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INTER ALIA

Conflicting interests

The profession has for long tolerated a situation in which a single firm can act for both sides in commercial transactions, but such a practice is coming increasingly under fire.

In a recent English case a single firm had acted for both sides in a money lending transaction, presumably in an attempt to reduce costs—something to which the demise of the scale fee there may have contributed.

A guarantor, seeking leave to defend, claimed that undue influence had been exerted on him by the lender and attacked the conduct of the solicitors.

Brightman J in *Stock & Trade Facilities Ltd v Foley* (unreported, Ch D, 14 May 1975) noted that prima facie it was unsatisfactory for the same firm to have advised the guarantor as had advised the borrower and the lender, and referred to the criticism by Danckwerts J in *Goody v Baring* [1956] 1 WLR 448 of solicitors who seek to advise a plurality of clients. The guarantor was granted the leave he sought.

The position of the solicitor is not merely that of the technician who places into legal form an arrangement previously finalised by others. As he is to advise, he can only adequately do so to one of the parties involved if he is to remain beyond suspicion and above criticism. Attempts to act for both sides obviously can give rise to numerous issues when things go wrong which are avoided when separate solicitors are acting. In such circumstances it is clearly in each client's interests for him to be separately advised. Since the particular transactions which go sour cannot be predicted, the adoption of a general rule is imperative.

Some firms have rigid rules of practice whereby separate solicitors act independently for separate parties. This goes some way to meet the problem posed, but those practitioners who do not ensure separate advice for each party are now seen as running a considerable risk.

Morals, legislators and lawyers

On p 670 we publish an address by the Prime Minister, the Rt Hon W E Rowling. The address is as timely as it is thoughtful and demonstrates the Prime Minister's readiness to discuss the vexed issue of the relationship between law and morals in a particular context.

No record was kept of the question-and-answer session which followed, but in it the Prime Minister displayed his total grasp of the issues involved.

If the address points to no answers, it does articulate the nature of the problem. It is plain that the Prime Minister sees the role of the lawyer in this context as being the voice of reason. His message is that we should not throw ourselves into the vanguard of pressure groups, tabulating lists of "non-negotiable demands".

Rather the role of the lawyer should be to help resolve the confrontation situation and so help strengthen democracy—to lead, as it were, from the rear by giving reasoned direction and urging the acceptance of reasonable compromise.

Certainly the lawyer is uniquely positioned to perform such a function. If we fail, we have only ourselves to blame.

Planning Courts

The profession as a whole must surely endorse the sentiments of the President of the Wellington District Law Society, Mr M J O'Brien QC, when he urged recently that the Justice Department reconsider its attitude of the provision of Court facilities presently paid for by the Law Society and to participation by practitioners in the design of new Court buildings.

At the opening of the new Magistrate's

Court at Lower Hutt, Mr O'Brien noted that: "A separate solicitors' room, modestly yet properly furnished, together with a small library, is essential to the proper functioning of a Court such as this. Law Societies willingly provide, at increasing cost, libraries which are also used by Magistrates and departmental officers involved in different types of prosecution. It is not unreasonable that Government should do more towards the provision of library facilities, such as shelving for the books, curtains or blinds to protect them, and reasonable floor coverings, all now paid for by the Law Society."

Mr O'Brien also noted that in future the profession must be involved in planning exercises from the outset. He referred to Mr I L McKay's recent investigation of developments in the design of Court buildings in Australia and recorded his Society's objections to the final Lower Hutt plan—implying that in future such objections are likely to be pursued more vigorously.

The profession not only has to make facilities work but also has intimate contact with the public who use them. This gives the profession a special place in the assessment of any new building proposals.

JEREMY POPE

LAW, MORALS AND PARLIAMENTARIANS

An address delivered by the Prime Minister, RT HON W E ROWLING, *to the Wellington District Law Society.*

Morals and the law is a vexed political issue, and it is from the perspective of a politician that I want to consider it. For I believe it is important that politicians should be prepared to discuss their role in matters like this which become the centre of great controversy.

Note, I stress "Role"—not personal opinions on specific issues, but the position occupied by the people's representatives when conflicting and perhaps irresolvable demands are made on them . . . whether to preserve the status quo or radically overthrow it.

It is a classic case of, "You're damned if you do, and you're damned if you don't."

I think we—and by "we" I mean everyone not just politicians—fall into the easy habit of assuming that our political system can readily withstand any of the pressures put on it.

A pluralist democracy such as ours is predicated on the belief that all interests have a right to be heard. Put another way, there is an initial belief in the equality of all persons or groups as sources of claims. No claim is given automatic priority simply by virtue of its source; and no claim is ruled out from consideration in advance. Obviously, a system based on a belief like this can only function through mutual accommodation and bargaining. If we forget that, and *insist* that our interests take precedence when they conflict with others, we are storing up trouble not only for ourselves but for the political system as a whole.

It was David Fell who observed that democracy is only a way of arriving at workable solutions in a workaday world. To recognise that should warn us against taking up what it is fashionable nowadays to call non-negotiable stands.

By and large, our parliamentary system has through the years successfully reconciled competing claims. We have evolved a complex but flexible system for recognising legitimate interests and building a way of life which the huge majority find perfectly tolerable.

Dr W H Oliver, one of our own historians, has remarked that New Zealanders by and large have believed that what we have is good enough if only it were a little better. That is a pretty fair comment, and I believe that it is a low-key way of summing up our success in operating a pluralist democracy in this country. We have sought a decent life for all, but we have not demanded Utopia—we have not pulled our system apart.

It is with these considerations in mind that I wish to look at the issue of morals and the law. When it comes to moral attitudes and stands there are two salient features which, in political terms, can bode trouble.

Firstly, they are non-tangible: in the sense that there are no interests involved which can be readily measured against available resources. There is nothing to which a government can point as concrete justification for its decision. Perhaps that is not entirely true, for we can make assumptions about possible

consequences of changing or maintaining the law. But these are only guesses; and in the very nature of the case I do not believe they can be very informed guesses.

Secondly, moral stands are by definition fundamental. They relate to a person's innermost ideas about what is good and proper for himself and for the community in which he lives. I think we can see that moral principles are prime candidates for the title of non-negotiable interests. We need to do some serious thinking about what we may reasonably expect of Parliament in areas such as this. One often gets the impression that, in moral matters at least, each pressure group is convinced of the self-evident truth or justifiability of its case; and that if only those cottonheads in Parliament would open their eyes for a moment they would be too.

We seem to expect a kind of politics by revelation.

The case I am concerned to put today is that this sort of expectation is probably dangerous within a democratic system such as ours. For better or for worse people seem to claim the greatest certainty for things which can not be proved or disproved. This tendency is potentially at odds with the experimental and pragmatic character of democracy.

The useful ghost at the elbow of every politician is the one which reminds him that he must be able to produce good reasons for his decisions: reasons which hopefully will reconcile "losing" parties to their loss. (The usual compromise of course is to make everyone partial losers and partial winners!)

The best way to pull off that little trick is to point to hard unassailable facts: the standing implication being that it would be politically irresponsible to fly in the face of those facts. I use the word "trick" but in fact there's no sleight of hand about it—or there should not be. It is perfectly in accord with democratic principles—it is what allows the system to work.

Consider then, moral issues which revolve around fundamental value judgements about how things *ought* to be. You might say that all politics is about how things ought to be. That is true enough. but there are certain kinds of moral issues which put this question of "ought" in its most difficult form—as far as politicians are concerned anyway. They either do not hinge on factual claims at all, or else they relate to facts in an unusually obscure way. They defy demonstration.

Victims

Let us briefly look at some of the issues in question and try and identify what it is about them that makes them such political prickly pears. Clearly the list includes such things as abortion, homosexuality, contraception and contraceptive advice for minors, suicide. What they have in common is that none of them involves doing something to someone against their will; and there seem to be no victims. Actually that is not literally true.

It can be argued in all cases that there are victims, but that the victimisation is more removed, far less obvious than is usually the case with acts defined as criminal. Harm may be done but the nature of that harm is arguable. In at least one and possibly two of the cases I have just mentioned there may also be another element which simply compounds the confusion.

Abortion (and suicide) can involve a whole philosophy of how the world is: of the nature of man, what it is to be a person, what may or may not be the legitimate subject of rights, and so forth. I do not intend to wade into those murky waters—certainly not straight after a solid lunch—but I mention them to bring home the extent of the dilemma the politician faces.

Grounds

On what grounds does he decide? Whatever his decision, it may have implications which are as unavoidable as they are unwelcome. The law in so far as it impinges on public morals does not only regulate behaviour. It may entail comprehensive ways of looking at man and society. Certainly many sections of the public may choose to think of it that way.

All these problems lead to the question "what should the relationship be between law and morality?" It seems clear that there is no consensus within the legal profession on this matter. Perhaps there is a majority one way or another—just as there may be a majority within society at large—but how do we establish it? And if we could, would any of you people who might find yourself within a sizeable minority be content to have the issue definitively settled against you because you lost the head count? Very profound beliefs and attitudes are at stake. at the very least we should not be in too much of a hurry to take irreversible action—irreversible that is for the foreseeable future.

Unfortunately, it is precisely because the stakes are high that many people want a rapid

decision about the role and state of the law. We cannot blame anyone for that.

It is understandable if some people accuse Parliament of foot-dragging or even cowardice, or at least inconsistency. It is understandable in the circumstances, but I am not so sure it is entirely justifiable.

Claims

I want to focus briefly on two things: the nature of the claims being made on Parliament; and the consequences of making a definitive decision given the present state of public opinion. Unavoidably I shall have to simplify. We can think of the claims being made as falling under a couple of broad headings.

One group openly or tacitly stresses the freedom of individual conscience. It is held that the behaviour concerned does not involve victims in the usual sense, and that therefore the law has no business coercing a person's conscience. The other group emphasises certain kinds of harm that can indeed be identified and which fully warrants the law being brought into play.

The first of these two attitudes has I suppose received its classic utterance in the well-known words of John Stuart Mill:

> "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . 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 warrant."

The remarkable Mrs Patrick Campbell summed it up rather more graphically when she declared she didn't mind what people did so long as they didn't do it in the streets and frighten the horses. Less scholarly, but it makes the point. And that point is that certain kinds of behaviour are nobody's business except the doer's; unless they are carried out in circumstances that can demonstrably harm others.

Serious affront to the feelings of others is normally accepted as grounds for controlling such behaviour, which is why there are numerous laws against indecency.

The second broad approach—that harm *is* done by certain kinds of acts even when performed in private, and that measures should be taken to prevent that harm—can take many forms. I shall confine myself to one particular statement of this position, a statement which will be familiar to all of you.

Lord Patrick Devlin has developed the argument that a failure to adhere to a "common morality" can actually threaten a society's survival. He contends that a society, through its government, has an overriding right and obligation to protect itself. If the breakdown of the common morality threatens the disintegration of society then there is every justification for enforcing a common morality by law.

I hope I have not done a wild injustice to Lord Devlin with this summary. But what I have said is I think a reasonable account of one of the more prevalent attitudes in the community.

These two positions cannot be reconciled. They are not simply differing conclusions drawn from the same body of evidence. They are recommendations about the law which stem from quite different ways of looking at man in society. So if a government or a majority of free-voting politicians adopted either view, they would in effect be telling large numbers of the public that *their* way of looking at the world is simply wrong.

When opposing factions among the public insist that Parliament adopt their viewpoint, and be seen to act on that viewpoint, they are putting Parliament in a nearly impossible position.

Of course what is significant about this situation is that the moral consensus that people such as Lord Devlin presuppose, has evidently broken down. The law has always reflected the public morality in a variety of ways and while there was no widespread demand for change things went along smoothly enough. But public attitudes have changed. It is no longer taken for granted that the law should try to enforce morals in quite the ways it has in the past. That is what makes the *political* difference. In a pluralist democracy such as ours it makes *all* the difference.

Settlement

How does Parliament settle the issue? There is a very real sense in which Parliament cannot settle the issue at all. Or at least not on its own. Not without help from the public itself. Clearly action of some sort is needed, be it positive or negative. Law exists on these issues. These laws are a legacy from past Parliaments and today's Parliament can not blink them.

It seems unavoidable that the laws at present in force must either be endorsed, exten-

sively modified, or repealed. What we must earnestly try to do is to arrive at some kind of tacit consensus as to *how* Parliament should proceed.

What procedures should it adopt; what *kinds* of criteria should guide its judgements; what kinds of considerations are simply out of Court as far as Parliament is concerned?

Put differently, what I am suggesting we give serious thought to is the need to identify the capacity or the tolerance of the political system we are trying to work. If we can agree on the "how" then there is some chance that most of us could learn to live with the "what". The actual law that eventually came out the other end of the pipeline could hardly please everyone; but at least everyone would know that the method by which Parliament arrived at it was the fairest and most logical possible. That would be no small gain.

The great difficulty with the problem we are considering today is that the arguments surrounding it can be and are being conducted at many different levels. We are entangled in a web of our own making, and it is hardly surprising that passions run high. Parliament and perhaps even individual politicians can all too easily become scapegoats at such a time.

What I am suggesting is that we can only start to resolve the *political* aspect of the dilemma if we make a genuine attempt to sort out what kinds of arguments are appropriate for Parliament to take into account, and what arguments are "not for this House".

I submit it is not in order for Government to arrive at hard decisions on the basis of arguments that are impressionistic rather than factual.

Clearly, it *is* Parliament's business to respect and realise in law a coherent moral attitude towards social relations. By that I mean the notion of mutual forbearance, decency, and consistency in our dealings with one another.

Our political and legal principles are, of course, permeated with the implied idea of rights. As a corollary of this it follows that Parliament is vitally concerned with the question of *harm*. The point at issue is how far should we go in defining harm. Should broad, diffuse and essentially unverifiable notions of harm be allowed to become the subject of parliamentary debate? Or should we confine ourselves to what is in principle identifiable harm, with assignable "victims"? Even that is difficult enough surely. One obvious problem is that even the narrow approach could not solve such questions as abortion.

Even if we leave aside as insoluble the question of possible harm to society as a whole—to its character and prospects of survival—and assuming we could satisfy ourselves that physical and social harm to the mother could be largely avoided . . . there still remains the question of the unborn child. Does it have rights? Is it, or at what point does it become, a person? There is no final and certain answer to questions of that kind.

Can we expect Parliament to make a decision on the matter, a decision that will have concrete legal consequences? Should Parliament actually only concern itself with institutions that allow for freedom of action, and leave such speculations to the individual's conscience?

Conscience vote

I raise this point because it introduces the subject of the so-called "conscience vote" in Parliament. I am far from sure that the title "conscience vote" is helpful. It tends to specify the nature of the vote in advance. "Free vote" is probably better.

As things stand, a free vote can be a random affair in the most profound sense of random, since different members arrive at their decision on the basis of quite different *kinds* of argument. For some it is indeed a vote of conscience: they act on the assumption that their own personal morality cannot be set aside. Others believe it their task to try and reflect majority opinion. Yet others concentrate on likely consequences—whether for individuals or society or whatever. The various ways of tackling the problem all imply different notions of parliamentary representation. Any majority that emerges is, as I said, utterly random—its logic in representational terms is elusive to say the least. Perhaps this bears thinking about.

Summary

I am suggesting that politicians have a responsibility to think through the implications of their representative role. They must try to clarify the criteria of decision-making—the standards suitable to the making of law in a pluralist democracy. The public too has an obligation. If it wishes our political institutions to remain workable, to act so as to balance divergent social claims rather than to divide society, then it must try not to make impossible demands. One cannot legislate moral philosophies.

The public has a right to expect that Parliament should arrive at its conclusions—whatever those conclusions may be—in a fair and logical way. I am not sure that it can expect more than that . . . though even on that count perhaps we in Parliament have so far sold the public short.

If there is any single message in what I have said today it is that in a society like ours, what it is safe for the law to do, depends in large measure on the *way* the law is brought into being. This is one reason why I reject the idea of a referendum or a so-called electoral mandate to decide moral issues. Referenda are always risky ventures. As often as not they tend to inflame feelings and divide society. They claim to settle an issue unequivocally, and so rule out the kind of gradual mutual accommodation which in political terms is the best option for us all.

As for elections: to inject issues of this sort into an election fought on party political lines could only skew the whole procedure.

I must conclude by making one thing perfectly clear. Parliament has not turned its back on the kind of problem presented, for example, by the abortion issue which I used a moment ago. Despite all the noise and publicity we have witnessed we are as yet working in something of a knowledge vacuum. We must know more, and to that end we have set up a Commission to enquire into abortion, contraception and sterilisation. Its terms of reference are wide; its powers are ample. We have every reason to believe that its investigations will provide us with the social and legal information we need for making an informed decision. Any comments it may make on the moral implications should surely prove helpful. Its report should in fact make a valuable contribution towards clarifying the lines of debate most appropriate to the parliamentary forum. In the meantime, we should all of us try to avoid being strident and intemperate. Feelings run deep in this area but that is not a warrant for sensationalism or mutual abuse. Parliament must look to itself and the public must help it.

We need guidelines. But should those guidelines be public feelings of "intolerance, indignation and disgust"? I think not. Let us work out something better for ourselves.

EVERY MAN'S HOME IS THE DISTRICT COUNCIL'S CASTLE?

KENNETH PALMER, *studying at the Institute of Advanced Legal Studies, examines Britain's Community Land Bill.*

The UK Minister for Planning and Local Government has proposed radical changes to the rights of land ownership in his Community Land Bill. The needs of the community are to come first, and through a system of municipalisation Councils will take over all land which is to be developed at a value determined without reference to any development potential. The Opposition spokesman has wholly condemned the Bill as odious, amounting to land confiscation, and inviting corruption and complete development stagnation. The Opposition agrees that where the granting of planning permission adds to the value of land, the value should be returned to the community, but it proposes the continued use of taxation as the answer.

The problem of private gain from inflation in land values is as old as time, and it is instructive to examine the techniques proposed in this latest measure. In the first place, there are four separate dates to be fixed by the Secretary of State for bringing the Act into effect, so the changes will progress as rapidly as practicable implementation permits. The Opposition is pledged to repeal the provisions.

On the "first appointed day", each local borough authority and regional (county) authority will be under a general duty to have regard to the desirability of bringing development land into public ownership, and to develope that land themselves or make it available for development by others. "Development land" is all land which is suitable for development, that is any new buildings, reconstruction or change of use. To bolster the obligation to consider municipal land acquisitions, Councils are given absolute power to acquire compulsorily any such development land, subject to the consent of the Secretary of State. Should Councils of different political affiliations be reluctant to acquire land, all Councils are

obliged to prepare land acquisition and development schemes, but, to prevent legal quibbles arising, the schemes "shall not create any obligation enforceable at law". For the completely inactive Council, the Secretary of State may step in on the second "relevant date" with a "designated development order" which will place the Council under a duty to acquire all the land in the area for the purpose of particular development so designated. The source of Council funds for this exercise is not stated.

On the assumption that the most appropriate time to take over development land outside specific development areas should be on disposal of land, a Council may resolve that an area become a "disposal notification area". This useful device gives the Council notice of any disposal of freehold or of leasehold for 7 years or more, and the Council has a statutory right to intervene in the transaction within 4 weeks of the notice, and purchase the land itself. Failure of the vendor to give notice of a proposed sale constitutes an offence. The effect of this procedure will be to render all private sales liable to pre-emption by a Council. Clearly the choice of intervening in one case and not another may tax greatly the integrity of Council members and their officers. Owners will also be reluctant to offer properties for sale. At present, the existing powers of compulsory acquisition by Councils are used to the utmost by certain Councils of one political colour, and neglibly by the others.

The implementation of the foregoing provisions can readily be contemplated as a reasonable progression of existing housing policies, and planning and development control duties. The provision which takes effect on the third "commencement date" is more fundamental and salutory. This date has the effect of suspending *all planning permission* until the land concerned is acquired by the Council itself or passes through Council ownership under a scheme for its development. As planning permission is required in the United Kingdom for all development, the effect of this provision is to prevent *all* private projects or changes of use unless carried out through Council ownership. The only development exempted (other than minor repairs) is the erection of a single dwelling for the occupation of an owner holding land before the end of 1974. The basic philosophy is that, through Council ownership, no private inflationary profit can be made, but profits which the Council may lawfully make itself will be shared with the Government. On the fourth "appointed day" the basis for compensation to be paid for the acquisition of all this property is changed from the present standard of current saleable value on the market to one of current use value, under which any grant or prospect of planning permission shall be disregarded. Accordingly, empty commercial or industrial land will be valued as bare land with no use potential.

The practicalities of the Bill are faced in the explanatory memorandum. It is officially estimated that local authorities will require an additional 12,750 staff to implement the total provisions. Assuming that suitably proficient staff can be recruited there will obviously be a significant move from private employment to public employment, and a large increase in a Council salary account. However, on the financial side, the memorandum estimates the annual cost of acquisitions at £300-£400 million, the administration cost at £50 million, and the capital value of disposals at £800-900 million. A huge profit to the community appears on paper and, better still, a local authority will be exempt from existing taxation on development gains.

The Bill has, however, received a very critical reception from almost every responsible public group as to the methods to obtain the end. Even the Churches have united to petition for exemption. For Councils, a small provision states that a local authority will no longer be able to either acquire any land or dispose of any land without the consent of the Secretary of State. At a stroke, the Secretary may thus prevent a Council financing the sale of rented properties to tenants. This traditional role of local government is rendered subject to ministerial control. Other Councils doubt the competence of a local authority to become a land developer or to provide the impetus for searching out projects which are financially self-supporting. For example, *The Times* refers to recent purchases by a Council of houses for £15,000 each with additional conversion costs of £35,000 per house. The average weekly rental is £5 per unit. Another example was a purchase for £123,500 of a large house in good condition by a Council for the purpose of demolition and the erection of 10 garages. These examples are exceptional, one hopes, but rents of 200,000 units owned by the Greater London Council return only 40 percent of the capital costs.

At the present time the property boom has collapsed, and Councils have been directed not to sell properties to tenants. If leaseholds are to continue, the Community Land Bill will pro-

duce no profits at all but a larger public debt. Councils are also being derated by the Government for overspending, even though spending expansion is often due to unforseen wage increases and costs in both the private and public sectors. Accordingly, Councils wonder where the money will come from for the ultimate goal of total municipalisation. Interest rates on Council loan stock are now 12.5 percent in order to attract private funds.

Finally, planning groups are concerned that Councils will become the judges in their own cause—namely issuing planning consents. The Council as owner will be strongly motivated to grant itself, or a developer under agreement, a consent which will justify a profit to it on the development. There is no appeal here against the granting of a consent, yet the statutory system virtually pre-supposes a bias in favour of a land acquisition plan which has no legal status and which may or may not be ignored.

To be fair, the Bill has two positive provisions. There is a new "financial hardship tribunal" to make limited awards to land owners who claim to suffer hardship upon the loss of land once the proposed current value compensation concept takes effect. The second provision gives the Secretary of State power to acquire office accommodation compulsorily where is has remained vacant for a generous 2 years period. This provision is aimed at a "Centre Point Building" case, to prevent the developer of a large building holding out for an unreasonable rental or simply sitting on an empty building whose value escalates simply because he is keeping the homeless outside.

One can predict that the Bill will be duly passed in accordance with the wholesome precept of Ministerial conduct that a Government should never concede faults in a proposed system which implements a principle. However it is also predictable that, in accordance with certain other provisions which are gathering dust in the U.K. Statutes, the "third commencement date" and the "second appointed day" may never dawn. Such an outcome may well satisfy all parties.

People and property—I must confess I have some sympathy for those who complain to me that offences against property seem to be punished more severely than offences against individuals. I do not know whether lengthy sentences do deter but if they do, there seems to be a case for the protection of the public in saying that the longest sentences ought to be for attacks on people rather than for depredation of property. Two recent cases of that kind, however, illustrate my suspicion that the message of a deterrent sentence fails to come through with clarity. On a Friday in Auckland, a Judge sentenced two people guilty of an armed robbery of a bank to stiff sentences but said they would have been longer and indeed probably the maximum but for the fact that the weapon carried was unloaded. His Honour said emphatically that the use of loaded weapons in such cases would expose the offenders to the utmost rigour of the law. That very weekend other premises in Auckland were held up by an offender who not only carried a loaded shotgun but was at pains to break open the breech to convince his victim of the presence of shells. These incidents remind one that when the picking of pockets was a capital crime in England, one of the most fruitful sources of arrest was Tyburn where convicted thieves were publicly hanged.

The truth is that we are still groping for answers to the causes of crime and the remedies for crime and the only truth that has been revealed to me during my short period as Minister of Justice is the verity of the old adage, "give a dog a bad name and you might as well hang him". If, in prison or out of prison, we treat people as animals—reject, scorn, mock and deprive them—then we can be certain that they will behave like animals.

DR MARTYN FINLAY to the National Council of Women.

On the side of Heaven—There are very few indeed who can cope equally well with all types of advocacy. I have known one or two, Sir Alexander Johnstone was one of them. His reputation was essentially as an advocate in civil cases. I was his first clerk when he took silk and knew him very well. At one stage he did a good deal of criminal work and I remember him having a remarkable run of successive acquittals; he had white hair and looked very much like an angel and there were those who thought that his successes in the criminal field were in no small part due to this angelic appearance. The juries, it was said, could not accept the idea that Mr Johnstone would have anything to do with really guilty people.—SIR CLIFFORD RICHMOND to the Wellington Young Lawyers.

ADOPTION PROCEDURES IN COOK ISLANDS AND NEW ZEALAND

PAMELA RINGWOOD *LlM, BA, Dip Soc Sci, Senior Lecturer in Law at the University of Auckland, writes of Cook Island adoption procedures and suggests gains should we fall into line.*

There is a great deal of discussion at the present time as to the rights of the natural mother to demand psychiatric interviews of adoptive parents or otherwise specify the kind of parent to whom the child shall go. It is not likely that the now discredited theory of matching a child, only a blob a foot or so in length, with parents assessed by a Social Worker, will be any more successful where the matchmaker is the natural mother. The difficulty is in judging the quality of a particular interaction between people who as yet have not had to cope with that particular baby's personality and needs, and a baby whose personality and needs are largely unascertainable in other than very broad terms. There are, however, three important considerations which should not be lost in a blanket denial of the effectiveness of a natural mother's choice of adoptive parents:

(a) Largely unused in our society is the feeling of support adoptive parents can receive from the fact that the natural mother liked them personally. This is not to say that a continuing relationship is always necessary, or in some cases desirable. But there is value in arrangements made overseas for the parents to become acquainted (naturally and anonymously in a social worker's office), prior to the consent being given by them all. My personal experience, unlikely as it sounds, is that the fact that one has had this support is a great comfort when the going gets rough.

(b) The need to allay the natural worry of a mother who is casting her child into what seems to her a void. We judge parents harshly who do not worry about their child's welfare—why should a natural mother be presumed to be unatural in having this anxiety?

(c) The need of the child to establish his identity and, in the case of an adopted child, to adjust his relationship to two sets of parents. This is pointed up by the research done by John Triseliotis in *Origins of Being*, a study of the adopted persons who applied for information as to their natural parents from the Scottish Register under the Scottish Adoptions Act 1930. The research assisted the UK Royal Commission on Adoption whose recommendations as to availability of information have now been incorporated into United Kingdom law.

Briefly to summarise the general research—about 80 percent of adoptions appear successful. A small proportion of adoptees who have poor relationships in their adoptive family feel a need to meet their natural parents in order to relate to them. Actually doing this does not always remedy their personal problems. Most adoptees find it helpful in getting a sense of security as an individual, to know something of their own heredity and in particular to know why the parent gave them up. Understanding the mother's decision was a crucial question with many.

Research I recently undertook in the Cook Islands as part of an overall study (partly sponsored by Interdepartmental Committee for Polynesian Research and by the University of Auckland) throws some light on all these points.

In general, legal institutions consist of legal machinery designed to achieve a desired social purpose. This is particularly obvious in the field of family law where the social purposes such as preservation of the family unit, have strong emotional overtones. In English law, rights over children had an important social and economic purpose in feudal society. The rights were crystallized in the institution of parents or wardship and meant that the parent or guardian had the right to dispose of the child in marriage and to be able to make use of the lands of the child. Disposal in marriage had much the same significance as bargaining over air rights has today—an airport in a strategic place may enable a country to barter for access to the airways and airports of a country who desire in time landing rights at one's own airports.

There are two different provisions—for the Europeans, or for Europeans married to a maori, the adoption is through the High Court and the New Zealand Adoption Act 1955 applies.

For maoris, whose customary rights are protected by Cook Island law, adoptions could be informal through Maori tradition or formal, through the Maori Land Court (Cook Islands Act 1951, s 458). Briefly, the traditional adoptions could be either *complete* in a similar sense to our legal adoption, in that the adoptive parents became the legal parents of the child and this was called child of the loins of seed, or *partial* when the child was cared for by one family but still remained the legal child of the natural family. This seems similar to fostering and this child was called the feeding child, indicating that the new family would provide for its needs. This situation would arise when a family had more children than it could provide for, because of numbers or perhaps some crisis such as the effects of a hurricane or financial loss, and relatives assumed care of one or more of the children. Similar to the distinction between adoption and fostering in New Zealand, in the first case, the child took the very important right to land in his new family, whereas the feeding child strictly does not. In fact, some feeding children or people claiming through them, have asserted a kind of moral right to the land, and if they are aggressive enough, they have succeeded in getting relatives to agree to this. Thus, although there are some cases of feeding children or their successors obtaining land rights in the new family, in strict tradition the feeding child still retains his original rights in the natural family and does not acquire new rights in the fostering family.

There are however, two important differences from New Zealand adoptive patterns—one relates to the fact that these are mainly family and not stranger adoptions, and the other to the very great importance of land on an island which is only 20 miles in circumference, where land has been and possibly still is the major source of wealth and, as in Maori custom, the source of status and identity.

Up till recent years, in Rarotonga there have been very few people who were not family. The major family groupings, although possessing distinct land rights, are all related in some way. At the present time there seems to be only one Samoan and one Tongan, living permanently there, and there is apparently no racial mixture to any degree other than with the Europeans. Asians are prohibited from immigration by law (Cook Islands Act 1915, s 458). This has had a number of implications.

Traditional adoptions usually recognised some blood or emotional tie. A child would be adopted by a childless couple or grandparents seeking a child in the house during their old age and they would seek the child by asking a relative to give them (in the case of grandparents), perhaps the first child, or generally one of the children where a couple had a number and perhaps more than they could easily care for. Although traditional adoptions then made that child, the child of the adoptive parents, it left untouched the land rights as it still had the rights of that family.

Of a different nature were adoptions where there was some emotional tie. These might occur when someone was marrying into an upper class family. If the family liked him they would adopt him and either give him a title or create one for him and he would gain the land rights of that family. Similarly, when the missionaries came to the Cook Islands families which felt a strong tie with them, would adopt them, thus entitling the missionaries to land in the island and providing them with status and protection.

Land is increasing more and more in importance because it is now the basis of commercial and industrial development and is in very limited supply so that there is now a good deal of resistance among relatives to adoption other than in the family. Most adoptions of this kind in the immediate future can be expected to be of relatives with similar claims to land as the adopting family. There also seems to be quite a lot of friction over the feeding children who have claimed a right to land of the foster family and it is possible that these arrangements may decline in number.

The important implication for us of these family adoptions is that apparently what is a major problem in European adoptions does not occur. As far as those dealing with the children as they grow up are concerned—the District Nurse, and the Education Department—the child suffers no identity crisis over the adoption. Also, unlike New Zealand there is no higher incidence of battered children among adopted than natural parents. Partly because of the close family ties and the very small area of the island, children grow up knowing and accepting their natural parents and well aware what their relationships are. In a sense they may be gaining parents rather than losing—an adopted child whose stepfather would not give her land rights in his family simply went to her natural father, put the situation to him and he gave her part of his land.

Similarly, according to the matron of the hospital the mothers giving up their children

are quite settled and have no emotional problems or depression. As a number of people said, the natural parents know that their relative will love that child as their own. Further, if the natural parent comes to feel that the child is being badly illtreated, as against simply feeling that something might be done differently, there are cases noted (including a recent one), where the natural parent has taken the child back. These cases are few in number, and certainly one of the factors which militates against such severe illtreatment is the family pressure and the smallness of the island society. The recent case, significantly enough, concerned a family which illtreated an adopted child who had gone with them to New Zealand.

I could not discover whether the right to take a child back in such cases applied to a traditional adoption as well as to fostering, but it is possible that, as with feeding children claiming land rights, some natural parents simply acted and created a de facto right. There were very few of these cases within people's memory, and the strong social pressures which exist would have a strong screening and preventive effect. The screening operates in two ways. Because the place is so small that everyone knows everyone else's business and a person unlikely to obtain legal adoption of a child, is less likely to apply. Also because it is the parent who decides on the specific person who will take the child.

In New Zealand, on the other hand, the parent must give consent to that specific adoption, but the consent is actually only to the information about the adoption as presented by the adopting agency. Only in those cases of adoption by relatives or friends are the natural parents giving consent based on a personal acceptance of the adopting parents. This means that the Rarotongan parent feels much more in control of the adopting process whereas here the adoptive parents are first selected by the Social Worker and then proposed to the natural parents. In Rarotonga, the natural parent selects or accepts the request of the adoptive parent before any legal or traditional action is taken. Both sets of parents in Rarotonga are fortunate also in that the social pressure is more positive than negative. It is regarded as proper that the childless person should be able to take a child into the home and the community supports that decision. Particularly in earlier times, although still to some extent, the presence of young people in the home ensured the performance of the mutual rights and obligations which sustained the dependent, of whatever age. The childless person has not, however an absolute right to the child, and the natural parent could refuse to give it. I was told of one case where the parents had refused a number of requests from a relative but had allowed him to exercise the right of naming the child, which apparently gives a status something like the original status of godparent and is an additional close connection with the child, while not assuming the right of parenthood.

Although theoretically the natural mother in New Zealand has a free choice in the decision as to adoption, this is not really so in many instances. Fashions in social work practice and social pressure as to what she should do alternate. Some years ago a great deal of conscious and unconscious pressure was exerted so that she would give up the child so it could have name and parents. Nowadays the prevailing climate seems to be as one solo mother said on television—that she should keep the child under whatever circumstances so that the child is not just 'tacked on' to a stranger family. Both views are extreme and neither is correct.

What is very wrong in our situation is that there is any pressure on the mother at all. She often has not the alternative of sending the child as a 'feeding child' to another member of her family. Nor, particularly in the case of some of the younger or less mature mothers, is she always aware of the nature of the total commitment she is making in keeping the child.

It is obvious that the decision and process of adoption in Rarotonga, though seen as a serious responsibility, is not the traumatic affair it is in New Zealand. There is not the anxiety which follows application and screening (only one Social Welfare Department report requested even in European adoptions), or follows from the iron curtain of non-communication which cuts the natural parent off from the child and fosters a good deal of often unnecessary anxiety and guilt. The situation in Rarotonga is that the adoption is an accepted process whereby those without children may acquire them and children without protection, acquire that. It does not appear that the natural parents are criticized either for giving or withholding consent.

The other important difference is that both the informal and the legal processes of adoption are simple and short in duration. (This is emphasized in *Beyond the Best Interests of the Child,* by Joseph Goldstein, Anna Freud and Albert J Solnit). There is no six month interim order with the possibility hanging constantly

over the adoptive parents that the child they are holding so fondly today may be reclaimed tomorrow. This over-shadows not only the precise six months but quite often an additional period of equal duration while legal cogs move. Applications for final orders are apparently not viewed by the Courts as urgent. In one sense they are not, as they do not involve loss of liberty, but in another sense they are, because of anxiety to the adoptive parents and its effect on the relationship with the child. Adoptions in the Cook Islands cost only a couple of dollars and are much shorter in time than New Zealand adoptions, which cost about $40 and may take 4-5 years to complete from the time of first application to Social Welfare Department to the final order.

Where the Rarotongan adoption has its problems is in the crucial question of land rights. It would appear to arise only when the child would have been better off from the point of view of land rights if it had not been adopted. This is a much less disrupting issue to the child than the effect on him of not knowing his origins, and is more easily resolved.

Post migration pattern—There has been a considerable swing in the Cooks to the system of legal adoption. The reasons are financial and to avoid embarrassment.

(i) Migrants to New Zealand are not given the Family Benefit in the case of feeding or traditionally adopted children.
(ii) Embarrassment in educational enrolment and in obtaining passports or birth certificates.

The statistics show a sharp rise in the number of adoptions, either by people before they emigrate or by people returning to adopt.

It is understandable why they do not resort to the legal process in New Zealand—length of time, intervention by unknown social workers, cost of a couple of dollars and a holiday home in Rarotonga, remoteness of the New Zealand Courts and their personnel whereas both are very familiar to Cook Islanders as many may also be involved in claims before the Land Court. These reasons and the element of control probably make even those Cook Island mothers, who have the child in a New Zealand hospital, send him home for adoption or fostering out. Although there is no emotional difficulty about adoption, there is very strong resistance to adoption outside family and it was often said that grandparents would resist the placement of such children in the New Zealand system. The only case of adoption by a foreigner was both unusual in that the parents and their family could not care for the newest baby and in the fact that the adoption was from outside the country. This is the only known instance of foreigner adoption.

Conclusion

This research was not exhaustive, in the limits of time and money available. It does, however, provide significant pointers in the light of topical discussion on adoption:

(1) The absence apparently of an identity crisis in the adopted child.
(2) The absence of mourning by the natural mother.
(3) The effect of strong positive support by the society to the natural mother and adoptive parents, and acceptance of the child.

It is obvious that the particular considerations in Rarotonga—limited area, a related society—would not allow a complete transplant of their system to New Zealand which would achieve similar results. It does, however, mean that the system of records being sealed so as to prevent the child having details of his past could now be relaxed so as to allow him to establish his antecedents. Also, the support given to the two sets of parents by society may well reap its reward in a better adjustment of the child and be preventive therapy in its most creative sense. Perhaps more attention could be diverted to this, and a little less to matching adoptive parents and children—if this was ever really possible.

What the Judge was really writing—Judges vary in their willingness to take very detailed notes of argument as appears from a story I once told about Sir John Salmond. You will all know of his famous judgment in *Taylor v Combined Buyers Ltd* [1924] NZLR 627. An admirer of Sir John's is said to have been sufficiently interested in that case to go to the trouble to find the Judge's notebook. He found it and was able to turn up the page headed with the names of the parties and of counsel. But when it came to the question of counsel's submissions all that the notebook contained was a number of rather well executed drawings of snails and birds and such like, which had evidently been done by the Judge while listening to argument. It was all very disappointing, and hardly a tribute to learned counsel concerned. SIR CLIFFORD RICHMOND to the Wellington Young Lawyers.

"JUSTICE" AT WORK

MR D J HEWITT, *a Christchurch barrister, writes of his recent visit to the London headquarters of "Justice", the British Section of the International Commission of Jurists.*

While in London recently I had the opportunity of calling at the office of JUSTICE, the British Section of The International Commission of Jurists. It was to realise the lawyer's faith in justice and human liberty under the Rule of Law that the International Commission of Jurists was founded. There I saw again the Secretary, Mr Tom Sargant, who visited New Zealand in January 1974, and who met members of the New Zealand Section. In London, I was invited to attend a meeting of the Administrative Law Committee of JUSTICE under the Chairmanship of Mr David Widdicombe QC. I was introduced, as a Council Member of the New Zealand Section, to the various members of this Committee who were most cordial and interested in New Zealand's experimental legislation. This Committee was particularly keen to learn more about the Administrative Division of our Supreme Court, with its wide ranging "application for judicial review", and the discretion to grant any form of relief to which the applicant might be entitled. The Administrative Law Committee, one of the most active of the various committees set up by JUSTICE, has established a high reputation for its work.

A brief outline of some of the activities of JUSTICE may be of interest and will show the need for effective institutions and safeguards.

Administrative law

Partly because there is no system of administrative law in England, the country has lagged behind many other European countries in this respect. The tendency has been to rely upon the traditions of fair play and integrity in administration, and in the ability of Members of Parliament to get any serious wrong put right, and in the belief that the English system of justice, with its rights under the common law, is the best. Limited remedies have been provided in limited areas but, in other areas, the citizen can suffer injustice through carelessness, indifference or malpractice for which a remedy is sought in vain. For example, in such areas as prison administration, the police, grievances of civil servants, and members of the Armed Forces, nationalised industries, and the administration of justice.

It has never been accepted in England as a universal principle that an authority complained against should not be the final judge in its own cause. Moreover, it has never been accepted effectively in England that any citizen who needs to challenge any oppressive or unjust decision, whether it be in the Courts, or whether it be by some instrument of government, should be able to do so from an equal basis of knowledge and expert help. Nevertheless, the Administrative Law Committee of JUSTICE has been most active and has prepared and submitted memoranda to government committees on a number of subjects including, Development Control Review, Legal Aid in Tribunals, Local Government Rules of Conduct and the Commission for Local Administration.

Development Control Review—In a review of development control the Administrative Law Committee has prepared and submitted memoranda and has given evidence covering the definition of development, police guidance, planning applications, decisions of the local planning authority, appeals against refusal of planning permission, planning inquiries, the training of planning personnel, delegation of powers, and costs in the light of the delay in planning appeals.

Legal Aid Tribunals—The Administrative Law Committee has made submissions to the Lord Chancellor's Advisory Committee on Legal Aid. It was recommended in principle that Legal Aid should be made available before all tribunals subject to the supervision of the Council on Tribunals. It was pointed out that legal aid was just as necessary in proceedings before tribunals as it was in Court proceedings, because the decisions of tribunals can have just as serious an effect upon a citizen's vital interests and well being. This applies particularly where there is a matter of principle or a large sum of money involved.

Local Government Rules of Conduct—The Prime Minister's Committee on Local Government Rules of Conduct invited the Administra-

tive Law Committee to submit written evidence. Among their recommendations was that there should be no weakening in the present law and practice. Moreover, there was need for disclosing interest at every stage of the decision-making process, including caucus meetings of a majority party; while the law on the disclosure of pecuniary interest should be simplified with the penalties increased for any infringement. Some changes in the general law relating to corruption were also recommended. Furthermore, a well established code of conduct and, in the case of officers, the contract of service, was submitted as a recommendation to minimise corruption.

The Commission for Local Administration—The Administrative Law Committee submitted comments on the proposed Commission for Local Administration for England and Wales and in the most important respects, the submissions made have been adopted.

Criminal law

Problem of Identification Evidence—In the opinion of JUSTICE, there are hazards which face an innocent person accused of a crime, if the prosecution is not scrupulously fair in its investigation and presentation of the evidence, or if the accused is inadequately defended. In this respect, there have been some recent cases in England which have troubled lawyers and laymen alike, and which would have been unlikely to have arisen if earlier recommendations of JUSTICE had been implemented. This applies in particular to the prosecution process and to the evidence of identification. For instance, JUSTICE has asked for a full disclosure of all relevant police evidence which might be helpful to the defence. While the declared objects of a notice of alibi, originally advocated by JUSTICE, are to give the police a chance to check whether the witnesses have criminal records, and to give the police a chance to investigate it, so that a charge can be withdrawn, if it is confirmed, or rebutted, if it is plainly false. However, it is the opinion of JUSTICE that the alibi witnesses should not be interviewed by the police, except in the presence of, or by leave of, the defence solicitor.

Prosecution process—It has been pointed out by JUSTICE that in England the police are the least controlled and the most powerful in Europe. Except in the comparatively rare cases undertaken by the Director of Public Prosecutions or a Government Department or a private citizen, the police investigate cases reported to them; interrogate suspects; and decide whether or not to prosecute: if so, whom and on what charges; interview witnesses; select the evidence and are responsible for the prosecution. So far as JUSTICE has been able to discover, this happens nowhere else in Europe. In most countries there is an independent prosecuting authority. For instance, in Scotland, all prosecutions have always been under the control of the Lord Advocate through the Procurator-Fiscal. And now, in Northern Ireland, except in trivial cases, the Scottish system has been adopted. In the view of JUSTICE, the English system offends against the principle that prosecution should be—and should be plainly seen to be—"independent, impartial and fair".

The case of Luke Dougherty

Luke Dougherty was convicted of stealing two pairs of curtains from a Sunderland store at a time when he was on a coach trip to Whitley Bay with 20 other adults and 20 children. His application for leave to appeal was dismissed and he served nearly 10 months of an 18 months sentence before he was released on bail. His conviction was subsequently quashed, as a result of representations made by JUSTICE to the Home Secretary, who referred the case back to the Court of Appeal.

Dougherty had been charged and convicted solely on the uncorroborated identification evidence of two store assistants. The way in which this was achieved was contrary to all the rules and normal safeguards. Photographs of likely suspects were shown to the two witnesses as to identification, but no identification parade was arranged. Dougherty did not know that both the witnesses as to identification saw him in the dock at the Magistrate's Court. At the trial these identification witnesses watched through a glass door while Dougherty was taken from the dock and seated among waiting jurors. After the identification witnesses had come in and pointed Dougherty out, this fact was made known to the Judge who was of the opinion that it was still safe for the case to go to the jury.

When these two identification witnesses were interviewed by the police prior to the final appeal, these witnesses said that the theft had been carried out by three people acting together—a man about 55, an elderly woman with a limp, and a youth. One of these witnesses said he was sure he had told this to the Sunderland police at the time, but the statements produced at the Magistrate's Court only mentioned a man

whose description was totally different from that of Dougherty.

Dougherty's solicitor gave due notice as to the alibi and the names and addresses of five witnesses who could testify that at the time of the theft Dougherty was on his way to Whitley Bay. These witnesses were interviewed by the police and confirmed Dougherty's claim. One of the witnesses was the woman who organised the trip and who had the names and addresses of the other passengers and details of the booking with the coach company. However, this woman did not give evidence and the Court was not told the result of the inquiries made by the police.

Dougherty's solicitor took the view that five witnesses would be sufficient to establish the innocence of his client and that it was not fair to the legal aid fund to ask for more. Dougherty, who supplied five names, was told to get the witnesses to Court. The witnesses were not interviewed and ultimately only two acceptable witnesses appeared.

Dougherty's hopes of a successful appeal rested on two grounds—the way in which his identification had been carried out and the witnesses he had been denied. He lodged a notice of appeal with a request that further witnesses be called. His counsel later provided him with grounds of appeal covering the issues of identification. Dougherty was granted legal aid for counsel to argue his application on the identification grounds, but the refusal of a solicitor was confirmed on the grounds that all the witnesses had been available at the time of trial.

Dougherty was given the choice of either accepting what he had been offered or of being unrepresented and facing the prospect of a long delay before the Court could decide if he would be allowed to call his witnesses. He chose the former. His application was dismissed by the Full Court which said that the trial Judge had properly exercised his discretion in allowing the case to go to the jury and that counsel had been right not to press the matter of other witnesses.

After Dougherty had been refused leave, JUSTICE was instrumental in obtaining statements from as many passengers and other witnesses as could be traced. Sixteen statements were forwarded to the Home Secretary with a covering letter and memorandum. Within 14 days the case had been referred back to the Court of Appeal and Dougherty had been released on bail. This time there was no doubt or argument about the new witnesses, because the Home Secretary had specifically mentioned them in his Letter of Reference and had asked the Court to look at the whole case in the light of their evidence.

In the course of their inquiries the police were able to trace six further witnesses who all confirmed Dougherty's story. Evidence was taken on Commission by the Circuit Judge and after 14 witnesses had given evidence, the prosecution finally conceded that it could not resist the appeal. In accepting the new evidence and quashing the conviction, the Lord Chief Justice agreed that the Court might have taken too narrow a view of its powers.

As a matter of comment, it might be said that Dougherty's consequent clearance and release should not have had to depend on the activities of a voluntary society such as JUSTICE. Moreover, although this was an exceptional case in which all the theoretical safeguards failed, it is not necessarily an isolated case. Everyone who faces trial faces a similar series of hazards in varying degrees.

The Luton murder case

In this case three men, Patrick Murphy, David Cooper and Michael McMahon were convicted of the murder of a Luton sub-postmaster. A fourth man, Matthews, was arrested first and charged with the murder. Later Matthews gave evidence for the Crown and became the chief prosecution witness. Matthews identified all three men, saying that he had been asked to accompany them to Luton for an innocent purpose, and named Murphy as the driver of the getaway car. The prosecution did not disclose to the defence statements taken from two eye-witnesses which clearly pointed to Matthews being the driver. All three men had substantial alibis but were nevertheless convicted.

Subsequently, largely as a result of a BBC documentary film on which the Secretary of JUSTICE gave the commentary, the Home Secretary referred the case of Murphy back to the Court of Appeal under s 17 (1) (a) of the Criminal Appeal Act 1968.

This called for a reference of the whole case but the Letter of Reference was restricted to the calling of one new alibi witness. This caused the Court to take a restricted view of its power to hear fresh evidence and prevented other witnesses being called and matters canvassed which might have helped the other two convicted men. JUSTICE made strenuous representations to the Home Secretary to widen the terms of the Letter of Reference but without success. Fortunately for Murphy, the new alibi

witness was believed by the Court and his conviction quashed.

Legal aid for bail and remands in custody—As a result of considerable pressure, amending legislation has incorporated into the criminal law a provision that no convicted criminal, however grave the offence of which has has been convicted, should be sent to prison for the first time without being offered legal aid. In the view of JUSTICE it is quite illogical to do this while thousands continue to be sent to prison every year untried and unconvicted, because they are refused bail when unrepresented and without legal aid. Research has shown that a number of women on remand in prison had not applied for bail because they did not know what bail was. Others, who knew enough to ask for bail had no knowledge of the criteria for the grant or refusal of bail, and so did not know what to say.

While the Criminal Justice Act 1967 gave power to Magistrates to impose conditions for bail, a joint working party of representatives of eight organisations, including Magistrates and police (which JUSTICE assembled) have made the following recommendations, namely:

(a) A presumption should be created in favour of the granting of bail;
(b) there should be more effective machinery for obtaining information about an applicant for bail including the use of a bail information form;
(c) when considering the acceptance of sureties, Magistrates should place more emphasis on character and relationship than on financial resources, and should make the decisions themselves.
(d) arrangements should be made for prisoners who are granted bail to be brought quickly back to Court if they have difficulty in obtaining sureties.
(e) personal recognizances should be abolished and a new offence of jumping bail created.

In the opinion of JUSTICE if these recommendations are to be effective, they need statutory authority or at least precise directives should be issued to all Magistrates and clerks. Clear directives are also needed on the power to impose conditions of bail. For instance, reporting daily to the police can be oppressive, because if an accused person intends to jump bail, he can do so as easily in a day as in a week.

Redistribution of criminal business—JUSTICE published a "memorandum of evidence" which was submitted to a Committee set up to consider: "within the framework of the Court structure what should be the distribution of criminal business between the Crown Court and Magistrates' Courts: and what changes in law and practice are desirable to that end?"

The primary purpose of the Committee was to consider ways and means of reducing the congestion of business in the Crown Court and the consequent delays in bringing cases to trial. JUSTICE recognised that a number of cases which could be satisfactorily tried in Magistrates' Courts were sent for trial at great expense of time and money. JUSTICE also took the view that this could be remedied without any important curtailment of existing rights and made the following proposals:

(1) The prosecution should exercise greater discrimination in the framing of charges, so that minor cases need not be sent for trial. In particular, the adding of a conspiracy charge to specific offences was deplored.
(2) With a view to removing the most powerful incentive for solicitors to advise their clients to elect for trial, the prosecution should be under a legal obligation to supply the defence in advance with copies of witnesses' statements. No solicitor willingly conducts an impromptu or blind defence.
(3) The range of offences that are triable summarily should be widened, including burglary, forgery and certain sexual offences.
(4) With certain exceptions all moving traffic offences should be tried in Magistrates' Courts.
(5) The working of the system of criminal legal aid should be properly supervised.

Furthermore, JUSTICE stressed the beneficial results which Duty Solicitors could achieve in sorting out cases and advising defendants, and in assisting the Court in the early stages of the case.

Complaints against the police—Efforts have been made to find a viable scheme for the introduction of an independent element into the handling of complaints against the police, preferably of an ombudsman character. Five basic principles have been suggested, namely:

(1) the investigation of complaints in the first instance must remain in the hands of the police;

(2) there should be no interference with the role of the Director of Public Prosecutions in deciding whether police officers should be prosecuted;
(3) the chief officer's responsibility for the discipline of his force should not be undermined;
(4) no officer should be placed in jeopardy twice in respect of the same complaint;
(5) the role of the police authority in supervising the handling of complaints should not be diminished.

JUSTICE has stressed the vital importance of the way in which the investigation is carried out. Moreover, JUSTICE has urged a separate determination of the questions as to whether (a) a police officer should be punished and (b) whether the complainant should be given any redress.

Civil law

Civil procedure—A Committee set up by JUSTICE has examined and published a report on civil procedure. The object of the inquiry was to consider all aspects of civil procedure in England with a view to evolving a simpler and cheaper system of dealing with civil claims. The Lord Chancellor opposed the setting up of any Courts outside the framework of the existing system and preferred to simplify and cheapen County Court procedure. An examination of various alternative procedures applicable to cases of all sizes proved a formidable task because of what was ideally desirable and what might be found acceptable. The main requirement was to make litigation cheaper, quicker and more certain without compromising the high standards of justice. The proposals of this Committee were designed to ensure that:

(1) The Court takes over the prosecution of the proceedings at the earliest possible moment;
(2) parties disclose the strength of their case to each other as soon as and as openly as possible;
(3) the great expense of the trial itself is confined to determining the real issues between all parties;
(4) so far as possible the element of factual battle is removed.

The whole matter was found to be by no means free from difficulty and further examination was necessary of a problem that plainly needed to be solved.

Parental rights and duties—A Committee set up by JUSTICE has examined and reported upon the subject of parental rights and obligations and the questions to which the care of children give rise. Consideration has been given to the law and practice in England and Wales and elsewhere. A number of radical changes have been suggested in order to bring the law and its administration into line with present day needs.

TEMPORARY JUDGE OF SUPREME COURT

The Attorney-General (Hon Dr Martyn Finlay QC) has announced the appointment of Hon Sir Trevor Henry as a temporary Judge of the Supreme Court pursuant to a certificate signed by the Chief Justice and three other permanent Judges of the Supreme Court that, in their opinion, it is necessary for the due conduct of the business of the Court that an additional Judge be temporarily appointed.

Sir Trevor was appointed to the Bench in 1955 after a distinguished career at the Auckland Bar and was senior puisne Judge when he retired after 19 years' service in 1974.

His acceptance of a temporary return to the Court is to be particularly welcomed, the Attorney-General said, because of the present pressure of work, particularly in Auckland, and the appointment of a Judge as Chairman of the Royal Commission on Contraception, Sterilisation and Abortion.

Cycle-cide—My client was a gardener who was much addicted to alcohol when his gardening work was done. One day he was seen to pedal furiously down Albert Street in Auckland on a bicycle, headed towards the sea. He continued straight on across the footpath and along a launch-landing and thence into the sea with his feet still whirling powerfully. A policeman rescued him and charged him with attempted suicide. This remarkable piece of litigation was one of my very first cases and the defence of drunkenness succeeded, as indeed it should have, before a celebrated Magistrate of those times. It has always amused me that anyone could be charged with attempted suicide in such circumstances.—SIR CLIFFORD RICHMOND to the Wellington Young Lawyers.

WILLS OF NETHERLANDS SUBJECTS IN NEW ZEALAND

KEITH MATTHEWS, *a Wellington practitioner, provides a note settled with the Netherlands Embassy. See also [1973] NZLJ 46 and [1972] NZLJ 407.*

The will of a Netherlands subject drawn up and executed in New Zealand, according to the law of New Zealand, is almost wholly inoperative in the Netherlands. It can have effect in that country only to appoint an executor, to provide for the disposal of the testator's body and to make bequests of personal effects, clothing and furniture. According to the Netherlands Embassy in Wellington, this is because a requirement essential by their law cannot be satisfied here, namely, that the will be executed as an "authentic deed".

The formalities required for an authentic deed by Netherlands law are very involved and must be carried out in the office of a Netherlands Notary. In foreign countries where no Netherlands Notary is available these requirements can be satisfied only by signature in the presence of the Netherlands Ambassador or one of his Consular officers who have the necessary powers. A New Zealand Notary Public is not qualified to act. The will must be drawn in the particular form required by the Netherlands law and must be read aloud to the testator in the presence of the witnesses before signature. The only exception to this is a "secret will" which may be written in the testator's handwriting and enclosed (unattested) in a sealed envelope. The envelope itself is signed by the testator in the presence of four attesting witnesses.

It seems that the only safe course for a New Zealand solicitor to follow where the testator is a citizen of the Netherlands and where there is a possibility that he may die entitled to property there, is to send him to the Embassy in Wellington to make his will. It is to be remembered that there are many Dutch nationals residing in New Zealand who may possess or inherit property in the Netherlands. The writer of this note is not familiar with the position in other countries of Europe, but as most legal codes there derive from the Code Napoleon it seems probable that the position would be similar. It should certainly be investigated by any solicitor instructed to make a will for a national of any European state.

It may interest New Zealand practitioners to know that there is a Central Register of Wills at The Hague, where a record is kept of the name of each testator and the names of his executor and of the Notary or Embassy holding the original will. No copy or other information is kept at the Central Register. It is an offence on the part of the Notary not to register a will. On death, Probate is not granted by the Courts but the Notary (on proof of death) issues a Certificate of "Heirship" or Inheritance, which serves the same purpose.

Revocation requires the same formalities.

Comrades in arms—Now I come to another random recollection prompted by mention this morning of one particular barrister who is now dead. It reminded me of a case where he appeared for a plaintiff widow whose husband had been fatally injured in an industrial accident. There were two defendants. The case finished late one afternoon. After the jury had retired, and while I was sitting in my room I could hear sounds of subdued revelry coming from the law library. I suspected the presence of alcoholic refreshment. Eventually the jury came back and duly gave their verdict in favour of the widow. So I said, "Well, Mr So-and-So, do you ask for judgment?" He stood up and said that he did and I mentioned the question of costs. He said, "Your Honour, in this case I ask for the very heaviest costs, very heavy costs indeed." I enquired of counsel for the two defendants what they thought about that idea—they were full of cordial agreement. So I said, "Well, it is late at night and as I am tired I will put off the question of costs until the morning." In the morning they all came back to the Court, but it was a very different story; it now seemed that costs according to scale would suffice and, overnight, dissension had arisen between counsel for the two defendants as to how the costs should be paid. This seemed a sad situation to me when they had all been such good and close friends the night before.—SIR CLIFFORD RICHMOND to the Wellington Young Lawyers.

NOTING OF RESTRICTIVE COVENANTS ON REGISTER

K R SMITH, *an Upper Hutt practitioner, argues that a recent ruling by the Wellington District Land Registrar has unfortunate consequences.*

The District Land Registrar has recently decided that all restrictive covenants are to be noted in future on the title relating to the servient tenement in accordance with s 126 (a) of the Property Law Act 1952. Noting on the title relating to the dominant tenement has ceased, though this has been done in the past.

Section 126 (a) of the Property Law Act 1952 states that the District Land Registrar shall have power to register restrictive covenants in the folium of the register book relating to the land subject to the burden.

The District Land Registrar is applying this section literally by *not* allowing registration of the covenant on the title relating to the dominant tenement. There is some weight against the interpretation of a section in this way. A clear concise statement is made by Lord Denning in *Seaford Court Estates Ltd v Asher* [1949] 2KB at 498, 499 where he says: "Wherever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise. He [the interpreter] must set out and find the intention of parliament".

This liberal approach of Denning in the Court of Appeal was disapproved by the House of Lords in *Mayor and St. Mellons v Newport Corporation* [1952] AC 189, who tended to follow a more literal approach.

However, it is painfully obvious that as the land entitled to the benefit, has no memorandum registered on the title, a subsequent purchaser may have no idea that he is entitled to enforce certain restrictions against the owner of the servient tenement.

Section 126 shows that the servient tenement must be under the Land Transfer Act in order that a restrictive covenant be noted against the title. Therefore it does not matter if the dominant tenement is land not brought under the Act. The purpose of this legislation is that notice of the restriction is brought to the land thus subject to the restriction, "notice" being the all important word here.

Mr E C Adams states that a covenant under s 126 is not actually "registered" under the Land Transfer Act; it is merely "noted" against the Land Transfer register, and such noting does not give the covenant any added efficacy beyond that all the world is deemed to have notice of it (See *White v Bijou Mansions Ltd* [1937] 3 All ER 260.) However, a distinction may be drawn between subsequent purchasers of the dominant tenement, and subsequent purchasers of the servient tenement. The above notice to all the world is a logical and reasonable consequence of noting such a covenant on the register for subsequent purchasers of the servient tenement. It is, however, absurd when one considers subsequent purchasers of the *dominant* tenement. Section 126 of the Property Law Act shows that a restriction as to user is to be noted on the folium of the land thus restricted. Such restriction is an interest under s 62 of the Land Transfer Act. Under s 62 a registered proprietor shall hold land subject to such estates or interests as may be notified on the folium of the register.

"Interest" in *Mozley & Whiteley's New Zealand Law Dictionary* is defined as "a right or title to, or estate in, any real or personal property". "Property" is defined as "an estate being an aggregate of rights exercisable over or in respect of land" (see s 2 of the Property Law Act). Any person who is a party to a covenant restricting use of land must obviously satisfy these definitive requirements.

Section 126 (b) states that any notification will not give the restriction any greater operation than it has under the instrument creating it. Therefore it *will* give operation at the least to that which is contained in the instrument. It is not operating satisfactorily if the interest of one of the parties is not noted on the appropriate folium, namely that of the dominant tenement. This deficiency is most noticeable when consideration is given to the fact that the parties who can enforce the restrictions contained in the covenant are those parties namely subsequent purchasers of the dominant tenement) who will never receive actual notice of these rights. I submit that "notice to all the world" as mentioned above is in fact limited to subsequent purchasers of the servient tenement.

The District Land Registrar seems to have given weight to incorrect considerations in applying a strictly literal interpretation to the statute. It also is to be noted that he is not bound to follow this approach. Section 126 states that "the District Land Registrar *has power* to enter . . . . . " It is not mandatory that he exercise this power; the wording rather reveals a degree of discretionary authority.

Section 62 of the Land Transfer Act also uses vernacular such as "any interest as *may* be notified" not "as *are* notified". The District Land Registrar would appear to have misused his discretion in not protecting the interest of the dominant tenement by in fact rendering the notification of a restrictive covenant a pointless exercise due to his limitation in respect of the servient tenement.

The District Land Registrar should have interpreted this statute liberally in order to avoid the mischief which has now revealed itself. Mr F R Macken in "The Liberal Interpretation" [1967] NZLJ 216 presents an interesting discussion on this point.

THE DEMISE OF THE ARBITRATOR

DR RICHARD LAWSON *Continues his Occasional Notes from Britian.*

The other day, an elusive bug laid me low while the Lords' test was under way. Thus reduced, I was reluctantly obliged to watch the game on my brand-new, remote-controlled colour telly. As I did so, a number of thoughts floated across my fevered mind. (Not a very long journey, my wife has just caustically observed.)

First, and possibly foremost, Denis Lillee must surely represent all that we seek in this greatest of games. He has the speed, of course; but he also has the most perfect, most graceful of actions; and he is also, this same wife tells me, devilishly handsome. And so he is. Other bowlers are as fast, even faster. But none have the sheer artistic quality of this Australian. Jeff Thompson is, no doubt, of similar speed and venom. But his is all strain, effort, labour and an ape-like run. Bernard Levin wants to die listening to The Mastersingers. I don't want to die at all; but if I do, let it be watching Denis Lillee. Like half the English side.

Another point to hit me concerned the technological advances now used in the field of live sport. Practically every ball of note, as well as every dismissal was immediately, but immediately, replayed.

It strikes me that, ultimately, this must mean the decease of umpires and referees in the modern form. It really is absurd for commentators, officials and players to dither on whether the batsman snicked the ball, the player was offside, or the ball crossed the line, when the information is there at hand in the form of the instant replay. What must invitably happen is either that officials carry small receivers with them, and they need only be small and light; or that these officials will sit in some control room, flashing the appropriate decision on the score board. Racing officials already are moving to this: soon all sports must be similarly assessed.

That, incidentally, should be the *only* permissible function of the instant replay. The start of the soccer season now means those endless slow-motion replays from all angles, rendered even more lifeless by the illiterate drone of thick-skulled managers and players. This is one case where technology has ruined a sport. Football has become a telly-spectacular: youngsters daring to visit the terraces for the real thing (if still living after a visit by the slack-mouths of Manchester United) are visibly pained at the differences between real football and the gaudy spectacular presented on the box.

Cricket, alas, is going the same way. Happily, its more leisured style lends itself to a more literate commentary. So, too, the inevitable ex-player in the commentary boxes is light years ahead of his football colleague. Few can equal the felicitous touch of Richie Benaud.

But the ruination of cricket has come with one-day cricket. Today, the tobacco firms sponsor three one-day competitions. They all draw enormous crowds and, which, commercially, are a great success. The nadir of all this was the Prudential World Cup.

What I fear is that a generation now growing up will treat this lunatic, guilless, tip-and-run rubbish as cricket, when really it ranks as rather elaborate form of rounders. Or perhaps I'm getting old.

THE EKETAHUNA LAW REPORTS

KNOWMHES v ARTS COUNCIL OF NEW ZEALAND

Application for judicial review—Arts Council—Whether lavatory pan an "artistic work"—Copyright Act 1962; Queen Elizabeth II Arts Council Act 1974.

CRUMBLE J (orally): By way of an application for judicial review the plaintiff, a master plumber, seeks an order that the defendant, a statutory body, pay to the plaintiff a sum of $10,000 for the purpose of installing 50 lavatory pans for domestic use in or about the county of Whapakiwi. The county has recently installed a system of high pressure water and in early 1975 it approached the plaintiff to arrange for the installation of flushing lavatories in the homes of some 50 families to replace the rather more primitive arrangements which had obtained up to that point. This the plaintiff agreed to do at the very reasonable price of $200 for each facility. He then approached the defendant with an application for a grant of $10,000 to undertake the work but this was declined with every indication of considerable impatience.

On first reviewing this case the Court was inclined to exhibit an impatience similar but sharper to that exhibited by the defendant when confronted with the original application. But on a closer examination this appears to be unjustified, and the Court is grateful to counsel for the plaintiff who has drawn to its attention the recent case of *PS Johnson & Associates Ltd v Bucko Enterprises Ltd and Others* [1975] 1 NZLR 311. This was an action for infringement of copyright in a product drawing commissioned by the plaintiffs in that case from which a mould was made for the production of lavatory pan connectors made of rubber. It was held that the product drawing was within the definition of "artistic work" in s 2 (1) of the Copyright Act 1962, that it was not required to be of artistic quality, and that copyright could subsist therein. In his judgment Chilwell J stated that an artistic work, to qualify for that description, need not exhibit any artistic quality. It is skill in execution and not originality of thought which is required; it is the work and not the art which is of primary importance.

It was argued by the defendant in this case that it had no jurisdiction to supply the plaintiff with funds, as the project he had in mind involved an object, to wit, a lavatory pan, might in no way be described as "artistic" and which did not, therefore, have anything to do with a body whose business was "art". I cannot agree. In the above case the defendant argued that the Copyright Act did not protect an idea but merely the outward expression of an idea. The case of a ballbearing was instanced, a simple, utilitarian object of no real artistic worth, a drawing of which would not give the author of such a drawing copyright. So with a lavatory pan connector, which can only be expressed on paper by drawing a conical shaped object having two sleeves with ribs of some sort for sealing purposes and with a slope between the wide and narrow sleeves. These arguments I have carefully considered, along with similar arguments on the utilitarian nature of lavatory pans advanced in the present case, but I am driven to concur in the view of Chilwell J when he stated in *Johnson v Bucko Enterprises* (supra) at p 321: "In my judgment there is no resemblance between the ballbearing and the pan connector except that they relate to objects of utilitarian value rather than artistic merit, but in these days who knows but what a modern artist may find artistic beauty in a lavatory pan connector: even the humble ballbearing might excite his interest".

I am even more of a mind with my brother Chilwell after seeing in evidence a photograph of a sculptural work by the deceased French artist, Marcel Duchamp. It is agreed by all parties to be an artistic work but it seems to me to bear a most striking resemblence to a urinal.

But the task of deciding what is and what is not "artistic" is that of the critic, not the Bench, and in any event I am constrained to pay heed to the wise remarks of Lord Macnaghten in *Montgomery v Thompson* [1891] AC 217, 225 where he stated: "Thirsty folk want beer, not explanations". How much more is this so in the matter of lavatory pans.

The first of two relevant statutes is the Copyright Act 1962 wherein s 2 defines artistic work as being, inter alia,

"(a) The following, irrespective of artistic quality, namely, paintings, sculptures, drawings, engravings and photographs . . .

"(c) Works of artistic craftsmanship not falling within either of the preceding paragraphs of this definition."

Is a lavatory pan a work of "artistic craftsmanship"? The framers of the Act did not regard the exhibition of "artistic quality" to be a necessary condition in deciding what was to be "art" and what was not, so I am left with "craftsmanship". Here I am assisted by s 2 of the Queen Elizabeth Arts Council of New Zealand Act 1974 wherein it is stated:

" 'Arts' include crafts and other forms of cultural expression."

As has been shown in evidence before this Court the craft of plumbing has been known since at least early antiquity. It was, as has been stated, of considerable importance to the inhabitants of Crete during the Minoan historical period; it is also evident that plumbers were at that time persons of considerable importance who had to be approached with caution and to the accompaniment of various ritual observances, a circumstance which has pertained to this day.

There can therefore be no doubt. The plaintiff in so far as this action is concerned is incontrovertibly engaged in an artistic work.

But that by no means disposes of the matter. The defendant argued that even if the plaintiff were engaged in an artistic work, that of itself would not automatically entitle him to the reliefs sought. It claims it has a discretion. This is so, but it is so only up to a point. Section 9 of the Queen Elizabeth II Arts Council of New Zealand Act sets out certain functions which, to a degree, circumscribe any purely untrammelled exercise of discretion. I refer in particular to s 9 (c):

"To make accessible to every person in New Zealand, as far as may be practicable, all forms of artistic activity."

The key words are "practicable" and "all". The defendant would be most remiss in its duty if it did not include the installation of lavatory pans along with opera. It is specifically directed to cast its net wide. It is also directed to pay due heed to practicability, and what could be more practical than the provision of lavatory pans to a small community which stands in sore need of the provision of such artistic works?

This Court therefore grants the plaintiff the relief he seeks.

Order accordingly

[Reported by AGRICOLA]

LEGAL LITERATURE

Legal Aid in New Zealand, by G B Fea (Butterworths, Wellington), X + 299, $17.50. Reviewed by M R Camp.

In *Legal Aid in New Zealand* Mr G B Fea has produced an excellent text that will be of help to anyone associated with this field. It will particularly be welcomed with open arms by members of the various District Legal Aid Committees. Until now, the extensive decisions of the Legal Aid Appeal Authority and the many rulings of the Legal Aid Board have been forwarded to and applied by the various District Committees, but have not been indexed in any way. Depending therefore on what indexing any District Committee has done, the problem of finding a previous decision was rather similar to looking through several years' law reports for a case, if the law reports did not have indexes or head notes. Mr Fea has been a member since its inception of the Legal Aid Appeal Authority and no doubt initially he had the same problems. It is fortunate for the profession that Mr Fea has solved the problem in such a comprehensive book.

In the book are set out the Legal Aid Act 1969 and its regulations followed by the Offenders Legal Aid Act 1954 and its regulations. In note form following each section or regulation are set out details of relevant decisions of the Authority together with some reported English decisions and rulings of the Legal Aid Board. In the last section of the book is the reproduction in full of the decisions of the Legal Aid Appeal Authority to which reference has been made in the text. As these have not been available in any published form previously, solicitors will at last be able to cite precedents

with some authority. Furthermore, the publication of the decisions should be of great value to solicitors for prospective appellants in being able to assess the manner in which the Act is being interpreted and applied.

Civil legal aid is now an established part of the litigation process and everyone involved in Court work should find the book of great assistance.

In the latter part of the foreword to the book The Honourable Mr Justice Tompkins says:

> "The author exercises independent and critical judgment in this book. He has not hesitated to point out where he thinks there are weaknesses or gaps in the Act or where it needs revision due to the march of inflation, though, of course, he leaves to the Legislature to decide what should be done in the interests of the public.
>
> "The work should be of great assistance to the legal profession in carrying out their duty to see that such of their clients as cannot afford to pay their costs for invoking the assistance of the Court, get the help the Legislature intended them to get.
>
> "I commend Mr Fea for his enterprise in writing this book and for the sound comment and full information on all legal matters contained in it."

I respectfully agree with everything said.

CORRESPONDENCE

Sir,

Reply to debt collection letter

Like other lawyers we have received irate replies to some of our debt collection letters but recently one of our clients received a reply to such a letter, an excerpt from which is attached as we thought you might like to publish it for the amusement of the other members of the profession.

Yours Faithfully,
CHATWIN & HEMARA
Hamilton

"Reference Job 103

"Dear Sir,

"Received your statement of accounts and invoices re additional costs re job number 103 of 17-6-75 through McLeod, Bassett and Buchan. It will be noted, after a delay of two years and nine months, wrongly computed on two accounts. The first invoice number 11543B, the final claim $765-64 is added to the first deposit of $1065-70 making $1,831-34, then in some psychic method, these two sums are added together with a *credit* of $997-43, to make the astounding claim of $2,828-77, but good for you, you make amends, alas but wrong again, your final figure does not match your added figure of my first deposit $765-64, eg second item of invoice number 11543B.

"You mention a computer error for the first account but no reason for the first mistake, eg $833-91 as against $765-64.

"I am puzzled as to which computer method you are using—whether it is the Inca Knotted-String or the more ancient Abacus method or perhaps you are using the two combined and ticing them up with a smattering of modern electronics for good measure, if using the Abacus method I suggest your balls are out of place or at least slightly awry, and if using the Inca Knotted-String method your knotts are balled up. If using the two together you will have a knotted tangled balls up.

"On the other hand, your computer operator may be using the more ancient Ten Fingers and Ten Toes system and these digits have a nasty habit of becoming stuck in the most inconvenient places. I politely suggest you assist the operator to extricate them.

"On the other hand, I have a suspicion you may be using a dubious bridge ruse, doubling your own bid and then redoubling to reach your final if unethical astounding contract.

"In short, in the words of a noted author, 'Your machinations, intricacies and deviations are at the least confusion twice-confounded'.

"To continue in more serious vein, but no less debatable in that there are numerous areas of disputation as to methods. . . ."

Sir,

Conference issue—Correction

Either I spoke indistinctly at the Law Conference or what I said proved too much for your recording equipment. May I be permitted to correct your Conference Issue, by recording what I think I said when venturing to comment on Mr Justice Cooke's paper?

The last sentence of the first substantive paragraph at the top of p 552 should not contain a puzzling reference to "statesmen and competent tribunals". It should read: "If part of the purpose of the mechanism is to reduce litigation over matters that have been pronounced upon by our *Statutory and domestic* tribunals, then that purpose is surely not being realised today".

The next four paragraphs should read:

> "With the assistance of the *Anisminic* case, it is only errors of law on the face of the record that now do not go to jurisdiction, in the wide *Anisminic* connotation of the word—it is those kinds of thing that are effectively barred from being advanced in an application for a judicial review.

"Mr Justice Cooke, perhaps too modestly, omitted to mention, in this connection, that he elucidated this in one of his own judgments—and I refer to his Honour's unreported judgment in *Car Haulaways*. In the Court of Appeal, counsel and the Judges all accepted his Honour's judgment as correct on that point.

"In my experience very few pleadings are so poverty-stricken as not to be able to muster an alleged jurisdictional error in the *Anisminic* sense.

"So that the litigation proceeds, in practice, in the majority of cases, without any statutory restriction. . . ."

The last paragraph on p 542 should begin:

"The paper itself supplies many examples of important points that are *uncertain* in administrative law. . . ."

Yours faithfully,
D L MATHIESON
Crown Counsel

Sir,

Legal aid

Recently I acted for a drug addict charged with burglary. This occupied five hours. Over three of those were spent waiting in the Magistrate's Court. The total fee allowed on legal aid was $22.00.

This is not legal aid—it is disguised charity.

Yours faithfully,
J J CLEARY
Wellington

Sir,

Alternatives to imprisonment

Thank you for the article under the caption abovementioned giving an address by the Minister of Justice, Dr Finlay QC.

The Minister emphasises the importance of periodic detention, community service and probation. However, after nearly 30 years of visiting prisoners in gaol and considering and discussing with others frequently the problem of reducing crime, I feel much more hopeful than Dr Finlay that, if certain reforms were introduced there would be a great reduction in the numbers of men who are confined.

At present prisoners do little to compensate the victims of their offences. For the protection of the public, offenders must be placed under necessary restraint, but, apart from this it is desirable that, as far as possible, each person whether offender or not should lead a normal life and be paid normal wages. Out of these wages a reasonable sum could be collected in fines towards compensating the victims and the remainder used in the keep of the prisoner, maintenance of his family and building up a fund for him on his release. Dr Finlay refers to certain penologists despairing of reform in prison.

Probably the greatest reform to reduce drastically the prison population would be placing upon a reconstituted Parole Board the duty of determining what would be the best time, having regard to the safely of the community, and the rehabilitation of the prisoner, to grant parole, including as might be thought fit, a term of periodic detention, community service and/or probation. This would need a reconstituted Parole Board consisting, say, of a third judicial personnel, a third psychologists or psychiatrists and a third welfare workers, including if possible, one of general experience and one representing the institution where the prisoner is known.

One of our members, Mr J J Howard, who has been a phenomenal helper of men in trouble, suggests a proposal somewhat similar—that each prisoner should be confined for one-third of his sentence: for the second one-third to work outside an institution but return there daily, and for the third period (being one-third of his sentence) he should be on parole subject to good behaviour and with the power of veto in special circumstances relating to any prisoner being released.

The systems propounded bear some resemblance to the "marks system" as used by the Reformer Maconochie of Norfolk Island. This system worked with great success even amongst many convicts regarded by many as beyond redemption.

Yours faithfully,
F C JORDAN
President
Howard League for Penal Reform

LEGAL RESEARCH FOUNDATION PRIZE AMENDED RULES

The Legal Research Foundation Inc has amended the rules for its annual prize for the best unpublished paper involving substantial research in a legal topic written in New Zealand. The prize is of an annual value of two hundred dollars and papers submitted for the prize are not to exceed 15,000 words. Though the Foundation's intention is to encourage research that would not have otherwise been undertaken, papers submitted in partial or full compliance with the requirements of any degree or diploma course at any university or tertiary education institution are not excluded from consideration for the prize. The Foundation reserves the right in any year to define the subject or subjects of the papers to be submitted for the prize.

Those wishing to be considered for the prize should forward three copies of the paper to the Secretary of the Legal Research Foundation Inc, C/o Faculty of Law, University of Auckland, Private Bag, Auckland 1. Closing date for entries is 1 December of each year. It is a condition of entry for the prize that the Foundation may in appropriate cases publish the prizewinning entry or any other entry as an Occasional Paper or otherwise.

AFTER THE ELECTION

The problems never seem mastered
By the ones that the country chooses.
So why don't we just give office
To the political party which *loses?*

J.B.J. in the *Justice of the Peace.*