an action for compensatory damages that the plaintiff has a right of set-off available, and that therefore, the purchase price should be taken into account in assessing those compensatory damages. The buyer therefore received exemplary damages for the tortious seizure, and also the value of the goods seized as compensatory damages, and it remained for the seller to subsequently recover this contract price in another action.

Mercantile Agency

R. and E. Tingey and Co. Ltd. v. *John Chambers and Co. Ltd.* [1967] N.Z.L.R. 785. This case seems to indicate that by interpreting a relationship as one of apparent principal and not mercantile agency the courts may obviate many of the difficulties of mercantile agency. The case revolved around a marine engine which the owner sent to an "agent" who sold to the buyer. The buyer bought the engine without notice of the true owner's title. At first instance the learned magistrate interpreted the relationship as one of mercantile agency, and because the agent sold other than for cash, he was acting outside the ordinary course of business of a mercantile agent. However, on appeal to the Supreme Court, the learned judge took the view that there were no terms of sale arranged between the owner and agent. There was nothing therefore to preclude the agent from selling to the buyer in its own name—which it did. Gresson J. then came to the conclusion that the supposed agent was in fact an apparent principal, and the owner was therefore precluded as against the buyer from denying that it had so clothed the agent with such authority to sell as apparent principal.

In so finding the learned judge avoided deciding if the sale was within the ordinary course of business, itself a moot point, and held that as the owner had by necessary implication conferred on the agent the right to sell as apparent principal, so misleading the buyer, the owner must take the consequences, and could not deny the buyer's title.

It is interesting to note that in the 1968 volume of the *Annual Survey of Commonwealth Law*, at page 502, *Tingey's* case is cited for the proposition that there is an implied warranty for a mercantile agent to sell otherwise than for cash. However, it appears that Gresson J. decided this case without relying on this aspect; it not being necessary so to do, as the learned judge found the relevant relationship to be one of principal/buyer, not mercantile agent/buyer: see page 788 of the judgment, where the learned judge says:

> I need express no concluded opinion as to whether the agent, in selling on the basis of set-off, was acting in its ordinary course of business . . .

R. P. Harris

COMPANY LAW

The Position of the Minority

It was held by the Court of Appeal in *Black White and Grey Cabs Ltd.* v. *Fox* [1969] N.Z.L.R. 824 that where the directors are given powers by the articles of association they cannot be controlled in the exercise of these powers by the company in general meeting. An ordinary resolution intra vires the company had been passed by a majority of the members at a special general meeting. By the articles of association full

control of the company and the exercise of the powers was placed in the directors. The power that the general meeting had sought to exercise was specifically entrusted to the directors. The Court of Appeal held that the general meeting could not control the directors who were exercising the powers expressly conferred on them.

The company had argued that the action by the minority shareholders was barred by the rule in *Foss* v. *Harbottle* (1843) 2 Hare 461; 67 E.R. 189. This was rejected on the ground that as the resolution was a nullity it was incapable of ratification. North P. was further of the opinion that the rule would not apply as it concerned the rights of qualified minorities and not individual membership rights.

If in the present case the directors had passed the resolution, but with a defect in the exercise of their power then an ordinary majority of the general meeting could, it is submitted, have ratified such a resolution. The rule in *Foss* v. *Harbottle* (*supra*) would then be a bar to an action by the minority. (See the notes on *Acts of Directors.*)

Section 62 Companies Act 1955

It was held by Woodhouse J. in *Skelton* v. *South Auckland Blue Metals Ltd. (in liquidation)* [1969] N.Z.L.R. 955 that s. 62 is not merely penal but that it invalidates a security given by a company for the purchase of its own shares. The learned judge refused to follow the decision of Roxburgh J. in *Victor Battery Co. Ltd.* v. *Cunny's Ltd.* [1946] 1 Ch. 242 and accepted the interpretation put on the corresponding sections in New South Wales, Victoria and Canada.

Reduction of Capital

In *Re William Jones and Sons Ltd.*, [1969] 1 W.L.R. 147 Buckley J. was asked to confirm a reduction of capital by returning without premium the capital paid up on preference shares and cancelling the shares. Under the articles of association the preference shareholders were entitled to participate in the surplus assets on a winding up, by being repaid in full and after repayment in full of the ordinary shares to participate rateably with those shares in any surplus assets up to £1 5s on each preference share.

Buckley J. was referred to the decision of the House of Lords in *Scottish Insurance Corporation Ltd.* v. *Wilson and Clyde Coal Co. Ltd.* [1949] A.C. 462. The learned judge stated that in that case the company had ceased trading and a winding up was expected at any moment. But here there was no prospect of a winding up. Buckley J. was reinforced in his view by the fact that the preference shares were selling below par so that by a reduction the preference shareholders would receive more than if they were to sell the shares. The Court thus held the reduction to be fair and equitable to the preference shareholders. An order was made accordingly.

Acts of Directors

In *Bamford* v. *Bamford* [1969] 2 W.L.R. 1109 the Court of Appeal was asked to consider the validity of a resolution passed by the majority of shareholders in a company which purported to ratify an allotment of shares by the company's directors. It was contended for the appellants that the allotment by the directors was invalid as it had been made mala

fide and further that the resolution passed by the majority of shareholders was a nullity.

The Court of Appeal held that even if the directors had shown impropriety in making the allotment, this could be, and had been waived by the majority of the votes of the shareholders at the general meeting of the company. The question of bona fides was not therefore argued at length. Harman L.J. cited Lord Russell in the well known case of *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 2 A.C. 134: "they [the directors] could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain."

Turning to the resolution passed by the majority of shareholders Harman L.J. stated at p. 1111:

> The only question is whether the allotment having been made, as one must assume, in bad faith, is voidable and can be avoided at the instance of the company, at their instance only and of no one else, because the wrong, if wrong it be, is a wrong done to the company. If that be right, the company, which had the right to recall the allotment has also the right to approve of it and forgive it; and I see no difficulty at all in supposing that the ratification by the decision of December 15 in the general meeting of the company was a perfectly good "whitewash" of that which up to that time was a voidable transaction.

M. S. McKechnie

CONTRACTS

Non est factum

In *Gallie* v. *Lee and Another* [1969] 2 W.L.R. 901, Mrs Gallie signed a deed purporting to be an assignment on the sale of her interest in a house to Lee. She signed the document without reading it, and, as Lee knew, in the belief that it was a deed of gift of the property to her nephew. The nephew witnessed the signature while holding a similar belief. Lee then mortgaged the property to a building society and Mrs Gallie, upon learning the true position, claimed that the assignment was void on the ground of *non est factum*. Judgment was entered for her at first instance.

The appeal was by the second defendants, the building society, and was unanimously allowed by the Court of Appeal, though the approaches of the different members of the court proceeded along various paths of reasoning.

Lord Denning M.R. followed a broad principle favouring a *bona fide* transferee for value and, after stating that where the plaintiff's mistaken belief was due to negligence on the part of the plaintiff then there would be liability to an innocent transferee, he held that the signature may not be avoided "when it has come into the hands of one who has in all innocence advanced money on the faith of its being his (the signatory's) document, or otherwise has relied on it as being his document': *ibid.* 913 F.

Salmon L.J. felt that a mistake as to the identity of the transferee named in the document could not be a mistake as to its character and class for the purpose of a plea of *non est factum*, and in this view he had the support of the Master of the Rolls: *ibid.* 910 E-F. Further, both