F. W. GUEST MEMORIAL LECTURE: SOME REFLECTIONS ON LEGAL EDUCATION IN NEW ZEALAND

The Hon. Mr Justice Haslam*

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.

We are assembled here tonight to honour, as far as lies in our power, the memory of a beloved and distinguished lawyer. In the opening lecture of this series last year, the Dean paid a graceful tribute to his predecessor, the first incumbent of the Chair of Law at this University. We who were privileged to know Professor Guest felt that special quality of quiet strength concealed in the modest personality. In the quaint language of the learned Bacon, he amply fulfilled his obligations as a "debtor to his profession" and was "by way of amends a help and an ornament thereto". In a lifetime all too short, he was a scholar of attainment in philosophy as well as in law, he was successful in practice, as the elected President of his District he was accepted as a leader in a highly competitive profession, and as the first Professorial Dean he set about transforming the Faculty to the needs of the age. Perhaps his lasting memorial must be the vigorous Law School which, in his brief term as Dean, he so profoundly influenced.

His inaugural lecture on "Freedom and Status", delivered on 4th July, 1961, graphically portrayed the meeting place of law and politics. These protean concepts will continue to confound the historians of ideas "to the last syllable of recorded time", and his choice of subject indicated his intellectual courage and originality of mind. Posterity can but regret that his bequest of formal writing is so slight in volume.

From his words of eight years ago, we can discern an intention by Professor Guest to stimulate thought on the meaning and purpose of law itself. Speculation of that nature easily evokes ideas on the aims of legal education. If greatly daring in such company, I pass on immediately to offer some comments on this topic with an eye to the demands of the future, please acquit me of forgetting the long line of worthy graduates from your Faculty, who have enriched the life of the law in this country, and to whom tributes can more fittingly be paid later this week in the course of the Centennial Celebrations of the University.

*** Mr Justice Haslam is the Chairman of the Council of Legal Education and the text is a revised copy of the address delivered at the University of Otago on 6th August 1969.**

In the days of the early Tudors, the great scholar Erasmus described the English lawyers of the time as doctissimum genus indoctissimorum hominum—which those of us of that closed and diminishing class who survived compulsory Latin would guess to mean "the most learned kind of unlearned men". In New Zealand we lawyers have assimilated criticisms less urbanely phrased, but tonight we are considering the adequacy of our current system of theoretical training. And this age-old problem will never be finally solved.

"We learned the XII Tables in our boyhood as a required formula. No one learns them nowadays." This sounds like a grumble from a pardonably forgetful local lawyer, who took the degree of Bachelor of Laws in the early twenties when Roman Law was compulsory, and at times in some other places, ill-taught. But it was another lawyer who uttered those words two thousand years ago and with a prophetic sense of his forensic immortality left them as lasting evidence of the ever-changing content of the law syllabus. His name was Marcus Tullius Cicero. (*De Legibus*—II.c.xxiii p. 59.)

Local history and requirements have combined to influence the peculiar development of the law course in our four faculties, and perhaps we are fortunate that the lawyer's capacity for devising a formula to resolve disputes was directed at an early stage to avoiding needless friction and frustration between the Law Society and the Universities (as they later became). The drive for reform came initially from such leaders of the Bar as the late Sir Alexander Johnstone Q.C., of Auckland, who recognised that a basic weakness in the profession could be traced to inadequate academic instruction in the training of some practitioners. Many lawyers in New Zealand were poorly educated men. For so long, it had been possible to qualify as a solicitor after passing a relatively simple test in seven law subjects of a severely practical character (and thereafter to become a barrister by prescription after five years), and the degree itself had been deficient in cultural content. An early step towards the strengthening of the law syllabus was taken in 1931 with the constitution of the first Council of Legal Education, which was empowered by university statute to make recommendations to the Senate or to the Academic Board upon "any matter relating to legal education". By January 1962, when the constituent institutions of the former University of New Zealand became autonomous universities in their own right, the Council was accepted as a body which had to survive as a unique relic of a former federalism. By special enactment (Law Practitioners Amendment Act 1961) it replaced the Senate as the national authority empowered to prescribe requirements in examining for admission to the legal profession. In the Blackstonian tradition, the Universities are now the sole venue for instruction (J. B. Thayer, "The Teaching of Law at Universities" (1895) 9 Harv. L.R. 169), while the latter have undertaken to teach in all subjects prescribed by the Council.

We are wedded to the fused profession as best suiting our needs, but the simplicity of our body politic as a unitary state reduces the scope of daily practice in comparison with some other common law communities, in that we have relatively few constitutional problems (Erwin N. Griswold, *Law and Lawyers in the United States,* (1964) The Hamlyn Lectures (Sixteenth Series) p. 3). Diversity in the range of daily tasks of the average local practitioner is due chiefly to the versatility that is demanded of him in the range of his skill.

The inherent conflict of opinion arising from this situation is well

stated by the former Chief Justice of the Commonwealth of Australia, Sir Owen Dixon, in his "Jesting Pilate" (p. 196):

> There almost inevitably develops a demand . . . that the student who obtains his degree should come armed at all points. Like Athena, he must come in full armour from the head of Zeus, prepared to engage in the battle of professional life. . . . Pressure is placed upon the university to teach the practical application of that very knowledge which it is the traditional and . . . proper function of a university to teach only as a branch of learning. Moreover, there is often a professional protest against the time spent on the theoretical at the expense of the practical. . . . How to apply it as an art should be surely the work of the profession to teach. . . . Nothing perhaps is more difficult in the preparation for a profession than to distinguish between the practical pursuit of the profession and the . . . knowledge of a . . . speculative kind which forms a lasting foundation for the support in the more able minds of the daily discipline of its practice.

We must all be grateful to the teaching staffs of the faculties for the manner in which they have met the changing conditions, and adapted their limited resources to the demands of a course which is designed to reconcile education in general with instruction in particular. After all, does the capacity in administration and in exposition, required of a successful senior member of a law faculty, differ greatly from the qualities that make a sound practitioner? At this point I crave leave to adopt the words of the Chief Justice of the Supreme Court of Tasmania (Sir Stanley Burbury) on "Legal Education and Professional Competence" delivered in the course of a paper to the Law School of the University of Virginia on 1st May 1964:

> . . . my experience as a practising solicitor, a practising barrister, a part-time law teacher, and a Judge, has led me to the conclusion that those who seek to separate academic study from vocational training and claim there is a great gulf fixed between 'academic' and 'practical' training in the law do a great disservice to legal education. I believe legal education must be a synthesis of the two.

It is also important to thank the members of the Law Society who have served on the Council of Legal Education since its foundation, and those who have been assessors of examination papers at the most inconvenient stage of the year's work in their offices. In Otago, the tradition of part-time lecturing by practitioners still plays its role and all who have served the cause of education in that strenuous addition to the cares of practice, merit special mention and expression of thanks. I suggest that the general body of practitioners cannot be heard to complain about developments in the general policy of Legal Education, unless they make themselves a contribution that is continuous, constructive and wise.

Again, there will always be the need for members of the profession to deliver the occasional lecture to students, and for their benefit to relate the booklearning with which the undergraduate may have some familiarity as a science, with the art that the variety of practice demands. We older lawyers recall having heard when undergraduates a leading barrister deliver a carefully prepared address from which we derived considerable advantage. I have always felt that in this field, self congratulatory reminiscences hastily assembled from the past experience of the successfully established, may have little value unless a serious, instructive, theme runs through the performance. To turn briefly to another aspect, research facilities in the faculties are of current interest to the Council of the New Zealand Law Society as no doubt they are

to the teachers, and it is hoped that some improvement can be achieved to bring advanced legal studies of that type more into line with developments in other branches of scholarship.

Like Hilaire Belloc, I regret that I cannot reduce my paper to an epigram, for I now turn to consider some effects exerted by the apparent attraction of the present law course. After we make due allowance for the wastage of wars and of the depression years, have we not at the moment fewer senior practitioners than is desirable? As one cause only, I suggest that at one time there was too little in the syllabus, and in the prescribed texts, to inspire the enthusiasm or to stir the imagination of the young student. We had the excellent prose of Sir William Anson and of Sir John Salmond, but too much emphasis was given to memorising the names of cases, rather than to acquiring facility in grasping principles. For example, to pass in criminal law, one became word-perfect in some twenty-four statutory definitions of offences, and a favourable result was then almost pre-ordained. Many of the texts at that time (despite the industry of the compilers) were dreary tracts of unpalatable prose, which we presumably accepted on the principle followed by a Victorian schoolmaster that "It does not matter what you teach a pupil so long as he does not like it." Later experience of the lectures and tutorials of Dr Cheshire, Sir William Holdsworth and Dr Stallybrass, the author of the 7th to the 10th editions of Salmond on Torts, not only painfully revealed to at least one New Zealand student grave deficiencies in knowledge that have never since been overcome, but also demonstrated, as Sir William Blackstone first told us, that the law itself is a worthy object of study and a challenge to the keenest minds.

Many students now think it worthwhile to take a law degree purely for cultural reasons, or in the hope that this attainment will help them in careers other than legal practice. Does not the sharp increase in the numbers of law students provide some evidence that in general the undergraduate of today finds more to attract him in our law course than his forbears did in their time? If this deduction be correct, surely enthusiasm from the outset, when learning the subject, must benefit the community later on as the graduate takes a bigger share in his professional life. "And so my sons," said the father of Judas Maccabeus, "be ye zealous for the law" (1 Maccabees 2.50).

One law school in New Zealand claims to have enrolled to the limits of its capacity and in contrast with the situation of a few years ago when attempts were made to encourage more entrants, we are now told that there may be a danger of over-production in law graduates. It seems to one observer that investigations are proceeding far too slowly into the future needs of recruits to professional ranks, and to other occupations where a law degree might be of advantage to the entrant, e.g. local body administration and to a greater extent than at present, certain departments of State. Enquiries while on circuit indicate many vacancies in the country districts, which makes one wonder whether our modern graduates (or is it their wives?) are developing a distate for living outside larger areas of population, as one is told occurs in another profession. If this trend were to accelerate, surely the efficiency of the law in practice must suffer, for a soundly based profession should be distributed in the community to meet the demands of the clients as a class.

Changes in lecture hours and in the length of courses of study have not yet spent their impact on the staffing of legal offices, and that hard-

ship to principals could be more lightly borne if legal incomes in New Zealand compared with the figures attainable in other English speaking countries, where staff salaries are proportionately lavish. The profession has re-adjusted itself to the problem, but is entitled to expect a mature and adaptable recruit to the staff when the senior student or graduate subjects himself to the exigent demands of office routine. At least he should now come to the desk better equipped in the educational sense than were the majority of his predecessors when they qualified for admission forty years ago.

The revised syllabus can be expected to combat one weakness inherent in the old part-time system when so many were passed without first acquiring a true appreciation of the responsibilities and traditions of their calling. For that reason some (but of course only some) failed miserably to uphold the ethics of good practice. They had passed through a law faculty without learning that sense of fitness and of duty that may properly be expected of every worthy member of a profession. One modern practitioner put it bluntly in an address delivered at that time to a body of recently admitted students: "We currently have with us too many land salesmen, who are masquerading behind practising certificates." Rigorous tuition and tough examining will not directly impart integrity, but a wisely selected law course, that is thorough and exacting, should awaken the student to the greatness of his chosen calling, and, in those who by nature and by temperament are fitted for the law, inspire a loyalty that should endure for a working lifetime. If I may quote again from Sir Owen Dixon (*supra* p. 131):

> **Professional ignorance is often the real source of the ethical problems that men feel. For with more knowledge of the law, and of the customs and traditions of the Bar, men know instinctively what they ought to do and they do not conjure up fancied situations and imaginary problems.**

Do not some of our subjects, if deeply studied, offer a guide, even a philosophy, for all who seek them? We need only pause to recall the basic principles to be found in the law of trusts and of partnership. With typical learning and felicity of expression, this theme is developed by Professor A. L. Goodhart in *English Law and the Moral Law* (1953) The Hamlyn Lectures (Fourth Series).

I now turn to a topic falling within the ambit of academic jurisdiction. Many forces are at work to debase our wonderful mother tongue, and in an age of mechanised means of distributing news and of offering entertainment, the destructive tendency has acquired greater impetus. For some years English was insisted upon as a compulsory subject for all students but that requirement was modified, as in some Universities the young lawyer derived little advantage from studying that subject for only one year. The teaching staff no doubt endeavour at all times to insist upon competent prose compositions when they are correcting essays from the students, but with respect, I suggest that there is need for constant vigilance. Prolixity is the blight of the current age in writing as well as in speech, and too many lawyers in this country are afflicted with the ailment. The weakness is by no means universal but many addresses to the Court are far too long, if only because insufficient care has been given beforehand to preparation and arrangement of expression, and to the excision of redundant words. Again the phrasing of questions and the sheer bulk of cross-examination could frequently be reduced to advantage. There are also examples to be found in correspondence between solicitors exhibited in evidence, which display the

verbosity that the dictaphone engenders. In the Wellington Law Library a memorial tablet to a former Judge bears his favourite line from Newman's improving poem: "Prune thou thy words". Asquith sarcastically complained of "fuliginous jargon" and long ago Palmerston rebuked one of Her Majesty's Commissioners abroad in terms with a modern ring: "If Mr Hamilton would let his substantives and adjectives go singly instead of always sending them forth by twos and threes, his despatches would be clearer and easier to read". Should not all our law graduates enter our profession with a command of written and of spoken English which, while neither curt nor bald, is clear, simple and direct?

In the inaugural lecture delivered last year, Professor Sim dealt with the effect upon the legal process of the emphasis upon verbal analysis in current philosophy. Statutes are impinging, with growing importance, even upon such fields of the common law as contract and tort. The recent creation of the Administrative Division of the Supreme Court is one indication of how deeply the legal profession has become concerned in the operation of social legislation, notably with enactments dealing with the complexities of planning and of licensing. It remains to be seen whether the deliberations of that Division will have any long term effect upon the principles pertaining to construction of statutes, but obviously, with more emphasis than hitherto, practitioners will be expected to add to their other techniques the aptitude of grammarians. That means an ability to recognise an antecedent noun and to grapple with a hanging participle, even if sanctified by being enshrined in a statute. Along with acquiring a capacity to use good English himself, the student must develop an instinctive appreciation of the meaning of words, with an ability to dissect the context and to compose his argument from that starting point. The problems of statutory construction are not likely to diminish, even if, more often than formerly, Acts of Parliament were expressed with exemplary clarity.

As far back as 1701, Holt, Lord Chief Justice, said: "An Act of Parliament can do no wrong, though it may do several things that look pretty odd". (*City of London* v. *Wood* (1701) 12 Mod. Rep. 669, 687-8, 88 E.R. 1592, 1602.) In more modern terms, while justice must always be seen to be done, some statutes have to be seen to be believed. Recent strictures by the President of the Court of Appeal in *Ashburton Borough Council* v. *Clifford* (as yet not reported) related to s. 36 of the Town and Country Planning Act 1953 when he said: "Surely it would have been infinitely better if the legislature, in plain terms had made suitable provision protecting the owners of buildings . . . . " While obscure legislation illustrates Dr Glanville Williams' phrase that "words have the penumbra of uncertainty", we must accept, as Mr Justice Frankfurter suggested, that statutes in general must be expected to lack the definiteness that single authorship can give. Again, as we saw in the *Attorney-General* v. *Lower Hutt City* ([1965] N.Z.L.R. 116), with reference to the power of a local authority to add sodium silico fluoride to water already pure, the most vexing problems arise when the situation before the Court could not have been anticipated by the most gifted legislative imagination.

Perhaps eventually a lady lawyer recalling the first and greatest of her kind, will shock the Court with the words which Shakespeare put into the mouth of Portia: "It is not so expressed, but what of that?" (Merchant of Venice, Act IV Sc. 1 l.260). I submit that the legislative

intent, expressing the spirit of the times, will in future best be divined by the well educated, well read practitioner, who, as articulate man, will justify the pride of a craftsman in his full appreciation of the English language. In polishing the instrument let us not forget the purpose for which it was forged.

I therefore turn briefly to a more fundamental topic. There appears to be a growing recognition in common law countries that the informal tribunal, without rules, and without reservation of right of appeal, has been proved inadequate as a means of administering justice. So much of good government lies in the technique, in the procedure, in the routine; and current public opinion appears to be less tolerant of a denial of an audience to the aggrieved person than of Draconian powers of government. Perhaps we can welcome this tendency as some indication of a surviving idealism in an age when so many formerly held beliefs have been eroded or even tacitly thrown into discard, As Lord Radcliffe has put it, "the progressive society . . . is a greedy consumer of its own institutions". (*Not in Feather Beds* p. 265.) Under the heading of due process in the United States, there is an increasing insistence upon the right to professional advice when the law bears heavily upon the citizen, and nearer home the same tendency can be observed. Lawyers, even if unloved, are still necessary. Again, the litigant is rarely persuaded that he has received justice, if he does not see the conclusions of the person entrusted with deciding his fate.

As Burke remarked so long ago, "Justice is the common concern of mankind", and a craving for impartiality may be a mark of man's standard of civilization. One of the earliest scenes recorded in literature is an image on the shield of Achilles described in the Iliad. Two citizens disputing in the street over the blood price of a man who had been killed, are applauded by their respective factions when they require a referee to arbitrate between them, and they await the judgment of the City Elders, delivered in turn with due deliberation. If common law countries are turning away from the informal tribunal as an instrument of justice which is unable to satisfy the citizen with a substantial complaint, they are only fulfilling the words of those two great jurists, Pollock and Maitland, that "Formalism is the twin-born sister of liberty" (*History of English Law* Vol. 2 p. 561).

To the lawyer this trend must be important, as his services will be required in even wider fields of activity and he must be ready to meet the challenge. Professor Sim dealt so capably with this trend in his address last Saturday evening. Greater demands will be made therefore on the young entrant to the profession, who must bring with him from the University a profound sense of dedication and of the long term purpose which he is trained to fulfil in society, even if perfection must forever elude all mortal men. In such a setting we may perhaps find in the end a revival of popular support for the law, which was at one time the impulse that carried it to supremacy in English speaking communities. Equally with the Court, the worthwhile practitioner must stand committed to the eternal quest for justice, wherever it may be sought. As Lord Birkett observed in the last broadcast that he delivered just before his death (citing from the works of George Eliot):

> Who shall put his finger on the work of justice and say 'it is there'? Justice is like the kingdom of God: It is not without us, as a fact, it is within us, as a great yearning. (Romola C. LXVII).