RECENT DEVELOPMENTS IN THE LAW

Contributed by students of the Faculty of Law, University of Otago.

ADMINISTRATIVE AND CONSTITUTIONAL LAW

Mandamus

Nicholas v. *Mooney* [1968] N.Z.L.R. 226. Following the refusal of a Magistrate to convict a local authority for an offence under section 30 of the Health Act 1956, the plaintiff applied to the Supreme Court for the writs of certiorari and mandamus. Speight J. held that such a refusal was not within the powers of the Magistrate, applying the following statement from *R.* v. *Port of London Authority, ex parte Kynoch Limited* [1919] 1. K.B. 176:

> A refusal may be conveyed in one of two ways; there may be an absolute refusal in terms or conduct amounting to a refusal.

The learned Judge also applied *Yukich* v. *Sinclair* [1961] N.Z.L.R. 752 in holding that the appropriate remedy in this case was not certiorari but mandamus. Mandamus ensures that the matter will be dealt with *de novo* and another determination made.

Principles of Natural Justice

(1) *Notice of intended action:*

Nicholson v. *New Zealand Kennel Club Inc.* [1968] N.Z.L.R. 529. When a penalty imposed on a member of an incorporated club by a properly constituted trial board was increased without adequate warning to the member and without giving the member an opportunity to be heard, the increased penalty was invalid as being contrary to the principles of natural justice.

Williams v. *Crimes Compensation Tribunal* [1968] N.Z.L.R. 711. In what was the first appeal brought to the Supreme Court under the provisions of the Criminal Injuries Compensation Act 1963, North P. (sitting as a Supreme Court Judge) held that an offender found liable to repay to the Crown compensation awarded to his victim is entitled to be heard both on the question of damages and the proportion he should be called upon to refund.

(2) *Disclosure of material taken into account:*

Perpetual Trustees v. *Dunedin City* [1968] N.Z.L.R. 19. This was an action for the writs of prohibition, certiorari and injunction on the ground that the defendant did not, when exercising its statutory power to take land under the Public Works Act 1928 comply with the rules of natural justice. The Council had allowed the plaintiff no opportunity to deal with reports given to it by the City Planning Officer and City Engineer. Henry J. applied the words of Jenkins L.J. in *University of Ceylon* v. *Fernando* [1960] 1 All E.R. 631 at 637:

> . . . [Their Lordships] would observe that the question whether or not the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point.

In the present case, the learned Judge held, the Council had complied with the provisions of the Public Works Act as to information to be given to the person or body affected. The earlier decision of *Connolly* v. *Palmerston North City Corporation* [1953] N.Z.L.R. 115 dealing with analogous facts and giving a contrary decision was distinguished on the ground that it was a decision on its own facts.

[N.B. *Perpetual Trustees* decision has itself since been distinguished in *Denton* v. *Auckland City* [1969] N.Z.L.R. 256 which will be reviewed in the next number of this *Review*.]

(3) *Making of representations:*

Pett v. *Greyhound Racing Association Ltd.* [1968] 2 W.L.R. 1471. In this case an appeal against the granting of an interlocutory injunction to a dog trainer whose licence was in danger of being withdrawn by stewards of a dog tracing track was dismissed. Counsel for the appellant contended that there was no need to hold an oral hearing or give the respondent the right to be represented by counsel. Lord Denning M.R. distinguished the dictum of Viscount Haldane L.C. in *Local Government Board* v. *Arlidge* [1915] A.C. 120 at 134 where the Lord Chancellor stated:

> I do not think that the Board was bound to hear the respondent orally provided it gave him the opportunities which he actually had

by stating that this may be true in some cases, but that it depended on the nature of the inquiry.

As regards representation by counsel Lord Denning M.R. distinguished the dictum of Maugham J. in *Maclean* v. *Workers Union* [1929] 1 Ch. 602 at 621,

> before such a [domestic] tribunal counsel have no right of audience . . .

by declaring at 1476 that where a tribunal is "dealing with matters which affect a man's reputation or livelihood or any matters of serious import", a person should be allowed to be defended by counsel.

[N.B. This decision appears to have been distinguished by Lyell J. in *Pett* v. *Greyhound Racing Association Ltd.* (1969) 119 New L.J. 178, Ed.]

Error of Law on the Face of the Record

G.E.C. New Zealand Ltd. v. *Town and Country Planning Appeal Board* [1968] N.Z.L.R. 695. The plaintiff company sought a writ of certiorari on the grounds that the Board was in error in declining to make an order under section 47 (3) of Town and Country Planning Act 1953 requiring the Wellington City Council to buy land it had previously refused to allow to be developed because of future road widening. The discretion given under the Act, the court stated, had been exercised correctly and the imminence or otherwise of the change in use was given consideration. The fact that the Board endeavoured to act consistently with decisions or other applications was not an abrogation of its freedom to consider such a case on its merits and constituted no error of law.

Exercise of Discretion in Granting Relief

In *Gibson* v. *Union of Shop, Distributive and Allied Workers* [1968] 1 W.L.R. 1187, Buckley J. held that if at the time an action has commenced, the plaintiff had or might have had a good ground of complaint involving a substantial legal issue, he is not disentitled to

declaratory relief because by reason of the lapse of time between the issue of the writ and the time when the action came to trial, the relief sought was of little practical significance.

Constitutional Law

R. v. *Fineberg* (No. 2) [1968] N.Z.L.R. 443. Briefly the facts were that the defendant had been found guilty in the Supreme Court of attempted murder on a commonwealth ship on the high seas. He appealed against his conviction on the ground, inter alia, that the Court before which he was tried had no jurisdiction over him. The judgment of the Court of Appeal was delivered by Turner J. The defence counsel in the Supreme Court argued that s. 8 of the Crimes Act 1961 was *ultra vires* the General Assembly. He based his submissions upon the provisions of s. 53 of the New Zealand Constitution Act 1852 and argued that despite subsequent enlargements and amendments, the legislature was still restricted to legislating for the "peace, order and good government of New Zealand". Moller J. had rejected this argument holding that the effect of s. 3 of Statute of Westminster (as adopted in New Zealand) was no more than to make s. 53 of the Constitution Act read as if worded:

> It shall be competent to the said General Assembly . . . to make laws for the peace, order or good government of New Zealand *even though such laws have an extraterritorial operation* . . .

Unfortunately, counsel in the Court of Appeal felt himself precluded from continuing the argument because of the reasoning of the Privy Council in *Kariapper* v. *Wejesinka* [1967] 3 All E.R. 485. In these circumstances the Court of Appeal gave no decision on the point.

B. J. Slowley.

COMMERCIAL LAW

Section 15 Sale of Goods Act 1908

In *Leggett* v. *Taylor* [1965] 50 D.L.R. (2d.) 516, a decision of the British Columbia Supreme Court, Rutton J. held that a purchaser was not entitled to rescind an agreement for the sale of a power cruiser by reason of a representation that the engine was a Chrysler marine engine, when it was, in fact, an automotive engine of the specified horsepower but one converted to marine use. Rutton J. found that this was a sale by inspection—a classification not found in English and New Zealand cases—and not one by description; the purchaser here having had more than a cursory glance as where there is a sale over the counter. "Since there was no warranty of performance and there was full opportunity to inspect by the plaintiff or by anyone of his choice, the doctrine of *caveat emptor* applies, and his complaint is no ground for rescission": *ibid.* 521.

This case may be contrasted with *Beale* v. *Taylor* [1967] 1 W.L.R. 1193. On this occasion the owner advertised a car as a "Herald Convertible, white 1961, twin carbs". The buyer after visiting the vendor and seeing the car, bought it. In fact the car was only part 1961, the front half being an earlier model welded on. The rear half of the car bore the mark "1200" which was first applied to the 1961 model. It was held that the buyer was entitled to damages as the vendor was