return to one's own country as a fundamental human right.

Emphasising that his Council was not aware of abuses in the exercise of the discretion, Mr Bisson suggested that although there was no problem at present, this is the sort of situation that can be overlooked until a citizen is unfairly or even improperly treated and then finds he has no remedy.

The Hon Henry May has replied, accepting that the continuing need for the discretion should be examined and saying that account would be taken of the Jurists' views in the examination of the Passports Act currently taking place.

It is to be hoped that the Jurists' view will prevail. There seems to be no reason compatible with our notions of individual liberty why a Government should be able to control at will the comings and goings of all its citizens. Certainly there are circumstances where the withdrawal of a passport is justified (eg where an individual has failed to repay the cost of his

repatriation from abroad on a previous occasion, or where criminal charges or custody proceedings are pending). However, these should be capable of definition, and a right of appeal to the Courts conferred against any refusal.

Protecting partners

In [1971] NZLJ 49, writing of the Guarantee Fund, it was noted that "the innocent practitioner on his own account simply pays his $13.60; the innocent practitioner in partnership quite literally stakes his life's assets." Attention was drawn to the plight of the older innocent partner where misappropriations have taken place, who can lose assets carefully husbanded for pending retirement.

Legislation now before the House will end this unsatisfactory state of affairs by establishing a "Partners' Protection Fund" which will indemnify innocent practitioners whose partners have perpetrated acts of theft, with the innocent partner/s bearing the first $5,000, and to which all practitioners in partnership will contribute.

At first sight it is logical that the sole practitioner should be exempted from contributing to a "partners" fund, yet on reflection and on balance this seems unreasonable. The Law Society argued that until recently defalcations by solicitors have tended to be made almost exclusively by sole practitioners, and it is indisputable that it is the sole practitioner who has been the principal beneficiary of the Guarantee Fund—both in terms of public confidence and in terms of being immune from calls to make good the misappropriations of partners. Further, the sole practitioner, soon after taking a partner, might have recourse to the protection fund.

As in other matters, equality here would seem to be equity. But such is not to be. The Government adopted a more narrow approach and failed to see any cogency in the argument that a practitioner should be required to contribute to a fund from which he might receive no direct benefit—an argument, curiously enough, which was advanced a generation ago in an unsuccessful attempt to block the establishment of the Guarantee Fund.

However the occasional grumble should not be allowed to obscure the New Zealand Law Society's landmark achievement in establishing a fund which, as far as is known, is unique.

A win for privacy

"Privacy" is a concept incapable of satisfactory definition, but there can be little doubt that whatever it is, it was the winner when the Ministry of Transport turned down a plan to incorporate photographs on driving licences.

Sir Basil Arthur noted that much of the argument in favour of the scheme came from the commercial world—and he rightly rejected the basis for this. To do otherwise would be to convert a driver's licence into an identity card, to enforce its being carried at all times, and to compel those who for a variety of reasons choose not to learn to drive to do so or be discriminated against.

He who attempts to use the licence of another is almost invariably caught out simply by being asked questions whose answers appear inside it. The proposal thus would have made scant difference to either law enforcement or to road safety—indeed it might even have made the roads even less safe by tempting out the nervous. Alternatively, we should have aped the Californians and empowered the Ministry of Transport to issue "non-licences" to non-drivers.

It is true that many countries do have identity cards and operate satisfactorily with them. However the concept is alien to our Anglo-Saxon heritage, and we do not need to have fears of some "Big Brother" to resent such a scheme. Simply a healthy respect for independence of thought and freedom of action.

Sleeping Judges—Mr Gazley made reference at some point to a Judge being asleep on the Bench. This reminded me that the most difficult sleeper to cope with that I ever knew on the Bench was the late Sir Joseph Stanton, who was also one of my very earliest employers as a law clerk. He did indeed go to sleep from time to time on the Bench but the difficulty was that when he was actually asleep he did not look as though he was asleep. On other occasions he looked as though he was asleep and you found he was not. One way we used to wake him up was to slide a few volumes of the Law Reports off counsel's table and on to the floor. I remember doing this myself on one occasion with the result that the Judge immediately opened his eyes and said to me, "Mr Richmond, you know there was really no need to do that at all!"—SIR CLIFFORD RICHMOND to the Wellington Young Lawyers.

CASE AND COMMENT

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

Measure of damages for a vendor's breach

An area of doubt which has long existed in the New Zealand law of vendor and purchaser is the extent of the application in New Zealand of the rule in *Bain v Fothergill* (1874) 7 HL 158. In the event of a breach of the contract by the vendor which is caused by his inability, without his own fault, to show a good title, this rule will limit the purchaser's damages to the recovery of the deposit with interest, the costs of investigating the vendor's title and some other minor expenses. The basis of the rule was the difficulty, especially under the deeds conveyancing system, of making a good title, a difficulty of which the purchaser was presumed to know at the time the contract was made. The Land Transfer system of registration, however, removes many of the problems inherent in the old system, but it has never been certain to what extent, if at all, it reduces the scope of the application of the rule in *Bain v Fothergill*.

In *Waring v S J Brentnall Ltd*, a judgment of Chilwell J delivered in the Supreme Court at Auckland on 1 May 1975, this matter was raised directly for consideration. The defendant was the purchaser under an agreement for sale and purchase of 10 lots in a subdivision. It entered into a contract to sell lot 110 to the plaintiff, but that lot was not one of those it had agreed to buy. It was, therefore, unable to give title and the purchaser brought the present action for damages for breach of contract. There are two main aspects to the Judgment of Chilwell J. The first concerns the effect of common mistake, both at common law and in equity. This aspect will not be considered in this comment. The second concerns the possible application of the rule in *Bain v Fothergill* to limit the purchaser's damages.

Chilwell J examined most carefully all of the New Zealand authorities on the application of the rule and reached two basic findings concerning them. The first was that there is no New Zealand decision which compelled him to hold that the rule applies in New Zealand to the same extent as in Britain. On the contrary, the Court of Appeal in *Slack and Le Fleming v Lockhart* (1863) 1 NZ Jur (Appendix) 1 doubted whether the rule could apply in New Zealand having regard to the Land Transfer system, and this doubt has echoed in more recent years by McGregor J in *Jacobs v Bills* [1967] NZLR 249 at 254, and by McMullin J in an unreported portion of his Judgment in *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 at 518.

The second finding was that the only applications of the rule in New Zealand so far have been in situations which would have arisen regardless of the Land Transfer system. These were: a failure to obtain a lessor's consent to an assignment of a lease (*Conn v Bartlett* [1923] GLR 729); inability to give vacant possession because of the imposition of a statutory tenancy in favour of a third party (*Staples v Lomas* [1944] NZLR 150); and where the beneficiaries under a trust prevented the trustee/vendor from committing a breach of trust known to the purchaser (*Jacobs v Bills* [1967] NZLR 249).

These two findings left it open to Chilwell J to find that the rule can seldom have application in New Zealand. The Land Transfer system removes many of the doubts which used to exist about the state of titles, and there is no reason why vendors should be protected in respect of those matters which are now certain. The rule would continue to apply in other circumstances, however, and his Honour accepted that the three cases mentioned above were correctly decided.

In the instant case, the Land Transfer system made the vendor's lack of title quite apparent, and there was no reason why the rule should be applied to protect it. Chilwell J therefore applied the normal measure of damages, which is the market value of the property at the time for completion less the contract price, plus a refund of the deposit with interest. The interest was awarded at 7.5 percent from the date for completion to the date of judgment.

It is respectfully submitted that the judgment clarifies in a most sensible manner this small but important point which has awaited a final decision since at least 1863. His Honour wisely declined to define the situations to which the rule would and would not apply, leaving that to future decisions. He declined to accept a formulation put forward by counsel for the purchaser that the rule would not apply where the issue is a question of title "in the narrow sense of that word" as not being sufficiently

precise. On the other hand, a general application of the rule is unnecessary having regard to the precision which the Land Transfer system has created. His Honour, therefore, left it that the rule can "seldom" have application in New Zealand when the land is subject to the Land Transfer Act.

D W McM

Domestic proceedings and retrospective payments under s 52

Practitioners involved in paternity suits will need to be aware of *English v Schoenmaker,* a recent case decided by Speight J (who gave judgment on 30 June last).

This was an appeal against the refusal by a Magistrate to make an order under s 53 (2) (b) of the Domestic Proceedings Act 1968 in favour of the appellant in respect of inability to support herself in the past by reason of caring for her child whose father was the respondent. The appellant and respondent had lived together for a substantial period in 1973 and she became pregnant. They parted towards the end of 1973 and the child was born at the end of February 1974. A question arose as to the payments claimed in respect of the appellant. After the birth, the appellant, a divorced woman, was unemployed as she had to look after the baby for many months and during this time she received no payments from the respondent. In August 1974 she obtained employment as a housekeeper in a live-in position. As a result she was able to have her baby with her and she received board and wages—which enabled her to keep herself. She was assisted also by the maintenance order made in respect of the child. In the Court below it had been found as a fact that she was, at the moment, and was at all times relevant to the hearing, able to provide for herself. Her difficulty was that for a period of some months prior to making the application and its hearing she had not received any payment, she had not been able to work and she had lived on savings. The problem was whether the Magistrate could make an order under s 53 (2) (b) for payment in respect of this past expenditure. His Worship's attention was directed to an unreported judgment of Cooke J, viz *Allen v Eaton* (Wellington, 22 April 1974), in which payments had been ordered retrospectively. In that case, Cooke J was satisfied that the girl was currently unable to support herself and he then proceeded to say that Parliament could not have meant to deny the Court the power to back date liability to such an order and he found room within the phrase "for such period not exceeding a period of 5 years from the birth of the child" to include a period antedating the hearing. His Honour agreed with this decision.

The Magistrate in this case had a "more fundamental" problem. He found as a fact and the appellant's counsel conceded before Speight J that she was able at the date of the hearing to "maintain" herself. Counsel for the respondent argued that that meant that she was at the date of the hearing able to "support" herself and that the Magistrate's jurisdiction under the subsection only arises where an applicant "*is* unable (whether wholly or partially) to support herself". Counsel for the appellant suggested that the word "support" was wider than the word "maintain", saying that "support" could mean "to provide back-up resources". The appellant, at the date of the Magistrate's Court hearing was able to maintain herself, but counsel submitted she had lost some hundreds of dollars in keeping herself during the earlier period of non-payment by the child's father. It was thus submitted that she was currently "less financially able to weather the adversities of life because of loss of some of her savings and in this sense she was not as well supported as she would have been had she not expended her own funds".

His Honour sympathised with this submission and regretfully found it unacceptable, as had the learned Magistrate. His Honour considered the dictionary meanings of "maintain" and "support" and looked at s 17 (1) of the former Destitute Persons Act 1910, comparing it with s 26 of the Domestic Proceedings Act 1968, noting that, in the latter, the past tense had been omitted and that the word "support" had been introduced and appeared to be used interchangeably with "maintenance".

In dismissing the appeal, Speight J observed that a "grossly unfair result" had been produced in cases such as the present and that it seemed to him "that urgent legislation is required"—a sentiment with which the writer respectfully could not agree more. His Honour added obiter that it is very questionable whether, under s 26, an order for past support could be made in respect of the husband who had previously defaulted but who has recently commenced to make maintenance payments. If this was the case, then, said his Honour, "it is a highly unsatisfactory state of affairs"—a sentiment with which the writer would heartily agree.

P R H W

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

Negligent rape rejected

In an earlier note ("Negligent Rape" [1975] NZLJ 78) it was suggested that the decision of the English Court of Appeal in *Morgan* [1975] 1 All ER 8, where it was held that on a charge of rape a mistaken belief that the victim consents is a defence only if it is a reasonable belief, should not be followed in New Zealand. On appeal, in *DPP v Morgan* [1975] 2 All ER 347, the House of Lords (Lords Cross, Hailsham and Fraser, Lords Simon and Edmund-Davies dissenting) has now held that the Court of Appeal was wrong and that the mistake need not be reasonable.

This ruling has been acclaimed by academic commentators: Professor Glanville Williams says it is "warmly to be welcomed", and Professor J C Smith describes it as "a victory for common sense as far as intention in the criminal law is concerned" (letters to *The Times*, 7, 8 May 1975). In some other quarters the Lords' opinion has been greeted with dismay: one barrister suggested it heralds the end of convictions for rape, and Mr Jack Ashley MP pronounced it "the craziest since Al Capone's day" (*Christchurch Press*, 2 May). Mr Ashley proceeded to introduce a private member's bill in the House of Commons which, in the unlikely event of it being enacted, would make reasonable grounds for such a mistake essential.

Unless juries suddenly decide to abandon reason it can hardly be doubted that the critics have mistaken the practical effect that the decision will have. In the vast majority of cases there will be no real possibility of any mistake and once the jury conclude that the female did not in fact consent they should have little difficulty in concluding that the defendant knew this. Moreover, although in theory a mistake need not be reasonable, the reasonableness or otherwise of any supposed mistake is undoubtedly of evidential importance: the less reasonable it is the less likely is it that the jury will think it a real possibility.

The outcry against the ruling in *Morgan* is the more surprising in view of the fact that their Lordships applied the proviso and affirmed all the convictions. There had been some evidence suggesting that the defendants could have regarded the victim's struggle as a mere sham, because her husband had told them it would be, but at the trial the defendants claimed that in fact she had not struggled at all. In convicting the defendants the jury had plainly rejected this testimony and their Lordships were unanimous in holding that no reasonable jury could have come to any different conclusion upon being directed that an honest but unreasonable mistake was a defence.

Morgan settles the law relating to rape in England, but the judgments of the majority are disappointingly obscure as to the true scope of the principle. It seems likely that there will continue to be dispute as to the true nature of mens rea and in particular the effect of unreasonable mistakes.

The majority reasoned as follows. In England s 1 (1) of the Sexual Offences Act 1956 simply provides that it is an offence "for a man to rape a woman", but "rape" is nowhere defined in any statute, so the meaning of the term depends on the common law. What little common law authority there is indicates that it is the act of having sexual intercourse without the woman's consent, intending to have it without her consent, or at least being consciously reckless as to whether she consents or not. Lord Cross thought that this view of the required mental element was also supported by the meaning of the word "rape" in "ordinary parlance", and Lord Hailsham thought the conclusion was also supported by the fact that most common law offences require intention or recklessness as to the prohibited event; he also cautioned their Lordships to be wary of importing any objective requirement after the "unhappy experience of the House after the decision in *DPP v Smith* [1960] 3 All ER 161". Lord Fraser also seems to approve of a general proposition that the need for mens rea imports a subjective test, which he quotes from Lord Reid in *Warner v MPC* [1968] 2 All ER 356, 367. From the proposition that rape requires intention or recklessness as to the absence of consent, the majority came to the logical conclusion that it is impossible to insist that any mistaken belief in consent must be reasonable because any true mistake, however unreasonable, negatives awareness of lack of consent.

This reasoning is quite clear and logical, but the difficulty is that their Lordships do not say that an unreasonable mistake will always suffice to exclude mens rea; indeed they indicate that there are or may be statutory offences where only a reasonable mistake may excuse, even though the offence is not one of "absolute" liability, and even though the words of the statute do not expressly or impliedly impose

liability for negligence. In these cases there is no need for foresight of all the elements of the actus reus, but the common law nevertheless provides a distinct defence of honest and reasonable mistake which will excuse a defendant if he raises a reasonable doubt on the question. This seems to be a version of the "half-way house" approach which was discussed in *Sweet v Parsley* [1969] 1 All ER 347, but regarded as only a possible future development. Unfortunately it is not clear when the Courts may infer that neither intention nor recklessness is required as to the elements of an offence so that a mistake will have to be reasonable before it can provide a defence.

Lord Hailsham appears to accept that in some cases the Courts may find that an honest mistake is a defence to a statutory offence, while in other cases they will properly require the mistake to be honest and reasonable. If the definition of the offences includes words such as "knowingly" or "wilfully", then there is little difficulty in holding that any true mistake may excuse (as in *Wilson v Inyang* [1951] 2 All ER 237), but it seems that the presence of such words is not essential: his Lordship did not doubt the decision in *Smith* [1974] 1 All ER 632 where it was held that an unreasonable mistake was a defence when a statute simply provided that it is an offence if anyone "without lawful excuse destroys or damages property belonging to another". In that case the Court of Appeal said it was "applying the ordinary principles of mens rea", but Lord Hailsham preferred to regard it as "a decision on the Criminal Damage Act 1971 rather than a decision covering the whole law of criminal liability". The House of Lords had been asked to declare that the bigamy case of *Tolson* (1889) 23 QBD 168 was wrong in so far as it required that a mistake as to one's marital status be reasonable but, without finally deciding the point, Lord Hailsham indicates that he is prepared to accept it as correct. But he seems to take this view because of the rather special wording of the definition of the offence of bigamy: not only did the statute not expressly import the need for any mental element, but it also expressly provided a statutory defence of seven years' absence together with an absence of knowledge that the spouse was alive during that time (cf s 205 of the Crimes Act 1961). On this basis Lord Hailsham's judgment is consistent with a general rule to the effect that if a statute creates a truly criminal offence then intention or recklessness as to all the essential elements of it should be required unless something in the wording of the statute suggests the contrary.

Lord Fraser also declined to question the rule in *Tolson*; He emphasised that it had stood for over eighty years, but also regarded it as turning on the particular statutory provision in question, although he makes no attempt to explain when the wording or subject matter of a statute will justify a conclusion that a mistake will excuse, but only if reasonable.

Lord Cross expressed a much clearer view. He thought that the *Tolson* principle should not be disturbed, not only because it had stood for so long and had been followed in numerous bigamy cases, but also because he thought it represented the correct and established view of the defence of mistake when applied to that kind of statutory offence. In expressing this view Lord Cross places no particular emphasis on the existence of the special defence to bigamy, but rather suggests that the general rule is that to be a defence to a statutory offence a mistake must be reasonable if the words defining the offence "do not expressly or impliedly indicate that some particular mens rea is required to establish it". This view is supported by reference to Lord Diplock in *Sweet v Parsley* [1969] 1 All ER 347, and to the well known passage in *Bank of NSW v Piper* [1897] AC 383, and also by asserting that there is no hardship in insisting that a mistake must be based on "reasonable grounds", at least when the conduct in question is not of a kind "which the law ought positively to encourage" (in the absence of the circumstances, such as lack of consent, which render it criminal). The result of this view was that Lord Cross states that if the English statute had expressly defined rape as "to have intercourse with a woman who is not consenting to it", then a mistaken belief in consent would excuse only if it was reasonable. If this view were to be accepted as correct it would be strongly arguable that the principle in *Morgan* does not apply in New Zealand because s 128 (1) (a) defines rape in the way contemplated by Lord Cross, although the subsequent paragraphs dealing with cases where "consent" is "extorted", or "obtained" by fear, personation of a husband, or fraud as to the nature of the act, fairly clearly contemplate intention or at least recklessness as to all essential elements and this could well lead a court to conclude that the same mental element must be required under s 128 (1) (a). This last suggestion gains some support from Lord Hailsham's judgment in *Morgan* in that one of the reasons why rape

at common law was there held to require intention or recklessness was that it was thought that this was implicit in the inclusion in the standard definition of rape of a requirement that the intercourse be "by force, fear or fraud" (eg *Archbold* (38th ed), para 2871).

Lord Cross's principle is very much in line with the principles enunciated by the Court of Appeal in *Morgan,* his disagreement with that Court arising solely from the apparent conclusion that the common law definition of rape did not include actual awareness of lack of consent. Furthermore, if Lord Cross is right then it seems that a mistake must be reasonable if it is to be a defence to the third class of offence in *Strawbridge* [1970] NZLR 909. The objection that this effectively and without good reason promotes negligence to the status of mens rea in many cases of truly criminal offences was canvassed in the earlier note on *Morgan;* Lord Cross's views do not seem to be adopted by the majority of the House of Lords, and it is submitted that they should not be adopted here.

In dissenting Lord Simon expressed general agreement with the judgment of the Court of Appeal. He took the view that, except where the definition of a crime requires an intention to achieve a result ulterior to the actus reus, a defendant only discharges the evidential burden which he must satisfy to raise the possibility of a mistake if he can point to reasonable grounds for the mistake. This, he held, was clearly established as the law, particularly by the judgments in *Tolson,* and he thought that the rule was justifiable because it would not be fair to the victim to allow a defendant to be excused for a mistake which was quite unreasonable or absurd. Lord Simon also asserts that the mens rea for rape includes actual awareness of lack of consent, so it seems he accepts that there is a presumption of law that there is no mistake on this issue, and this can be rebutted only by evidence of a reasonable mistake.

The dissent of Lord Edmund-Davies is somewhat remarkable in that he, more strongly than any of the majority, asserts that in principle, and as a general rule, the requirement of mens rea means that actual awareness of the circumstances of an offence must be proved, so that an unreasonable mistake should be capable of excusing. But he reluctantly concluded that he was bound to uphold the requirement that any such mistake be reasonable "as being in accordance with established law".

It is difficult to be confident that *Morgan* settles anything beyond the rules applicable to the offence of rape in England. The judgments of Lords Cross and Simon can be cited in support of the view that where statute creates an offence and no words are used which expressly or impliedly import a particular mental element, then only reasonable mistakes can excuse. This is in accordance with numerous dicta, but elevates negligence to the status of mens rea; and is the law being "fair" to the victim in any relevant sense when it insists that a foolish person should be liable to punishment? Lord Hailsham clearly contemplates that at least in some cases the Courts will insist that actual awareness of the relevant facts is required even though the statute is quite silent on the point, with the logical result that even an unreasonable mistake may excuse. Lord Fraser might have agreed with this, but that is not really clear. Perhaps one can regard Lord Edmund-Davies' judgment as supporting that of Lord Hailsham's, given that the majority decision suggests that it is not correct that authority requires the conclusion that only a reasonable mistake can exclude mens rea when that is required.

It seems likely that disputes will continue on these issues until there is legislation defining what the mental element in offences is to be in the absence of particular statutory provisions to the contrary.

G F O

PRIVATE INVESTIGATORS' REGISTRAR APPOINTED

A barrister and solicitor from Auckland, Mr B K Shenkin, has been appointed the registrar under the Private Investigator and Security Guards Act 1974.

The Act authorises the police and others to object to the issue of a licence and in those cases a hearing becomes necessary. Licences will not be necessary till 1 November.

Sparks in Marks—The *Mansfield Chronicle* reports "May Catherine Jones of no fixed address, admitted stealing the pork pies valued at 18p, from Marks & Spencer Limited, and recklessly damaging two angel cakes and a steak and kidney pie."

CORRESPONDENCE

A legal definition of death and life

Sir,

Mr Facer's contribution to the Journal on the subject of the legal definition of death [1975] NZLJ 171 is fascinating, particularly so in view of the contributions made by him and others in respect of the abortion question over the last year or so. your correspondents of 3rd June have commented on several issues arising, but there is another arising out of Mr Facer's article which also interests me.

In his article, Mr Facer comments that "two distinct events occur for the dying human being: one is the death of the body, the other the passing of the person. The death of the body is a physical phenomenon providing a series of measurable events that come within the province of medicine. The passing of the individual is a non-physical process, poorly defined, largely unmeasurable and closely connected to the nature of the dying person" (pages 171-172). Mr Facer then proceeds to say that the passing of the person raises "questions that are essentially philosophical and moral, not medical or scientific".

As medical and scientific knowledge about life and death becomes more sophisticated philosophers and moralists gain fresh information which assists them in assessing and explaining the non-medical and non-scientific aspects of death, namely "the passing of the individual". That is why, in my view, one must regard the conclusions of earlier philosophers and moralists with a degree of scepticism because of the inadequacies of earlier scientific and medical knowledge. This comment applies not only when considering when a person ceases to exist, but also when considering when a person may first be said to exist.

What is particularly interesting is that Mr Facer recognises that at the time when life is extinguished, one has to consider the death of the body (a physical phenomenon) and the passing of the person (a non-physical or metaphysical phenomenon). At the other end of the life scale similar questions must arise when life commences, namely, one must consider when the physical body comes into existence, and when the non-physical person comes into existence.

It is apparent, in the light of modern medical knowledge, that the physical body comes into existence at the time of conception and from then until death life is a continuing process of development, maturation and nutrition in an environment which is more or less supportive at various stages of life.

The more difficult question arises when one attempts to consider when the non-physical "person" comes into existence. The historical review of philosophical thinking given by Mr Littlewood ([1975] NZLJ 103 et seq) is interesting but not exactly enlightening in view of the advances in medical knowledge. In the light of present medical knowledge "quickening" (that is, when the mother becomes aware of the movement of the unborn child) and "viability" (that is when the unborn child may be expected to survive if it is born prematurely) have ceased to be of critical importance because we now know that the unborn child moves well in advance of the mother's physical awareness of this phenomenon, and because we know that the age of viability is reducing as medical knowledge advances. Accordingly it makes no logical sense to suggest that a child en ventre sa mere at 25, 30 or 35 weeks is any more or less a physical human being or non-physical person if it happens to be born prematurely at such an age or whether it happens to be born at 40 or more weeks.

Accepting medical knowledge as it is, I would seriously question whether there are any logical or physical philosophical grounds for arguing that the "person" comes into existence at any other time than when life itself in the physical sense commences.

I accept that it may be difficult to define when the "person" comes into existence, but this must be a factor for consideration in the abortion debate just as it is in attempting to define death. If Mr Facer accepts that there are two issues to consider at the end of life (the death of the body and the passing of the person) then he must accept that the same questions must be considered at the commencement of life. It may be significant that he has not attempted to consider this question.

Yours faithfully,

J M VON DADELSZEN

An obstetrician's dilemma

Sir,

Barrie Littlewood at [1975] NZLJ 103 has now concluded his review entitled "Abortion in Perspective". Perhaps I might steal a little space to comment on his paper.

The need to indulge in the history of the Roman Catholic Church to build up his "no law" theory escapes me. As an obstetrician (Sir William Liley is mistakenly described as one—he is a foetal physiologist), I am faced with the decision as to whether to abort a pregnancy or not. I have no religious scruples because I belong to one of the groups Mr Littlewood has described as being liberal.

But one thing bugs me—and it does not seem to trouble Mr Littlewood at all—there is no doubt in my mind that this is a child I am being asked to destroy. It is as much a child as a child is an adult. Development is a matter of time.

It seems fine to have a "no law" situation where the decision is just a matter between the patient and her doctor. But who speaks up for the child? Has he no rights at all?

Medical techniques are improving very rapidly. Twenty-six aborted babies have already survived in the State of New York alone and when serving on an International Standards Committee meeting in Moscow I was not surprised when the American delegates asked for a new definition of abortion. With improved techniques earlier and earlier aborted foetuses can be expected to survive.

I do not wish to overstate the position or made a case for the legal rights of the intranterine child. But surely even Mr Littlewood can see that whether the baby is inside or outside the uterus he is one and the same person.

Yours faithfully,

KEITH DRAYTON FORGOG

Christchurch

Simple as ABC

Sir,

We have noticed the following in the Public Notices column of *NZ Truth* for 17 June 1975:

"To: XYZ of parts unknown

Take notice that an application for an order dispensing with your consent to such an order has been lodged in the Invercargill Magistrate's Court. . . ."

Nothing could be fairer than that.

Yours faithfully,

CRAIG, MORGAN & CO
Wellington

Computer arbitrators

Sir,

At a recent meeting of the New Zealand Computer Society one member advised it has been pointed out to him that certain contracts involving computers and computer services of one sort or another often needed provision for an arbitrator knowledgeable in such matters.

Accordingly, it was agreed that, as with other professional societies, the President of the New Zealand Computer Society for the time being, will accept responsibility in such documents to appoint suitably qualified arbitrators in case of need.

It was further agreed that this decision be brought to the attention of the business community through appropriate journals. The Society will be pleased if you will include such a comment in your publication.

Yours faithfully,

T A SCOULAR
Vice-President
New Zealand Computer Society
PO Box 2132
Wellington

"Statutory interpretation—II"

Sir,

As an addendum to my article, "Statutory Interpretation" [1975] NZLJ 234 I would note that in *Black—Clawson International Ltd v Papierwerke Waldhof—Aschaffenburg AG* (The Times March 6, 1975), their Lordships were pretty much in agreement that Courts could have recourse to a report made to Parliament by Committee of Experts to identify the "mischief" which an Act was intended to remedy but there was a wide spectrum of opinion as to what part of the material ought to be used.

Lord Reid thought that the report should be looked at only to find the contemporaneous state of the Law and the "mischief". Lord Simon felt that, where the report included a draft bill with a commentary, the Courts could look at the commentary if the Act followed the terms of the draft Bill. Viscount Dilhorne felt that it was legitimate to have regard to the recommendations of the Committee, its notes to the draft Bill and the terms of draft conventions. Lord Wilberforce agreed with Lord Reid but added that it was not proper or desirable to use such a document, or anything reported as said in Parliament or any official notes or clauses in a draft Bill for a direct statement of what a proposed enactment was to mean even if the proposed Bill was enacted without variation. Thus the situation is still extremely fluid.

Yours faithfully,

J B ELKIND

[This addendum was not received in time for inclusion in Dr Elkind's article.]

Spencer Mason Trust

Sir,

The Regulations governing awards of Postgraduate Travelling Scholarships by the Trust have been amended.

The earlier Regulations might have been construed as limiting awards to graduands and graduates of the University of Auckland, but this is not the intention, and it has been thought appropriate to revise the Regulations. They are, however, limited to those residing in the district of the Auckland District Law Society.

The Spencer Mason Trust was established pursuant to the will of Mrs Nellie Louise Mason widow of Mr Spencer Rex Mason; Mr Mason died in 1942, when President of the Auckland District Law Society.

Travelling Scholarships are awarded annually, with applications closing on 31 March in each year. The first awards were available in 1970, and the trustees have since followed a pattern of making annual awards. In general the total annual amount available for travelling scholarships has been a little in excess of $3,000 per annum; awards tend to be made in favour of say three applicants each year.

The present trustees are: Messrs C P Hutchinson QC (Chairman), W J Fisk and S N Hetherington and Professors J F Northey and P R H Webb. Mr Hetherington and Professor Northey are ex-officio trustees by virtue of their positions as respectively President of the Auckland District Law Society and Dean of the Faculty of Law at the University of Auckland.

Yours faithfully,

A G WOODS
Secretary Spencer Mason Trust
South British Guardian Trust Co Ltd
CPO Box 1934, Auckland

Canadians "shocked"—So says NATIONAL (published for the Canadian Bar Association) of a report entitled "The Native Offender and the Law". "Native Canadians—Indians, Métis and Eskimos—represent about one-eighth of Saskatchewan's people, states the report, yet they make up more than half the inmates of provincial prisons, about a third of those in Saskatchewan Penitentiary at Prince Albert. Even more startling are the figures for native women, since they account for nine out of ten of the female prison population."

On lack of public concern over such "shocking statistics", the report finds it "paradoxical in a period of emphasis on fundamental and minority rights, and on social justice, but part of the explanation seems to be public unawareness of the dimensions of the problem . . . much of it, if not most, associated with the use of alcohol".

THE RIGHT OF RENEWAL

A further chapter in the reminiscences of the late E M MACKERSEY.

When I look back over the many and various problems which I was called upon to endeavour to solve during my forty years' practice in Te Kuiti, I have always regarded this case as my greatest achievement. The principal actor in the drama was one William Gadsby.

Mr Gadsby was one of the pioneer settlers in the King Country. He arrived in Te Kuiti early in 1907, over 12 months before the opening of the main trunk railway, and there obtained what was then known as a Native Lease from the Maori owners of some 1,500 to 1,600 acres. This land comprised easy undulating country but it was unfenced and entirely unimproved and was covered to a small extent by native bush, the balance of the area comprising fern and scrub. The term of the lease (duly confirmed by the then Native Land Court) was for 21 years with a right of renewal for a further term of 21 years. The terms of lease, which were by no means onerous, did however contain a covenant by the lessee that he would duly and punctually pay the rent and the county rates, and there was also a covenant that he would eradicate and keep eradicated all noxious weeds on the property. There was no provision in the lease for any compensation for improvements effected by the lessee during the term of the Lease or any renewal thereof. The right of renewal was in the standard form adopted by conveyancers and, in short, provided "that should the lessee duly and punctually pay the rent and duly and punctually observe and perform all the covenants contained or implied in the lease, and should give to the lessors at least three calendar months before the expiry of the term written notice of his intention to take a renewal of the said lease, then the Lessors would grant a renewal thereof for a further term of 21 years on the same terms as the existing lease except as to rent, which was to be fixed at an amount equal to 5% of the then existing Government Valuation of the unimproved value of the land." There were a great many other Native Leases of land in the King Country on precisely the same terms.

Immediately this lease was confirmed by the Native Land Court, Mr Gadsby took possession of the land, which was situated a distance of not more than two miles from the Te Kuiti Railway Station, and by sheer hard work and determination, ring fenced and subdivided the property into a number of paddocks, cleared the land of bush and scrub, and laid down the area in good quality grass and erected a dwelling and the necessary out-buildings.

After farming the area successfully for a few years with sheep and cattle, Mr Gadsby on the establishment of a Dairy Factory at Te Kuiti, by the New Zealand Co-operative Dairy Company, decided to run dairy cows on an area of approximately 200 acres, while continuing to run sheep and cattle on the remainder of the farm.

So successful did the venture into dairying prove to be that he decided to dairy on the entire area. This, of course, was beyond the capacity of one man. However, after successfully raising the necessary finance, he subdivided the remaining area into seven separate dairy farms on each of which he erected a dwelling, a milking shed, and the necessary outbuildings.

He had no difficulty in sub-leasing these dairy farms at satisfactory rentals to seven energetic young farmers, numbers of whom were then eagerly seeking land in the King Country.

Mr Gadsby had been a valued client of Broadfoot & Finlay since that firm started practice in Te Kuiti in 1912, and when I arrived in Te Kuiti in 1923 I continued to act as his solicitor. At that time, of course, dairy farming on the whole area had been established for a number of years and was proving highly successful to all concerned.

Towards the end of the year 1927, I received instructions from Mr Gadsby to forward to the then Maori owners (who numbered about 40) notice of his intention to take a renewal of his lease for a further term of 21 years. The lease then had something over four months to run. I accordingly duly sent by registered post the required notice to all the owners, all which notices were received by the respective owners within the required time.

At the time I received these instructions I regarded the forwarding the notices of my client's intention to take a renewal of his lease as a mere matter of form and never doubted for one moment that the lease would in due course be renewed.

It was therefore with some surprise that about a month later I received a letter from a

firm of solicitors practising at Thames, stating that they were acting for four of the principal Maori owners of the land and that their clients definitely refused to grant any renewal of the Lease upon the following grounds, namely—that the lessee had failed:

(1) To duly and punctually pay the rent.
(2) To duly and punctually pay the rates.
(3) To eradicate and keep eradicated all the noxious weeds on the property.

Under the terms of the lease the rent was payable half yearly in advance. I ascertained from Mr Gadsby that he had always regularly paid the half yearly rent within on the average one week from the due dates, which rent had always been accepted without demur or any objection by the Maori owners, but he at once admitted that he could not contend that he had always paid such rent on or before the actual half yearly dates as set out in the lease.

In regard to rates, the position under the Rating Act was that rates were legally due and payable 14 days after demand. The Rating Act further provided that if the rates were not paid within six months and fourteen days after demand a 10 percent penalty was incurred. At that time a large number of farmers in the King Country were operating under bank overdraft and the almost universal practice adopted by county ratepayers was to delay payment of their rates until just before expiry of the six months period. This practice had been adopted by Mr Gadsby, who had always paid his rates before the 10 percent penalty accrued but he had never in fact paid these rates within 14 days of demand.

In reference to noxious weeds, Mr Gadsby informed me that when he first took up the land there were small patches on it of gorse and blackberry (both noxious weeds under the Noxious Weeds Act). He stated that these small patches had been regularly cut and grubbed in accordance with the best recognised farming practice and that the land was now, from a practical point of view, virtually free of noxious weeds. This was, of course, before the discovery of the hormone weed killers and it was then, from a practical point of view, virtually impossible to entirely eradicate noxious weeds. A personal inspection by me of the land confirmed in full all that Mr Gadsby had told me.

Having seen Mr Gadsby and obtained the above facts, my first reaction was to regard the refusal of the four Maori owners to grant a renewal somewhat lightly. I felt that provisions for relief against forfeiture as set out in the Property Law Act would apply and I was confident that an application to the Court for relief would undoubtedly succeed. I then commenced a study of the law, confident that it would support me. Alas, I was in for a devastating shock.

One of the first authorities which I found was the case of *Chrystal v Ehrhorn* [1917] NZLR 773. The circumstances of this case were as follows: A lessor in Palmerston North had leased a city property for a term of 21 years with the right of renewal for a further term of 21 years, the right of renewal being in effect precisely the same as in Gadsby's case. When originally leased the property was in a totally unimproved condition. During the first 21 years of the term the lessee had erected thereon a substantial commercial building but when, in due course, he applied for a renewal for a further 21 years this was refused by the lessor upon the grounds that the lessee had failed to duly and punctually pay the rent and had likewise failed to duly and punctually pay the rates. It appeared that although the rent had always been regularly paid and accepted by the lessor without demur, it had not always been paid on the actual due dates. Neither had the local body rates always been paid within 14 days of demand. The lessee applied for relief. Here was a case which for all practical purposes was identical with Gadsby's case.

Mr Justice Edwards, in giving judgment for the lessor, held that s 94 of the Property Law Act 1908, giving the Court power to grant relief against forfeiture, did not apply where the right of renewal was a conditional right which only arose if the lessee had strictly complied with all the provisions of the Lease. The Judge said he was bound by the decision of the Privy Council in the case of *Greville v Parker* [1910] AC 335.

In the course of this judgment, Mr Justice Edwards took the opportunity of drawing the attention of real property lawyers to the fact that the Privy Council's decision had revolutionised the law of this country so far as it concerned the power of the Courts to grant relief from forfeiture in cases in which the right of renewal was in the form traditionally used by conveyancers but which, by reason of the Privy Council's decision, was a conditional right only, and did not arise at all until all the prior conditions had been strictly complied with.

I was now faced with the difficult task of informing my client what, in my view, was the true legal position which, of course, was that any application he might make to the

Court for relief against forfeiture would fail and that the Maori owners would at the expiry of the first term of the lease (which then had less than two months to go) be legally entitled to take possession of the land with all its improvements without payment of any compensation whatever.

The interview with Mr Gadsby was painful in the extreme. At the end he said, "If what you tell me is correct, then all my hard work over 21 years is gone. All I can look forward to is complete and utter bankruptcy." It, of course, not only involved bankruptcy and ruin for Mr Gadsby but his seven sub-lessees would also be dispossessed of their land, whose only legal remedy would be a fruitless claim against their then bankrupt sub-lessor. Mr Gadsby said that he thought that British justice and fair play would never allow such a position to arise. I knew that in spite of what I had told him he felt that I must be mistaken in my view of the law, and he asked me what I proposed to do about it. All I could say was that I would look further into the matter and see if there was anything that possibly could be done, but I felt that as the law then stood there was nothing that I could in fact do.

I then re-read and studied at length both the decision of the Privy Council and the judgment of Mr Justice Edwards in *Chrystal v Ehrhorn*.

As I was studying these cases I remembered the advice given to me by Mr J R Reed—"If on the facts your client has a good case, the Law will always support you." Well, here was a case in which all the facts supported me in full, but unfortunately the law did not. There was only one course open to me, namely to apply to the highest authority in the land, which after all is Parliament, and endeavour to have the law amended. This, I realised immediately, was going to be extremely difficult. It was then early in the month of February 1928. Parliament was in recess and would not meet again until June. Any amending legislation which I could induce Parliament to enact would have to be retrospective in effect—always difficult to obtain.

However, in this respect I was indeed fortunate. The then-Attorney-General was Mr Frank Rolleston, whose brother, J C Rolleston (universally known to his friends as "George"), was then living in Te Kuiti and was the Member of Parliament for the Waitomo Electorate. George Rolleston was not only a client of mine but also a close personal friend. I at once got in touch with him, gave him the facts and asked him to arrange for me to interview his brother, Frank, at the earliest possible moment. He at once said, "Well, that is easy—my brother is coming to stay with me next week. I will arrange for you to see him."

The following week I duly interviewed the Attorney-General, to whom I gave all the facts, and I also read to him the decisions of the Privy Council and of Mr Justice Edwards. I then asked him to do what Mr Justice Edwards had plainly said ought to have been done 11 years before—to amend the law and to make it retrospective.

I received a most courteous and attentive hearing and when I had finished, Mr Rolleston said to me, "I have been most impressed with what you have told me and I am going to tell you now that I am prepared to recommend to Cabinet to authorise the passing of the necessary amending legislation."

I could not, of course, have hoped for anything more. Mr Rolleston then went on to say that to induce Cabinet and the House to enact retrospective legislation was always difficult, and while he did not doubt that my view of the law as it then stood was correct, it would considerably strengthened his hand in persuading Cabinet to agree to his request if my view of the law was supported by senior counsel's opinion. To this I at once agreed and I asked him to nominate the senior counsel whose opinion I should seek. Mr Rolleston then said that he knew that Cabinet would be strongly influenced by the opinion of Mr Michael Myers KC (later, of course to become Chief Justice).

I accordingly wrote to Mr Myers for his opinion, which I received without delay and which supported in full my view of the law. I then wrote to the Attorney-General enclosing a full memorandum of the facts, together with Mr Myers' opinion.

After a short interval I was delighted to receive a letter from the Attorney-General saying that Cabinet had approved the passing of the necessary amending legislation and that the same would be retrospective, and he invited me to draft the proposed bill, which he suggested I should then submit to the Chief Law Draftsman whom he had instructed to render me every assistance.

This I did without delay. My draft first of all provided that it applied to all leases, whether executed before or after the passing of the Act, and then went on to empower the Supreme Court in its discretion to grant relief against forfeiture should a lessor refuse to grant

a renewal, notwithstanding that the right of renewal was a conditional right only.

This draft I then forwarded to Mr Myers, with the request that he confer with the Chief Law Draftsman and settle the terms of the proposed bill. This Mr Myers did and returned to me a copy of the Bill as approved by the Chief Law Draftsman, which to my delight and, I may say, somewhat to my surprise, was substantially in the form as submitted by me.

I then hastened to inform Mr Gadsby of the good news and to inform him that all was not yet lost. At the same time, I impressed upon him the absolute necessity of keeping the information I had just given him as strictly confidential. It was, of course, of supreme importance to ensure that the news of the impending legislation should not become known to the solicitors for the Maori lessors. The Bill had yet to be submitted to Parliament and it was important that it should go through with the minimum of publicity and, if possible, without opposition. We were, of course, by no means yet out of the woods. The lease was just about to expire. Parliament did not meet until the following June and it was essential to keep Mr Gadsby in undisturbed possession of the land until the law was amended.

I accordingly with all possible speed issued a Supreme Court writ and statement of claim, asking for specific performance by the lessors of Mr Gadsby's right of renewal.

This alone was somewhat of a colossal task. There were some 40 lessors, who were scattered over both the North and South Islands, and about three were then residing in the Chatham Islands. Over 40 copies of the writ and statement of claim had to be prepared and to each copy had to be attached a certified translation of the writ and statement of claim into the Maori language. This, however, was accomplished, the writ was filed in the Supreme Court at Hamilton, and the copies despatched for personal service on the individual Maori defendants.

The next sessions of the Supreme Court at Hamilton commenced early in May and by the time the opening of the Court approached, I had filed in the Court proof of service of the writ on about 30 defendants. Amongst the defendants not yet served as far as I was aware were the three Maori owners then in the Chatham Islands. I had sent these documents for service to the officer in charge of the only Police Station there, the only means of communication with the Chathams then being by irregular and infrequent steamer. This, of course, suited me as it would have been fatal to bring the action on for trial before the amending legislation had become law. I accordingly did not set the action down for trial for the May sittings of the Court.

It was therefore with some surprise that a few days before the opening of the May session of the Court, I received from my Hamilton agents a praecipe filed by the Thames' solicitors, setting the action down for trial at the May sittings. Having confirmed that the warrant to defend filed by the Thames' solicitors was signed by only four of the Maori defendants, I at once filed in the Court a motion to strike the case out of the list of those set down for trial upon the grounds that service had not yet been effected upon all the defendants and that the action could not be set down for trial by a solicitor who was, in fact, acting for only four of some 40 defendants.

This motion came on for hearing before the late Mr Justice Blair, who had no hesitation in making an order removing the action from the list, as asked in the motion. During the hearing of this motion no mention by me was of course made of the impending legislation. Neither, to my relief, was it referred to by the other side. The secret was still intact.

In June Parliament met and very early in the session a short announcement appeared in the Wellington papers that amongst Bills introduced into Parliament and read a first time, was a Bill to amend the Property Law Act 1908. The nature of the amendment was not news as far as the press was concerned. Parliamentary debates were then, of course, not broadcast. All was going well—my only difficulty then was that when I had first advised Mr Gadsby of the unfortunate legal position in which he then was, he had immediately told his friends, some of whom had leases of Maori lands on similar terms to Mr Gadsby. The result was that alarm and despondency quickly spread amongst a number of King Country farmers, who feared that if Mr Gadsby should be dispossessed of his land a similar fate awaited them. This was, of course, before any move in regard to having the law amended had commenced.

From then on I was continually receiving calls from justifiably irate farmers demanding to know what I was going to do about it. These farmers did not mince words. Such expressions "legalized robbery", "Is this what you lawyers call British justice?" and other more forthright expressions were common. All I could say

was that I was doing what I could to help Mr Gadsby, which of course satisfied nobody, including myself.

I had arranged with my Wellington agents to watch the position and to wire me immediately the amending legislation was finally passed.

I will never forget the morning, about the end of June, when I opened a telegram from Wellington which read, "Property Law Amendment Act 1928 now law". (See now s 120 Property Law Act 1952.)

A few days after this, the news first reached the solicitors for the defendants, who took the matter, I am pleased to say, in a true sporting spirit, for I received a telegram from them which read, "Many congratulations on ad-hoc legislation. It appears to be all over now bar the shouting." And so it was. The Maori owners agreed to grant a renewal. The writ for specific performance was not proceeded with, Mr Gadsby was saved from ruin and the faith of the ultimate fairness of British justice was restored in the eyes of many King Country farmers. And so ended the Gadsby case.

OBITUARY

H Jenner Wily SM

The death in Auckland recently of Mr Herbert Jenner Wily, OBE, SM (retired) ended the life of a man of many achievements. He was born in Auckland in 1901 and received his legal education at the University College of Auckland, being admitted as a solicitor in 1923 and as a barrister in 1928. He commenced legal practice in Pukekohe and in 1930 joined Mr J K S Hall in a partnership in Auckland which subsisted until Mr Wily was appointed to the Magistrate's Court bench in Auckland in 1948. The appointment of a practitioner to the bench in his home city was then almost unprecedented, but as his appointment brought the number of Magistrates in Auckland up to six it was not difficult to avoid embarrassment for either Mr Wily or his former clients. While at University Mr Wily represented his College and obtained a "blue" in athletics. He maintained his interest in athletics after he ceased to compete and was for 13 years secretary of the Auckland Branch of the New Zealand Amateur Athletics Association.

Mr Wily was a most industrious man as is evidenced by his many publications, which involved him in countless hours of work in his spare time outside of his official duties as a Stipendiary Magistrate, an office which he held for 19 years until his retirement in 1967. One of his first publications was a revision of *Cruickshank's Magistrate's Court Practice* which was the handbook of many of the older generation of practitioners. By the time Mr Wily took it in hand, it was very much in need of updating.

H Jenner Wily SM

In his later years Mr Wily became a keen bowler and it was indeed unfortunate that for the last year or two of his life a physical disability prevented him from enjoying this sport. Altogether Mr Wily was a man of many parts and his passing is mourned by a wide circle of friends both inside and outside the legal profession. He is survived by his widow and a son

and daughter, the former being a prominent member of the accountancy profession in Sydney, while the latter, a University graduate in arts, is a secondary school teacher.

L G H SINCLAIR

P H T Alpers

Mr Peter Henry Thorwald Alpers died at Christchurch in November 1974 at the age of 61.

Mr Alpers was educated at Christ's College, where he won a senior scholarship, became Head Prefect, head of the school Cadet Corps and a member of the lst Cricket XI. He was a good all-rounder at sport and earlier represented his school in inter-school athletics. Later he played senior cricket for the Old Collegians' Cricket Club until prevented by illness.

During the last war Mr Alpers served with the 3rd Battalion of the Fiji Infantry Regiment for three years and rose to the rank of Captain. He saw active service in the Solomon Islands and was later the Commanding Officer of the Brigade School of Instruction for the Fiji Military Forces at Bilo until demobilisation. During his military service he acquired a working knowledge of the Fijian language.

The late Mr Alpers was for a time Judge's Associate to Sir Archibald Blair. He graduated in 1936 as a part-time student at Victoria College. He was employed first with Messrs Weston, Ward & Lascelles, and later with Mr C S Thomas until mobilised at the beginning of 1942. After demobilisation he returned to Mr Thomas's office for a few months before commencing practice on his own account in Christchurch, where he practised for the rest of his life. In earlier years he maintained a branch office in Kaikoura. In 1972 he was joined in partnership by his son, Oscar, who is continuing the practice.

Mr Alpers was President of the Canterbury District Law Society in 1961. At the 1957 Conference in Christchurch he presented a paper on "The Law's Responsibility Regarding Domestic Relations" (1957) 32 NZLJ 121. He was a foundation member of the NZ Legal Association, was interested in the establishment of legal advice centres in Christchurch, and was an original member of the Canterbury District Legal Aid Committee. He was also a member of the Forensic Club in Christchurch for many years.

An organisation which absorbed much of Mr Alpers' energy was the Canterbury Council for Civil Liberties. He was the first President in 1954 and worked in the Council until shortly before his death as a member of the Committee and Vice-President. His sound legal advice and his power to analyse a situation to its essentials made a valuable contribution to some aspects of our public life. He was also president of the Howard League for Penal Reform and a member of the Campaign for Nuclear Disarmament.

Mr Alpers was always balanced and fair-minded in his outlook, but never shirked a decision, regardless of popularity. He was a courageous and tenacious advocate, notwithstanding declining health and deteriorating eyesight since his early forties. He was to some extent overshadowed by the legal and literary distinction of his father, the late Mr Justice O T J Alpers, but was, nevertheless, outstanding in his own right and he enjoyed the respect and affection of his fellow practitioners in all his dealings with them.

He is survived by his widow, a daughter, and his son.

Mr F P Hill

The late Mr Francis Pahl Hill died at Christchurch last December in his seventy-fourth year. He received his early education at the Lyttelton High School and in 1917 entered the Justice Department as a cadet. He served in the Magistrate's Court at Greymouth and later in Christchurch where he attended lectures in law at Canterbury University College.

On his admission in 1925 as a solicitor, Mr Hill was employed by Mr A S Nicholls, Christchurch, in the firm's branches at Methven and Leeston and was admitted to partnership in 1944. When Mr Nicholls retired in 1956 Mr Hill became senior partner in the firm, then known as Nicholls, Hill, Lee & Scott. His son, Mr P G Hill, joined the firm in 1959, and is a member of the Council of the Canterbury District Law Society.

Mr Hill was an intense enthusiast and seldom missed a day's cricket. His active playing days were maintained in the West Christchurch Club until he was 64 years of age, during most of the period in the President's grade. He was regarded as a keen and steady bowler and a useful batsman, and, in his earlier years, he played in the same club team as other lawyers of those days—Sir Arthur Donnelly and Roy Twyneham. Mr Hill was one of those responsible for the organising of the annual cricket match for the lawyers in the early 30s at the "Valley of Peace" where the legal team would be captained by the late L D (Pidge) Page—

regarded as a very astute cricket tactician and a brother of the more famous Test cricketer and New Zealand captain, M L (Curly) Page.

Mr Hill gave long and valuable service to his Club over many years as a Committee Member and Treasurer, and was elected to Life Membership. He also served for many years on the Management Committee of the Canterbury Cricket Association, acted as Convenor of the Representative Match Committee and, on several occasions, managed the provincial Plunket Shield team.

Mr Hill was highly esteemed by his fellow practitioners who respected his integrity and helpfulness over a long period of years. He is survived by his widow and three sons.

IN RE REFERENDA

Now that the referendum is over and done with, some thoughts spring to mind. First, and less obviously perhaps, it must herald the beginning of the end of the present electoral system. Since the war, just one government has had a majority of the electorate as well as its majority in Parliament. The present Labour government has the backing of some 36 percent of the electorate (and that is a figure based on those who actually voted). Yet our "first-past-the-post" system of Parliamentary elections on a constituency basis still gives the Government a tiny, but absolute, majority over all the opposition parties.

It is significant that when the Government of the day wants a truly representative vote, it throws away the present system. It adopts a national vote (the referendum) or one based on proportional representation (the many recent polls in Northern Ireland). Already the bastions are crumbling: the *Economist* and *The Times* are advocating electoral reform; and more power to their elbows.

The other point is whether we ought further to employ referenda to settle continuous issues. Here your writer argues for a good, solid "no" vote. It is because, overall, Members of Parliament are considerably more open-minded, tolerant and far-seeing than the great mass of the electorate. I have never believed in the "Good Sense of the British People", nor, indeed, of any People. Most of them are dim, bigoted and prejudiced to an intolerable degree.

I maintain my better view of Parliamentarians notwithstanding the shock to the system administered by our "innovation" in broadcasting the House of Commons. The evidence has poured in that the Mother of Parliaments nourishes some pretty doltish children in her womb. Yet, even so, Parliament has always led the country, especially in matters affecting moral change: abortion, hanging, homosexuality, have all been dealt with by a Parliament light years ahead of the electorate.

Those now calling for greater use of referenda have already cited hanging as a matter suitable for laying before the people. Well, you know and I know, that a thumping majority would bring back capital punishment, probably in public at that. Castration for sex offenders would be enthusiastically endorsed, and the compulsory repatriation of West Indians, Pakistanis and Indians would receive bellows of approval from here, there and everywhere. I, of course, would vote wisely and properly, but few others could be so trusted.

There is, perhaps, some inconsistency in my themes, for I ask for electoral reform to produce a more representative Parliament, yet reject the referendum as a way of truly testing popular feeling. But my defence is this: that Members of Parliament are always ahead, in the mass, of their constituents. Few of the latter ever know how their Member voted on this issue or that. Parliament needs reforming, not bypassing.

R G LAWSON

Retainer out to tender?—A recent issue of the *New Law Journal* carried this advertisement—"SOLICITOR with own practice required by company to write to delinquent debtors. Simple job with standard letter sufficient. Would suit young man starting own practice or one with typist time available. Could be a part-time job. Apply 01-540-8838." It's an interesting precedent with intriguing possibilities!

Court Yard—"I got an inkling this was a distinguished occasion when I saw Mel Belli outside parking cars." *Bob Hope at the American Bar Association Dinner.*