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INTER ALIA

Magistrates with juries

The suggestion from the Attorney-General, Dr Martyn Finlay, that Magistrates should be able to sit with juries should come as no real surprise (see *Lawtalk 21*). The profession appears to be increasingly aware of the problem posed by growing numbers of jury trials and increasingly reconciled to the choice that basically lies between further limiting the right to trial by jury or restructuring the Courts to accommodate them.

The alternative of further restricting the right to a jury trial is open to fundamental objection. We have already so restricted the right of jury trial as to be radically out of line with the range of offences for which such trial is available in England. There, even the mundane victim of the breathalyser may elect trial by his peers.

That this restriction has been by-and-large accepted is testimony to the success of a fully professional Bench of Magistrates and to the confidence they enjoy of both the public and the profession.

Accordingly any suggestion that the attained level of professionalism be leavened by greater use of Justices of the Peace should be viewed in this light.

Of the other alternative, it has been said that Magistrates are not necessarily chosen for their ability to preside over criminal jury trials. This, though, is not to suggest that none has a background which would qualify him to sit with a jury.

Nor is the spectre of selected Magistrates sitting with juries to be looked at askance. After all, until the Beeching reorganisation of the English Court structure, Justices of the Peace presided over jury trials—and, indeed, they still sit in the Crown Court as full members of that Court notwithstanding that the Bench in such circumstances is "chaired" by a Crown or High Court Judge.

If selected Justices can acquit themselves with distinction when presiding over jury trials, a fortiori, a selected professional Magistrate should be able to

There is, of course, the problem of selection—and the argument that if one is to be given such jurisdiction, then all should be. However such an argument would probably founder on the rock of the profession's opposition should a general extension of jurisdiction be mooted.

Rather one can imagine perhaps four Magistrates being given jurisdiction to sit in the Supreme Court, there to preside over jury trials in which (perhaps) there was a right of summary trial.

After all, in such cases the Magistrate would have the jurisdiction to sit as both Judge and jury—surely a more onerous responsibility than to sit as Judge with jury.

Such an innovation would remove any need for a separate Crown Court and would mean that the selected Magistrates would still have the variety of work in the Magistrates' Courts which is generally considered essential to spice an otherwise constant diet of crime.

Small claims

Even if the adversary system is the most efficient in arriving at the truth, does it do so at too great a cost? That was the question posed to the 18th Australian Legal Convention by Sir Richard Eggleston. It is a question which the Government here has answered in the affirmative.

By way of redress comes the Small Claims

Bill (No 2) which establishes Small Claims Tribunals as sections of selected Magistrates' Courts, with jurisdiction up to $500 and from whose deliberations lawyers will generally be excluded.

The temptation to exclude the profession's participation completely has been resisted, and those with more than three years' experience will be eligible for appointment as Referees. This is as well, as one would expect lawyers to have a major role to play in making the concept work.

The exclusion of lawyers, presumably justified on the grounds that to allow them in to represent parties (other than in approved cases) would be to escalate costs, leaves the parties very much to fend for themselves. One would hope, therefore, that where a lay litigant is up against an experienced opponent (perhaps a professional pleader from a commercial concern) provision will be made for him to be represented by counsel should he wish.

The establishment of the Tribunals will to some degree ease the burden on the Magistates' Courts, and doubtless their jurisdiction has been pitched at a higher level than some had anticipated with this aim in mind. It is, however, difficult to object to jurisdiction to such a level when a defended case can, under the present system, easily consume such an amount in solicitor-client costs alone.

Hearings, too, will be in private and informal. There would seem to be a case for judgments, too, being confidential. If one accepts that the standard of justice dispensed is inevitably likely to be less satisfactory than that provided at higher levels of the Court structure, it is important that a losing party be not unduly prejudiced by any particular outcome. One can easily imagine a manufacturer losing a consumer claim, the loss being given wide publicity and then being revisited upon him—perhaps quite unjustly—in a loss of business.

In accommodating the legitimate claims by the consumer for inexpensive justice, it would seem axiomatic that gross injustices against manufacturers must be guarded against.

No well-tuned cymbal

The Social Credit Political League has once more proposed that a Supreme Court Judge might be more appropriate as Speaker of the House of Representatives than an elected Member of the House.

The idea has some superficial appeal, and so perhaps some of the objections to it ought to be tabulated.

First, of course, would be a lack of Parliamentary experience—as fortunately there is no practice here of retiring politicians to the Supreme Court Bench. To remedy this, and for less worthy reasons as well, there would be a temptation for the government of the day to make politically motivated appointments to the Bench.

Second, although (in the words of Mr Beetham) a Judge "would bring with him the status, dignity and impartiality that the office of Speaker requires", just how long public faith in the existence of those essential attributes of the Judiciary could be expected to survive when one of their number is enmeshed day by day in the fire and heat of the nation's debating chamber is open to question.

Thirdly, no Supreme Court Judge should reasonably be expected to suffer the antics to which the Speaker of the House and the Chairman of Committees are at times subjected. Thus either some robust parliamentarians would be in for a rude awakening for no more than perpetuating parliamentary tradition, or alternatively the Judge, as Speaker, would have to accept behaviour he could never condone in a Courtroom. This is not to imply that the conduct of lawyers is necessarily superior to that of parliamentarians, but simply to note that each group is governed by a quite different code.

Finally, and perhaps fatally, the suggestion would fuse both Judiciary and Parliament, and so is constitutionally unsound.

If, as Mr Beetham suggests, the idea is based on the sole premise that an impartial Speaker is unable to promote the interests of his electorate, other alternatives deserve consideration. Sir Roy Jack, for example, is known to favour a special seat for the Speaker—perhaps called Thorndon? Or on election to the post, a Speaker could retire from his seat which could then be filled at a by-election.

JEREMY POPE

True blue—Counsel for petitioner in a divorce suit, in opening: "If your Honour pleases I wish to make a minor amendment to the petition. The parties were not married in the Wedgewood Room in Levin, but in the National Party Rooms. It was still blue, your Honour."

O'Regan J: "Very well, I will correct your blue."

A POLITICAL PHILOSOPHY

At [1975] NZLJ 670 we reported in full the Prime Minister's address to the Wellington District Law Society. That was not a political address, but to preserve a form of balance we reproduce extracts of the corresponding address subsequently given by the Leader of the Opposition, the HON R D MULDOON.

If I had to find a statement of principle which came closest to a basic philosophy for the National Party I would go back 200 years to Edmund Burke; in *Thoughts on Scarcity* he said this: "It is one of the finest problems in legislation and what has often engaged my thoughts whilst I followed that profession, what the State ought to take upon itself to direct by the public wisdom and what it ought to leave with as little interference as possible to individual discretion. Nothing certainly can be laid down on the subject that will not admit of exceptions, many permanent, some occasional. But the clearest line of distinction which I could draw whilst I had my chalk to draw any line was this: That the State ought to confine itself to what regards the State or the creatures of the State, namely the exterior establishment of its religion, its Magistracy, its revenue, its military force by sea and land, the corporations that owe their existence to its fiat, in a word everything that is truly and properly public: To the public peace, to the public safety, to the public prosperity." Evolution of the more complex modern state has in my view in no way invalidated the fundamental principle expressed in the words of Burke.

The State ought to confine itself to what regards the State or the creatures of the State. Let us put aside the establishment of its religion as a concept that was not finally transmitted to the colonies and of course the religious character of the British people evolved and fragmented in the 200 years since Burke but certainly its Magistracy, its revenue, and its military force by sea and land remained basic concerns of the modern state.

Corporations that owe their existence to its fiat is a term that encompasses a much wider area of public concern today with the growth of the welfare state and embraces our health, education, social welfare services and even some portion of the mass media.

It is here however that we enter upon dangerous ground: What is in fact today everything that is truly and properly public.

As with so much of Burke, part at least of the answer is supplied in the balance of the definition: "To the public peace, to the public safety, to the public prosperity."

This indeed foreshadows the modern managed economy but overall is the fact that the definition is drawn as a limitation. Burke's approach was to limit the power, the operation and the encroachment of the State to everything that is truly and properly public and as the great conservative philosopher, in my view his approach has in this sense stood the test of time.

What has evolved since then of course has been a greater regard in the British tradition at least for the worth of the individual, for the sanctity of human life and for the value of human dignity. It is these concepts that have added to and rounded out the original conservative approach that I have quoted and set out and provided us at least in the National Party with a basic philosophy which is seldom expressed in words but which is nonetheless real for that. It adds on to the conservatism of Burke a liberal humanitarianism which finally has regard for people as individuals and as a community.

As a party then, I suppose that one could say that we set out to preserve a reasonable balance between all the people in the New Zealand community.

In doing this we must have regard to their different ethnic and cultural backgrounds, their different aspirations, their different day to day wants.

We must preserve for them the opportunity to do their own thing; to question established values but not to overthrow the established order; to evolve as the country evolves and to play an active part in that evolution if they are of a mind to. We must go back to Burke and in the light of changing circumstances still preserve the greatest possible freedom for individual enterprise while ensuring that the State does properly and effectively what regards the State.

We must preserve the Rule of Law and we must abhor arbitrary justice, the abrogation of human rights.

We must preserve and protect the right to dissent and prevent and put down the wish to disrupt. We must never accept the principle that because something is long established it must be changed but we must always accept the principle that no matter how long established it may be it can be questioned and if the questioning is inadequately answered then change should follow.

CASE AND COMMENT

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

Who is entitled to apply for rates postponement?

The oral judgment of Wilson J delivered at Auckland on 27 May 1975 in *Johnston v Manukau City Council* raises several interesting points concerning rating.

Johnston and others were the owners of about 18 acres of land within the City of Manukau. The land was let to a company called Tamaki Farms Ltd which used it for grazing. In 1968 and again in 1970 the owners had successfully applied to the Council for postponement of part of the rates on the grounds that the property was zoned for industrial use, and was therefore valued and rated accordingly. The applications were made under the provisions of two local acts; the Manukau City Empowering (Rates Postponement) Act 1967 and the Manukau City Council (Farm Lands Rating) Act 1969. However, in 1973, the Council decided that its earlier decisions granting postponement should cease to have effect on the grounds that the land was not farm land. The owners' objection to the Council was dismissed and they brought an application under Part I of the Judicature Amendment Act 1972 seeking to have that decision quashed.

In reaching its decision the Council purported to act pursuant to s 99 of the Rating Act 1967 (which by the provisions of its empowering acts could be used by the Council).

The relevant portion of s 99 is as follows:

"Every decision of a territorial authority granting an application for postponement of rates . . . . . shall immediately cease to have effect, if the property ceases to be used solely as *farm land*" (the italicized words are imported into the section by s 114 of the Rating Act 1967). The evidence showed that, at the time when the postponements were first granted, the land was being used for grazing by the lessee and that this use had continued unchanged. The Council therefore based its decision on the fact that the land had never been used by the *owners* as farm land. His Honour decided that the test in s 99 was whether the land had ceased to be used as farmland, ie it was necessary to show that there had been a change in the use of the land. There was thus no evidence before the Council on which it could reach a decision cancelling postponement of the rates, it had no jurisdiction to reach such a decision, and this provided sufficient grounds for that decision to be quashed.

In addition, the argument was raised that the Council's initial decisions were incorrect because the right to apply for postponement was, by the local empowering Acts given to the occupier of the land concerned, and not to the owner. This point is an interesting example of the difficulties which can be caused by the application of parts of the Rating Act to a situation covered by a local body's empowering Acts. Certain sections of the Rating Act were imported into the empowering Acts by provisions contained in those Acts but unfortunately not all those which related to the definition of occupier. Section 2 of the Rating Act is one of the sections which does apply. This defines occupier as "the owner thereof, except where a person other than the owner has a right to occupy the land by virtue of a tenancy granted for a term of not less than 12 months certain, in which case the term 'occupier' means that other person".

The lease to Tamaki Farms Ltd was for a term of more than 12 months and by virtue of that definition it was the occupier and the person entitled to apply for postponement. However, because the owners had not given notice to the Council of the lease it was they who appeared on the City Roll as occupiers and, when the applications for postponement were made, the Council assumed that the owners were entitled to make such applications. The

other section of the Rating Act which related to the definition of occupier for the purposes of that part of the Act dealing with postponement is s 87 which includes the person by whom the rates are being paid within the definition of occupier.

In the present case the terms of the lease were that the amount of the rates was included in the rental payable and it was consequently the owners as lessors who were under a duty to pay them. It appears, therefore, that if this section had also been incorporated in the empowering Acts, the owners would have been entitled to apply for postponement. Unfortunately, that section was not so incorporated. His Honour held that the owners had never had the necessary qualification to obtain the postponement which had been granted to them and this meant that the Council's initial decisions to grant postponement were made in error. Moreover, it appeared to Wilson J that there was no provision, either in the Rating Act 1967 or in the Councils empowering Acts, which would make it possible for this error to be remedied.

It appeared therefore that this anomalous and probably entirely unwanted result of the application to the one situation of several statutes was also irreversible. However, his Honour decided that the error should not be perpetuated and in order to achieve that end he decided that, in spite of the decision which he had reached that there was sufficient ground to quash the Council's decision cancelling postponement, he would exercise the discretion available to him in considering extraordinary remedies and refuse to grant the application.

The case under discussion is also significant because it exemplifies the type of proceeding amenable to the review provisions of the Judicature Amendment Act 1972. The procedure to be followed in an application under Part I of this new and very important legislation is laid down by Wilson J in a minute in *New Zealand Engineering, etc. Union of Workers v Court of Arbitration* [1973] 2 NZLR 534.

There is useful reference to legislative inconsistency in the field of rating law in *O'Keefe's Law of Rating,* Butterworths (1975), pp 20-27, and passim.

J V and J A B O'K

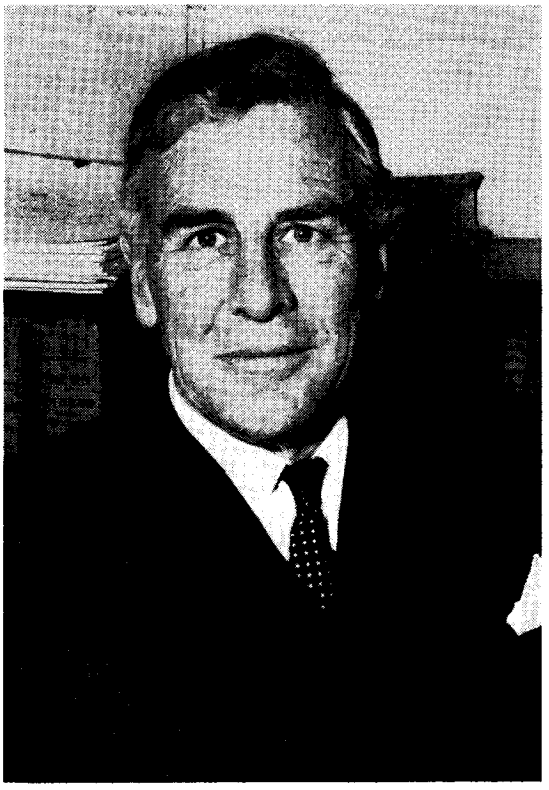
A Judicial Staff College?—The case for having a judicial staff college has been argued for some time now. JUSTICE is in favour of such a college and it exists in other countries in one form or another. An article in *The Times* last January drew attention to the German Academy of Judges at Trier. France has a National School for the Training of Judges. And another of the recent reports by the Council of Europe, this time on sentencing, prepared by senior Judges and legal experts, analyses current practice in various European countries and also raises in some detail the question of the aims of sentencing and the effectiveness of judicial intervention in influencing behaviour. There have been many sentencing conferences or exercises, both for Magistrates and Judges. But Leonard Orland, professor of law at Connecticut University, was probably right when he remarked that such conferences or exercises gradually lose their value as those who attend them simply come to "record their differences, reassure each other of their independence and go home to do their own disparate things as before."

Of course disparity in sentences can be as facilely criticised as uniformity in similar cases —a uniformity which can be pejoratively dismissed as the "tariff system". It is unlikely that two similar cases are ever absolutely equal in every respect: the circumstances of the crime, the background, personality and previous criminal history of the offender and the social climate in which the court operates. The trick is to get broad general concordance in roughly similar circumstances; and this is in fact beginning to happen. At the same time, the desire for such concordance should clearly never completely override a sensitive appraisal of special circumstances and the need to differ from the norm when it seems appropriate. This does pose the problem, however, of just what weight should be given to the different explicit and implicit aims of the sentences; and whether and how their aims should change as society itself changes.—HUGH KLARE, CBE, in the *Justice of the Peace.*

Understand your Bench—In a city in which I formerly practised, counsel endeavoured to have the prettiest female defendant appear in the first traffic case of the day because the local Magistrate had an eye for beauty; the penalty for her offence was suitably tailored and fixed the tariff for the less handsome defendants for the rest of the day—MR D J SULLIVAN SM.

TRIBUTES TO THE LATE SIR IAN MACARTHUR

A special sitting of the Supreme Court was held recently at Christchurch to honour the late Sir Ian Macarthur.



Sir Ian Macarthur at the time of his appointment

Sir Ian who was 69, served on the Bench for 16 years during which time he established a reputation as an extremely thorough and courteous Judge. His extensive knowledge of commercial law well equipped him to chair the special committee which was appointed in 1968 to review the Companies Act. During his time in Christchurch, Sir Ian served the community in many fields other than the law. He took a leading role in the Canterbury branch of the Outward Bound Trust, serving as its president for several years from 1963, and was also active in the Royal Commonwealth Society.

He was also president of the Marriage Guidance Council, and president of the Royal Christchurch Musical Society.

Sir Ian in younger days was a keen sportsman, and represented Wellington at hockey. He was an enthusiastic golfer, and for many years a delegate to the council of the New Zealand Lawn Tennis Association.

On the Bench with the Chief Justice, Sir Richard Wild, who presided at the sitting, were Mr Justice Roper and Mr Justice Casey. Among the many who crowded the Courtroom to pay tribute were representatives of many sections of society, including Judge Blair, Judge Archer, the Christchurch Magistracy, present and past Court staff, Bishop Pyatt, Bishop Ashley, City Councillors, representatives of the University, the Police, and of the district law societies, and Mr J T Eichelbaum, a senior partner of the late Judge's old firm of Messrs Chapman Tripp & Co.

In paying tribute, Sir Richard Wild, noted that Sir Ian's tragic death has robbed New Zealand of a fine Judge and Christchurch of a greatly respected citizen.

"There are with me, as you see, his brethren who sit in Christchurch—but I speak as well for all the other Judges in New Zealand, as well as for our former colleagues since retired. On behalf of us all I extend our deep and respectful sympathy to Lady Macarthur and her family," his Honour continued.

"Ian Macarthur was born in Wellington and it was there that he went through school and University to graduate LLM in 1931. For entry to the law he had a sound practical training, working first as a law clerk and then as Associate to Mr Justice Smith. Those were grim years for a young man trying to gain a foothold in the profession but he had the courage to journey overseas to widen his horizons and his experience. On his return he got more expert training in the chambers of Mr A H Johnstone K C in Auckland. Then, in 1935, showing the same courage and determination, he set up in Wellington a practice on his own account which prospered well until, with the sense of duty that characterised his whole life, he put it aside in 1940 to enlist in the Army. In the War he served with distinction in the 3rd Division and rose to the rank of major. When he returned to Wellington it occasioned no surprise to the profession that he was invited to join the leading firm of Chapman Tripp & Co, as a partner. In the 14 years of practice that then ensued he served in the councils of the Law Society, be-

coming President of the Wellington District in 1956 and Treasurer of the New Zealand Society for two years.

"Then in 1959 Mr Justice Macarthur was appointed a Judge of the Supreme Court and he came to Christchurch. In this City he has served the cause of justice faithfully for these past 16 years. It was on Trafalgar Day, 21 October, that he took the oaths of office, a fact noted by the presiding Judge, Mr Justice McGregor, who observed that the new Judge needed no reminder of Lord Nelson's historic signal. Now that Mr Justice Macarthur has passed on one may indeed say that Duty was truly his watchword. And to that I would link a couplet from John Bunyan's hymn which was sung at the service in the Cathedral:

"One here will constant be,
Come wind, come weather."

Constant he was, and dutiful, in all he did: in his Court, in his public service, to his family, and to his friends.

"Mr Justice Macarthur was a Judge of sterling integrity; a sound lawyer, wide in experience, deep in knowledge. In striving always to do right in his Court he was not one to be hurried or to hurry. For him the search for justice was too sacred a task for that. But he knew the virtues of patience and carefulness, of courtesy and compassion; and because those qualities were part of his very nature he did do justice in this Court to all manner of men and women. He had a very high sense of the dignity of the office of the Queen's Judge, but with it a personal humility and thoughtfulness which endeared him to all his brethren and which also, as is shown by your presence in such numbers today, won him the affection of the practising profession and the admiration of the wider community. If he had disappointments in his judicial career he kept them to himself for he was utterly loyal. And here may I acknowledge with gratitude the loyalty and comradeship he showed me in my office over these past 10 years during which I have worked so closely and happily with him. For the whole profession, Bench and Bar alike, he leaves an outstanding example of dedication and service.

"I have spoken of Mr Justice Macarthur the Judge of this Court but, sitting here today, I am deeply conscious of Sir Ian Macarthur, the citizen of Christchurch. When he came here 16 years ago he set himself to do his appropriate part, so far as a Judge can, in the public life of this City. He has served its citizens in many ways as well as by holding the Presidency of the Outward Bound Trust, the Marriage Guidance Council and the Royal Christchurch Musical Society. He developed a strong feeling for the traditions and dignity of Christchurch: for its history and its institutions as well as for its trees and lawns and buildings. He had a special devotion for the old Supreme Court building from which with such reluctance he had finally to be dislodged. Those who use the new building which will take its place will have good cause to remember the long hours Mr Justice Macarthur spent in pondering over the plans to ensure that the beauty of the precincts is safeguarded and the most precious wood and stonework preserved.

"He was every inch a Judge. And, if I may say so, his quality and bearing suited Christchurch as Christchurch suited him. I know that he came to love this City, and I would like to acknowledge with gratitude the high respect and admiration that in return the City showed him, in its spontaneous delight on the award of his Knighthood last year and in that memorable service in the Cathedral last week.

"Over the past hundred years and more Christchurch has been served by a succession of notable Judges whose names will be remembered in her history. Standing high amongst them in the years to come will always be the name of Ian Hannay Macarthur," Sir Richard concluded.

On behalf of the Government, the Solicitor-General, Mr R C Savage QC said that the sitting of the Court enabled the gathering to pay respects and to record tributes to the late Mr Justice Macarthur.

"It is right and proper that we do but it is not just because it is right and proper that we are here but because we want by our presence to show that his Honour was a man we respected, we admired and we liked," he continued.

"The Attorney-General regrets very much that his official duties prevent his being present here today as he would have wished to be. He has asked that I should speak in his stead.

"So it falls to my lot to record on behalf of the Government the gratitude and appreciation of the community for the services Mr Justice Macarthur has rendered New Zealand in his office of Judge.

"His Honour the Chief Justice has spoken of the late Judge with particular reference to him as a member of the judiciary and those who follow me will, I am sure, speak of his career while he was in practice, including his service to the Law Society, and also of his contribution to the City of Christchurch both

from the Bench and in other fields. I will content myself by saying something in a general way of his Honour.

"On the Sunday after his death I attended an annual service held by his old school in Wellington at which one of the speakers referred to an address given by a Dr Gibb who was then Minister of St John's Presbyterian Church Wellington, when the school was founded. Dr Gibb was one of those principally responsible for the establishment of the school and he spoke of the aims that the founders of the school had. He had said the school wished to instil in its boys grit, gumption and grace. Old fashioned terms for what are in reality, when properly understood, great qualities. His Honour, as one of the school's earliest pupils, learnt those lessons well as his career shows.

"First, his distinguished career at school, university and on the sporting field followed by his early years in law all show determination and tenacity of a high order.

"Second, in 1935 he set up in practice in Wellington on his own account, and those were difficult days for anyone to start. But he did and continued in practice on his own account until he joined the Army in 1940.

"Third, he treated all with whom he dealt, either in practice or on the Bench, with every consideration, with patience and above all with great, indeed grave, courtesy. In the language of yesterday, he had learnt and applied the lessons of grit, gumption and grace.

"The Judge himself, when speaking on an occasion to mark the death of a fellow Judge once said: 'It is probably true to say, however, that a Judge is remembered most of all not for what he does, but for the way in which he does it' and of that particular Judge he spoke of his patience and unfailing courtesy. We, indeed, will remember his Honour in that way too, and for his sound learning and human judgment; but as well we shall remember him by the way he presided in and conducted his Court, particularly for the way in which he made clear, that the business of the Supreme Court of this country is, as it ought to be, one of the most important matters upon which one can be engaged; and so, like all important matters, it must be done with the decorum, dignity and form that is appropriate to it. The administration of justice in this Court in his Honour's hands will be remembered by all who took part, in whatever role, as a memorable experience.

"To Lady Macarthur and the members of his Honour's family I express the Government's deepest sympathy," Mr Savage concluded.

On behalf of the New Zealand Law Society, its President, Mr Lester Castle, said that the demands made upon the Judges and the increasing pressures under which they are called upon to ensure the speedy, efficient and effective administration of justice inevitably take their toll.

"Whilst the legal profession throughout New Zealand mourns the passing of his Honour Mr Justice Macarthur, we remember with gratitude his many accomplishments not only as a Judge of this honourable Court but also in earlier times as a member of our profession, which he served with the diligence that he brought to all tasks entrusted to or thrust upon him. 'Near enough was never good enough' for Sir Ian Macarthur," Mr Castle continued.

"We recall his services to the profession as President of the Wellington District Law Society in 1956, as a member of the Council of the New Zealand Law Society from 1955 to 1959, as Treasurer of the Society in 1959 and as a member of the Legal Education Committee, the Council of Legal Education and as the Law Society's principal spokesman on matters pertaining to transport licensing. It was said of him at the time of his elevation to the Bench, 'The new Judge brings to his judicial office a wealth of experience in the Courts coupled with a manifest soundness of judgment which has been characterised by thoroughness and a demand for precision in all that he undertakes. Ever courteous and patient, he has by his essential fairness in approach gained both the respect and the affection of his colleagues at the Bar.'

"It is equally true to say that throughout 16 years as a Judge of this honourable Court, those talents and attributes which he brought from the Bar were always in evidence on the Bench. The members of the profession throughout New Zealand join me in paying their sincere tribute to him this day, as they do in tendering sincere condolences to Lady Macarthur and her family," Mr Castle concluded.

On behalf of the Canterbury District Law Society, its President, Mr Hearn, said that he did not propose to try to further review the distinguished career of the late Judge so much as to try and speak of the man as we came to know him in this district.

"The late Judge was a man who always discharged the duties of his high office with

great distinction. He had a disciplined mind, a clarity of expression and a profound knowledge of the law. His many judgments in diverse and complex aspects of the law serve as their own memorial, complete in themselves," Mr Hearn continued.

"Yet it is the personality and character of the man himself that we shall immediately remember him for. To appear before him was to learn a reverence for the law, a respect for its institutions and a love for its traditions. For him there were not several ways for something to be done; there was only the correct way. Yet coupled with the discipline he imposed on himself and others and his impatience with the irrelevant, he combined a courtesy and an understanding which made his Court everything justice should be. His was not the quick way and expediency found no place in his search for the answer according to the law. His philosophy was that a litigant should not be put to the pain of an appeal because of his failure to apprehend the law and he devoted much time and effort to the consideration of his judgments. Perhaps there would be no Judge less reversed on appeal.

"His expertise in the criminal law was well illustrated by his conduct of two particular trials this year, *Lewis* and *Acton,* both long and arduous, both complex and difficult, but his summing up in each case has been described as immaculate.

"In all his years of service on the Bench I do not think there would be one litigant, one accused, one prisoner, one person who would leave his Court doubting that he had received a fair hearing, whatever the result may have been. For a man of the law I know of no greater tribute; for a Judge no greater distinction.

"As a man he had a warm and human personality. He had an enquiring mind and was interested in many things. Whenever he was able to he joined practitioners on social and less formal occasions. Then he had a word for all, and in particular for younger practitioners. He was always ready to help the law and its students, and was generous with his time and wisdom. Many younger practitioners will recall their first meeting with the late Judge, perhaps at a Society Court workshop or perhaps presiding at an admission ceremony. On such occasions the law had no better image. I recall quite recently the warm appreciation of some Australian law students who appeared before him in the semi-final of an Australasian mooting competition; the likes of his Court they had never seen before.

"Well-known for his interest in music and the arts, he spent some of his valuable time tracing the history of the carved canopy and dais in the old Supreme Court and was resolved that they should be preserved.

"Generally formal, he could be delightfully informal. I remember seeing him put aside his work in the Society's library to help a new librarian find an obscure text she had been looking for. It was typical that he knew exactly where to find it and was prepared to take time to help. If he sought something of the Law Society he often made a personal call to the Secretary's office and such visits were pleasant occasions. If a man's worth is to be measured by the affection and Loyalty of those who work with him and for him, no man was worth more.

"I believe he loved the simple beauty of the river bank with its trees and gardens and was often to be seen walking there during a lunch break, courteous, kind and distinguished.

"This then is something of the man we knew and honour today.

"I have a message from His Excellency the Governor-General who, as a life long friend and associate, has asked to be associated with the tributes paid at this sitting of the Court.

"As well as members of the Canterbury District Law Society there are present in Court amongst the distinguished visitors the Presidents of the Otago and the Southland District Law Societies. The Presidents of Nelson, Marlborough and Westland District Law Societies have expressed their regret that they are unable to be present and have asked to be associated with the tributes we pay.

"The presence of so many widely-representative persons here today is more eloquent than any words of mine.

"To Lady Macarthur and his family we express and extend our deep sympathy with the hope that this gathering and the honour here paid may in some degree help to sustain them in their sad loss," Mr Hearn concluded.

Anglo-Saxon Solomon—The impartial Englishman is supposed to say: "Some people say there is a God; others say there is none. The truth probably lies somewhere between the two." RICHARD ROE.

LEGAL AID ON A GLOBAL SCALE

MR J C CLAD *of the Ministry of Foreign Affairs notes how New Zealand helps with global "legal aid".*

New Zealand's bilatenal aid budget of nearly $57 million provides many forms of assistance to developing nations, including health, agriculture, education, and geothermal projects in 34 countries. Some 30 percent of the aid vote for 1975/76 is allocated to multilateral assistance, helping such bodies as UNESCO and the UN Development Programme. The monies here, however, are also used primarily in traditionally "developmental" projects such as increasing food production, attaining adult literacy, and improving rural communications.

In the wide range of international aid programmes one would scarcely expect legal services to be a high priority. Yet the New Zealand contribution to the Commonwealth Fund for Technical Co-operation (CFTC) partly reflects this country's satisfaction with legal assistance programmes offered by the Commonwealth Secretariat, and if international concern at the economic power of multinational corporations is any guide, interest in such services as trade agreement negotiation and resource law drafting is likely to increase dramatically.

"Each state," according to the 1974 UN Charter of Economic Rights and Duties of States, "has the right to regulate and supervise the activities of trans-national corporations within its national jurisdiction, and to take measures to ensure that such activities comply with its laws, rules, and regulations." What the Charter does not make clear is how a developing country with meagre legal skills at its disposal can "regulate or supervise" the trans- or multi-national corporations which commonly overbear the smaller states. At the UN this year an international code for regulating these companies will be debated but in the meantime the CFTC and the UN are making a real contribution toward correcting this imbalance of economic power.

It could be said that an attitude is evolving in the international community which is not unlike the doctrine of unfair advantage emerging in our own common law. In absence of a tribunal to give this attitude legal cohesion, the CFTC and other organisations are concentrating on upgrading terms in agreements between developing states and large multinational companies. There are two ways in which this is being done: there is the UN approach and there are the activities of the CFTC.

In December 1974 a Commission and Research Centre on Transnational Corporations (TNCs) was established at UN Headquarters in New York. Among the Centre's programmes are training workshops for government lawyers and other officials negotiating with TNCs. The first such workshop was held in New Delhi, India, from 10 March to 4 April this year.

The main emphasis of the workshop was "negotiation". Organisers agreed that fitting commercial agreements into the framework of existing laws was only part of the exercise. More important is achieving equitable contracts through attention to all particulars and this was regarded as the crucial negotiating skill by the workshop. The concensus at the conclusion of the workshop was that the conventional law school courses in underdeveloped countries do not offer the right sort of training for these skills.

The workshop involved the participants in simulated negotiation sessions as well as lectures in substantive legal issues. A fictitious bargaining session, based on the renegotiation of mining agreements at Bougainville, Papua-New Guinea, was designed to test the participants.

Workshop trainees also studied investment and taxation laws, consortium arrangements with foreign companies, labour laws, and policy criteria for evaluating proposed investments. Other workshops are planned for Latin America and Africa in the near future.

This "workshop" or training approach of the UN has been devised to deal with the economic imbalance caused by a situation where the world's 10 largest companies, when measured by sales, are larger than some 80 nations' gross national product. With assets in excess of $200 thousand million these corporations command resources unavailable to developing nations. How are poor countries to protect their interests when concluding agreements with these concerns?

Mr H M A Oritiri of the University of Ibadan, Nigeria, recently commented that "A poor country, starved of foreign exchange, overburdened with debt and struggling to imple-

ment a modest development programme, will, in the absence of alternatives, readily enter into agreements with multinational corporations on unequal terms, reflecting its weak bargaining position and its desperate pursuit of a modest rate of advancement." CFTC help to poor countries, in contrast to the UN, concentrates on providing legal services at short notice to Commonwealth countries. In this way it is adding a new dimension to common law traditions linking these nations.

Over the past several years lawyers working with CFTC have helped Commonwealth countries with draft legislation, instruments of security, investment codes, preparation of litigation, and direct negotiation of commercial agreements. Commodities covered by these activities include oil, geothermal energy, copper, diamonds, and fish.

In addition, CFTC lawyers have advised governments on merchant and shipping legislation, revenue policies, and accession to treaties.

CFTC has not, however, confined itself to mere legal advice. Training courses in legislative drafting are regularly offered and in July the Commonwealth Legal Education Association (which is assisted by CFTC) held a seminar at Leeds University.

New Zealanders have been prominent in CFTC legal services programmes, including advice on international law and treaties to Bangladesh, registration of customary land in Papua-New Guinea, and mineral exploitation laws in Western Samoa.

Ironically, the Bougainville copper renegotiation (used as example at the UN workshop in New Delhi) was actually conducted by the CFTC, demonstrating the practical spirit of Commonwealth legal services aid. A glance at a recent CFTC report reveals the following examples of this type of international "legal aid": Drafting price control legislation for the Bahamas, Preparing a Financial Institutions Act for Gambia, a New Zealand tax lawyer for Kenya, law reform advice to Papua - New Guinea, customs agreement negotiation for Swaziland, and legal advisers for the East African Community.

Legal services aid is not just an academic exercise. A recent CFTC mission went to a small African state to assist with mining negotiations. Intervention at a timely stage helped boost expected revenue by almost 30 percent, an immediate and tangible return which contrasts favourably with even the most successful "on the ground" development project.

The likelihood is that legal services aid to developing nations will increase. Although the UN is less ambitious than the CFTC, the creative use of lawyers and their skills remains a common feature of both organisations. The Commonwealth Secretariat has offered legal advice to member states on short notice and in this respect CFTC legal projects are greatly aided by legal traditions shared by Commonwealth countries. It is likely that New Zealand lawyers will play an even greater part in this aid and our government's contribution to CFTC is in part a recognition of the results of legal aid on a global scale.

With the growing complexity of world commerce, countries are relying more than ever on lawyers to protect their interests. This help also goes beyond commercial business. Developing nations commonly ask the Ministry of Foreign Affairs for information about New Zealand laws on matters as varied as cattle movement controls and air services licensing. It is all part of a flexible approach to law and lawyers, an approach entirely at home with our common law system.

In spite of folklore to the contrary, lawyers have a lot to do with justice, and global legal aid is only an extension of social justice to the law of nations. It is a positive step forward. As Jose Luis Bustamande y Rivero, President of the International Court of Justice, comments: "This world of ours has gained in maturity . . . History, that silent teacher, has taught that amid the fluctuations and transitory episodes, power and decline, the only permanent factor is justice."

How to lead—I noted in Court on 7 April 1967 a young counsel who was taking perhaps his first undefended divorce case. He was taking it on the basis that the respondent was an habitual drunkard and treated his wife with habitual cruelty and this was one question—"Do you say that over the last few years and over the last three years in particular you have had genuine cause to fear for your life or safety and that of the two youngest children of the marriage from the cruelty of the respondent?" I don't know what the answer was!—MR W V GAZLEY to the Wellington Young Lawyers.

Signpost—A correspondent writes that a sign on a pond near New York reads "KEEP OFF—CHURCH PROPERTY. NO FISHING AND NO SWIMMING." To which someone has added the words, "AND NO WALKING ON THE WATER."

SOME REFLECTIONS ON LIABILITY OF THE CROWN

P J EVANS, *Senior Lecturer in Law at Auckland University, writes that since he wrote the case note on City of Wellington v Victoria University [1975] NZLJ 282 he has further considered the issues in that case and the extent of the doctrine of Crown immunity in this country in general.*

The immediate stimulus for these reflections was an attack by some students on the distinction I attempted to draw in the case note between the *Victoria University* case and the decision of the Court of Appeal in 1965 in *Lower Hutt City Council v Attorney General* [1965] NZLR 65. Those who have read the case-note will recall that in the *Lower Hutt* case the Court of Appeal held that the Drainage and Plumbing Regulations 1951 did not apply to a plumber working as an independent contractor for the Crown on a Ministry of Works project on Crown land because if they were to apply this would affect the "rights" of the Crown. To hold that they applied to the contractor would thus be contrary to s 5 (k) of the Acts Interpretation Act 1924 which states:

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

In the *Victoria University* case Mr Justice Cooke held that because of s 5 (k) the University was not bound by the City's Town Planning Ordinances in erecting a building (the von Zedlitz building on Kelburn Parade) because it was erecting the building on Crown land, and the building was to be paid for by the Crown. This was so even though the University was not acting as an agent of the Crown, or under contract with the Crown, but was itself a principal in employing the building contractor(*a*). My argument in the case-note was that whereas had the regulations applied to the plumber in the *Lower Hutt* case there would have been an affect on the liberty of the Crown to use the property as it chose (since it would have been prevented from having carried out on the property work not in conformity with the regulations) no similar affect on any liberty of the Crown would have been involved if the ordinances had applied to the University in the *Victoria University* case. The University, I pointed out, was, on the Judge's analysis of the facts, a licensee. There was no good reason why the protection which extended to the Crown, and to contractors doing work for it on its land, should extend to licensees of the Crown. I anticipated a possible objection by pointing out that if it were to be contended that, at the least, the Crown's power to give others permission to do anything they wished on its land would be curtailed if the ordinances applied, strictly this power would not be affected. This power is only the power which every landowner has to extinguish the duty others owe him not to interfere with his land. If a person has a general duty at law not to do something on another's land or elsewhere, which duty is independent of the duty which he owes to the landowner, then the landowner cannot extinguish this duty. If the landowner gives permission for the act to be done on his land it will still be a wrong, but it will not then be a wrong against the landowner.

"But hold on!" said the students, "Everything you have said of the one case holds good of the other also. If the power to give permission would not have been affected if the ordinances had applied, it would not have been affected if the plumbing regulations had applied either. In both cases if there was a consent the act would remain a wrong but cease to be a wrong against the Crown as owner of the land. You speak of a "liberty to have work carried out" which you say was affected in the one case but not in the other. But what is this except a liberty to excercise the power to permit others to do things on the land? This liberty would be left as much intact as the power. And if you really meant the power is this not the very same power which you say would not have been affected in the *Victoria University* case?"

The logic was impeccable and more than a teacher should reasonably have to face. Yet I still felt there was a distinction between the cases which I might find if I probed more carefully.

(*a*) There was also an issue in the case concerning the effect on by-laws of s 412 of the Municipal Corporations Act 1954, which I discussed extensively in the case note.

The first question seemed to be what "right of Her Majesty" was supposed to be "affected" in the *Lower Hutt* case? It is worth commenting before we proceed that the word "right" in s 5 (k) has not been the subject of close analysis in the New Zealand Courts but it seems clear from the trend of the decisions that it is not limited to rights in Hohfeld's strict sense of a claim to a performance or abstention by another(*b*). Nevertheless one might reasonably contend that it ought to refer to some identifiable legal advantage. In the *Lower Hutt* case the closest we get to a pronouncement on this point is Mr Justice Turner's comment that to hold that the plumbing regulations applied to the contractor would "affect the rights of Her Majesty (viz to enjoy the land)"(*c*). What "right" is involved here? There seem to be two possible candidates. The first is the Crown's "right", or power, by entering into contracts to bind others to do work for it on its land. But this power is just a particular aspect of the power the Crown always has by entering into contracts with willing parties to bind those parties to perform services for it. Common sense suggests that a mere interference with this "right" of the Crown should not prevent a statute or regulation applying to a citizen since otherwise the Crown could, by an appropriate contract, free a citizen from any prohibition at all. Common sense is backed up by the authority of the Privy Council. In *Dominion Building Corporation v R* [1933] AC 533 at 549 Lord Tomlin, referring to a similarly worded Canadian statute, stated:

> "The expression 'the rights of His Majesty' in this context . . . in their Lordships' view . . . does not cover mere possibilities such as rights which, but for the alteration made in the general law by the enactment under consideration, might have accrued to His Majesty under some future contract."

The second possible "right" is the power I have already discussed, namely the power the Crown has to permit others to do things on its land. As I have already pointed out, this "right" would not strictly have been affected had the regulations applied in the *Lower Hutt* case since the Crown could still have extinguished the duty owed to it as landowner. Yet if the Crown's "right" would not have been affected it would undoubtedly have been rendered less useful. For in regard to acts in breach of the regulations there would then have been no persons who could lawfully take up the permission. It seems to have been this practical affect on the advantages of possessing this power which the learned Judges in the Court of Appeal had in mind when they held that the "rights" of the Crown would be affected if the regulation applied.

The analysis so far suggests that there is an ambiguity in the word "affect" as it is used in s 5 (k). On the one hand it might mean "legally affect" in the sense of negate or modify; on the other hand it might mean "legally *or* practically affect" in a sense which would be wide enough to include the case where a right is left intact but rendered less useful. Plainly, the learned Judges in the Court of Appeal treated the word as having the second of these senses. The difficulty with this interpretation is that we are left in uncertainty as to just what type or degree of practical affect is to be sufficient to bring the rule into play. There must, presumably, be some limit: for if subjects were to be exempted from the application of statutes whenever any slight adverse affect on the usefulness of some legal incident of the Crown might result from their being bound, the law would be in chaos.

The view that an adverse practical affect on some right of the Crown may be sufficient to bring s 5 (k) into effect, makes it relevant to consider whether there is any difference between s 5 (k) and the old common law doctrine of Crown immunity concerning the question who is entitled to claim the benefit of the Crown's protection. At common law the primary test whether an individual was exempt from the application of a statute was whether detriment to the interests of the Crown would result if the statute applied to that individual(*d*). Hogg, in *Liability of the Crown* at p 184 argues that provisions such as s 5 (k) do not alter the common law. Prima facie, this seems to me wrong. Such provisions should be construed according to their terms. It is also contrary to various expressions of opinion in the New Zealand Courts, the most authoritative of which is that of Sim J speaking in the Court of Appeal in *McDougall v Attorney General* [1925] NZLR 104 at 111(*e*). He first quotes with approval some comments of Chapman J in *In re Buckingham* [1922] NZLR 771 and then adds some comments of his own:

(*b*) For a discussion of the New Zealand cases see Hogg, *Liability of the Crown* (1971), The Law Book Company, Sydney at 185.

(*c*) At 78.

(*d*) Hogg, op. cit. at 174.

(*e*) See also *Andrew v Rockell* [1934] NZLR 1056.

"In the course of his judgment Chapman J said this with regard to the language of s 6: "I cannot overlook these words which replace a presumption of law by a declaration of positive law which cannot be ignored, save where we find that the Legislature has enacted something repugnant to it." I agree with this observation and I think that the Court is not entitled to limit the operation of the section by a consideration of the common-law rule on the subject. That rule as stated in the passage from *Bacon's Abridgement* quoted with approval by Jessell MR, in *Ex parte Postmaster-General* is very different from the rule expressed in s 6 of the Interpretation Act. [This rule is identical to that in s 5 (k).] In view of the difference the Court is not justified, I think, in saying that the Legislature did not intend to make any change in the law. The language of the section is clear and definite and effect must be given to it."

Despite this, the view apparently taken by the learned Judges in the *Lower Hutt* case that the word "affect" in s 5 (k) includes a "practical affect" makes it hard to contend that there is any substantial difference between s 5 (k) and the common law on the present point. One would have to find a case in which there was detriment to the Crown, but not through an impact on any legal incident which could be referred to as a "right" of the Crown. A possible case can be constructed out of the facts in *In re Telephone Apparatus Manufacturers' Application* [1963] IWLR 463. In that case the telephone manufacturers were held not bound to register an agreement between themselves concerning supply of telephones to the Crown with the Registrar of the Restrictive Trade Practices Court because this might have rendered another agreement between them and the Crown concerning the telephones almost wholly ineffective. On the facts as they occurred there would have been prejudice to the Crown's rights under the agreement between it and the manufacturers if the agreement had had to be registered. But suppose there had been no such agreement, but merely an expectation that orders would be placed by the Crown subsequently. Then there might have been detriment to the Crown, but the only "right" affected would be the Crown's right to enter into future contracts. This "right", as we have seen, is not covered by the term "rights" in a provision such as s 5 (k). It is only in an extraordinary case like this that there would be any difference, but whether or not there is in fact any practical difference between the common law position and that which follows from the Appeal Court's interpretation of s 5 (k), it seems that the correct approach to the question in New Zealand should be through the words of s 5 (k).

We can now turn back to the *Victoria University* case. Was there any legitimate basis for a distinction between that case and the *Lower Hutt* case? In both cases, it seems, what was involved was a potential affect on the advantages of the Crown's power to permit others to do things on its land. Nevertheless there is one difference between the cases. Whereas in the *Lower Hutt* case the relevant acts were to be performed for the benefit of the Crown, in the later case the licensee (the University) was to be allowed to perform, or have performed for it, acts which were for its own benefit. It was this distinction which I inadequately attempted to characterise when, in the case note, I wrote that the liberty of the Crown to have work carried out on the land would be affected in the one case but not in the other. Could this difference have justified a distinction between the two cases? It depends on how widely the notion of practical affect is extended. Clearly it is *some* disadvantage to a landowner if his licensees are restricted in the range of things which they can do on his property for their own benefit. But clearly also, the disadvantage is much less than that which exists if the landowner cannot obtain the services of others to do things on the land for his own benefit. At common law it seems the licensee would probably be free from this restriction. Certainly there are cases where legislative restrictions have been held not to apply to tenants or sub-tenants of the Crown because to hold that they applied might adversely affect the value of the Crown's reversion(*f*). But it could have been contended that the situation is different under a statutory provision such as s 5 (k). It might have been held that the practical affect which will bring a case within s 5 (k) must be real and direct, and not merely indirect and slight as it is where a licensee or lessee's liberty to do things for his own benefit is in issue.

In the *Victoria University* case the learned Judge was careful to limit his findings to cases such as that before him where the work was being paid for by the Crown, and the Crown had in fact been very much involved in the

(*f*) See eg *Rudler v Franks* [1947] KB 530, and the cases quoted therein.

planning of the project. Perhaps one can see the case as representing the high-water mark of situations where there is some practical affect on a right of the Crown. Quite possibly the practical involvement of the Crown in the building project which existed in this case will come to be seen to distinguish this case from others where a licensee or lessee of the Crown is involved(*g*). Yet the position is unsatisfactory. There is little clarity in the law. The Crown can, it appears, in some cases free citizens from the impact of a statute by giving those persons permission to perform the relevant acts on its land. We cannot say with any confidence how far this rule applies. Presumably there is, at the least, some limitation in respect of things mala in se, presumably, for example, the rule does not apply to the provisions of the Crimes Act. Apart from this, the rule does not seem to be based on any sound principle. There appears to be no good reason why citizens should be exempt from the impact of otherwise general laws just because they are doing what they do on Crown land with Crown permission.

There is one further matter worth mentioning in order to round off this discussion. The question who is entitled to the benefit of the Crown's exemption often surfaces when a claim is made by some public corporation to be entitled to the same protection as the Crown. It is sometimes suggested that the issue in these cases is whether the corporation is part of the Crown. Hogg, in *Liability of the Crown* at p 204 has argued cogently that this is not the true issue. A public corporation is never part of the Crown. The issue is whether it is entitled to the Crown's exemption from statute in the particular case. A corporation may be entitled to this protection in one case but not in another. Hogg argues that, in general, a corporation will be entitled to the protection if it is acting as servant of the Crown and if some interest of the Crown would be impaired if the Corporation were to be held bound by the statute or regulation in question. This view appears to be an accurate description of the common law, but once again one may doubt whether common law tests are strictly appropriate in New Zealand because of s 5 (k). In my view the correct issue here, as elsewhere, should be whether some identifiable "right" of the Crown would be affected in some identifiable manner were the statute or regulation to apply.

(*g*) There is at least one case of the Town and Country Planning Appeal Board where the Board has assumed that lessees of the Crown are bound by that Act. See *Minister of Railways v Auckland City* (1959) 5 NZTCPA 214 where it was assumed that an underlying zoning of railway land would apply to Crown lessees.

THE LAWYER'S RESPONSIBILITY TO SOCIETY

Excerpts from an address given by SIR JOHN MARSHALL *to the Canterbury District Law Society's seminar at Ashburton.*

Although we are free to cut ourselves off from society, to live in an ohu or an ivory tower, a lawyer cannot avoid his responsibilities to society. The hallmark of a profession is service primarily to those who seek those services, but overflowing into the larger community in which we live.

There are many authorities I could quote in support of this proposition. I will quote only two:

> "A Lord Chancellor of England, Lord Buckmaster, in an address to the Canadian Bar Association, said: 'We are not, and we ought not ever to be, people who merely know the law and appear in Court and plead cases. We ought to be, and our historical role has always made us, far more than that. We are the people who not merely administer the law, but we ought to shape and help to make the law. No lawyer ought to exclude himself . . . from the great public life of which he forms a part. He, beyond all other men, is bound to use his energies for the public good. . . .' "

The second quotation is from the American Bar Association Journal, where it says:

> "What is distinctive about the role of the lawyer in a democratic society? The law of such a society is a kind of self rule, where the subjects are also the rulers, where . . . the officials are responsible to the people. In such a society the lawyer is a natural leader unless he abdicates in favour of less informed per-

sons or otherwise defaults in the face of insistent obligation."

This work is done quietly behind the scenes, or before Parliamentary committees which do not usually attract the notice of the press, and I think it would do no harm, and possibly much good, if the public knew more of these and other activities of the Law Society.

This matter was the subject of some discussion at the last law conference in Wellington at Easter. The NZ Society is certainly aware of the problem and conscious of the need for better public relations.

The species lawyer suffered, and still suffers from the fictional characters of literature and the theatre, from the lawyers of *Bleak House,* or Galsworthy's *Man of Property,* and, in these modern times, the sleuth type and the criminal type of the radio and television serial.

There is also the popular impression that is enshrined in many a story which lawyers tell against themselves of the size of fees that are sometimes charged. The picture of two litigants fighting for possession of a cow while the lawyer milks it, and so on.

The other side of the picture, of much work done without any reward at all is not mentioned, and, indeed, who would wish to mention it. But the charges that are made must not only be adequate from our professional point of view but seen to be justified by the client who pays them if we are to reduce the resentment that is sometimes felt towards the profession which has from time to time been expressed to me as MP by constituents.

The law does give rise at times to delay and to feelings of frustration, to the feeling that the letter of the law and not the spirit is being followed. These are matters which can be mitigated but never entirely removed, but the public usually sees only the results and often does not understand the reasons which are not always the dilatoriness or slothfullness of the lawyer concerned.

In the life of a nation there are two kinds of leadership, the leadership of thought and the leadership of action. The men that give that leadership in its highest form may do so in both fields, but it is more common for the man of thought to make his contribution in the form of ideas which go to the moulding of policies, and for the man of action to grapple with the problems of applying them.

For the members of our profession there is ample scope in both fields: for the men of action in the conduct of public affairs in this most democratic of the democracies; for the men of thought in the problems of a changing pattern of society in which the law must keep pace with new social concepts and where those new concepts themselves need the careful scrutiny of thoughtful minds.

It is interesting to see the extent to which the members of the profession are now giving this leadership to the country and to the communities in which they live.

If we first look at local body affairs we find that there are few borough councils upon which lawyers are not serving. However I do feel that there is a field of service in hospital administration to which members of the profession could make a valuable contribution. The time is ripe for reform. The leadership of men of thought and of action who can bring to bear on these problems the scrutiny of a keen mind and an impartial judgment, is greatly needed in the face of the controversial and conflicting claims that are now being made.

In cultural and sporting life, and in many voluntary societies for the public good, members of the profession are taking an active and prominent part in administration and leadership.

I have mentioned only some of the public activities in which lawyers are today serving the community, and mainly the cases where that service is on a national or regional level. There must be many others whose service is local, less spectacular but no less worthwhile.

In addition, it would be proper to include the services rendered to the profession itself by the Council of the New Zealand Law Society, the District Law Societies, and the several committees which watch the interests of the profession and also the interests of the public as they are affected by professional matters.

After this by no means complete review of the part lawyers are playing in the life of the community, I think it can be said that the members of the profession have not neglected their public duty. This is the more so when it is realised that the membership of the Law Society is about 3,000 and that that represents about .1 percent of the population.

I think it can be said that by no other profession or group in the community is so much done for so many by so few. The profession deserves the respect and gratitude of the community, and while I believe that it has that in a large measure, the public's attitude towards the profession is something to which some thought could properly be given.

I think the public attitude differs according to whether lawyers are considered as individuals or as the Law Society in its official capacity,

or as the species "lawyer". Lawyers as individuals of course get the respect they deserve, be the same a little more or less.

The relationship of solicitor and client is a very personal one and while there are dissatisfied clients, the general experience is one of confidence in and respect for the men to whom they take their troubles. It is at times a touching and humbling experience to see the way in which people come to rely on their legal adviser.

Of the profession as represented by the Law Society, I do not think that the public knows enough. I think particularly of the work which the Law Society does in relation to Parliament, in keeping a vigilant eye on legislation, and in making representations fearlessly and impartially when it feels any legislation infringes on well-established constitutional or legal principles.

There is also the type of person who comes to a lawyer expecting his assistance in some sharp practice, and is disappointed at the reception he gets.

These are all factors which contribute to the sum total of public opinion in relation to the law. It is a matter which in the absorbing details of a busy practice the average practitioner may overlook. Indeed, I suppose the average practitioner may be rather more than indifferent, but I think it is relevant to the best administration of the law that the public should have confidence in those who administer the law, and I believe that such confidence is amply justified.

I am concerned that at the present time there are fewer lawyers in Parliament than has generally been the case in the past. Twenty years ago there were 11 lawyers in the House of 80, and six of them were in Cabinet. Today there are six lawyers (two of whom have not been in practice) in a House of 87, with only one in Cabinet. Ten or twelve more are needed. I hope and expect that this situation will be remedied to some extent at the end of this year.

The sacrifices are very real, disruption of family life, a lower income, and a workload which far exceeds in time and personal inconvenience the demands of legal practice. But there are rewards too for those who have a concern for people and for the public good as they see it.

For those who have the urge, there is the fascinating attraction of being involved in the processes of government, of helping to shape the course of events, of trying to resist or delay or divert mistaken policies, of promoting new ideas, of initiating or supporting development and reform.

Even the financial rewards of a Member of Parliament have improved to the point where a lawyer in his forties, who has established himself and has some private income, accommodating partners and an understanding wife, could reasonably make the break and the monetary sacrifice.

In many Legislatures in the free world lawyers tend to be the predominant element. Their training and experience fits them for law making and for administration, and for the Parliamentary debating chamber.

If he is not in his practice then the lawyer is not earning his fees, but the staff still have to be paid and the rent and other overheads still go on.

This is a factor which must be taken into account where public service or other extra-mural activities involving time away from the practice are undertaken by a lawyer. It is for this reason that I have in recent years favoured a more realistic fee for lawyers and other professional men who are asked to undertake commissions of inquiry, or to act as chairman or members of tribunals or committees.

There is, however, much community service which can be given without unduly encroaching on the working day. This covers almost every aspect of community life from the religious, charitable and educational to the sporting, cultural and social activities.

It is to the great credit of our profession that in every community, large or small, lawyers are to be found in positions of leadership and responsibility, and in innumerable ways making the place where they live better for their being there.

This is not a matter for boasting or aggrandisement. It is what men and women who have had the training and education and advantages which we have been privileged to enjoy, should be doing as responsible citizens, who have been well served in our society and who in turn should try to serve society well.

Lawyers in the House—Of course, the House of Commons is simply studded with lawyers—it has always been, and it is well known that until the Members get from the Temple, the House never really comes alive. I suppose since the war the average number of lawyers has been about 125—which out of a total membership of 630 is not bad going. BROUGHAM in the *Justice of the Peace.*

COMPENSATION UNDER THE TOWN AND COUNTRY PLANNING ACT—REALITY OR ILLUSION?

P M SALMON, *an Auckland barrister, examines s 44 of the Town and Country Planning Act.*

In the course of argument before the Supreme Court in the case of *Manukau City Council v Minister of Works* [1974] NZLR 98, counsel for one of the appellants is reported as having stated that for all practical purposes the compensation provisions of s 44 of the Town and Country Planning Act are largely illusory, so much so that known cases of recovery of compensation under that section are difficult to discover. Certainly I am not aware of any decisions relating to the award of compensation under s 44 in the case of an operative district scheme although there are cases under the existing Act and its predecessor, the Town Planning Act 1926, concerning the payment of compensation consequent upon a refusal pursuant to s 38 of the Town and Country Planning Act or its earlier equivalent. Some of these cases are, *Wells v Newmarket Borough* [1932] NZLR 50, *Mt Eden Borough v New Zealand Wall Boards Ltd* [1945] NZLR 711, *MacKay v Stratford Borough* [1957] NZLR 96, *Allison v Piako County* [1957] NZLR 1214 and *McCutcheon v New Plymouth City* [1966] NZLR 1082. Section 38 of the Town and Country Planning Act applies only to draft or proposed District Schemes. As most local authorities in New Zealand now have Operative District Schemes, the relevance of the Section is now mainly in relation to such a Scheme.

Subsection (1) of s 44 provides entitlement to full compensation for all loss suffered by any person having any estate or interest:

(a) In any land taken for any purposes authorised by s 47 of the Act or otherwise for the purposes of an operative district scheme,

(b) In any land, buildings or other improvements injuriously affected by the operation of any such scheme, or

(c) In any land, buildings or other improvements injuriously affected by any refusal or prohibition which is made or enures under s 38 of this Act.

For reasons already mentioned, s 38 is becoming less important. I do not think that any great problems are likely to arise where land is taken and I intend, therefore, to confine my comments to a consideration of the section as it relates to compensation for land, buildings or other improvements injuriously affected by the operation of an operative district scheme.

It can be seen that the wording of subs (1) is wide and if the section had ended there no doubt by this time there would have been many claims for compensation.

The difficulties which arise in the path of anyone seeking compensation under s 44 are as a result of the provisions of subss (5) and (6). Subsection (5) lists circumstances where compensation is not payable. These circumstances are:

(a) In respect of the operation of any provision in a district scheme if the provision could have been made and enforced without liability to pay compensation by any local authority or public authority independently of the Act—this would, no doubt, cover the restrictions on the use of land that can be imposed under bylaws made pursuant to the Municipal Corporations Act or the Counties Act. For example, under s 386 of the Municipal Corporations Act there is provision for making bylaws governing a number of matters which one could also expect to see in town planning ordinances. Examples are the regulation or prohibition of the erection of buildings not having a frontage to a public or private street, the prevention of overcrowding of land with buildings and the prescribing of the minimum frontage and area of an allotment of land on which a dwelling house may be erected—see s 386 (1), (14), (17) and (18).

(b) In respect of any of the following provisions of the district scheme: (i) A provision limiting the number of buildings that may be erected in any area; (ii) A provision regulating the relationship of buildings to the land on which they are to be erected; (iii) A provision regulating the height or the floor space of buildings in relation to the area of their sites; or (iv) A provision regulating the design or external appearance of or space about buildings. This subclause covers those matters normally referred to in town planning ordinances as the bulk and location requirements. It is, of course, very specific in its terms and any particular case would have to be looked at carefully to see whether it came within one of these restrictions. For example, it can be argued that a provision of a district scheme which limits the number

of habitable rooms which may be constructed on any site is not caught by that provision and can, therefore, still be the subject of a right to compensation. Other matters relating to the use of sites which are not caught by this restriction are, for example, provisions limiting the number of people who can be accommodated on a particular site or provisions relating to parking and to the provision of space for the loading and unloading of vehicles.

(c) In respect of any building commenced or any contract made or other thing done in contravention of any district scheme after that scheme has become operative or in contravention of any decision of the board.

(d) By reason merely that any district scheme shows: (i) Any proposed new highway or street widening or proposal to close a highway: or (ii) Any proposed public reserve or open space. Subsection (6) then goes on to limit the right to compensation in certain cases by the necessity to exercise rights of objection and appeal and by other restrictions to which I will refer shortly. So far as an operative scheme is concerned, subs (6) applies only to the operation of any provision regulating the use of buildings or land by prescribing areas to be used exclusively or principally for specified purposes or classes of purposes. In relation to most schemes I have seen this subsection is limited to matters arising from the zoning of land and the limiting of the uses of that zoned land to those uses permitted either as predominant uses or conditional uses in that zone. It could be argued that subs (6) would also apply to the designation of land, but I think that a comparison of the wording of subs (6) with the words used in the second schedule to the Act indicates that it was not intended to apply to designated land. The wording used in subs (6) is very similar to that used in cl 1 of the second schedule whereas the designation of land is dealt with quite separately in cl 3, 3A and 4 of that schedule. It would seem likely too that subs (3) is related to subs (6) and that the two subsections were intended to apply to the same sets of circumstances. Under subs (6) compensation is payable, notwithstanding anything in subs (5), in any case where loss is suffered through the zoning of land, but only in cases where the claimant or the person through whom he claims has exercised the rights of objection and appeal to the Board conferred by the Act and a claim for compensation is made within twelve months after the date on which the provision becomes operative or within one month after the date of any final determination of the Board on an appeal, whichever is the later, and the owner or occupier shows:

(a) That the provision deprives him of the right to continue to use the land or building for the purpose for which it is already used and that that use does not detract from the amenities of the neighbourhood. (In relation to this provision the Land Valuation Court in *MacKay v Stratford Borough* [1957] NZLR 96 held that where a building on land had been demolished it was a continuation of the use to erect another building for the same purpose). Or,

(b) That the provision deprives the owner of the right to change from the existing use of the land or building to any other use which would not do any of the following things: (i) Detract from the amentities of the neighbourhood; or (ii) Cause demand to be made on the Crown or any local authority for an extension that is not in the economic interests of the region or locality of any public service or cause existing or proposed public services to be uneconomically used; or (iii) Cause an extension that is not in the economic interests of the region or locality of the subdivision into lots of less than four hectares of land along existing highways; or (iv) Cause an extension that is not in the economic interest of the region or locality of industrial or commercial development along existing roads or streets. Compensation is not payable in any case where the provision deprives the owner of the right to change from the existing use of the land or building to any other use for which it is not suitable.

It can be seen that the provisions contained in paras (a) and (b) of subs (6) do limit considerably the circumstances in which a claim for compensation could be successful. Both paragraphs refer to detraction from amenities and the word "amenities" is defined in the Act as meaning those qualities and conditions in a neighbourhood which contribute to the pleasantness, harmony and coherence of the environment and to its better enjoyment for any permitted use. To take a fairly obvious example, a person who wanted to continue an industrial use or change to an industrial use in an area otherwise used for residential purposes would be most unlikely to obtain compensation.

Any benefits conferred by subs (6) are further limited by a proviso which places a limit on the amount of compensation that can be obtained for loss otherwise covered by that subsection. The effect of the proviso is that the amount of compensation payable under the subsection shall be assessed as if no restriction upon use of any other land had been imposed by the scheme or

by any operative district scheme affecting adjacent land.

The other proviso to subs (6) is also worthy of comment. It reads: "Provided also that compensation shall not be payable in any case where the provision, prohibition or refusal deprives the owner or occupier of the right to change from the existing use of the land or building to any other use for which it is not suitable." One could imagine the arguments that could arise in endeavouring to define the criteria by which suitability will be judged. Obviously the practicability of any change of use would be a matter to be taken into account in the assessment of compensation. If, before a use could be changed, it was necessary in order to comply with regulations or bylaws to make alterations to the building, once again this would be a matter that would be taken into account in assessing compensation. In the light of the other restrictions, it is difficult to see why this proviso was added at all. It appears from an examination of the relevant Parliamentary debate that at the time the Town and Country Planning Bill was presented to Parliament the justification for this provision was the prevention of the subdivision of cliff faces or lands subject to erosion or lands that could not be drained. All these matters are covered by other legislation, particularly that to do with subdivision and would obviously all be relevant when it came to assessing compensation. I would like to see that proviso deleted.

To summarise the effect of the section so far then, a person contemplating bringing a claim for compensation would look first at subs (6) to see whether the claim came within the provisions of that subsection. If it did, then he would have to be very careful to exercise the rights of objection and appeal and to bring his claim within the time limited by that section. His rights to bring a claim under that subsection are not affected by the provisions of subs (5).

If the potential claimant comes to the conclusion that his claim is not one of those contemplated by subs (6) he would then examine subs (5) to see whether it was excluded by the provisions of that subsection. If it is not, then he could proceed to bring his claim, which would then be governed so far as time is concerned, by the provisions of the Public Works Act 1928.

Problems of interpretation arise in considering the question of the time within which a claim must be brought. Subsection (2) of s 44 provides that claims for compensation should be made and determined in accordance with the Public Works Act 1928 in respect of lands taken under the Act or in respect of damage done from the exercise of any powers conferred by the Act. Subsection (3) provides that where compensation is payable in respect of zoning, it shall be assessed and paid as if the restrictions thereby imposed were the taking under the Public Works Act of a corresponding interest in the land. In most cases where compensation was payable in respect of zoning the provisions of subs (6) would apply so that the claim would have to be brought within the time limited by that subsection. So far as other claims are concerned, however, one must make a decision as to which of the two time limits provided by the Public Works Act applies. Under s 42 of the Public Works Act claims for compensation fall into three categories—the taking of land, the injurious affection resulting from lands taken and the suffering of damage from the exercise of powers conferred in the Act. In contrast to this the Town and Country Planning Act refers in s 44 (1) to the taking of land or injurious affection from the operation of the Scheme and in subs (2) to the taking of land and to damage done from the exercise of any powers conferred by the Act.

It is important to resolve the question of which category the claims fall into because under the Public Works Act claims made in respect of lands taken (including claims for injurious affection resulting therefrom) may be brought within five years from the date of the proclamation whereas claims in respect of damage arising out of the execution of works must be brought within 12 months from the date of the execution of those works. The situation, as it relates to claims under the Town and Country Planning Act, is clear enough where land is taken—the time there would obviously be five years—but is far from clear when it comes to considering the time limit for bringing a claim in respect of land, buildings or other improvements injuriously affected by the operation of the Scheme. The confusion arises principally because of the different wording used in subs (1) and (2) of s 44 and although it can certainly be argued that, because it is injurious affection that is being spoken of, the time limit must be five years, I would recommend that as a matter of caution, in the light of the words used in subs (2), that any claim for injurious affection should be brought within one year. This is an aspect of s 44 which should obviously be clarified by amending legislation.

At this stage the question arises whether, bearing in mind the restrictions imposed by

subs (5) and (6), there are any circumstances where a claim for compensation could be brought. I have already indicated certain matters commonly provided for in town planning ordinances which are not caught by the provisions of subs (5) and if loss results from the operation of these provisions there would appear, prima facie to be a right to compensation. The designation of land for public works or for reserves can obviously result in loss although this situation is specifically covered by s 47A of the Act. It could be, however, that the property owner or occupier could suffer loss as a result of the designation for which he would not be compensated when the land was taken and in such a case he could make a claim under s 44 as well as using the procedure under s 47A. In *MacKay v Stratford Borough* [1957] NZLR 96 the claimant was prevented from building on a commercial section as a result of a refusal of a permit made under s 38 and was held entitled to recover not only compensation for the land—which was ultimately taken under the Public Works Act—but also under s 44 for any losses that he had suffered in addition to the value of the land as a result of the refusal under s 38. Councils, of course, draw their codes of ordinances so as to keep to a minimum the loss suffered as a result, for example, of designation, by providing that until the land is actually required for the public work in question it may continue to be used for its existing use providing no new buildings are erected.

Another example of a common provision in codes of ordinances which could possibly give rise to a claim for compensation would be the listing of a property or an object as a place of historical, scientific interest or natural beauty with the consequent limitation on the use to which the property or object could be put. Further examples could no doubt be found by reference to particular codes of ordinances.

In summary, therefore, the number of circumstances where is would be possible to claim compensation is certainly limited, but there have probably been potential claimants frightened by the apparent complexity of the section. It is hoped that the analysis contained in this article will be of some assistance in this regard.

It is probably fair to say that the existence of the section has acted as a check to the draftsmen of codes of ordinances who would be conscious of the necessity to draft them in such a way as to avoid claims for compensation where possible. Thus, the section, no doubt, has a desirable effect quite apart from the occasional opportunities it gives for claims to be made.

However, in view of the limitations placed by the section on what originally appeared to be an extensive right of compensation, I must, with respect, agree with the comments of Richmond J in delivering the judgment of the Court of Appeal in *Superior Lands Limited v Wellington City Corporation* [1974] 2 NZLR 251. At 258 his Honour, after noting that s 44 of the Act expressly enlarges the area of "injurious affection" as a subject for compensation, goes on to note that "The approach which has thus been made to this new field is cautious indeed, having regard to the qualified terms of s 44, and to the rights of the Council under s 45 of the Act to bring about a discharge of an award of compensation."

The question arises as to the reasonableness of the restrictions placed on the right to compensation. In considering the question of reasonableness one must bear in mind that the town planning legislation takes away rights to the use of land although, of course, it undoubtedly confers benefits as well. However, because it takes away rights for the benefit of the community as a whole, the community should be prepared to compensate the individual for the loss of those rights in all reasonable circumstances. The exercise of the right to compensation where it exists should be made as straight-forward as possible and should not be subject to any unnecessary restrictions or limitations.

The best protection which the individual has under the existing Act lies not in his right to compensation, but rather in his right to take what he regards as an unreasonable decision by a local authority to the Town and Country Planning Appeal Board where arguments arising from objections to district schemes will be considered by the Board as though that tribunal were a Court of first instance rather than an appeal tribunal—see *Wellington Club Inc v Wellington City* [1972] NZLR 698.

In the light of these rights of appeal I do not consider that any objection can be taken to the restrictions imposed by subs (5). However, in two particular respects I consider that subs (6) is unnecessarily restrictive. Under paras (a) and (b) of that subsection the onus is placed on the owner or occupier of land to show that the use to which he wishes to put his land does not detract from the amenities of the neighbourhood. As it is his rights that are being taken away it would, in my submission, be reasonable that the onus in this regard should be placed on the council rather than on the property owner. The second major re-

spect in which this subsection is unnecessarily restrictive in my view is the limitation on the time within which a claim must be made. It will be noted that it must be brought within 12 months after the date on which the provision becomes operative or within one month after the date of any final determination of the Board on an appeal, whichever is the later. Anyone contemplating a claim under that section would have to obtain evidence from both valuers and town planning consultants and it would probably be quite impossible to do this satisfactorily within one month. There appears on the face of it to be no good reason why there should be this limitation and I think it would be better if the usual limitation period applicable to compensation claims were to apply.

There are two general principles that should be borne in mind in considering a claim for compensation. The first is that a District Scheme is restrictive not permissive and a man may use his land in any way he likes unless that use is prohibited or restricted by the Scheme (or in some other way). As Salmon J said in *Buxton v Minister of Housing and Local Government* [1961] 1 QB 278, 283 "Before the town and country planning legislation any landowner was free to develop his land as he liked provided he did not infringe the common law." A person is, therefore, prima facie, injuriously affected by any provision in an operative scheme which prevents him from acting in a way otherwise permitted. The second general principle is that it is a presumption of law that it is not the intention of the Legislature to deprive a person of his property without compensation. As Lord Atkinson said in *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744, 752 "The canon is this, that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms." And Bankes LJ in *In Re Ellis and the Ruislip-Northwood Urban District Council* [1920] 1 KB 343 said (at page 361): "It is a well established rule of construction that a statute is not to be construed so as to deprive a person either of his property or of the beneficial enjoyment of his property without compensation unless the legislature has expressed its intention to do so in clear terms." In my submission, it is clear from these observations that insofar as there are any ambiguities in s 44, they will be construed in favour of the claimant.

I commenced this examination of s 44 by referring to a statement to the effect that for all practical purposes the compensation provisions of the section are largely illusory. Although it is clear that there are fields where claims for compensation are open there is no doubt that the wide promise of subs (1) is not borne out when one examines the section further. The obvious matters in respect of which one might claim compensation are hedged around by restrictions. It is to be hoped that when the Town and Country Planning Act is redrawn—a task which I understand is at present in hand—this section will be examined closely with a view to ensuring that such compensation rights as are given by the Act are clear so that prospective claimants will know precisely where they stand and will not be deterred by having to glean their rights from a section which presents considerable difficulties of interpretation even to those regularly practising in the field.

Dressing sensibly—The attitude of the Judges to the get-up varies. Mr Justice Cusack was sitting in the Queen's Bench, wearing his wig, stiff collar, bands, gown and sash. A witness stepped into the box wearing an open-necked shirt, and was asked by counsel if he had forgotten his tie or could not wear one. Said the Judge: "I am not in the least bothered about that. He is much more sensibly dressed than I am." Mr Justice Paull is another who, when witnesses hastily summoned came in their working clothes, waved away their apologies—"It was very kind of you to come at such short notice. You have been very helpful." A few days after Mr Justice Cusack's case, a witness wearing an open-neck shirt went into the box in the Divorce Court, before Judge Percy Rawlins. Said the Judge: "I cannot understand why solicitors don't advise their clients to dress properly before coming to Court." Many of them do. I remember one who borrowed a collar and tie from a prisoner's friend at the Old Bailey so that the man should look a bit more respectable in the dock. The friend went home without his neckwear because the prisoner got five years. ANTHONY NICHOLSON in *Esprit de Law*.

The Magistrate's lot—"Having given of his best, the Judge must not take it amiss when superior Judges reverse his decisions, reduce his sentences and question his common sense, his learning, his application and his sense of propriety. In few learned professions do superiors so publicly reprehend the apparent shortcomings of their inferiors." MR D J SULLIVAN.

CORRESPONDENCE

Sir,

Lawyers in the House

By chance I recently stumbled across your "Inter Alia" comments at [1975] NZLJ 281 advocating an increase in the number of lawyers in Parliament. My initial reaction was echoed by a colleague who suggested, in more irreverent tones than I convey here, that if I were earning as much as most lawyers do by the time they are 30, I also would consider that I had some divine right to rule. (I must hasten to add that his remark was made in respect of the law profession in general.) After nodding my cynical agreement, I cast the article aside. However, during the past few days I have had cause to search for other things in the place where I deposited it (my rubbish is collected weekly), and on each occasion it has caught and held my attention. I am disconcerted. Your comments continue to rankle with me. No doubt this torment stems from a deep-seated prejudice that I hold against all lawyers—as must anyone who would dare to criticise the profession. Whatever the source of my unease, I have decided to spit against the wind by writing to you.

In short, I fail to see any merit in your argument that what Parliament needs is more lawyers. I could, if I were unkind, make the glib and obvious comment that the high proportion of lawyers in the United States governmental system does not seem to have prevented it running into well-publicised difficulties during the past couple of years or so. Nor need I point to the "unsubtle" election sheet distributed to Christchurch lawyers (and justly criticised by you) as evidence of any self-protective mentality that lawyers might tend to bring to Parliament. Nor need I take sides in the argument that a greater number of lawyers—regardless of which side of the House they sit on—must mean a greater conservative bias in Parliament, a bias stemming from the nature of their training, and perhaps from a "well-honed" (to use your expression) appreciation of the socio-economic status granted to lawyers by our society. Forgive me, my prejudices begin to show through again. No, there is a far more compelling reason that renders your argument fallacious. It is as simple as it is obvious: the democratic process does not exist to gratify the skills of lawyers, but to meet the aspirations of people, *all* people. You may well be right when you say that Parliament lacks "a breadth of experience of life, a continuing experience of decision-making, and an expertise well-honed for reducing problems to their fundamentals." My retort would be, however, that you implicitly overstress the value of *efficiency* in the parliamentary process, as against the value of having a public arena representing a plurality of perceptions and opinions, comprising varying levels of expertise, and—above all—safeguarding membership from all socio-economic levels. Few could claim that in terms of speed and the economical use of legislative resources a parliamentary democracy is the most efficient means of governing. But if we wish to adhere to democratic values that is a "price" we must pay. Moreover, the problem in such a system is not solely, or primarily, one of efficiency, it is one of *effectiveness:* how to secure agreement on any action at all in the face of pressing societal problems. This is no doubt a difficulty; but it is one which, in itself, is worth having, reflecting as it does that in a democratic system no-one—*no-one*—has the right to assume that he holds title to "the one best way". Such an assumption hides an insidious arrogance—insidious because it posits a plausible "solution" to the seemingly cumbersome nature of democracy—that deserves to be seen for what it is.

I must confess to just a little surprise that a suggestion such as the one you make should come from a lawyer. For, and while the analogy is by no means perfect, one would not expect the law profession to argue that juries should be stacked with lawyers on the grounds that they possess an expertise greater than that enjoyed by the so-called average citizen.

Finally, you do not make it clear in your comments whether the political commentator to whom you refer, and who pointed out that "the incidence of lawyers in the New Zealand Parliament (is) perhaps the lowest in the world", considered this a good or a bad thing(*a*). Put in those words lawyers' membership of Parliament sounds a little like a disease; while I, for one, would think that "a mere six" lawyers sitting in the New Zealand House of Representatives is ample. But, I am sorry,—my prejudice and envy surface once more. I really *must* stop it.

Yours faithfully,

B J GREGORY

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(*a*) The latter—JDP.

Sir,

Voting inside

Be it far from me to criticise or to cast censure upon any of my fellow beings but I feel constrained, albeit reluctantly, to point out that the expressions of opinion, at [1975] NZLJ 605, under the heading of "Voting Inside", constitute a patent piece of nonsense.

No person has, as far as the laws of New Zealand are concerned, a "fundamental right" to vote. At the best, a person has a voting privilege if, but only if, Parliament gives to him or her that boon.

A person who has been convicted of a crime involving moral turpitude has demonstrated his or her utter disregard of the welfare of the community in general and of some of his or her fellow members of society in particular and therefore, because of that disregard, should be inhibited from exercising powers and performing functions—including the "right" to vote in public elections—enjoyable by the upright and the honest.

Criminals should, as a matter of law, be tainted with what the Roman jurists referred to as "infamia" and should be classed as infamous persons and, being so classed, should be severely restricted in their civil capacities.

Imprisoned criminals may be "members of society" but merely because they are such members, it does not follow that they should retain the rights, powers and privileges of those who are not incarcerated evildoers.

People who, by indulging in criminal activities, have fully demonstrated that they are, to say the least, socially inadequate should be made subject to all sorts of social restrictions and social inconveniences and, in particular, should be excluded from the franchise.

Such an exclusion does not show that the State is being hard in the matter of law and order: it merely demonstrates that the State restricts the powers of the criminal, the infamous and the evil to participate in some degree in the affairs of the nation.

Indeed, the way things are going, the law appears, in many respects, to be treating bankruptcy and insolvency as greater social impediments than outright criminality.

The recent amendment to the law reminds one of the saying in the Scriptures "the evil flourish like a green bay tree".

Yours sincerely,

DAVID FORSELL
Wellington.

Sir,

Right to a passport

In the same mail that I received the 19 August issue of your Journal I received the 11 June issue of Dalloz French reports. Interestingly both periodicals gave a prominent position to the right to a passport.

As if to reinforce your editorial comment the French report (D.175.435) dealt with the case of a Frenchman, a Mr Yann Fouere, who had had his application for the renewal of his passport refused without reason given. It appeared that Mr Fouere had been a member of the Breton Liberation Front which had been involved in certain troubles in Brittany in 1968. Though Mr Fouere's part in these activities had been investigated no prosecution was instituted against him, and further, in 1969 an amnesty had been granted in respect of those activities. Mr Fouere challenged the Deputy Prefect of Saint-Malo's refusal to renew the passport and won his case at first instance. The matter was then taken to the Conseil d'Etat, the supreme jurisdiction for these matters. It was there held that there was no manifest error in the decision of the Deputy-Prefect and the refusal was upheld.

The French passport law is even more dated than the New Zealand law and vests "an absolute and unfettered discretion" concerning the issue and renewal of passports in the administrative authorities. Like the New Zealand law it has given rise to few cases. The learned commentator on *Fouere's* case discussed at some length the points at issue and generally the matters covered in your editorial comment. While not satisfied that the French legal position regarding passports was satisfactory, he was nevertheless encouraged to see that the Court in *Fouere* was at least prepared to investigate in some way the exercise of discretion by the administrative authorities and hoped that this decision was one transitional to a position of rather greater protection of the individual's rights.

Yours faithfully,

A H ANGELO
Wellington.

Hear Greer—I have a suspicion—I may be quite wrong—that our academic lawyers are still somewhat timid in their approach to legal education—that they concentrate almost entirely on what the law is as opposed to what the law should be.

Take, for example, the law of rape—a subject with which I have had to concern myself recently. I should not be surprised if in the next few months our academic lawyers will devote a great deal of time to analysing the speeches of the five law Lords who heard the appeal of *R v Morgan*—discussing ad nauseam whether the reasoning of the majority is or is not to be preferred to that of the minority. They will, I fear, tend to overlook the fact that the point at issue is comparatively unimportant and that the furore aroused by the decision—uninformed as much of the comment on it was—reflects a widespread feeling that the whole law relating to sexual offences against women needs to be looked at afresh in the light of the changed position of women in English society today. The law student, as well as knowing what the law of rape is, ought to be encouraged to reflect on this wider problem. In this connection the views of, say, Miss Germaine Greer would be worth at least as much—indeed, I would say far more than—those of Lord Cross of Chelsea.—LORD CROSS OF CHELSEA to the 18th Australian Legal Convention (1975) 49 ALJ 314.

Rich Man—Poor Man—It is now settled that there is one law for the rich and another for the poor. Most people will agree that the judgment of Sir George Baker in *H v H* (*The Times,* 19 June 1974) was just. The President of the Welfare Division refused to hold that if the divorced wife who remarried a poor man should get no more, a wife who remarried a rich man should get the same. There had been no matrimonial offence and because of her new wealth the wife was only awarded one-twelfth of the unencumbered value of the house, of which she had asked for one-third. Comment from the *Guardian Gazette.*

Off with his . . . ?—All connoisseurs of the absurd will have read with relish Birnberg & Co's letter to *The Times* of 8 June 1974. They reported that the Judge at Woodford Crown Court turned out of court their female articled clerk because she was improperly, albeit neatly, dressed in subfusc trousers. What would he have done if an elderly gentleman had entered clad in a cerise skirt and false hair down to his shoulders? Committed him for contempt or greeted a brother judge?—Furnival in the *Guardian Gazette.*