The New Zealand
LAW JOURNAL

2 April 1974 No 6

THE POLICE KNIGHTHOOD

If newspaper editorials are any guide to public opinion, it would seem that the accolade accorded Police Commissioner Sir Angus Sharp in the New Year Honours List was generally warmly received. Leaving aside the disappointment that many in the profession must have felt over the failure of the Executive to acknowledge in the traditional manner the contribution of our Courts over the past year, the honour bestowed on Sir Angus and his Department would, I expect, also meet with the general approval of the profession.

Within the Police Department news of the announcement of the honour was discussed in an air of considerable excitement, even days after the event, and it was evident from the many comments made to me by members of the force and their wives that they were thrilled that their Chief should have been so honoured. For many, of course, appreciation of the significance of the award would be dulled somewhat by their scepticism of a system which unfortunately always seems to have about it the appearance of recognition extended too often, to too many, by too few. But, I would suggest, even the sceptics might have noted with some satisfaction the inclusion of Sir Angus's name in the New Year's List.

Sir Angus took over control of the Police Department as its Commissioner in June 1970. His first few months in office were relatively uneventful, but in August of that year his first innovation as Commissioner received extensive national publicity with his announcement of a revised and comprehensive list of instructions to members of the police on the subject of public protest. His list of thirteen "do's" and "don'ts" for policemen engaged in the control of demonstrations required them to adopt tact and good humour when dealing with citizens engaged in exercising their right to peaceably protest. The list warned that policemen should "outwardly ignore abuse, insults, taunts, jeering", or any other tactics employed by demonstrators to bait the police into intemperate action, and should avoid making "idle threats, or disparaging or sarcastic comments towards demonstrators". These instructions (or statement of policy as they might be called) undoubtedly set the stage for the period of relative tranquility that this country was to enjoy; relative, that is, to the period immediately preceding when relations between demonstrators and the police had deteriorated to such an extent that the violence of what was to receive notoriety as the "Agnew Demonstration" had become an almost accepted aspect of public protest.

Sir Angus's "soft line approach" (as one Member of the House preferred to call it) towards demonstrators was spared the "test to destruction" that the Springbok Tour might have provided, and though the Police did not escape criticism for the way they handled demonstrations at places like Mount John and the Woodbourne Air Base, they have, I would suggest, given general satisfaction in their control of public demonstrations. Certainly they must be given a large share of the credit for avoiding here the tragic confrontations that have bloodied the streets and campuses of other lands. Their efforts prompted this comment in the following extract from an editorial tribute to Sir Angus and his men in the *Daily News* of 16 August 1972:

> "*The Daily News* . . . affirm/s/ that it believes that the police force, in extremely difficult times, is acting in a balanced and mature way in its efforts to keep law and order without cramping and confining legiti-

mate protest. This is a grey area where either too much licence or too little could be given to protesters. Either extreme could lead to violence. We have pleasure in recording our view that the police is walking this delicate tight-rope with great skill and and judgment. In this delicate area, minor errors of judgment are inevitably made, and it is right and proper that public attention should be drawn to them. But such incidents must not be allowed to cloud the overall picture of a difficult job well done."

Much of the credit for the police performance over the past few years in the field of public protest must go to Sir Angus, He has consistently counselled and encouraged his men to pursue a line which avoids the need to meet force with force. And, although as he himself acknowledges, police actions have not always been above reproach, in the main this has been due to the failings of individuals rather than of the force as a whole.

But the present balance has not been achieved with some difficulty. Policemen cannot just be ordered to act in a certain way—as one Police Commissioner discovered too late. They derive their power and authority from the law, not from the Commissioner. They have, therefore, to be led, and cannot be pushed.

When Sir Angus took office as Commissioner, policemen generally tended to see their duty in the execution of their office in terms of their powers rather than their own personal qualities. To suggest, as Sir Angus clearly did in 1970 and again in 1972, that policemen should combine both, and exercise a degree of discretion in the matter of minor breaches of the law so that their actions reflected judgment, tolerance and understanding, was a radical departure from the traditional attitude that the policeman's lot was simply to apply the law—not to question or think about it. That Sir Angus was able in some measure to persuade his men to adopt this approach is evidence of their confidence in him.

One of the most difficult tasks facing any Police Commissioner is in finding a balance between the demands of the public generally on the one hand, or a vocal minority, that the conduct of his officers be held up to public scrutiny and perhaps censure; and the demands of his officers and men on the other, exerting considerable pressure on him to support his men whatever the issue. When criticism is directed at the conduct of police officers on particular occasions it would be a simple matter for the Commissioner to assure the public that he will forthwith instigate a rigorous investigation of the matter and punish any misconduct. But it would be quite another matter for him to then face his men and convince them of his loyalty and support. He must therefore find the balance so that his statements on these matters are acceptable to both the public and to his men. This requires considerable judgment, but I can recall only two instances during Sir Angus's term of office when there have been public comments by his men which, by implication, have suggested that he went too far to meet public demand and failed to support his men. One such occasion was the "Gilfedder Affair", where, in my view, any such complaints were entirely *without foundation* (see [1973] NZLJ 457), and the other was the Alexandra Blossom Festival investigation which seemed to drag on for months and which obviously stirred up quite a bit of feeling in the police ranks. But in this latter case there would be few who would deny, on reflection, that the steps taken by Sir Angus were proper in the circumstances (though I have often wondered why the Commissioner did not simply say, in his television interview on one aspect of it, ie the hosing of prisoners in the cells, that this was the best way of bringing under control a difficult and potentially dangerous situation.)

Sir Angus's performance in this difficult area was undoubtedly considerably aided by the opportunity afforded him by the "Storm Trooper" *Gallery* interview a few months after he took office, to demonstrate to his staff, and to the public, that he was ready and willing to come to the defence of his men when the occasion demanded it. That *Gallery* interview was by no means a flawless performance, but the issue, the location, and the Commissioner's readiness to counter the meticulous questioning of Dr Brian Edwards, made it one of the most exciting *Gallery* programmes ever screened.

The knighthood, as Sir Angus himself said, was as much in recognition of the work of police men and women throughout the country as it was of the direct recipient. One of the characteristics of a good police force is that it is able to discharge its duty to the public efficiently, but unobtrusively. In this regard the performance of the New Zealand Police must rank as a model for the rest of the world. The noisy gadgetry and displays of weapons and force which are a characteristic of many forces throughout the world have been rejected by our own Police Department in favour of training, organization and communications—and, as the

recent armed hold-up of the *Evening Post* newspaper building indicates, a good deal of cool courage. But organisation too can be carried to extremes and very often can take on the appearance of force itself. Traditionally our Police have avoided conducting themselves in a way which might be misinterpreted as an invitation to meet force with force. But one wonders whether the military styled operations that the Police carried out at the Woodbourne Air Base, and in the "bikie" confrontation at Christchurch during the festive season, are in keeping with the role of a body charged with applying particular laws to particular individuals in particular circumstances. Couple that type of operation with the introduction of the "riot shields" that the Police announced they were considering acquiring some months ago, and force in the form of organised opposition may well be the result. But this is a matter of which Sir Angus is probably well aware, and I have no doubt that both he and Deputy Commissioner Burnside are alive to the need to keep any militarists on their staff under a tight rein.

Because the Police tend to conduct themselves in an unobtrusive manner, very often what is deserving of the highest praise passes almost unnoticed; and just as frequently allegations of errors of judgment, or inaction, receive exposure far in excess of their deserts. It would not be surprising, therefore, if policemen should occasionally feel that their efforts have been in vain and that all was lost to the distorted picture of the Police service that is repeatedly presented to the public. But however humble is the projection by policemen of their own efforts, and however severe is some of the criticism I have alluded to, the full force of their courage, humanity and dedication makes its own impression on the minds of the thousands they rescue or assist every year. It was inevitable therefore that sooner or later the country would be moved to show its appreciation in the way it did.

The Honours List probably carries a different meaning for each of us, but for my own part I am pleased to see that the present Government has decided to bring it out of the past and into the present. It still has a long way to go. But stripped of some of the present trimmings, and brought out in the open so that we are less suspicious of behind the scene "string pulling", the present system could provide a meaningful way of rewarding service to the public. The Commissioner's knighthood is a significant honour for both himself and the Police Service as a whole. And although primarily accorded as a mark of appreciation for efforts over the years, it was also an acknowledgment of their professionalism. However, and without wishing in any way to detract from the importance and significance of the honour itself, I cannot help feeling that the honour bestowed on Sir Angus was as much a boost for the system as it was for the recipient himself.

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SUMMARY OF RECENT LAW

INSURANCE—MOTOR VEHICLE

Owner as passenger injured whilst car being driven by unlicensed driver—Unlicensed driver not indemnified against claim by passenger—Transport Act 1962, s 79 (3A). The plaintiff was the owner of a car, which with his consent was being driven by an unlicensed driver, when an accident occurred. The plaintiff was a passenger in the car at the time and was injured. The question was whether the defendant was liable to indemnify the unlicensed driver under the plaintiff's insurance policy in an action brought by the plaintiff against the unlicensed driver having regard to s 79 (3A) of the Transport Act 1962 prior to its amendment by the Transport Amendment Act 1970. *Held,* Section 79 (3A) of the Transport Act 1962 does not apply to a person in charge of a motor vehicle at the time of an accident nor does it provide an indemnity for an unlicensed driver. (*Wright v A-G* [1970] NZLR 764, referred to.) *Samson v AA Mutual Insurance Co* (Supreme Court, Auckland. 31 July; 9 August 1973. Wilson J).

MASTER AND SERVANT—INDUSTRIAL INJURIES AND WORKMEN'S COMPENSATION

Injury "arising out of and in the course of" employment — Employee lawfully driving employer's truck to Auckland for employee's own private purposes — Requested to bring back employer's trade goods when returning—Accident on return journey—No causal connection between accident and carrying goods—Workers' Compensation Act 1956, s 3 (1). The plaintiff and his father and two brothers were the directors and sole shareholders and salaried employees of the defendant company. The defendant carried on the business of winemaking and wine selling and also had a wineshop in Thames in which the defendant's own wines and other New Zealand wines were sold. The plaintiff drove one of the defendant's trucks to Auckland for private purposes. He met his father in Auckland, who asked him to take some special wine, which the father had purchased for the shop, back to Thames in the truck. The

members of the family had no rigid timetable of working hours. On Sunday night, driving back to Thames in the truck carrying the wine, the plaintiff met with an accident and was injured. The plaintiff claimed compensation for injuries arising out of and in the course of his employment by the defendant. *Held,* 1 Whether an accident arises "out of and in the course of" employment depends upon the sufficiency of the connection between the employment and the thing done by the employee which remains a matter of degree in which time, place and circumstance, as well as practice, must be considered together with the conditions of the employment. (*Whittingham v Commissioner of Railways* (1931) 46 CLR 22, 29, applied.) 2 An accident must not only occur "in the course of", ie during, actual employment, but in addition must arise "out of" it. There must be a causal relation between the accident and an order expressed or implied given by the employer. (*Davidson & Co v M'Robb* [1918] AC 304, 317, 327, applied.) *Chan v SYC Ltd.* (Compensation Court, Auckland. 24 July; 8 August 1973. Blair J).

NEGLIGENCE—NEGLIGENCE CAUSING DEATH

Deaths by Accidents Compensation Act 1952—Claim by widow separated from deceased—Failure to enforce maintenance order no bar to claim—Reasonable expectation or probability of reconciliation for claim to succeed. The plaintiff claimed damages under the Deaths by Accidents Compensation Act 1952 for the death of her husband. Negligence was admitted. The plaintiff and her husband were married in 1963 and after two years the marriage began to break down. In March 1968 the plaintiff obtained separation and maintenance orders on the grounds of persistent cruelty and failure to maintain. The maintenance order was for $20 per week and the State house was vested in the plaintiff. The husband left the house on that day and never paid any maintenance thereafter. The plaintiff received a benefit from the Social Welfare Department and although the maintenance officer made attempts to enforce the maintenance order he was unable to locate the husband. The plaintiff, however, saw the husband quite frequently, although she did not ask him for any money, and there was evidence as to a possible reconciliation. *Held,* 1 To estimate the pecuniary loss suffered by the claimant a material question is—What were the deceased's reasonable prospects of life, work and remuneration, and if realised, to what extent the claimant would benefit from them. (*Shaw v. Hill* [1935] NZLR 914, 920;*Donaldson v Waikohu County* [1952] NZLR 731, 741, and *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 614, applied.) 2 Where spouses are separated the widow must show there is a reasonable expectation or probability of reconciliation rather than mere speculative possibility of reconciliation in order to found a successful claim. (*Davies v Taylor* [1972] 3 All ER 836, 843, applied.) 3 That the benefit which the claimant would have received had the deceased not died must arise from the relationship between the parties. (*Burgess v Florence Nightingale Hospital* [1955] 1 QB 349, 360, applied.) 4 Failure to enforce a maintenance order is irrelevant to an assessment of a widow's expectation from her husband because as a separated wife she had a legal right to maintenance. (*Mayall v Hogan* [1966] VR 173, and *Nowakowski v Martin* [1951] 1 DLR 670, referred to.) 5 A small allowance must be made for contingencies in calculating the amount of compensation. (*Bresatz v Przibilla* (1962) 108 CLR 541, 544, applied.) *Miles v Baragwanath* (Supreme Court, Auckland. 20 July; 3 August 1973. Beattie J).

NUISANCE—NEIGHBOURING OWNERS

Thistle seed blowing on to adjoining property—Actionable depending upon surrounding circumstances and establishing that substantial annoyance or damage has been suffered. Negligence in regard to property—Towards adjoining property—Thistle seed blowing across boundary—Duty to take reasonable care to prevent spread of seed. The plaintiff occupied a piece of land as lessee and the defendant owned the adjoining land. Both properties were infested with variegated thistle. The Court found that the plaintiff had made intensive efforts to control the variegated thistle on the property leased to him, that the defendant had not made a systematic and substantial effort to eradicate the thistles on its land, but that had the defendant done so then within two or three years the plaintiff would have the thistles under control. The question was whether a landowner was liable in law for the spread of thistles by seed from his land to adjoining land. *Held,* 1 An action may now lie, be it based on nuisance or negligence, for the spread of weeds through natural agencies on to neighbouring properties. (*Giles v Walker* (1890) 24 QBD 656, *Sparke v Osborne* (1908) 7 CLR 51, *Molloy v Drummond* [1939] NZLR 499, not followed.) 2 Whether such an action will lie depends upon the surrounding circumstances, such as the extent of the spread of weeds, the damage likely to result, the cost and practicability of prevention and the location of the properties concerned. 3 If a claim is based on nuisance the claimant will have to show that he has suffered substantial annoyance or damage and, in any case, the Court will be concerned to strike a tolerable balance between conflicting claims of landowners to enjoy their properties and the interests of surrounding occupiers. 4 If a claim is based on negligence, a claimant will have to show a breach on the part of the defendant of his duty to take reasonable care to avoid the spread of weeds or their seeds. (*French v Auckland City Corporation* (Supreme Court, Auckland. 29 June; 10 August 1973. McMullin J).

REVENUE—SALES TAX

Claim for arrears of sales tax against receiver appointed under debenture—Fund for sales tax to be set aside before disposing of any assets—Sales Tax Amendment Act 1933, s 6. The question in issue was whether a claim for unpaid sales tax against a receiver appointed under a debenture, which secured a debt to the debenture holder by a fixed charge over the company's freehold land and fixed plant and other specified assets and a floating charge over the remainder of the company's assets, took priority over the debenture holder. *Held,* Section 6 of the Sales Tax Amendment Act 1933 directs a receiver to *set aside* a fund for sales tax before disposing of any assets of the taxpayer. It is only in respect of the balance, after such setting aside, that competing priorities take effect. (*Re Burney's Glass Co Ltd* [1938] NZLR 92, referred to.) *Bank of New South Wales v Collector of Sales Tax* (Supreme Court, Wellington. 23 July; 3 August 1973. Beattie J).

TOWN AND COUNTRY PLANNING—CHANGE IN USE

Status of objector—Objector likely to suffer significant economic consequences if change in use per-

mitted—Matters to be considered by Appeal Board. Town and Country Planning Act 1953, s 38A. The appellant had unsuccessfully appealed to the Town and Country Planning Appeal Board against refusal by the second respondent to consent under s 38A of the Town and Country Planning Act 1953 to a change of use to permit the establishment of a factory on rural land situate about one mile from the centre of Blenheim, forming part of a block of 14 acres intended to be developed as a light industrial estate. The first respondent objected to the application for change of use on various grounds, one of which was that the change was not justified having regard to the amount of land already available in the county. Two miles further out from Blenheim than the appellant's land the first respondent owned 126 acres, most of which was zoned industrial in the unpublished draft district scheme, and of which about 14 acres had been set aside for light industry and 56 acres for heavy industry. A considerable amount of money had been spent on roading, drainage, water and power supply. The locus standi of the first respondent as as objector to the application under s 38A was contested. *Held,* 1 A person who reasonably claims to be appreciably affected by a use for which application has been made under s 38A of the Town and Country Planning Act 1953 is entitled to object thereto, and this may include a person who claims that he is likely to suffer significant economic consequences differentiating him from the general public, the question being one of fact and degree, and primarily for adjudication by the Council at first instance or the Town and Country Planning Appeal Board on appeal. 2 There being a valid appeal before it the Appeal Board had to consider all matters relevant under s 38A (2A) and it would have been bad planning and not in the public interest as a whole to permit industrial development to start on part of the 14 acres until the future of the land as a whole had been decided. *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd and Another* (Supreme Court (Administrative Division), Wellington. 18 June; 26 July 1973. Cooke J).

TOWN AND COUNTRY PLANNING—CODE OF ORDINANCES

Predominant use "retail and wholesale shops"—Open-air car sales yard not a "shop". The appellant, a licensed motor vehicle dealer, was convicted under s 36 of the Town and Country Planning Act 1953 of using land as an open-air car sales yard being a use not permitted in a commercial B zone. A predominant use in that zone was "retail and wholesale shops", and "shop" was defined in the district scheme as a "building", and "building" itself was also defined therein as "any structure whether temporary or permanent, movable or immovable". *Held,* 1 When considering the meaning of the word "shop" in the code of ordinances it is permissible to look at the scheme statement. 2 The intention of the ordinances as a whole was to confine "shops" to buildings, and a building on the appellant's land was not performing the function of a shop but was ancillary to the displaying and offering of cars for sale in the open yard. (*Fearon v Mitchell* (1872) LR 7 QB 690, 695, and *Plummer and Adams v Needham* (1954) 56 WALR 1, referred to.) The appeal was dismissed. *Robinson v One Tree Hill Borough Council* (Supreme Court, Auckland. 17, 30 July 1973. Beattie J).

TOWN AND COUNTRY PLANNING—DISTRICT SCHEMES

Application for conditional use—Typed report of Council officer produced and circulated at hearing—Appeal Board not barred by defects in proceedings before Council—Town and Country Planning Act 1953, s 42 (1A). The appellants were objectors to a successful application made by the second respondent for consent to a conditional use of part of the land, which had been set aside under s 439 of the Maori Affairs Act 1953 "as a Maori reservation for the purposes of a place of historical interest and a recreation ground for the common use of the Maori people", for the establishment of a camping ground. At the hearing before the council one of its officers read a prepared typewritten statement, copies of which were circulated immediately prior to the reading thereof. The appeal was founded on (a) the fact that no copy of the statement was made available before the hearing, and (b) the consent disregarded the provisions of the Maori Affairs Act 1953, which prohibited the alienation of such land. *Held* 1 Section 42 (1A) of the Town and Country Planning Act 1953 (inserted by s 11 of the Town and Country Planning Amendment Act 1971) enables the Board to deal with an appeal notwithstanding some defect in the proceedings before the council. (*Denton v Auckland City* [1969] NZLR 256, and *Leary v National Union of Vehicle Builders* [1971] Ch 34, distinguished.) 2 The Appeal Board could determine the appeal and if consent were granted it would then be for the Maori Land Court to ensure compliance with s 439 of the Maori Affairs Act 1953. *Spearman and Another v Bay of Islands County Council and Another* (Supreme Court (Administrative Division), Whangarei. 26, 27 July; 14 August 1973. Wild CJ).

CASE AND COMMENT

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

Who is a step-parent?

In *Lineham v Lineham* (the judgment of Cooke J was delivered on 13 December 1973) a child was born to the respondent wife when she was a single woman aged 19. No entries relating to its father appeared in the Register Book of Births. The appellant husband married the wife at the end of 1972 and he deserted her in March 1973, a separation agreement being drawn up in April 1973, at which time the child was just over three years of age. An order for the child's maintenance was sought against the husband, under s 35 (3) of the Domestic Proceedings Act 1968, on the basis that, though not the natural father, he was the child's stepfather. It was conceded that the child was a child of the family as defined by

s 2 of the 1968 Act. As the Act does not define a "step-parent" and as no assistance was to be got from *Sample v Sample* [1973] 1 NZLR 584, the Court had to decide whether a "step-parent" included the relationship between a child born to a woman then unmarried and a man who was not the child's natural father. According to the old Victorian case of *Irwin v Sholl* (1897) 22 VLR 640, decided under the Neglected Children's Act 1890 (Vic.) the answer would be no. The learned Judge, however, made an exhaustive review of legal and other dictionaries and concluded that usage did not now confine step relationship to children of prior marriages, saying:

> "Whatever may have been the ordinary meaning in 1897, it seems to me that at the present day the term 'step-parent' is the obvious one to describe the relationship of a husband to his wife's child by a previous union, whether or not that union was a marriage. It is hard to think of any other suitable term. Nor is there anything in the context of s 35 to suggest a restricted meaning. On the contrary, inasmuch as it also authorises an order on the application of a foster-parent against the other foster-parent the section was clearly meant to have a wide scope. . . . Moreover s 26 (2) (d) of the Destitute Persons Act 1910 enabled a maintenance order for a child to be made against the husband of the mother of a child, whether legitimate or illegitimate, if the child was born before the marriage of the mother with her said husband. It is unlikely that the Domestic Proceedings Act 1968 was intended to be narrower in scope in this respect. Finally it should be noted that s 3 (1) of the Status of Children Act 1969 . . . provides that for all the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, *and all other relationships shall be determined accordingly.* I think it is in accordance with the spirit of this provision, if not within the precise letter, to treat a child as a step-child, even though she and the natural father have never been married. If the husband is unaware of the existence of the child, it may be that the child will not become a child of the family; but the question does not arise in this case."

Cooke J therefore held that the Magistrate had jurisdiction to make the order against the appellant for the maintenance of his separated wife's child.

Having disposed of this main point, his Honour proceeded to deal with a further, but subsidiary, matter. There was no information about the natural father of the child and the time limit under s 48 for applying for a paternity order, prima facie six years, had not expired. It was not known whether the mother could prove paternity or even whether the natural father was still living. In the Court's view, on the face of it, when a marriage had been as short-lived, before separation as the present one, there was ground for suggesting that the mother should in fairness look first to the real father, rather than to its jurisdiction. "In the present case," stated his Honour, "there may be reasons why it is fair that the burden should fall on the stepfather. For example, it may be impossible to identify or trace the father; or there may have been bargaining on the matter when the separation agreement was negotiated. I am not in any way seeking to suggest how the Magistrate should exercise his discretion. But it is not clear that this aspect has been considered and apparently all the relevant facts have not yet been put before the Magistrate's Court. They were certainly not put before this Court."

In the circumstances, Cooke J, instead of simply dismissing the appeal, ordered (pursuant to s 124 (3) of the Domestic Proceedings Act and s 121 (1) of the Summary Proceedings Act 1957) that the application for a rehearing be referred back to the Magistrate's Court, should the husband so elect, for consideration of whether it was reasonable to make an order for maintenance of the child against the husband as step-father when no proceedings had been taken against the child's father. The husband was given until 1 February 1974 to notify the Magistrate's Court whether he did so elect; if not, his application will stand dismissed. In view of the Victorian decision mentioned above, the view was taken that the appeal was a proper one and no order was made as to costs.

It is understood by the writer that the husband has made his election and has notified the Magistrate's Court accordingly.

The case is usefully comparable with the English decisions in *Bowlas v Bowlas* [1965] P 440 (CA) and *Smith v Smith* [1962] 3 All ER 369 (CA) and the New Zealand decision in *In re A Maintenance Order* (1938) 33 MCR 63.

PRHW

Interim maintenance orders under the Domestic Proceedings Act 1968, s 77

In *Prince v Prince* (the oral judgment of Wilson J was delivered on 29 November 1973) the appellant husband appealed from an interim order for maintenance of $20 a week made in favour of the respondent wife. It purported to be an order for the maintenance of the wife only, though the application before the Court below referred to maintenance for both the wife and her daughter.

Though the child's provision was not, strictly speaking, before his Honour, it is interesting to note that he observed that the normal course followed in the lower Court was to rely on the statutory presumption that the child was the child of the husband as being conclusive for the purposes of an interim application and not to allow the question to be gone into. Wilson J was firmly of the opinion that the practice was an incorrect one. He pointed out that s 77 (3) of the 1968 Act specifically referred to the children *of the defendant* and not, as the Magistrate had thought, to children of the family. "As the jurisdiction to make the order is restricted to children of the defendant," concluded his Honour, "it is surely not competent for the Court to rely on the statutory presumption without allowing the matter to be tested because the presumption is, of course, only a prima facie and rebuttable one."

The substantial complaint about this order, however, was that there was no jurisdiction to make it. Jurisdiction is given by s 77 (1) of the 1968 Act, which provides that where the hearing of an application for a maintenance order . . . is adjourned for any period exceeding one week (which was not the case here) or where any such application is referred to a conciliator under s 15 of the Act, any Magistrate may, if he thinks fit, having regard to all the circumstances of the case, make an order under this section, ie, s 77. As Wilson J observed, the jurisdiction to make an interim order in the circumstances of the present case had to be shown to arise under the second part of s 77 (1), ie, that an application for a maintenance order (not an interim order) had been referred to a conciliator under s 15 of the Act. Evidently the Magistrate had referred "the application for separation and ancillary matters" to a conciliator when he made the interim order.

His Honour then proceeded to scrutinise carefully the provisions of s 15 and described the emergent pattern thus: "If the substantive application is for a separation order subs (1) applies. If it does not come within subs (1), subs (2) may apply. It is only where the matter has not already been referred to conciliation under subs (1) that subs (2) applies, but irrespective of whether an order has been made under subs (1) or subs (2), the Court may make a further order at any stage, if there appears a reasonable possibility of reconciliation". In the present case there had been an order under s 15 (1) but nothing came of it. This was done in 1971, when the applications for separation, maintenance, etc had been filed. "In my opinion," said Wilson J, "that having been done, it was not competent for the Court to make another order for conciliation except under the provisions of subs (3) and I am bound to say there is nothing in the evidence which was tendered to the Court at the hearing of this application for interim maintenance which would suggest that there was the slightest possibility of reconciliation of these parties, and Mr Boot, for the wife, concedes that is so. There was, therefore, no jurisdiction to make an order for conciliation on the hearing of this application for interim maintenance, nor could there have been any jurisdiction to make such an order, even if the order for substantive maintenance had been before the Court, which it was not. If the order for interim maintenance is to be justified . . . it must be on the basis of the order of reference to a conciliator in 1971."

His Honour then returned to s 77 (1) and noted that counsel for the husband contended that there must be an order of reference to a conciliator contemporaneously or immediately preceding the order for interim maintenance and added that he thought the Magistrate must have considered this to be the case in as much as he "went out of his way to make an order which I find he had no jurisdiction to make". His Honour proceeded to observe that s 77 (1) said "*where* any such application is referred to a conciliator"—it does not say "*when* any such application is referred to a conciliator". It refers to a situation—not to a time. I think that the practical convenience of that interpretation confirms that that was the intention of the legislature, because of the adjournment which must follow a reference, during which it is obviously desirable to provide for interim maintenance where necessary". Counsel for the husband had in fact conceded that the order was made under s 15 (1).

His Honour therefore held that there was jurisdiction to make the interim maintenance order. He did, however, reduce it to $10 on

the ground that, having regard to the wife's circumstances at the date of the hearing, $20 was excessive. As she was acting as a housekeeper and obtained free board and lodging for herself and her child, $20 was considerably in excess of the needs of both. No order was made as to the costs on the appeal. With respect, this decision must be taken to be correct on all points.

PRHW

LEGAL REFERRAL CENTRES

A paper presented by Mr N W WILLIAMSON *to a University of Canterbury Seminar on Legal Aid. Previous acknowledgments have incorrectly attributed the organising of the seminar to the Canterbury District Law Society, whose members took an active part in proceedings.*

The Centres which are currently operating in Christchurch are not only Referral Centres but are also Advice Centres. They are generally called Legal Advice Centres and in fact carry out three separate functions:

(a) Legal Advice Service
(b) Legal Referral Service
(c) Form Filling Service.

The term "Centre" may be an unfortunate one in that it conveys something of a more permanent nature than the once a week attendance that has been arranged at each of the suburban and city premises where the legal advice is given.

The principal reason for the formation of the Legal Advice Centres in Christchurch was to provide a facility for those persons who were unable or unwilling to seek legal advice in the normal way. Essentially the Centres were aimed at poor persons, that is, those persons who were unable to afford the services of a lawyer or at least who thought they were unable to afford these services. Quite clearly there are a number of such people in New Zealand, in particular pensioners, either old age pensioners or invalid pensioners with fixed incomes who often need some legal advice or aid but are unwilling to obtain it because they fear the cost of it. It is not an unrealistic fear because if a lawyer is to maintain a reasonable income he clearly has to maintain a consistent hourly rate of earning. This means if he is to occupy time in advising or investigating matters on behalf of a pensioner he is obliged to either give up part of his hourly rate or alternatively charge the pensioner at the usual rates. There are also others in New Zealand who are poor by virtue of their circumstances in that the beardwinner is on a low wage and his income is almost totally committed to paying rent, food expenses, clothing and education expenses for his family.

Also it appeared clear that there were many persons who were either too shy or too socially inadequate to attend at a solicitor's office. Many of us will readily understand this attitude when we consider our own attitude to attending a doctor or a specialist even when we are conversant with the general procedure by which they operate. Many such people have in fact attended at the Legal Advice Centres and armed with a letter of introduction from the solicitor at the Centre they have been assured enough to go into the city and attend a solicitor in relation to their particular problem.

Essentially the purpose behind the Centres was experimental in that it was desired to obtain real information as to whether such Centres were necessary and the type of Centre which would be best suited to the real needs of the community.

Location

Originally it was decided in Christchurch to establish some Centres in the suburbs and some Centres at Social Welfare organisations such as "Open Door". The reason for establishing Centres in suburbs was to bring the advice and service close to those people who needed it. Transport costs and difficulties sometimes appear to be the stumbling block for persons who are confused or inadequate. After the first year there are now six Centres operating in Christchurch, four of these are in the suburbs namely Aranui, Sydenham, Hornby, Bishopdale and two of them operate in the city namely at the "Open Door Mission" in Lichfield Street and the Citizens' Advice Bureau in Gloucester Street. The latter two Centres are closely connected with social work being carried out at these Centres. The "Open Door" Centre in particular has operated in a casually successful way over the past year. Many of the persons helped at that Centre have been referred to the solicitor by the social workers from the Centre or because they have gone to the Centre for some other help. So far as the Citizens' Advice Bureau in Gloucester Street is con-

cerned, this bureau is co-ordinating activities of various social groups and provides a central place for persons particularly those in flats or living in sometimes inadequate facilities in the central city to obtain advice and if necessary legal analysis, advice and aid.

Organisation

Many of you will already be aware of the details under which the Centres operate. I mention some of these details, however, because it may be of considerable help if you were to discuss some of these details and ventilate the suggestions which you have about them.

(i) Rosters. These rosters of volunteer qualified solicitors were prepared and have been operating reasonably satisfactorily. At first those on the rosters received a turn every 3 or 4 months. Because of the number of Centres operating some persons now receive a turn every 2 months. In effect this means that they spend 1½-2 hours at the Legal Advice Centre one night every 2 months. There have been two instances of practitioners just not turning up but otherwise attendances have been very good. Clearly there is a great deal of responsibility on the solicitor whose turn it is to either attend himself or to ensure that another person attends or that the Committee member in charge of the Centre is advised. Each Centre has a Committee member in charge and that person is responsible for all matters relating to the Centre including the roster or any other problem which may arise.

(ii) Students. During this year law students have attended at most of the Centres. They have been of particular assistance in filling out the cards for persons who wish to obtain advice from the solicitor and in assisting persons to complete either pension or other Government forms or in assisting them to fill out legal aid forms. Often the student has sat in on the consultation and been able to contribute some suggestion to the solicitor or in discussion with the person being consulted. In some cases the student has also been able to operate a follow up at the Centre in order to ascertain whether a person has in fact attended for the referral which was arranged. At most of the Centres these students have operated also on a roster system but at the "Open Door Mission" Chris Harding and Debbie Ayton have attended regularly. This regular attendance, while demanding on them, has been of great assistance because they have provided a regular follow up and a continuity which has been of great help to the qualified solicitor who attends.

(iii) Records. Each Centre has a folder in which cards, referral letters, copies of the roster and copies of the names of solictors willing to accept referrals are kept. Also in these folders supplies of legal aid forms are normally kept. The cards which the qualified solicitor or student are required to fill in contain the name and address of the person seeking advice, the name of the solicitor and law student attending and the general facts of the case and suggested action. These records are then kept in a filing cabinet in the Law Society's Office. There are two reasons for keeping the cards—(1) Because it enables some analysis to be made of the number of persons attending the Centre and the reasons for them attending, and (2) Because it provides some record in case this is necessary in any alleged negligence claim.

Aranui Centre—Experience to date

This Centre commenced on 19 September 1972. It has now been operating for over a year and during its first year 244 persons were seen about various problems. Of these 48 were referred back to their own solicitor or to a solicitor they had previously consulted about another matter and 67 were referred to solicitors on the referred back to their own solicitor or to a solicivolved was as follows: matrimonial and paternity 71; accidents and traffic 45; contract and hire purchase 27; workers' compensation 14; estate 11; social security benefits 6; fencing 5; conveyancing 3; miscellaneous matters 62. As an appendix to this paper I have set out various notes shown on cards to indicate something of the variety of problem that has been dealt with at the Centre. For the time spent at the Centre it is clear that this has been used to a maximum in view of the number of people that have been seen and advised. It may be that this Centre has been used a little more than the others because it was the first established and consequently has received the most publicity.

Problems

As with all new ventures there have been a number of teething problems concerning the Centres. The work there has also highlighted other problems which exist in the profession at the moment. Some of the problems are as follows:

(1) *Complaints About Solicitors*—It was quite clear, particularly at the early stages, that a number of persons had come to the Centre to check up on their own solicitor or to complain about the delay or inactivity on the part of their solicitors. As a result of the number of

these complaints it was decided to adopt the following formula. First, when a complaint is made about another solicitor then that solicitor's name and details are not sought but the enquirer is given advice along the following lines: "Your own solicitor has the full facts about your problem. I don't and therefore it is difficult for me to comment on your position. I think you should go back to him and discuss it with him again and tell your solicitor that you are unhappy about the way that you are being treated. If he still does not satisfy you then you are, of course, always free to change your solicitor. If you feel that you have been gravely mistreated then you are entitled to make a complaint to the Law Society but at this stage I don't think I am able to help further by commenting."

(2) *Specialisation*—From the comments made by a number of those who attended at the Centre it has become clear that many solicitors merely tell their clients that they do not carry out certain types of work. It appears that these solicitors do not refer their own clients to other practitioners who would deal with, for example, traffic or matrimonial matters, but merely inform them that they do not do this sort of work. Consequently a number of those persons who have attended at the Centres and who already have their own solicitors have really sought referrals to other solicitors who would be able to do the sort of work they wish undertaken.

(3) *Negligence*—Although to a large extent the Centres have operated on a referral basis it would seem clear that the solicitors at the Centre are liable in negligence for any incorrect advice given to persons attending the Centre. There has been a difference of opinion in our Committee in relation to this matter because of the expense involved in obtaining insurance cover and the reasonably remote possibility of a claim. The situation in which a claim would seem to be most likely is that where a person attends at a Centre for advice as to whether or not they would be entitled to claim on the basis of certain facts. If they were advised that they had no claim but later after the time limit had expired they found that they did in fact have a claim then they could sue the solicitor who gave them the advice and the law society who arranged and organised the Centre. To ensure that these difficulties did not interfere with the smooth operation of the Centres it was decided to take out insurance to cover such negligence. This has been done. In Auckland the Centres that operate there are under the auspices of the Citizen's Advice Bureaus and it is claimed that in view of a disclaimer made at the time the advice is given and the fact that that the Bureau are organised by Councils rather than the Law Society that no insurance cover is needed. In Wellington, however, where three Centres operate, cover has been obtained.

Future

It has been suggested by some that the Legal Advice Centres are an undignified attempt by the profession to please the public. It has also been suggested that they are just another new idea which will have some temporary popularity. I was intrigued recently to find a publication dated 1927 and printed by the League of Nations entitled "Legal Aid for the Poor". This publication deals with legislation and schemes for legal aid in various countries. From a perusal of this it appears that for a long time English law while insisting stoutly on the rights of the individual has neglected in practice to cater for the poor and for persons who need protection from the law.

There are two quotations which I ask you to consider in your discussions. The first is from the Annual Report 1972 of the North Kensington Neighbourhood Law Centre. This Centre is the only full time Centre at present operating in the United Kingdom. The report in speaking about the future makes a number of suggestions but in particular comments as follows:

"Secondly, we must recognise that since time immemorial lawyers have principally functioned as agents for the better off. This attitude is changing—a great encouragement to our work has been the support of the established profession, reaffirmed by a visit from the President of the Law Society in January, 1972. However, far too little research has been done, either by academics or practitioners, into ways in which the law can be used for the benefit of the poor. To take an example, while enormous legal energy has been expended on increasing the wealth of the haves through tax avoidance, the Social Security Tribunals which regulate the income of the have-nots are unknown ground to all but a handful of solicitors. Many laws passed by Parliament for the benefit of poor people have been under-used or under-enforced for lack of lawyers to interpret them. There must be many areas in which, in co-operations perhaps with University departments and other experts, new departures can be made and new legal principles established."

Also I ask you to consider the comment of Messrs P J Evans and S D Ross in an article entitled "Legal Aid in New Zealand and Abroad" published in the New Zealand Universities Law Review issue of April 1972. This comments as follows:

"3. Legal Advice

"The New Zealand Act contains no provision at all for legal advice. In addition the thirty-dollar 'initial contribution' will act as a deterrent for those who need legal assistance in negotiating a settlement but who do not wish to get involved in litigation. The Act thus fails to provide any system of preventative legal services for the poor. Similarly, there is no attempt in the New Zealand scheme to encourage lawyers to play a creative role on behalf of the poor or to play a part in educating the poor about their rights."

For my part on the local scene I think urgent consideration should be given to all or any of the following ideas:

(1) A telephone service manned throughout the day by a qualified solicitor so that advice or referrals on an emergency basis can be given. At present the Citizen's Advice Bureau take such calls and refer them to the solicitor who is to attend at the Citizen's Advice Bureau Centre on any particular week. That service is not very widely known about and greater publicity would have to be given to it.

(2) Liaison Officers. I think that the Law Societies in Auckland, Wellington and Christchurch should have qualified solicitors working for them and that these qualified solicitors should organise the Advice Centres and should themselves give advice at Citizen's Advice Bureaus and ensure that persons who require a solicitor are passed promptly on to a suitable solicitor who will deal with their matters.

(3) A Legal Advice Scheme should be introduced by the Government to enable persons of limited means to obtain legal advice and assistance up to a limit of say $50. Details of the scheme in England are shown on the sheet attached as appendix 2.

(b) Neighbourhood Law Centres could be set up in the main cities in New Zealand to provide for advice under the $50 scheme and to conduct certain litigation for poor persons. These Centres would need Government and Law Society financing as well as money from the $50 Advice Scheme and the normal legal aid fees.

I believe that it is important that at all times any schemes set up are recognised as flexible ones. The results of these schemes and research by either Law Schools or practitioners will hopefully result in schemes better adapted to poor persons in New Zealand who need legal advice or assistance.

APPENDIX

ARANUI LEGAL ADVICE CENTRE—SAMPLE CASE NOTES

1 *Daughter's De Facto and Trouble with Debt*—A sailor and he never bothers about summonses. He owes over $100. Advised to tell daughter to either put up with it or to kick her de facto husband out.

2 *Client Leased House in October*—Paying weekly instalments—Man walked in and says, "It's my house. I bought it in September." Landlord is a builder but had no written agreement with me. Apparently he has sold the house for removal but did not tell me. Advised that since no written agreement had a monthly tenancy and would have to find other accommodation.

3 Client said he purchased car from motor vehicle dealer in October 1972. Obtained $400 from finance company. Later $90 was added to this to cover premium if was sick, or had an accident. Has been off work. His wife has advised the company who have now attempted re-possession of the vehicle. They have added further charges. Company won't explain what now appears to be an excessive calculation. After discussion referred to his own solicitor.

4 Client separated from first wife and divorced. Has now bought house jointly with another man who wishes to get his money out. Referred to own solicitor.

5 Old age pensioner says still owes $4.19 for trade debt. Wanted to know how he could pay the balance now after such a long time and where he should pay it to.

6 A traffic accident matter. Questions of insurance and damages. Advised him as to his position.

7 Pension from Germany. Compared to Social Security here it would be a greater amount, if he could receive Social Security here. Bank costs for transferring pension from Germany appear excessive. Advice needed as to tax, bank costs and Social Security rights here.

8 Client is married to a Malaysian. He

wants (a) to adopt wife's child; (b) explanation about rehab loan and capitalising family benefit. Discussed all matters generally with him and advised him to go to a regular lawyer because he was able to pay his way.

9 Client complained that tenants had stolen property from his flat. Advised him to inform police.

10 Client wanted advice on legal costs involved in divorce. Said she was separated by Court order in December 1966. After discussing generally suggested that she consult the solicitor who had acted on the separation proceedings.

11 Client says person has been booking up a large amount of telephone toll calls on her account. Post Office are now threatening to disconnect her phone. She can't afford to pay. Would want to collect from the other person. Referred to another solicitor.

12 Client slipped on the footpath near a fire hydrant and fractured arm. Damaged clothing. Has had other expenses. The road had been repaired and completed but contributed to accident. Referred to solicitor.

13 Client had trouble with golf balls continually coming over his fence. Collects 30 to 40 a year. Worried about damage to children. Advice given as to contacts that could be made with golf club and possible remedial action.

14 Aranui smells. Suggested meeting of residents and possibility of actions against drainage board and in general against Attorney-General with assistance of legal aid. Very full discussion of difficult problem. Most residents in lower income group and complaint is worthy of assistance. Litigation could be of assistance particularly because properties have devalued and living conditions unpleasant. General advice as to various rights given.

15 Difficulty of parents with daughter. Girl 16 wanting to live away from home. Various miscellaneous problems. Advised as to rights and courses of action.

16 Woman claims gave thousands of dollars to firm of solicitors to invest for six months at 8 percent. They have returned money but claimed that they were unable to invest it. She does not believe them. After discussing says she will take the matter up again with the solicitor and if she receives no satisfaction will report matter to the Law Society.

CORRESPONDENCE

Sir,

Re: De bonis non

There was no enthusiastic response to my request in the JOURNAL of 4 December for expressions of opinion on the above subject. Perhaps it was thought that the request by me only revealed ignorance which did me no credit. However, I was disappointed by the indecisive answers given by some students in high places.

So, I decided to see whether Joshua Williams, that old literary authority had anything to say in his treatises on property, real or personal. I was not disappointed. In the 14th edition of *Personal Property*, he, at page 449, says this: "The office of administrator is not transmissable like the office of executor. On the decease of an administrator, before he has distributed all the effects of the intestate, a new administrator must be appointed; for the administrator or executor of such administrator has no right to intermeddle. So, if an executor should die intestate without having completely distributed his testator's effects, an administrator must be appointed to distribute, according to the will of the testator, such of his effects as were not distributed by the deceased executor. In each of these cases the administration granted is called an administration de bonis non administratis, of the goods not administered, or, more shortly, de bonis non."

But he says this on page 455: "It could be wished, however, that the office of an administrator were transmissable in the same manner as that of an executor".

It would seem that Williams was of the same opinion as I was anent at least, the usefulness of clothing creditors as a body with the power to elect one of their body in order that he might continue interrupted administrations.

The author traces the rise of distribution of property from customs varying from place to place and from people to people and he is able to point out how and when one custom and then another was superseded by this statute and then another custom by another statute till a searcher for authority might be pardoned for thinking that an improvement in procedure would not be an impossibility to devise something as effective as it would displace.

Please may I add a short tail-piece? I would not be thought to have been wearied by the search for authority for, on the search, I met old friends whom I had not met for years in legal literature, to wit: the persons of gerunds and subjunctives, although I noticed that the ugly animal "date" had started to show himself.

Yours truly,

L A TAYLOR
Hawera

PEDANTIC OR SEMANTIC

In his first edition of *Judicial Review of Administrative Action* (1959) Professor de Smith stated(*a*):

> "But those Courts and commentators who decline to accept any form of justice as natural may take their choice from among 'substantial justice', 'the essence of justice', 'fundamental justice', 'universal justice', 'rational justice', 'the principles of British justice', or simply 'justice without any epithet', as phrases which express the same idea."

Since that date many other phrases, of which "fair play in action" is the most popular, have been coined, but they have not necessarily assisted in clarifying the nature of the obligation involved. Because there is a danger that what is comprehended by "natural justice" may be identified with the more general notion of "fairness", it is necessary to subject the recent cases in this area to close analysis and to ascertain exactly what was decided and the reasoning adopted.

The locus classicus concerning the availability of certiorari and prohibition is the dictum of Atkin LJ(*b*) who stated:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Until recently it could be said that the duty to act judicially, as a condition to the granting of relief by certiorari or prohibition, was synonymous with compliance with the principles of natural justice. It was of course understood, as has been recognised by de Smith(*c*), that:

> "Certiorari will undoubtedly issue to quash proceedings terminating in an order of an 'administrative' character, provided that the authority making the decision was at some stage of the proceedings obliged to act judicially."

New Zealand decisions such as *New Zealand Dairy Board v Okitu Co-operative Dairy Co Ltd* [1953] NZLR 366 applied that principle and granted relief in respect of breaches of natural justice committed during the judicial stage of the decision-making process. In fact, the Atkin dictum has been interpreted and applied in such a liberal fashion that it is difficult to find any case where intervention was justified, but refused on the ground that the requirements set by Atkin LJ had not been satisfied.

The dictum has, of course, been assailed at various times. Lord Reid's speech in *Ridge v Baldwin* [1964] AC 40; [1963] 3 All ER 66 is possibly the most vigorous attack, but even his Lordship did not suggest that certiorari should be granted in respect of non-judicial functions. The main thrust of his remarks was directed by the imputation of a duty to act judicially where rights were affected(*d*).

The Divisional Court in *R v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 All ER 770; [1967] 2 QB 864 said that the Atkin dictum was not intended as an exhaustive definition but reiterated (at pp 777, 881) that:

> "The only constant limits [to certiorari] were *that the body concerned was under a duty to act judicially and* that it was performing a public duty"(*e*).

Ashworth J was even more definite; he said (at pp 784, 892) that:

> "I regard the duty to act judicially . . . as the paramount consideration in relation to relief by way of certiorari."

Shortly before that decision was delivered another Divisional Court consisting of Lord Parker CJ, Salmon LJ and Blain J refused certiorari and habeas corpus in *Re H K* [1967] 1 All ER 226; [1967] 2 QB 617. In that case it was argued that the immigration officer was required to act judicially or quasi-judicially in exercising his powers under the Commonwealth Immigrants Act 1962. Lord Parker CJ doubted

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(*a*) At p 102, cited by Barrowclough CJ in *Lamond v Barnett* [1964] NZLR 195, 203. The corresponding passage in the second ediiton (1968) is at p 136.

(*b*) In *R v Electricity Commissioners* [1924] 1 KB 171, 205.

(*c*) Op cit, 399.

(*d*) In New Zealand there is no such presumption; see the propositions advanced by McCarthy J in *Modern Theatres (Provincial) Ltd v Peryman* [1960] NZLR 191, 197. See also the remarks of Lord Pearson in *Pearlberg v Varty* [1972] 1 WLR 534, 547; [1972] 2 All ER 6, 17, quoted at p 5, infra.

(e) Ibid, 778, 882 per Lord Parker CJ. The poriton italicised appears in the All ER but not in the official report. Diplock LJ said at p 887, 781 that: "so long as the quasi-judicial stage in the administrative process persists the High Court's power of control of it by certiorari continues".

that the immigration authorities were acting in a judicial or quasi-judicial capacity. He continued(*f*):

> ". . . I myself think that even if an immigration officer is not [acting] in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but of acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only *to that limited extent do the so-called rules of natural justice apply,* which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the Courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially"(*g*).

Blain J was content to say that mandamus would lie for failure by an immigration officer to apply "his mind dispassionately to a fair analysis of the particular problem and the information available to him in analysing it" (ibid: 236, 636).

This case may be said to have been the beginning of some identification of fairness with natural justice, but neither the case itself nor any of the others which followed it really bear that interpretation. In *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904; [1969] 2 Ch 149 it was assumed that the Home Secretary was required to act fairly, but this was seen only to require a consideration of any representations that were made. In fact, no representations were made and the statement of claim was struck out. In the *R v Gaming Board of Great Britain, ex parte Benaim* [1970] 2 All ER 528; [1970] 2 QB 417, Lord Denning MR said that the Gaming Board had a duty to act fairly. This involved the Board in giving an applicant an opportunity of satisfying it of the matters specified in the legislation. The Board "must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from office . . . or depriving him of his property . . ."(*h*). In relation to the disclosure of information received by the Board, it was sufficient compliance with the obligation of fairness if the Board gave the applicant sufficient indication of the objections to enable the applicant to answer them(*i*). Nor was the Board bound to give reasons(*j*).

In *Wiseman v Borneman* [1971] AC 297 the statute prescribed a procedure for the tax commissioners to follow. Under that procedure, the taxpayer was not entitled to see and reply to the counter statements of the commissioners. The House of Lords were satisfied that the statutory procedure was not unfair. Lord Guest raised the very issue being discussed when he said (at pp 310-311):

> "When, however, the matter which the tribunal has to decide is a preliminary point which does not finally decide the rights of parties, then the question arises whether, and, if so, *to what extent* [emphasis added], the principles of natural justice should be followed by the tribunal."

Lord Wilberforce spoke of the case as one where it was not necessary to supply the requirement of audi alteram partem and where "the roughness of justice" had not reached "the point when the Courts ought to intervene"(*k*).

Re Pergamon Press Ltd [1970] 3 All ER 535; [1971] Ch 388 concerned the obligations of an inspector charged with the duty of investigating and reporting in terms of the Companies Act. That duty was not quasi-judicial or judicial because the inspector decided nothing and deter-

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(*f*) Ibid, 231, 630. Emphasis added.

(*g*) Salmon LJ appears to have overlooked the qualification emphasised in this extract where he spoke of the immigration officer being obliged to act in accordance with the principles of natural justice (ibid, 233, 633).

(*h*) Ibid, 430, 534. Was it not to be inferred that more disclosure would be required by natural justice in those circumstances?

(*i*) This again may be seen as less than what would be required by natural justice.

(*j*) Though this may be arguable, many would assert that natural justice demands that reasons be given.

(*k*) Ibid, 320. The audi alteram partem principle need not be observed and the procedure is seen to be "fair" or "not fair", it is clear that a distinction must be made between compliance with natural justice and fairness.

mined nothing. But because of the consequences of the report (which might lead to a criminal prosecution or a civil action), the inspector was obliged to act fairly. Though he could obtain his information in any way he thought best, he should not condemn or criticise without giving the person subject to investigation an opportunity of correcting or contradicting what was said. Chapter and verse need not be quoted; an outline of the charge would usually be sufficient. Those being investigated could not expect to see a transcript of the evidence or to cross-examine witnesses. Sachs LJ put it in a nutshell when he said (at p 542; 403):

> "... there must be an appropriate measure of natural justice, or as it is often nowadays styled 'fair play in action' ... In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand."

This distinction between what might be described as the entire obligations of natural justice and the lesser requirement of fairness is also borne out in the later cases.

In *Pearlberg v Varty* [1972] 2 All ER 6; [1972] 1 WLR 534 remarks were made by their Lordships in relation to fairness. The question whether the taxpayer had a right of audience before, or a right to make written representations to, a tax commissioner before he gave leave to raise back assessments was answered in the negative. It was said that the Act had made no provision for this right, that this was deliberate and that the function of the commissioner was administrative. He was not making a final determination and there was no substantial injustice(*l*). The obligation to act fairly was recognised(*m*), but the Act did not impose a judicial function; it was merely an administrative power(*n*). Lord Pearson saw the question as "one as to the true construction of the legislation" (at pp 17; 547) when he said:

> "A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles [of natural justice] in performing those functions, unless there is provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions, there is no presumption that compliance with the principles of natural justice is required, although as 'Parliament is not to be presumed to act unfairly', the Courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing would be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed."

It will be noticed that fairness was not seen as requiring a plurality of hearings or representations. Nor are the procedural safeguards of natural justice necessarily applicable. To the same effect are the remarks of Lord Salmon who declared (at pp 21; 551-552):

> "A decision under section 6 of the 1964 Act is in the class of purely administrative preliminary decisions, taking away no rights and in respect of which neither reason nor justice requires the persons concerned to be heard before the decision is made. Their turn comes later: *Wiseman v Borneman* per Lord Reid at p 308 and Lord Wilberforce at p 317. The tax payer places great reliance on *Wiseman v Borneman,* which was a very different case from the present; in that case the proceedings in question were clearly of a judicial nature. The principles there enunciated in this House do not appear to me in any way to support the tax payer's argument in the present case."

The next case, *R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 All ER 589; [1972] 2 QB 299 is of importance because it has been relied on by the New Zealand Supreme Court. The applicant sought certiorari, mandamus and prohibition. The Court agreed that the function of the Corporation as the licensing authority was not judicial but that it must exercise its powers fairly. To do this it must, before changing its policy, first give not only the applicant but also all persons whose interests were affected an opportunity of being heard. Prohibition, ordinarily restricted to statutory tribunals with judicial functions, was granted(*p*). Roskill LJ, whose remarks have been relied on in other cases, said that it was the duty of the Court (ibid, 596, 310):

> "... to see that whatever policy the corporation adopts is adopted after due and fair regard to all the conflicting interests. The power of the Court to intervene is not

(*l*) Ibid, 9, 540, per Lord Hailsham.
(*m*) Ibid, 13, 542, per Viscount Dilhorne.
(*n*) Ibid, 14-15, 544, per Viscount Dilhorne.
(*o*) It is doubtful if this was the case in *Wiseman v Borneman.*

limited, as once was thought to those cases where the function in question is judicial or quasi-judicial. The modern cases show that this Court will intervene more widely than in the past. Even where the function is said to be administrative, the Court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness . . . For my part, I am not prepared to be deterred by the absence of precedent if in principle the case is one in which the Court should interfere. The long legal history of the former prerogative writs and of their modern counterparts, the orders of prohibition, mandamus and certiorari, shows that their application has always been flexible as the need for this use in differing social conditions down the centuries has changed."

There is no doubt that the Courts can and have intervened to secure fairness. Mandamus lies to compel the proper performance of a statutory duty. What is questioned is the use of prohibition to achieve this result.

A case which tends to emphasise the importance of the distinctions hitherto made is *Bates v Lord Hailsham* [1972] 1 WLR 1373 where the plaintiff claimed a declaration and an injunction to restrain the members of a committee from making an order under the Solicitors Act 1957, s 56. Reliance was placed on the *Liverpool Corporation* case but it was distinguished by Megarry J, who said (ibid; p 1378):

"In the present case, the committee in question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated."

At this point a summary may be useful. Apart from the *Liverpool Corporation* case where prohibition was granted for failure to act fairly, the decisions support the following propositions:

(1) If the function of the statutory tribunal is judicial, and this is not to be presumed(*q*), the principles of natural justice, which include the nemo judex and audi alteram partem rules, must be satisfied. The content of these principles in the sense of their application in the individual case, will vary according to the circumstances of each case, as was recognised by Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118. Certiorari or prohibition and mandamus will be available in respect of such tribunals.

(2) If the function is described as administrative or executive, there is an obligation to be fair and this will almost always be implied by the Courts(*r*). Mandamus will be available to compel performance of the statutory obligation.

(3) If the function is legislative, no obligation to act judicially or fairly arises.

This brings us to the New Zealand cases, the most important of which is *Furnell v Whangarei High Schools Board* [1973] 1 All ER 400. There was judicial disagreement concerning the effect of the legislation. The majority in the Privy Council saw the legislation as a complete code which was not unfair and held that neither the sub-committee nor the Board had acted unfairly. The minority did not accept that the legislation was complete and being of the view that the function of the sub-committee was at least quasi-judicial would have required that Mr Furnell be given "a fair opportunity of commenting or contradicting what is said against him" (at p 421).

Only the reasoning of the majority will be examined. Having found that the legislation was a code, which it was not their function to redraft, the majority went on to say, presumably *obiter* (at p 412):

"It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules. (See the speeches in *Wiseman v Borneman* [1971] AC 297). Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. *Nor is it a*

(*p*) Roskill LJ appears to have seen this difficulty. At pp 309, 595, he said: "It seems to me that if any redress can be given, it must be redress by way of an order of prohibition. The applicants have not sought relief, as perhaps they might have done, by way of injunction and declaration.

(*q*) Lord Pearson in *Pearlberg v Varty* [1972] 1 WLR 534, 547; [1972] 2 All ER 6, 17, cited supra.

(*r*) Lord Pearson in *Pearlberg v Varty* [1972] 1 WLR 534, 547; [1972] 2 All ER 6, 17, cited supra.

leaven to be associated only with judicial or quasi-judicial occasions. [Emphasis added.] But as was pointed out by Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration."

The most difficult passage is that to which emphasis has been added. If it is understood to mean that natural justice *includes* fairness and that compliance with the latter is not confined to those with judicial functions, this is entirely consistent with earlier decisions. If it means that administrative bodies may at some stage of their proceedings be obliged to act judicially (and fairly) this has long been recognised as being the case. The authorities relied on were *R v Gaming Board for Great Britain, ex parte Benaim, Re H K, Re Pergamon Press Ltd, Wiseman v Borneman* and *Pearlberg v Varty,* which have already been discussed. It is suggested that those decisions do not support the proposition that the principles of natural justice are identical with the obligation of fairness. They suggest that fairness involves compliance with only part of those principles and that the part which applies will vary according to the circumstances of the case.

The decision in *Furnell* was considered by White J in *Smit v Egg Marketing Authority*(*s*) where certiorari was granted. His Honour adopted the remarks of the majority already cited and went on to say that:

> ". . . the type of proceedings need not be defined as 'administrative', 'judicial' or 'quasi-judicial' in order to decide whether the rules of natural justice apply. The doctrine may apply whatever the nature of the inquiry by a statutory body subject to any limitations and rules imposed by the statute. Further illustrations of the modern application of natural justice are to be found in *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589(*t*) and *South Otago Hospital Board v Nurses and Midwives Board and Others* [1972] NZLR 828, 835(*u*) . . . I approach the question therefore on the basis that the Authority was obliged to act fairly in giving effect to the powers with which it was entrusted by the regulation."

The judgment is ambiguous in relation to the question being examined here. While there is a finding that the Authority was required to act fairly, there is also a reference to the nature of the Authority's functions and the "flexible rules of natural justice". While it is clear that the Court was entitled to intervene in *Smit,* the question remains whether it would not have been consistent with earlier authority to issue mandamus only(*v*), rather than certiorari which requires that the function be judicial.

A similar observation can be made concerning the judgment of Wild CJ in *Bank v Ashe and Others*(*w*), where prohibition was granted to restrain the members of the Lower Hutt City Council from hearing objections to the stopping of a street. Though the Chief Justice held that the councillors were disqualified by reason of bias on the test stated by Turner J in *Turner v Allison* [1971] NZLR 833, 848, he did not expressly decide that the function of the councillors was judicial. He seemed to justify intervention on the basis that fairness was the appropriate standard to apply. Because the test applied in *Turner v Allison* is the test for bias by a judicial officer, it might be inferred that the function was judicial and that the nemo judex principle would be violated if the councillors proceeded.

Two other cases call for brief mention. An application under the Judicature Amendment Act 1972 was made in *Pagliari v Attorney-General*(*x*) where it was argued that the Minister of Internal Affairs was obliged to comply with natural justice in making a deportation order. Though Quilliam J was disposed to accept that recent cases had blurred the distinction between judicial and administrative "decisions"(*y*), he said that the intention of the

(*s*) Supreme Court, Wellington, 21 March 1973, unreported.

(*t*) With respect, that case is concerned not so much with the application of natural justice, but with the power to intervene if unfairness has occurred.

(*u*) In that case a breach of natural justice was established and certiorari was granted to quash the decision of the Board.

(*v*) This assumes the correctness of the reasoning in *Yukict v Sinclair* [1961] NZLR 752 and *R v Paddington Valuation Officer, ex parte Peachey Corporation* [1966] 1 QB 380.

(*w*) Supreme Court, Wellington, 15 August 1973, unreported.

(*x*) [1974] 1 NZLR 86.

(*y*) But it is not the "decision" which is important, it is the process by which the decision is reached which is significant. The Privy Council in *Nakkuda Ali v Jayaratne* [1951] AC 66, 75 declared: ". . . the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted.

Legislation in the Aliens Act 1948, s 14, was

> "to confer on the Minister a wide discretion and it would be contrary to the nature of the legislation to fetter the Minister's discretion by imposing . . . the audi alteram partem principle . . . "

Hence, whether any or all of the principles of natural justice apply is a question of legislative intention. To the same effect are the remarks of McCarthy J in *Rich v Christchurch Girls' High School Board of Governors (No 1)*(*z*) when he stated (at p 9) in relation to the exclusion of the nemo judex rule:

> "There can be no doubt, as a matter of law, that Parliament can exclude any particular rule of natural justice by express words or patent necessary implications . . . But this does not mean that all of the principles of natural justice are excluded."

The position, therefore, seems to be this. It is a question of legislative intent whether all or some of the principles of natural justice apply. When all of the principles or most of them apply the function of the tribunal is described as judicial. In cases when only some of the principles apply, it may be appropriate to speak of an obligation to be fair. But the distinction between being obliged to act judicially and being obliged merely to be fair should be maintained, quite apart from any consequence there may be as to the remedy available. There is reasonable certainty as to what the principles of natural justice contain and what a tribunal must do to satisfy them. There is, on the basis of the cases here discussed, much less certainty as to the content of the obligation to be fair. In each case it has been something less than what is demanded of a tribunal with a judicial function. If these two separate obligations become identified, there will be less certainty as to the obligations, procedural and otherwise. demanded of a particular tribunal. Until the Court decides in each case that there has been a denial of natural justice (or fairness) in the particular circumstances, neither the tribunal not the parties will know what is required. It is therefore strongly suggested that we should not throw overboard in favour of a general but variable obligation of fairness, the reasonably clear obligations comprehended within the principles of natural justice, which have hitherto been confined to those tribunals with a judicial function. The distinction argued for here is in fact maintained in *Halsbury's Laws of England* where it is stated(*a*) that the obligation to act fairly "can generally be interpreted as meaning a duty to observe *certain aspects* [emphasis added] of the rules of natural justice".

DR J F NORTHEY

(*z*) [1974] 1 NZLR 1.
(*a*) (4th ed) para 66.

REGULATIONS

Regulations Gazetted 21 to 28 February 1974 are as follows:

Building Societies (Trustees' Deposits) Order 1970, Amendment No 3 (SR 1974/36)
Christchurch Secondary Schools Regulations 1966, Amendment No 3 (SR 1974/27)
Companies Regulations 1956, Amendment No 3 (SR 1974/29)
Customs Tariff (Carboxylic Acids) Amendment Order 1974 (SR 1974/30)
Customs Tariff (Prepared Glazings And The Like) Amendment Order 1974 (SR 1974/37)
Drug Tariff 1970, Amendment No 12 (SR 1974/42)
Hawksbury Lagoon Wildlife Refuge Order 1974 (SR 1974/28)
Milk Producer and Other Prices Notice 1968, Amendment No 16 (SR 1974/44)
Minimum Wage Order 1974 (SR 1974/31)
Private Savings Banks (Government Securities) Order 1974 (SR 1974/38)
Revocation of Order in Council Relating to the Prohibition of the Importation of Wool-Packs and Wool-Pockets (SR 1974/39)
Social Security (Pharmaceutical Benefits) Regulations 1965, Amendment No 3 (SR 1974/40)
State Services Salary Order 1974 (SR 1974/32)
State Services Salary Order (No 2) 1974 (SR 1974/33)
State Services Salary Order (No 3) 1974 (SR 1974/34)
Trustee Savings Banks (Government Securities) Order 1974 (SR 1974/41)
University Bursaries Regulations 1971, Amendment No 4 (SR 1974/35)
Weights and Measures Metric Packages Notice 1974 (SR 1974/43)

MAGISTRATE APPOINTED

Mr Patrick Maurice Browne of Auckland has been appointed a Stipendiary Magistrate.

Mr Browne, who is 52 years of age, was born and educated in Greymouth, where he attended the Marist Brothers' High School. He has for the last 17 years been a partner in the firm of Copeland, Browne and Fitzpatrick, Otahuhu. Mr Browne is married with six children. He takes an active interest in local church affairs. Mr Browne has taken up his duties at Auckland.

DISCRETION AS TO SECURITY FOR COSTS

There have been three interesting decisions lately on the construction and effect of s 467 of the Companies Act. Two of these are Supreme Court decisions (*G Richardson Ltd (In liquidation) v Tuakau Sand Ltd* in which the judgment of O'Regan J was delivered on 16 August 1973 and *Belfast Caravans Ltd (In liquidation) v Ashby Bergh & Co Ltd* in which the judgment of Roper J was delivered on 8 November 1973); the third is the English Court of Appeal's decision in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 WLR 632.

The general position on a defendant's right to have security for his costs is to be found in RR 577-580 of the Code of Civil Procedure(*a*) and in a passage in the judgment of Williams J in *Wilkinson v Johnston* (1889) 7 NZLR 369 (*b*). In addition the Courts have a power to make an order for security for costs against a plaintiff limited company under s 467(*c*) of the Companies Act. The section provides:

> "Where a limited company is plaintiff in any action or other legal proceeding, any Court or Judge having jurisdiction in the matter *may*, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require *sufficient security* to be given for those costs, and may stay all proceedings until the security is given". (Emphasis added.)

This section has consistently given rise to two problems: (i) What is the meaning of the word "may" in the section? (ii) If a Court does decide to grant security to the defendant, by what principles should it be guided in assessing what is a sufficient security? The three cases that from the subject-matter of this note consider these two problems.

The meaning of the word "may"

The "old" law was that the word "may" was to be construed as "must" when the plaintiff company was in liquidation or in severe financial difficulties. The discretion conferred on the Court was to be exercised "in one way". The best known authorities(*d*) in support of this construction are the *Northampton Coal, Iron and Waggon Company v Midland Wagon Company* (1878) 7 Ch D 500, especially at p 503 per Sir George Jessell MR and *Pure Spirit Company v Fowler* (1890) 25 QBD 235, especially at p 237 per Denman J, and at p 238 per Charles J.

In *Pure Spirit* Denman J said:

> "I think . . . that the Court is bound to order security for costs where the company is in liquidation and there is no evidence to rebut the inference that the assets will be insufficient to pay the defendant's costs if he succeeds."

The reason for this strained construction of the word "may" is to be found in James LJ's judgment in *Northampton Coal* (supra) at pp 503-4:

> "But I consider security for costs to be ex debito justitiae, and it is a very important matter whether a suitor is likely, if successful, to be able to obtain payment of his costs."

There are arguments the other way too, of course. The effect of James LJ's view is to force the limited company to provide security or have its action stayed. This entails the possibility of a meritorious plaintiff being denied its rights at law because of its impecuniosity. Indeed in *Belfast Caravans Ltd (In liquidation) v Ashby Bergh & Co Ltd* the defendant did not file any defence lest it was thought to have

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(*a*) See *Sim's Practice and Procedure* (11th ed) Vol I, pp 375-8.

(*b*) This was a case in which his Honour had to decide whether an undischarged bankrupt should provide security for costs. At p 373 his Honour said: "The Supreme Court Rules certainly do not specify that security for costs should be given. A particular class of cases is mentioned in which security may be claimed, but there are no other provisions in the Rules. I do not, however, think that the Court is thereby prevented from exercising its general jurisdiction, and I am of opinion that where any special circumstances arise which make it right that security should be given, the Court can order security to be given. There is nothing in the Code about undischarged bankrupts suing, and it cannot be said, therefore, that the Code is an exhaustive exposition of every case which may arise."

(*c*) Section 447 of the UK Companies Act 1948: this is the corresponding English and Scottish section. For all practical purposes it is identical with the NZ Act.

(*d*) See also *City of Moscow Gas Co v International Financial Society* (1872) LR 7 Ch App 225 at 229 and *Freehold Land & Brickmaking Co v Spargo* (1868) WN 94.

waived its right to security. Its only step in the action was an application for security. Thus a defendant can, if successful in its application, obtain a stay and deprive a meritorious plaintiff of its rights without entering any defence at all(*e*).

The "new" law is that the word "may" means what it says: the Court has a discretion which it will exercise having regard to all the circumstances of the case. It ought not to be hampered by any special rules. This construction was first laid down in New Zealand as early as 1949 in *Jollands Ltd v Whitley* [1949] NZLR 290: despite the fact that both *Northampton Coal* and *Pure Spirit* were cited to the Court (see p 291, arguendo), Fair J giving the judgment of the Court held that [s 467](*f*) gave the Courts "an entire and absolute discretion" as to whether or not any security should be entered. His Honour rejected the defendant's argument that it was mandatory to order security where the Court was satisfied that there was reason to believe that the company would be unable to pay the costs of the defendants if successful in their defence. His Honour went on:

> "With regard to this, we may say that this seems contrary to the language used, and to the general principle of law that persons should not be deterred by lack of means from obtaining justice through the Courts, and implies a restriction upon the powers of the Courts that does not exist in respect of its exercise of a similar jurisdiction in ordering security to be given by foreign plaintiffs. The word 'may' is normally directory and leaves a wide discretion."

The English position was left unclear(*g*) until the Court of Appeal's decision in *Sir Lindsay Parkinson & Co v Triplan Ltd* [1973] 2 WLR 632. The respondent, Triplan Ltd, as plaintiff, claimed £25,900 in an action for a quantum meruit for work done and materials supplied, alternatively as damages for breach of contract. It was a small company and had agreed with Parkinson to supply the labour necessary for the execution of a contract in which Parkinson was the main contractor. One of the points taken on behalf of Parkinson was that, this being a case in which the plaintiffs were in financial difficulties, the Court must order security. This argument did not commend itself to Mars-Jones J at first instance who thought that the word "may" in [s 467] of the Companies Act [1955](*h*) gave the Court a real discretion. Parkinson appealed to the Court of Appeal on the ground that the trial Judge erred "in wrongly holding himself able to distinguish or freely to ignore the Court of Appeal's decision in *Northampton Coal, Iron and Waggon Co v Midland Waggon Co* (1878) 7 Ch D 500 as explained by Denman J in *Pure Spirit Co v Fowler* (1890) 25 QBD 235". In the Court of Appeal, Parkinson appeared to have conceded that the word "may" imported a real discretion(*i*). Lord Denning, however, thought the point so important that he had to deal with it: there had been some misapprehension on the matter in the past and the sooner it was put right the better. His view was that the Courts had a discretion which it would exercise considering all the circumstances of the case(*j*). Lawton LJ agreed with Lord Denning's formulation(*k*) and said:

> "I agree with Lord Denning MR that the effect of s 447 is that once it is established by credible evidence that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence, the Court has a discretion, and that discretion ought not to be hampered by any special rules or

(*e*) Whether or not the defendant's fears were justified, however, is an open question. The position on waiver of one's right to security by entering a defence against a plaintiff company seems to be governed by *Southland Frozen Meat and Produce Export Co v Nelson Bros* (1895) 13 NZLR 704. Williams J there held, following *Washoe Mining Co v Ferguson* (1866) LR 2 Eq 371, that in the case of a plaintiff limited company suing a defendant, the defendant did not waive his right to security by filing a defence. Thus even under the old practice of the Courts of Chancery (which was adopted in New Zealand—see *Ferrier v Bartleman* (1893) 11 NZLR 319) a defendant did not waive his right to security merely by filing his answer to the plaintiff's claim if the plaintiff was a limited company. Furthermore, even the old rule laid down in *Ferrier v Bartleman* which governed plaintiffs other than limited companies has been abrogated by R 577A, Code of Civil Procedure; see Sim, pp 376-7.

(*f*) The case concerned the equivalent of s 467 in the Companies Act 1933, s 380.

(*g*) In an unreported decision in *Acrobin Ltd v Kartsu Tenants Association,* Plowman J came to the same conclusion as Fair and Cornish JJ in *Jollands Ltd v Whitley* (supra)—viz that the word "may" gave the trial Judge a true discretion. See a note in (1966) 110 Sol Jo 199 by J H Hames, QC.

(*h*) Section 447, Companies Act 1948 (UK).

(*i*) See Lord Denning's judgment [1973] 2 WLR 632 at 646 D.

(*j*) Ibid, p 646 E.

(*k*) Cairns LJ had put this matter slightly differently: see [1973] 2 WLR at pp 647-8; but Lawton LJ was careful to disagree with Lord Denning's formulation.

FIRST FIJI LAW CONVENTION
8 - 10 JULY 1974
PROGRAMME

Sunday, 7 July	
pm	Registration of Delegates at Suva Town Hall.
Evening	Free for private entertainment by arranged hosts in Suva.
Monday, 8 July	
10.00 am to approx	Opening Ceremony at Suva Town Hall by the Prime Minister, Ratu Sir Kamisese Mara.
11.30 am	Speeches of welcome, etc.
2.00 pm to 3.15 pm	First Business Session (Town Hall)—"The Court of Appeal for the South Pacific Region". Speaker: Dr Martin Finlay, QC, Attorney-General of New Zealand. Commentator: Mr S M Koya.
3.30 pm to 4.30 pm	Second Business Session (Town Hall)—"Simplifying the Laws of Divorce". Speaker: Mr Ray Watson, QC, of Sydney, Australia. Commentator: Mr F M K Sherani.
6.30 pm to 8.30 pm	Cocktail Party at Lower Town Hall.
Tuesday, 9 July	
9.00 am to 10.30 am	Third Business Session (Town Hall)—"Industrial Law, Conciliation and Arbitration Courts". Speaker: Mr Justice Blair of New Zealand. Commentator: Mr K C Ramrakha.
10.45 am to 12.15 pm	Fourth Business Session (Town Hall)—"Insurance Law in relation to Motor Vehicles in the South Pacific". Speaker: Mr Douglas Newman, QC, of Adelaide, Australia. Commentator: Mr A D Leys.
2.00 pm to 4.30 pm	Sports Afternoon. Competitions in golf, bowls and tennis. (Facilities for squash, billiards and snooker also available.)
8.30 pm onwards	*Island Night at Isa Lei Hotel.* Dancing, floor show.
Wednesday, 10 July	
9.00 am to 10.30 am	Fifth Business Session (Town Hall)—"Law Reform in Developing Countries". Speaker: Professor J F Northey, Dean of Law, University of Auckland. Commentator: Mr John Falvey, Attorney-General.
10.45 am to 12.15 pm	Final Business Session—"Human Rights". Speaker: Senator Lionel Murphy, Attorney-General of Australia. Commentator: Dr Colin Aikman, Vice-Chancellor, University of the South Pacific.
4.30 pm	Afternoon Tea with His Excellency the Governor-General, Ratu Sir George Cakobau at Government House; Beating of Retreat by Fiji Military Forces personnel.
8.00 pm	Banquet and Closing Ceremonies. Soqosoqo Vakamarama at Laucala Bay Hangar.

The closing date for registration is 30 April 1974. However, late applications will be received till 31 May, subject to an extra processing fee of $5.

Registration form overleaf.

FIRST FIJI LAW CONVENTION

SUVA. 5th-10th July 1974

CONVENOR
FAIZ SHERANI

ADDRESS
P.O. BOX 1004, SUVA, FIJI
CONVENTION OFFICE:
297 VICTORIA PARADE, SUVA.
PHONE 22625

REGISTRATION FORM:

This form must be received by the Organising Secretary not later than the 30th April, 1974, together with the appropriate fee.

Title **Surname** **Given Names**

.....

Address .....

.....

Accompanied by (a) Wife.
(b) Other.

My Association or Society is .....

( ) Judge.
( ) Queens Counsel.
( ) Barrister.
( ) Solicitor in Practice.
( ) Solicitor with Corporation.
( ) Other.

FEES NOW PAYABLE.

REGISTRATION Double @ F$60-00
Single @ F$50-00

Programme Tour/Function @
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" "
" "
" "
" "

Cheque enclosed _____

Please make cheques payable to the First Fiji Law Convention, and cross not negotiable.

I desire you to arrange in Suva Hotel Accommodation for:

(a) Myself from ..... a.m./p.m. ..... July 1974 to ..... a.m./p.m. ..... July 1974.
(b) Wife from ..... a.m./p.m. ..... July 1974 to ..... a.m./p.m. ..... July 1974.
(c) Other from ..... a.m./p.m. ..... July 1974 to ..... a.m./p.m. ..... July 1974.

I will require. ( ) Twin Rooms @.....
( ) Double Rooms @.....
( ) Single Rooms @.....

Tariff subject to availability.

I am arranging my own accommodation and my address in Suva will be:

.....

I desire you to make the following Travel Bookings for me.

FROM ...../...../74 a.m./p.m. **TO** ...../...../74 a.m./p.m.
( ) First Class. ( ) First Class.
( ) Economy Class. ( ) Economy Class.
( ) **I wish to make my own travel arrangements.**

Signed.....

regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the Court will exercise having regard to all the circumstances(*l*) of the case."

The position on the construction of the word "may" in s 467 of the Companies Act both in England and New Zealand is accordingly now the same(*m*). And the recent decision of O'Regan J in *G Richardson Ltd (In liquidation) v Tuakau Sand Ltd* would appear to support this view. This decision is an excellent example of a situation where adherence to the old law would work an injustice. The plaintiff company which was in liquidation brought an action under s 45 of the Wages Protection and Contractors' Liens Act 1939 alleging that the defendant vexatiously and without reasonable grounds served notices of charge on three persons indebted to it. These acts caused it to be financially embarrassed and to be put out of business. The defendant moved for an order for security for costs which was opposed by the plaintiff. His Honour was not in a position to find in fact that the plaintiff's insolvency was brought about by the action of the defendant, nor even to find that there was any triable issue. But if he exercised his discretion in favour of the defendant, a denial of justice might occur.

> "It is clear, however, that if I require the plaintiff to give security it will not be able to comply with the order and if I stay the action till such security is given, the defendant will be quit of the claim."

Relying expressly on the English Court of Appeal's construction of s 467, his Honour held that he had a discretion in the matter and that he would not exercise it in favour of the defendant. He therefore made no order.

The principles by which a Court is to be guided in assessing what is "sufficient security"

This question arose recently in *Belfast Caravans Ltd (In liquidation) v Ashby Bergh.* This was an action for breach of contract whereby the plaintiff company claimed $108,370 from the defendant. The basis of the plaintiff's claim was that in breach of s 16 (1) and (b) of the Sale of Goods Act 1908, the defendant had supplied the plaintiff with goods, which were neither reasonably fit for the purpose for which they were required, nor of merchantable quality. The defendant company, which had not filed any defence, lest it be taken to waive its rights to security, moved for an order for security for costs under s 467 in the sum of $6,500. The plaintiff appears not to have opposed the defendant's right to security(*n*), but he did oppose the quantum of security to which they were entitled. The only evidence before his Honour was the plaintiff's statement of claim and an affidavit filed in support of the defendant's application by a solicitor. The issue before his Honour therefore was by what principles was the Court to be guided in the exercise of its discretion in making an order under s 467. His Honour referred to three authorities: *Sunday Times Newspapers Co Ltd v McIntosh & Others* (1933) 33 SR (NSW) 371 at 373 per Long Innes J; *Mokau Timber Co v Berry* (1908) 11 GLR 212 per Cooper J; *Jollands Ltd v Whitley & Others* [1949] NZLR 290. But his Honour did not consider these authorities to be of much help. He proceeded to take the following further matters into consideration in order to determine the amount of security:

(*l*) As to what circumstances might be proper to take into account, see Lord Denning [1973] 2 WLR 646, 646 E: whether (1) the company's claim is bona fide and not a sham; (2) whether the company has a reasonably good prospect of success; (3) whether there is any admission by the defendants (on the pleadings or elsewhere) that the money is due; (4) whether the application was being used oppressively so as to stifle a genuine claim; (5) whether the plaintiff's impecuniosity had been caused or contributed to by the defendants.

(*m*) A further English decision on s [467] is *John Bishop Ltd v National Union Bank Ltd* [1973] 1 All ER 707. There Plowman J ordered a company in liquidation to give security for costs even though it was only one of two co-plaintiffs. His Lordship distinguished *M'Connell & Vartlett v Johnston* (1801) 1 East 431, *Sykes v Sykes* (1869) LR 4 CP 645 and *D'Hormusgee & Co and Isaacs & Co v Grey* (1882) 10 QBD 13 which had suggested that where there were co-plaintiffs resident in the jurisdiction no order would be made. The grounds for Plowman J's distinction were: (1) s 467 gave him a total discretion and none of the cases concerned s 467 or its equivalent: [1973] 1 All ER 707 at 711 b; (2) the old cases were all cases where there was a real overlap between the co-plaintiff's claim. Here there was an overlap which was "comparatively small": [1973] 1 All ER 707, at 710 h.

(*n*) This is rather surprising in view of *Parkinson v Triplan* (supra), *Jollands v Whitley* (supra) and *G. Richardson Ltd v Tuakau Sand Ltd.* In his Honour's judgment the reason given was that since the plaintiff was in liquidation, the authorities supported the view that in such a case a defendant is entitled to security *as of right.* The authorities cited were *Northampton Coal, Iron & Waggon Co v Midland Waggon Co* (1878) 7 Ch D 500 at 503 and *Pure Spirit Co v Fowler* (1890) 25 QBD 235 at 236. This is an interpretation of the section which clearly cannot be supported as the law stands at present.

(1) That the plaintiff company was in the hands of an experienced and responsible liquidator.

(2) That there was no good reason to determine the matter on the basis that the plaintiff's claim would fail completely, nor that it would even come up for a hearing; and if it did, that it would go to the length of time that the defendant envisaged(*o*).

Having done so, his Honour ordered that the defendant should have security for costs in the sum of $2,500 with leave to apply for further security if circumstances should warrant it.

From the authorities cited by his Honour and from his Honour's judgment itself, the following principles emerge to guide the Court in construing the words "sufficient security":

(1) The Courts must have regard to the probable cost to which the defendant will be put so far as can be ascertained. In the absence of any information the Court should consider the nature of the suit and fix an amount which will be adequate for the services rendered(*p*).

(2) The power to award security necessarily involves the lesser power of ordering less than the whole amount of security necessary to indemnify the defendants against costs incurred(*q*).

(3) The amount of security should not be illusory or oppressive—not too little nor too much(*r*). The Court should take all the circumstances(*s*) into account, including the chance of the case collapsing(*t*).

Summary

The recent cases show that:

(1) The word "may" in s 467 of the Companies Act gives the Court a real discretion to be exercised according to all the circumstances of the case. In particular the defendant is not entitled to security for costs as of right merely because the plaintiff company is in liquidation.

(2) The question of assessment of the quantum is also entirely discretionary: but a Court may be guided by the three principles listed above in making its assessment.

FRANCIS DAWSON

(*o*) These considerations have been taken into account in other cases: see *Dominion Brewery Ltd v Foster* (1897) 77 LT 507 at 508 per Lindley MR and *Imperial Bank of China, India and Japan v Bank of Hindustan, China and Japan* (1866) 1 Ch App 437.

(*p*) *Sunday Times Newspapers Co Ltd v McIntosh & Others* (supra).

(*q*) *Jollands v Whitley* (supra).

(*r*) *Mokau Timber Ltd v Berry* (supra).

(*s*) Eg, the experience of the liquidator as in *Belfast Caravans Ltd (In Liquidation) v Ashby Bergh.* In *Sir Lindsay Parkinson v Triplan* (supra) the Court of Appeal took into account an open offer made by the defendants to settle the matter. The rationale for so doing is to be found in the *Supreme Court Practice* (1973), p 377, which reads: "Again, if he admits so much of the claim as would be equal to the amount for which security would have been ordered, the Court may refuse him security, for he can secure himself by paying the admitted amount into Court."

(*t*) *Dominion Brewery Ltd v Berry* (supra).

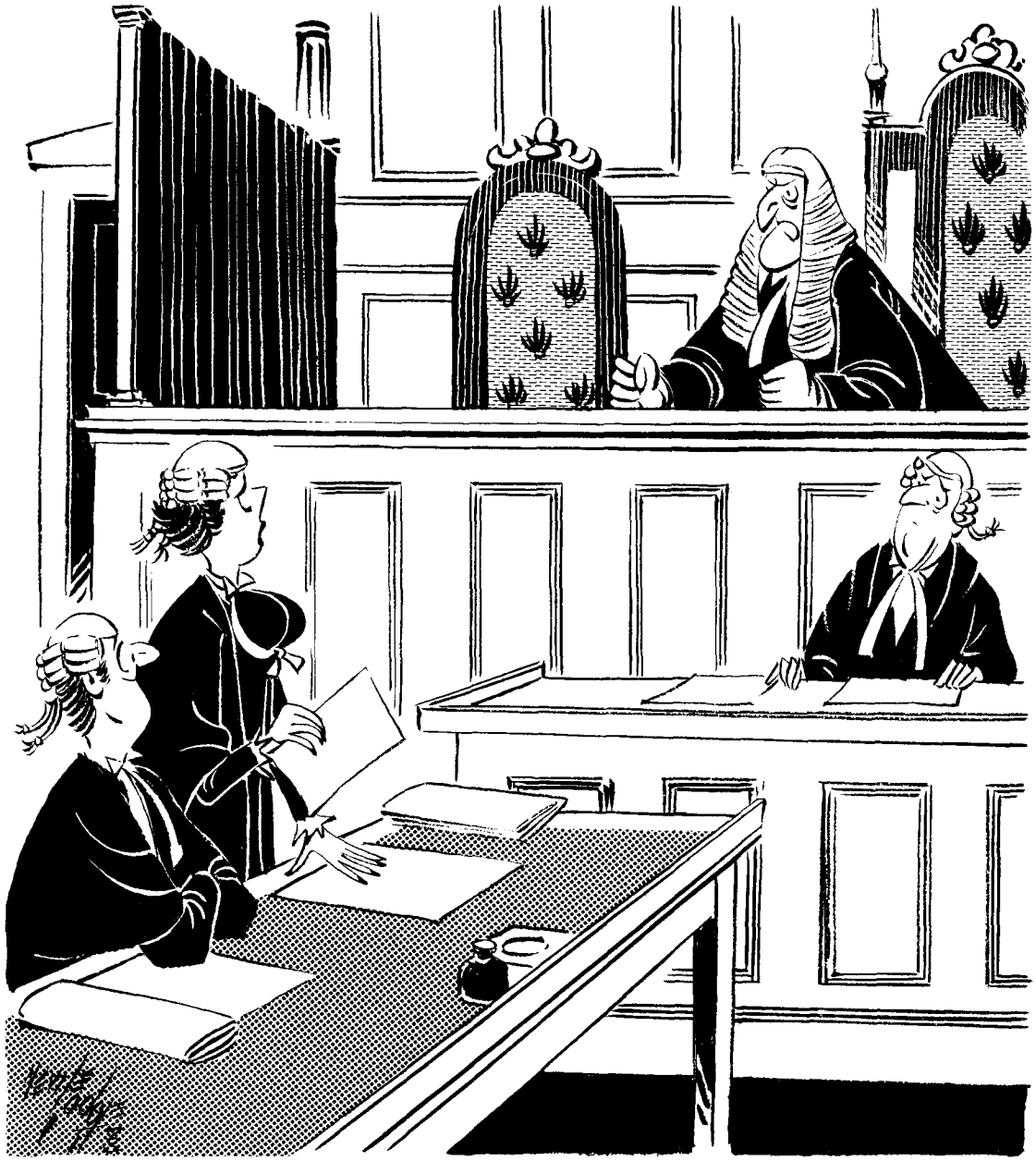
Knee-caps and Animators—It was quite by accident last week that I came across the Revocation of Customs Import Prohibiiton Orders Order Serial Number 1973/247. This provided inter alia, that the orders made in 1916, 1925 and 1931 respectively prohibiting the importation of Kugelman's Herbal Remedies, Ashton Bennett Electro-magnetic knee-caps and Dr Joslin's Etheric Animators have been repealed. Had I not stumbled upon this I would not have been able to say "I knew this would happen" when the home market is flooded with the accumulated overseas stocks of these articles although, I confess that I still don't know what an Etheric Animator is. I suppose it's something to animate your etheric. Fascinating things one learns reading regulations. I propose to call the attention of Miss Germaine Greer to Amendment No 12 to the Fresh Water Fisheries Regulations 1951. This amendment provides that the fee for men over 17 for a fishing licence in the North Island is $6 for the whole season, when for women over 17 it is $3. This blatant discrimination is continued in licences for the South Island and for half season, monthly, weekly, daily and single river or single water licences.—Mr P G Hillyer QC, at a Bar Dinner for Mr Justice Chilwell.

Soliciting judicial appointments?—"Lord Goodman referred to the fact that solicitors were eligible for the paid employment of chairmen and deputy chairmen of Quarter Sessions. I wonder if your Lordships really would have gathered . . . that that power has existed for thirty years. And how many people do you think have been appointed in that time? Two.

"The fact of the matter . . . is that they are far too prosperous . . . if a senior partner in a first-class solicitors' office, who is the head of a really big business with, I suppose, an invested capital of £500,000, is so full of public zeal that he wants to become a County Court Judge or its equivalent, then all I can say is that he needs his head examined." Lord Hailsham.

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING . . .": 5

Drafted by Scilicet *Engrossed by Neville Lodge*



"While I am not opposed to Women's Lib, I do *not* believe that weepers were designed for that purpose!"

LIFE IN THE LAW REPORTS

Dr Richard Lawson writes again from Britain

Mr Justice Willes had a rich fund of memories. In the celebrated *British Columbia v Nettleship,* he recalled the case of a blacksmith being sued upon a breach of contract. He had shod a horse with lack of diligence: the rider had thus been late for his wedding to an heiress; had duly arrived only to find that his fickle bride had wed another. Later the same Judge recalled the chemist who had sold a small tin of ointment for use on sheep. His potion decimated a flock. It certainly was hard, sighed this sentimental man, "that a man who would only make a profit of a few pence should be responsible for so heavy a loss". But he was so held (£2,000 in all), as was indeed the blacksmith, though the extent of his liability has not been handed down to us.

These are marvellous cases, and they allow us a rich feast of imaginings. Did the bride marry the best man? Where was her tardy groom riding from? What had he been doing, and with whom? And what was it that saw off two thousand quids worth of mutton?

But what about that surly ferryman recalled by Tindal CJ in *Walton v Fothergill*? He had declined transport to one soon to be interviewed for an appointment, which the latter then failed to obtain. What had caused this unpleasantness? Had the traveller been a "toff" who had offended our stout yeoman? Was the weather bad, was the boat leaking, was the ferryman's wife in labour? We know nothing, but that the traveller's loss was dismissed as "too remote".

These cases should be the stuff of law. More like this and students would be pounding on the doors for admission. Then there would be no problem of recruiting for the profession. But look at what we get served up these days. *Rookes v Barnard* was a miserable labour relations dispute. *Suisse Atlantique* a boring demurrage case, and *Hedley Byrne* was, after all, a matter between bankers, far removed from the real world which you and I inhabit. Thumbing through the recent law reports, there is nothing better than some unutterable nonsense about stamp duty, town and country planning and the like. The headnotes are longer than the judgments, which is as good an indication as any of a pretty dull affair.

I would not like it to be thought that New Zealand could not rival the remembrances of Willes J and Tindal CJ. Consider *Cotter v Luckie,* where a stud bull was discovered to have a broken penis: a "structural defect", as Salmond J was later to call it. Quite rightly, the seller was found to be in breach of the implied condition as to conformity with description. In *Dell v Quilty,* Reed J held that a stud bull with a penis (an ineffective once, since the animal was sterile) did conform to its description "albeit the results of its exertions were negative". Consider, too, *Midgely v Quinleven* where a horse prone to attack old ladies was found not to be reasonably fit for its purpose. It was, you see, a cryptorchid; that is, its testicles had not descended, a condition likely to annoy the most urbane of animals.

Now look through the recent New Zealand Law Reports. Moneylenders, police offences, more town and country planning, and miles and miles of road traffic offences. All dull stuff, not calculated to enliven the corridors of learning.

It is plain that something must be done before all human life flees the law reports. We should, perhaps, set up some fact situations and promote full and proper litigation. For instance, a millionaire in shabby outfit, sporting an eggshell skull, could be run over; negligently, of course. Or what about that story Dudley Moore told of the death of an aunt? Her teeth fell out, a nurse slipped on them, fell out of a window, landed on an ambulance, it went out of control, drove into the boiler room and blew the hospital to bits. How about that for a causation problem! Leaves *Re Polemis* and its dismembered Arabs a long way behind.

George Orwell once wrote incisively of the decline and fall of the English murder, blaming it on the influx of cheap American films. Why the law reports are so sterile these days, I cannot say. But something must be done to halt the decline and fall of the English (and New Zealand) case.