F. W. GUEST MEMORIAL LECTURE

THE QUEST FOR JUSTICE IN THE WELFARE STATE

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The F. W. Guest Memorial Trust was established to honour the memory of Francis William Guest, M.A., LL.M., who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

I accepted the University's invitation to deliver this address with a deep sense of the honour which it conferred upon me, and I am happy this evening to think that it has given me an opportunity to pay my formal respects to your University and its Law School, and at the same time to remember with you, at this lecture given in his honour, the late distinguished head of that school, Professor F. W. Guest, whose personal acquaintance I was privileged to claim. My subject this evening is "The Quest for Justice in the Welfare State". It is a topical one, in which I hope that the scholar, the practising lawyer, and the lay citizen may each find something upon which to reflect.

What I propose as our programme is that we should take notice of the regrettable current state of strain in the administration of justice in this country, and examine in a little detail three typical areas in which that strain is particularly apparent. I hope that some of the underlying reasons for the present state of affairs may emerge as we proceed. At the end I may have something to say as to possible remedies – so far as there may be any; but I shall be satisfied if I have done no more than direct your attention to some of the fundamental causes of the present position, leaving you to reflect as to where we go – if anywhere – from here.

We need not take too long to agree on the basic facts upon which our discussion tonight must find its foundation. They are the facts which have recently justified the Government in setting up a Royal Commission chaired by Mr Justice Beattie to inquire into the structure and operation of the Courts of Justice. That Commission has now been sitting more or less continuously for the best part of this year, and, having almost concluded taking evidence in New Zealand, is at present overseas examining at first

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hand such experiments in Court structure as have recently found their way onto the foreign – and particularly English and the Australian – scenes. I do not think it necessary tonight to weary you with figures designed to prove that our Judges and Magistrates are grossly overloaded. Only the other day you will have seen a Press Association report in which it was stated that appeals against sentence were currently running some seven months late in the Court of Appeal. I could amply justify my generalisation on the overload from my own practical experience on the Bench; but I prefer to rest it upon this proposition; that of all the very numerous, and highly differently-oriented, witnesses who came forward to give evidence before Mr Justice Beattie's Commission, none was found who attempted to deny this state of overloading. All, I repeat all, were agreed that the Courts of this country were catastrophically clogged up with a flood of litigation, civil and criminal, disproportionate to any that we have previously experienced and not by any means to be accounted for by the mere growth of population; and all were content to concentrate on possible palliatives and remedies, about which decided differences then appeared between them as to what courses should be followed. Some said, appoint more permanent Judges and Magistrates; some, appoint a number of temporary Judges or Commissioners to bear temporarily a part of the load; some, constitute new Courts with new jurisdictions; some counselled the abbreviation of trial procedures to make cases shorter. But none said, even obliquely, that there was not a problem of the gravest kind, a failure to resolve which must result in calamity.

I will content myself, as I pass on from this factual introduction to my subject, with reminding you that Supreme Court Judges are today required to make Court fixtures involving sitting every day of the working week without respite, writing their reserved judgments either at nights or in the weekends, with no leisure to read reports or legal literature, or to reflect upon legal philosophy, much less to enjoy any decent domestic life even after the daily work programme has been completed. Magistrates are in the same position. They sit on the Bench day after day, week after week, all day, hardly looking up between the time when they give a summary decision (often without necessary deliberation) in one case and the time when – immediately the words are out of their mouths – they hear the Registrar calling on the next. This is a state of affairs long enough the subject of complaint behind the scenes, and now no longer to be borne, and is a prelude to disaster unless some drastic amendment can be made to conditions of work in the Courts.

Now let us look at the way in which this has come about – for it has come about quite quickly. So short a time ago as the date of my own appointment to the Supreme Court Bench, some 25 years since, the life of a Supreme Court Judge was quite different, and his daily work was quite different in its nature too. As to his life being different, he was expected to sit on the Bench perhaps four days in the week, and he had the balance of the time to think about and write his judgments with decent deliberation, and occasionally to read a legal text or keep himself up to date with the law reports. It was possible for him to allow his wife to make arrangements for a dinner party sometimes in the evenings, at which he would have some reasonable expectation of being present. Such a degree of leisure – if you can call it leisure – as was afforded to the Judges was a sound investment

for the community. But, as I have said, not only was a Judge's life quite different – the nature of his work was also different. The character of litigation has today unmistakably changed, and is changing. The personal injury cases, in the first place, have gone. In 1960 they took up a substantial part of the Judges' time (when I say Judges in this part of the lecture I am referring equally to Magistrates); today they have disappeared behind the door of the Accident Compensation Commission. This is all to the good as far as the Courts are concerned, and has made room for other different types of litigation, of more importance on today's scene. What then has filled the place of these cases, and over-filled it to breaking point? It was of course the Welfare State which removed the personal injury cases from the Court lists. Under the Welfare State the principle of fault in determining liability has been abandoned; all get compensation for accidental injury, whatever the cause, from the State. We must now look at some of the kinds of cases with which that State has replaced the personal injury cases; and I have selected as typical groups the Administrative Law cases, the Matrimonial Property cases, and the Criminal Legal Aid cases.

First then let us notice the increase in the volume of administrative litigation as a factor in the present position. It is a very modern phenonemon, and its contribution to the current overloading of the Courts is undeniable. If you were to ask the management of some of the principal concerns in New Zealand, in whatever part of the economy they play their part – the Dairy Board, or the Meat Board, the largest municipalities, the banks and insurance companies, or great corporations such as conduct the forestry and paper undertakings – what have been their most important pieces of litigation during the last five years, they would almost certainly reply as one with instances of administrative litigation: applications to the Court involving restraint upon unwarranted or excessive exercises of authority; applications for the quashing of administrative decisions taken unfairly or on inadequate notice; town planning appeals; reviews of decisions of the Licensing Commission, or the Commerce Commission, or the Transport Licensing Authority, or like tribunals. This is the stuff of litigation in the Welfare State. But such litigation, which now affords so many instances of the most expensive, time-consuming and important proceedings in our Courts, was almost unknown 50 years ago. After all it was only in 1911 that *Board of Education* v. *Rice,*[1] sometimes referred to as the pioneer of these cases, was decided in the Lords. The very term *Administrative Law* is new. Neither in the first edition of *Halsbury's Laws of England* published in 1907, nor in the second, published in 1931, is the title *Administrative Law* to be found at all; and in the third edition, published in 1952, the subject is not separately treated, the reader being cross-referred to *Crown Proceedings* or *Public Authorities* for decisions on this topic. It is only in the fourth edition or *Halsbury,* now currently in course of publication, that we find Administrative Law independently dealt with, and now suddenly occupying 200 pages of text. The first edition of de Smith's *Judicial Review of Administrative Action,* an authority in the library of every counsel practising in administrative law, was published only in 1959.

It took some time for people to realise what a force in changing the face of the law the administrative tribunal would prove to be. Fifty or sixty years ago there were few indications of such changes as have since taken place.

1 [1911] A.C. 179.

There was no town planning or zoning in those days, no transport licensing; the Dairy Board, the Meat Board and the Apple and Pear Board had never been heard of; there was no Milk Board, no Licensing Commission, no Commerce Act, no Reserve Bank. Things have changed, haven't they? But as corporations such as these began to be born, and to grow up, and to be endowed with far-reaching powers, their presence began to be felt. People's lives were changed when the local town planning scheme was found to forbid the sale of the family residence except perhaps to the University; or when they woke up to find that a tavern, or a community rubbish tip had been located by official action in their neighbourhood. Farmers could be "zoned" from one dairy factory which they liked, and made to supply another in whose manager they had no confidence. And it became desirable, it became necessary, to find out what, if anything, could constitute a ground upon which it was possible to stand in order to challenge decisions made by the new ad hoc administrative tribunals in such matters as these.

The administrative tribunals, as you will know, were not Courts of Justice in the full sense. They had to serve two masters – and there is good authority for thinking that this is difficult. They had to do justice as well as was practicable, but they were instruments of policy as well. Their membership reflected this ambivalence. Frequently, in fact usually, chaired by a lawyer, they almost all included as well in their membership persons of special expertise in the particular subject of their jurisdiction; and it is on the possession of such special expertise that they have always rested their objection to the institution of any appeal from their decisions to the general courts of this country. For, they said, the Judges of the Supreme Court are not chosen for their expertise in the kinds of cases we decide, and have not the special knowledge necessary to review our decisions fairly.

Not that they have been implacably resistant to the idea of *appeal* – it was *appeal to the Courts* that they resisted. City councils, on the question of new taxi licences, might tolerate, and did, an appeal from their decisions to a Transport Licensing Appeal Authority. So did the town planning committees of the big city corporations put up with appeals to the Town and Country Planning Appeal Board – for such appellate tribunals were comprised, like themselves, or even more, of experts or so-called experts in their own field. But the Judges, they said, did not profess to be expert in the administrative fields, and knew nothing of policy. They therefore resisted appeal to the Courts, and it is only in the last ten years that law reformers have been successful in having statutes passed instituting such appeals.

In the intervening period the citizen had not been left entirely without resort to the Courts in the worst cases of unfair oppression by officialdom. There was the writ of certiorari, a majestic remedy by the grant of which the Supreme Court "removed" the proceedings of an administrative tribunal into its own Court for quashing – but only in a limited class of cases, those where for instance the rules of natural justice had not been observed, or those in which the tribunal had exceeded its jurisdiction. There is not time now to discuss the certiorari cases: as time went on this remedy, efficacious when available, was found to be applicable to an insufficient proportion of cases where people complained that the official decision was "wrong".

And so it came about that in 1968 a new Division of the Supreme Court – the Administrative Division – was constituted by statute[2] to exercise

2 Judicature Amendment Act 1968.

jurisdiction in the field of administrative review, and a direct appeal was given to that Division from certain named administrative tribunals. At first limited to two such tribunals, this jurisdiction now extends to some 30 or more, and it is likely quickly to spread through the whole field covered by the special tribunals. Shortly afterwards a further Judicature Amendment Act[3] greatly simplified the procedure prescribed for applications for judicial review, removing some of the technicalities which hampered the old Extraordinary Remedies procedures.

The lack of special expertise in the Courts which I have mentioned has been found to prove a more formidable obstacle to appeal procedure even than had been predicted. For without such expertise how can the Court hearing an appeal know whether the decision below was "right" or "wrong"? A serious question here raises its head: what is to be the test by which the question whether an administrative decision is right or wrong, is to be answered? I cannot longer linger over this problem now. It is enough to say that so far the combined wisdom of the Judges has failed to formulate a simple clear principle by which the question can be solved. Perhaps the formulation of such a principle is the most important task now facing the Courts. But conferences, counsel, and a degree of leisure will be necessary to solve this riddle, and today the emphasis is on speed.

But I have said enough about the administrative cases to convince you, perhaps, that these demonstrate how the Welfare State by its very nature may generate a great volume of litigation of a kind previously unknown or almost unknown, such as severely to tax the available resources of the administration of justice.

It is important to realise that the Welfare State and the administrative law cases are cause and effect. We have chosen to live in a Welfare State. We must live with the consequences of our decision, and one of the consequences is the necessity to widen the jurisdiction of the Courts to restrict the excesses of officialdom. Such an increase in the jurisdiction of the Courts must inevitably increase the burden placed upon them.

There are two possible ways of attempting to provide for this necessary additional burden – neither of them completely satisfactory. One, of course, is to increase the number of Judges. This, though an effective palliative in the short term, is not a final solution, as we shall see when we come to the end of this lecture. The other way is to limit access to the Courts exercising the new jurisdiction. This method is effective in lessening the load but of course it leaves some people, who consider themselves aggrieved by official decisions, without any remedy. But though we may sympathise with the citizen in his objection, for instance, to licensed hoardings, though he does not live in the immediate neighbourhood himself, or with him who wishes to appeal against a decision to allow sewage to be discharged untreated into the harbour, though he cannot claim any interest in the matter beyond that which any other ratepayer would also have, we cannot open the Courts to the objections of such people if we wish to keep litigation within bounds. Some special interest in the matter must be shown by an applicant for review. Though at first one might turn away from such a thought, yet we must admit that the principle behind limitation of access to the Courts in these administrative jurisdictions is politically sound, for if I

3 Judicature Amendment Act 1972.

may anticipate our final conclusion, the resources of the State are not infinite, and the classes of persons who may apply to the Courts are logically closed classes. It has been suggested by the English Law Commission that the test of locus standi should be liberalised so as to allow more persons access to the Courts in administrative cases; that access should be in the discretion of the Court in any given case, the burden being upon the applicant simply to show a "sufficient" interest in the matter under review.[4] Myself I favour a more stringent test than this, viz, the test generally adopted in this country, which limits the eligiblity to those with some special interest beyond that of the general public. And I would recommend a conservative attitude in the Court's application even of this test. Just as now it is imperatively necessary that the Courts should be available to *interested* persons, it is equally necessary not to open the door so wide as to swamp the Courts with applications. But we must now leave the administrative cases, merely noting that the burden which they have laid upon the administration of justice in the Welfare State is inevitable, and that it is logical to prescribe some effective limit on the eligibility of the general public to apply to the Courts to revise official decisions, if the Courts are not to be overrun by borderline applications.

It is now time to study the second group of cases which we proposed to examine together – the matrimonial property cases.

The matrimonial property cases are hardly as obviously as are the administrative law cases the direct consequence of the institution of the Welfare State; but I make no apology for including them in this lecture, for, if the Welfare State has not itself produced them, the same climate of public opinion which produced the Welfare State has been responsible for them.

Post-marital litigation between husband and wife over property accumulated or improved during a marriage is no novelty; but its volume has increased in recent years quite disproportionately to the increase in other types of litigation; and for the last year and for the next decade ahead this type of litigation has been and will be greatly stimulated by the uncertainty brought about by dramatic and uneven statutory changes in domestic property law. Before last year, when the Matrimonial Property Act 1976 was passed, the law on this subject was to be found in two Acts passed simultaneously in 1963 – the Matrimonial Proceedings Act and the Matrimonial Property Act – which purported to amend the principles of the previously existing law quite drastically. And there can be no doubt that in 1963 such an amendment and restatement of the law was well justified. The law on this subject had indeed failed to keep pace with changing public opinion. But in response to that opinion it was changed in 1963, and with so little adequate legislative consideration, that the following twelve years were spent in almost continuous argument in the Courts as to what indeed were really the principles which Parliament had intended to enshrine in the two Acts of 1963. After *E* v. *E*[5] in 1971 in which, in the Court of Appeal, two senior Judges of Appeal overrode the Chief Justice in that Court, and Mr Justice Tompkins in the Court of hearing, things settled down a little, for some of the worse inconsistencies between the two 1963 Statutes had been firmly pointed out, and some of the resultant difficulties, if not solved, had

4 *Report on Remedies in Administrative Law* (1976; Cmnd. 6407) para. 48.
5 [1971] N.Z.L.R. 859.

at least been clearly stated. But the liberals thought that too literal a reading of the statutory provisions had been accepted by the majority in the Court of Appeal, and when in *Haldane* v. *Haldane*[6] a different Court of Appeal was content to follow the principles which had been stated in *E* v. *E*, those principles were tested in the Privy Council. In that Court of last resort their Lordships expressed the view that in this context the spirit of change was sufficiently discernible behind the text of the Statues as published, and the Courts were firmly given a more liberal Testament to follow, in the future.[7] Had the Government been content to allow the law to settle down without more, I have for myself little doubt that the Courts would have been glad to follow *Haldane* v. *Haldane* in spirit and letter, and there might then have been time to review, with the deliberation absolutely necessary for such a formidable task, the whole field of domestic property law. But the Women's Lobby was too strong politically, and both parties were intimidated into passing the Act of 1976, now in force, sponsored in the first place by Dr Finlay for the then Labour Government, and after the fall of that Government adopted and passed into law by the Administration at present in power.

It is not a part of my purpose tonight to criticise the tenor of the Matrimonial Property Act 1976, though critics, and severe critics, of it have not been wanting; there are no doubt some of you here who were and are fully, and even enthusiastically, supporters of it. But it cannot be doubted that the effect has been to pass, too quickly, a piece of legislation which drastically alters one of the main sections of the law of domestic property, without deliberate consideration of the inevitable legal repercussions in other cognate sections of the law. The Act of 1976 had not been passed before lawyers all over the country were asking: if this legislation goes through, what about the Administration Act, and succession on intestacy? What about the Family Protection Act, and the cases decided over the last three-quarters of a century defining the remedies of widows left without sufficient provision? I myself spoke personally to the Secretary for Justice about these matters, which I thought of grave importance, while the new legislation was still only in contemplation. The reply was always given that of course these other Acts would also have to be altered if consistency was to be achieved. It was impossible to take any other view. The necessity for this was perfectly obvious to everyone.

But the Matrimonial Property Act was passed in December 1976 and here we are, after a further nine months, and the new legislation urgently awaited by the lawyers has not made its appearance even in draft, nor apparently is there any consensus of opinion behind the scenes as to what form it should take.

At this stage it is suddenly said that it is now found that the amendment of these Statutes in the requisite degree "involves the most formidable difficulties". Only the other day Mr Thomson, the Minister of Justice, said that no promise could be made of speedy progress for formulating the necessary further steps which must be taken. As to the second leg of matrimonial property reform, (the situation on the death of one of the spouses) the Minister said he could not promise speedy progress. The

6 [1975] 1 N.Z.L.R. 672.
7 *Haldane* v. *Haldane* [1976] 2 N.Z.L.R. 715, [1977] A.C. 673 (P.C.).

practical problems were great, and time had not made them appear any less formidable. The task was to combine broad fairness with differing individual circumstances while avoiding the need for Court intervention in the ordinary case. While the principles and philosophy might be clear, the fine print was for the moment exceedingly blurred. It is therefore evident, on the Minister's own confession – and how could he candidly state the position otherwise? – that the Women's Lobby pressured the Government into passing the first leg of the legislation without time being allowed for any adequate consideration as to the next step, although it must always have been painfully apparent that a next step of some kind would become urgently necessary once the first Act had been passed.

There is a great volume of matrimonial property litigation now pressing for hearing in the Courts, and each of these cases uses up a lot of a Judge's time. This very considerable factor in the overloading of the Courts has been directly produced by the precipitancy with which a Government has been pushed into novel legislation without adequate consideration of the nature or consequences of the measures adopted; without any attempt to decide what would be the cardinal principles in the collateral statutory amendments which must undoubtedly immediately become necessary. The result has been uncertainty in the Courts, instead of certainty; and when this is added to the doubts produced by attempts to apply, with insufficient experience, the new principles sketched out in the 1976 Act, the result has been a disinclination in the legal profession to settle disputes – for, if the principles applicable are not certainly ascertainable what can be lost by litigating?

If the Government had given adequate consideration to the inevitable impact of the proposed legislation on other collateral branches of the law of domestic property, it would have proceeded more deliberately with its reforms of this branch of the law, and we might now have been spared a great deal if not all of that part of the overload on the Courts which the matrimonial property cases have brought about. The matrimonial property cases may serve as a warning of the kind of damage that can be done to the administration of justice by too precipitately reforming existing laws without regard to the consequences of the reforms.

You will see that the two groups of cases which we have so far noticed exhibit one important difference. The cases comprised in both groups have greatly increased, under the Welfare State, in numbers and in importance. But whereas in the case of the first group, the administrative law cases, this was really inevitable from the very nature of the Welfare State, in the case of the second group, the matrimonial property cases, this was not inevitable at all, but was brought about by the precipitancy with which the Government agreed to reform *at once*, half of the law of domestic property without thinking about what was left to be done to the other half. The load that this placed on the Courts could have been avoided; but now it is too late.

With this lamentation, I must now pass on to the third group of cases I promised to consider with you – the criminal legal aid cases, in which the facts will lead us to a very different kind of conclusion, for this time there is an effective remedy available, if the Government would take it. Until the second half of this century it was generally taken for granted that every individual subject of the State had an absolute right, perhaps subject to his paying the necessary Court costs, to present his "case" to the Courts, in any

litigation, and perhaps particularly in criminal litigation, in which he might involve himself or become involved, and to appeal from one Court to another so far as a right of appeal was given by the law; and any suggestion that the Courts might be too busy to consider his case would have been regarded as a sad reproach to all those concerned with the administration of justice. "To none will we delay, to none will we sell or deny, right or justice": this was Magna Carta[8] and at least in the first half-century of my own life it could be said that anyone who had a case to present to the Courts was able to have it presented.

It might have been said, and it was sometimes said, that this was all very well; that he who had money in his pocket was able to put his case before the Courts, but that he who had none was left without any satisfactory opportunity. To this generalisation I would firmly reply today, as I would certainly have replied 40 years ago, that in those days members of the Bar conceived it to be their duty to present to the Court cases which showed any merit, payment or no payment. No counsel of those days, if he wished to retain his own self-respect and the regard of his colleagues, turned down cases for lack of a fee.

I am prepared to say that by and large in those days, all those who had cases with any real merit in them had access to the Courts. And prompt access. But there were still those who disliked the element of charity which they saw involved in getting a case heard for nothing. It was said, too, that while one could get counsel, of a sort, by the process which I have described, one did not always get good, experienced, senior counsel. From such arguments as these, which in theory could hardly be validly answered, though perhaps practice furnished an answer to them, Legal Aid was born.

It is the state of affairs 30 or 40 years afterwards that we have before us for review tonight. Before we do so let me say one thing with emphasis. This lecture is not a criticism of the concept of legal aid. Legal aid or no legal aid is no longer an issue at all. Legal aid is with us, and it has come to stay not only here but in all the other English speaking jurisdictions. No one favours going back to the old system, any more than it would now be possible to overturn the medical and hospital services of the social security scheme because of obvious imperfections. Legal aid is now a permanent feature of our way of life. But its institution has contributed largely to the congestion of the Courts, and that congestion must be placed in its historical and logical context before we can begin to appreciate its significance as a social phenonemon. It is the congestion brought about in the *Criminal Courts* about which I now wish to speak, and I want to examine how far this congestion has been brought about by an over-generous system of *criminal legal aid.*

For the point is, that the Courts today are catastrophically clogged up with defended criminal cases. The Judges and Magistrates sitting in crime are worked to a standstill. So great is the congestion that some of the Courts have almost given up any attempt to keep up with their work, those presiding simply doing what they can from day to day, and letting the rest pile up.

8 25 Edward I (1297) c. 29.

I wish that some statistics were available to show how many more criminal cases are defended, both in the Magistrate's Court and in the Supreme Court, now, than were defended 20 years ago; and what proportion of these defences, nearly all paid for by the State, succeed. But I am informed by Judges and Magistrates alike that a considerable proportion of the cases coming before them are cases in which legal aid has been granted, for which you and I pay, in which as soon as the matter is heard it plainly appears that there are no merits at all, and the accused has consequently had no chance of success from the start. But of course we must remember that he has nothing to lose by putting his worthless case before the Court. He does not pay for this, and no payment or harm of any kind is visited upon him if his case falls to pieces. I have not any personal experience in recent years of the position in the Supreme Court or the Magistrate's Court; but from my own knowledge I am aware that many criminal cases come before the Court of Appeal, in which, when what is said is finally weighed up, the arguments for the appellant prove to be entirely worthless, the result being that the time of three Judges of the Court of Appeal has been taken up, perhaps for one day, perhaps for more, listening to submissions which could never have succeeded, and would have never been advanced except for the fact that you and I, through the tax that we pay, are subsidising and encouraging their advancement without any risk or cost to the applicant. It may be not unfairly said that it sometimes seems as if the lawyers, who are paid by the legal aid fund, hardly subject their clients' cases to sufficient critical examination before deciding to present them, such as they are, to the Courts; but perhaps it may equally fairly be replied, that in the Welfare State everyone thinks himself entitled to have his case presented by a lawyer, free of charge to himself, however worthless that case may be.

A considerable improvement in the conditions of hearing in every criminal Court in the country could be brought about almost instantly by the institution of a more careful scrutiny of the grant of legal aid, in a determined attempt to limit the subsidy on criminal cases to those in which there is some reasonable chance of success by the applicant.

This is a drastic reform to suggest. It seemed to those who sponsored its introduction that the concept of legal aid was founded, in the Welfare State, on the right of every citizen to have his case, good or bad, fully and capably put before the Courts free of charge to himself without any attempt to prejudge its merits. To limit the number of cases eligible for the grant of legal aid by some process of sifting them in advance presents formidable difficulties in principle. It involves no less than to predetermine, in some degree, the possibility or probability of success in cases not yet argued. This has been said to be impossible of acceptance in the Welfare State. But needs must when the Devil drives; we have reached the stage where something of this sort must be done, and I remind you in this behalf of that tribunal of democratic liberty *par excellence,* the Supreme Court of the United States, in which some nine-tenths of the cases put forward for appeal are thrown out without ever getting any hearing from the Court, upon a predetermination of their probable merits made *ex parte* by one of the constituent Judges.

One way of sifting the applications for criminal legal aid would be to appoint a special officer whose duty it would be to examine the applications, and come to a conclusion, in a preliminary way, as to whether the proposed

defence, or appeal, showed any merits promising some reasonable possibility of success. This preliminary application could of course be entrusted to a Judge or Magistrate; but as a principal purpose of the exercise would be to relieve the Judges and Magistrates of some of the load of work occasioned by legal aid, I would much prefer to see a special departmental officer appointed to whom this work would be entrusted.

There is room for a new official, a permanent paid legal aid officer, in a number of our busier Courts, seconded to supervise the grant of legal aid in criminal matters, distinguishing between those able to show some prima facie deserving case, and those unable to show any, and rejecting applications in the second class. Such officers, if they did their work with discrimination, could save the State a very substantial expenditure on unmeritorious cases, and at the same time, far, far more importantly, relieve the Judges and Magistrates of a very substantial number of trials over which they are now compelled to preside to no sensible end at all, room thereby being found for the prompt hearing of cases in which, at present, litigants with meritorious cases are made to wait.

This suggestion is a radical suggestion. It is open to criticism. In the first place it necessarily involves the pre-judging by a paid State official of the merits of a matter which has not yet come before the Court, but which it is desired to put, with legal aid, before the Court. If a request for legal aid is rejected, the applicant may fairly say that his case has been pre-judged by the State – itself a party to the prosecution – before it has been heard at all. There will be cases, from time to time, in which through haste, inadvertence, or plain stupidity, such an official as I have suggested may deny a person with a deserving and meritorious case the opportunity of being heard at the State's expense. These cases will not in fact be many. I should think that 49 out of 50 cases in which such an official might be moved to refuse legal aid would be cases which on the fullest further investigation would still show no merit whatever, and upon which any group of Judges or Magistrates would agree that they were undeserving of legal aid. No, the percentage would be a very small one, but we must admit that there would be ultimately some cases like this.

You may say that no community committed to the principle of ideal justice could tolerate such a degree of prejudgment as this suggestion would involve.

But we are deceiving ourselves if we imagine that, whatever system of justice we adopt, it can be made *perfect*. We cannot expect *ideal* justice in the Welfare State. Justice can be only as nearly perfect as is practicable, for the resources of the community are not infinite. If we are to preserve legal aid as an effective instrument of criminal justice, and if the legal aid cases are not to be permitted to continue to crowd out – as at present they are crowding out – the ordinary deserving litigant who may be entitled to a prompt hearing of his case, this can be done only by some radical surgery whereby the excesses to which criminal legal aid has now gone are excised, and a more healthy development of the whole system of justice is made possible.

If it is said that suggestions such as these run contrary to our previously-conceived ideas of justice, full and free for all, it could be replied: perhaps such ideas must be modified, if in the Welfare State we are not to be sternly confronted – as indeed we now are – with a situation in which

unless some such restrictions are adopted, justice for *anyone* may become impossible.

The fact is that we have already reached the point where the resources available for the administration of justice have proved insufficient to do efficiently and promptly all that the Welfare State so insistently requires of them. It has turned out, in the light of experience – as we might have thought it would turn out, if we had taken thought – that the administration of justice is after all not able to be stretched indefinitely to meet insatiable demands. It is a function of a number of variables. The more funds are available, for instance, the more Judges can be appointed – but only if fit appointees can be found who are willing to accept judicial office. But the more burdensome the conditions of work become, the more persons fit to be appointed will decline appointment – and this point has already been reached. The supply of fit persons is limited, and some of the best men are already asking – or their wives are – why accept judicial office to be worked like a slave from morning to night and from one month's end to another, hearing cases which when heard are quite unworthy of a first-rate lawyer's talents? The conditions of judicial appointment have sadly deteriorated in the Welfare State. Moreover, the more cases, say, in the field of criminal defence that are subsidised by the taxpayer, the longer the list of arrears in other Courts will become. Something must go, at this stage, and this at least should be obvious to us all, that the present number of administrative law cases and matrimonial property cases cannot continue to be heard unless the pressure in some other group of cases is decreased. It is these considerations which have persuaded me to nominate to you, as one measure that expediency at least must commend, the adoption of a rigorous sifting process substantially decreasing the number of cases in which legal aid is granted in crime.

I repeat that our resources are limited, and that we have now reached the point where every extra right of appeal that we grant, every class of litigation that we subsidise and encourage by legal aid, simply means that in some other field of litigation, at present satisfactorily serviced, litigants will be denied resort to the Courts simply because their cases cannot be reached. Politics is the art of the possible; and when the politicans are settling the policy under which the administration of justice in New Zealand is to develop, they may do well to remember this.

Let me in concluding deal quite inadequately with one remedy which has been proposed, on which I advise you not to rest too many hopes. It has been recommended by many to increase the number of Judges. But have you not heard of Parkinson's Law? On every increase in the number of Judges there will be found some reformers who will propose in the interests of freedom and democracy that other further loads be placed upon the Courts, justifying the proposals by the increase in judicial strength. So, not less legal aid, but more, will be urged, it being said that the judicial strength is now sufficient to stand the consequences. No; Parkinson's Law stands in the way of this remedy, though no doubt the appointment of more Judges would afford, at least in the meantime, some relief.

I have addressed you long enough, and it is time to cover in a few sentences, if that be possible, the ground over which we have ranged. A quarter of a century of the Welfare State has produced cracks and strains in the administration of justice, which threatens to come apart at the seams.

These strains are not produced by any one cause, but by a variety of causes; and though the Welfare State must accept a general responsibility for the present position, there is no one general remedy that can soon put matters right where now they are wrong. Some of the overload, as for instance in the administrative cases, is inherent in the very being of the Welfare State, and nothing can be done to alter this position if the liberty of the subject is to be a cardinal consideration. I have recommended to you in this connection, however, that we should not widen, as it has been proposed in England to widen, the class of persons to whom the right of application to the Courts in administrative cases is given, but that such access to the Courts continue to be restricted severely to those who show a special interest in the subject-matter of the case, beyond that of members of the general public. Our available resources, already sorely taxed, will not allow more. Other strains, as in the matrimonial cases, have been brought about by over-haste in law reform which is now passed into law; a mistake which cannot now be remedied, but which can serve as a beacon when similar situations arise later. Other strains again, such as those caused by over-generous legal aid in criminal matters, could and should be remedied, if the Government has the perception to see what is wrong, and the courage to take the necessary action. I have had the hardihood to specify, tonight, one measure which might be effective. The moral of all this is, perhaps, let us hope that the Beattie Commission will firmly, but with due care, prescribe some reforms calculated at least to alleviate the present unbearable conditions – but we must not hope for the impossible, and imagine that once that Commission has reported all may be made well by a few words in one or two statutes. Most people regard the Beattie Commission as having been asked the question: How can the State best do all that is being asked of it in the administration of justice? But this may be a foolish question, not admitting of any but a foolish answer. It may not be possible for the State to do all that is now being required of it in the administration of justice. The administration of justice is a human undertaking. Like all human undertakings it has its limits. Like a sheet of rubber it may be stretched further, if desired, in a given direction and over a given area; but that very operation necessarily involves contracting it in another. No, we can never have a perfect administration of justice. Our resources will not permit it. We have not the money, the time, or the talent for this. We have an administration of justice only as good as our resources can afford. The wise State assesses its available resources, and allocates them carefully so as to obtain the greatest return from them. If it is found that they are being used wastefully, the wise State will reallocate them.