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

selling a car of a certain description and that description was false. Whereas in *Leggett's* case the fact that the buyer had inspected the advertised cruiser had made the sale one by description, in *Beale's* case the attitude of Sellers L.J., who delivered the substantive judgment of the Court of Appeal, was that the buyer had visited the seller to see a car as advertised and he saw what was ostensibly advertised. Thus fundamentally he was selling a car of that description.

In *Beale's* case the defence raised was similar to that which was successful in *Leggett's* case. The seller stated that the sale was "of a particular car as seen, tried and approved, the [buyer] having an abundant opportunity to inspect and test the car": *ibid.* 1196. This was the very reason why Rutton J. in *Leggett's* case decided for the defendant. Sellers L.J., however, rejected this defence: "Perhaps one hundred years ago more credence might have been given to the seller's defence than is given now, but since the Sale of Goods Act, 1893, the rule *caveat emptor* has been very much modified": *ibid.* 1196.

Here then there is to be observed a wide divergence of approach—a Canadian judge applying the doctrine of *caveat emptor,* and a British judge in similar circumstances stating that the doctrine has been so much modified that it was not applicable. A New Zealand court would presumably follow the English decision but it should be noted in passing that *Leggett* v. *Taylor* is quoted with apparent approval in 1966 *Annual Survey of Commonwealth Law,* 416.

Section 16 (2) Sale of Goods Act 1908

In *Henry Kendall & Sons* v. *William Lillico & Sons Ltd and Others* [1968] 3 W.L.R. 110 the House of Lords had occasion to consider the meaning of the term "merchantable quality" as used in s. 14 (2) of the Sale of Goods Act 1893 (U.K.)—the equivalent section in New Zealand is s. 16 (2) Sale of Goods Act 1908. The facts of the case are briefly these: in 1960 a large number of young pheasants owned by the plaintiffs died from eating compounded meal which contained Brazilian ground nut extraction. The plaintiffs sued the local compounder who agreed to pay damages. The local compounder joined its suppliers, Grimsdale & Sons Ltd. and William Lillico & Sons Ltd., who in turn sued their supplier, the importers Henry Kendall & Sons and Holland Colombo Trading Society Ltd.

The majority of the House of Lords held that Grimsdale & Sons Ltd. should succeed against William Kendall & Sons Ltd. under s. 14 (1) (s. 16 (1) of our Sale of Goods Act 1908) as the purpose for which the goods were required—compounding into pig and poultry food—was a particular purpose and it was to be inferred in the circumstances that the buyer relied on the seller's skill and judgment. Grimsdale & Sons Ltd. however failed in its actions under s. 14 (2) (our s. 16 (2)) as the ground nut meal was commercially saleable under its description and was thus of merchantable quality.

All members of the House of Lords agreed that for goods to be of "merchantable quality" they must be commercially saleable under their description. They could not however agree upon the test to be applied to determine whether particular goods are or are not commercially saleable under their description.

It would appear that the purpose for which goods are required is not part of the description. "Merchantability is concerned not with purpose but with quality": per Lord Pearce at 168. Thus the fact that

Kendall knew the ground nut meal was to be resold in smaller lots to compounders, an important consideration for s. 14 (1), was ignored for the purposes of s. 14 (2).

This would seem illogical if it is considered that Lord Wright's test of merchantable quality—the test adopted by Havers J. at first instance, by the Court of Appeal, and in the House of Lords by Lord Morris of Borth-y-Gest and Lord Reid—is defined in terms of purpose. This test is: "If goods are sold under a description which they fulfil and if goods under that description are reasonably capable in ordinary use of several purposes they are of merchantable quality within s. 14 (2) of the Act if they are reasonably capable of being used for any one or more of such purposes even if unfit for use for that one of those purposes which the particular buyer intended": *Canada Atlantic Grain Export Co. Inc.* v. *Eilers* (1929) 35 Lloyds L.R. 206 at 213.

However the other three members of the House of Lords considered that Havers J. had applied the wrong test. Lord Pearce observed that the suggestion that goods are merchantable unless they are of no use for any purpose for which they would normally be used and hence would be unsaleable under that description may be misleading. His Lordship used the examples of a new carpet which happened to have a hole in it and a car which had its wing buckled. They would no doubt if their price was reduced sufficiently find a ready market but it would be wrong to say that they would necessarily be merchantable.

Lord Guest was of the same opinion and for this reason followed the test of Dixon J. in the High Court of Australia decision in *Grant* v. *Australian Knitting Mills Ltd.* (1933) 50 C.L.R. 387 at 408 where it was stated that goods are of merchantable quality if a buyer with knowledge of any defects would buy the goods "without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms".

In New Zealand a similar view had been taken by Salmond J. in *Taylor* v. *Combined Buyers* [1924] N.Z.L.R. 627 at 644:

> It is clear . . . that "merchantable" does not mean merely "saleable". Goods may be saleable yet not of merchantable quality. Few goods are so defective in quality that they cannot be disposed of at any price or for any purpose.

For there to be a breach of s. 16 (2) two conditions must exist. Firstly the goods must be bought by description from a seller who deals in goods of that description. Secondly there must be a breach of merchantable quality and according to the writer's interpretation of the majority in *Kendall* v. *Lillico* (*supra*) there is no breach of merchantable quality if the goods bought are of use for *any* purpose for which goods sold at *that* price are normally used.

R. N. Macassey.

COMPANY LAW

In the objects clause of the modern memorandum of association of a limited liability company the inclusion of two particular types of subclause has produced what has been called " . . . the progressive attenuation of the doctrine of *ultra vires* . . . " (D. V. Barker (1966) 82 L.Q.R. 463) and led to speculation as to whether the doctrine has actually ceased to have effect. The clauses in point are firstly, the type of