On reflection, I doubt whether either *Anchor Products v. Hedges*[32] or *Nominal Defendant v. Haslbauer*[33] can strictly be said to represent "developments" in the law. However it may be fondly hoped that there is now no further room for argument as to the effect of raising an inference of negligence from the fact of an accident either as to the burden of proof or the plaintiff's freedom to adduce evidence beyond that fact.

J. A. SAMUEL*

DURAYAPPAH v. FERNANDO[1]

New significance for the audi alteram partem rule.

"Natural justice" is a much maligned term. When used in its technical sense it is not deserving of scorn, for all it connotes is that in some circumstances decisions affecting the rights of citizens must be reached only after a fair hearing has been given. This has two components; the principle audi alteram partem must be observed, and the members of the decision-making body must not be interested or otherwise biased.[2] Three well known classes of case concern, broadly, dismissal from office, expulsion from clubs and unions and deprivation of property; and there are numerous decisions concerning the necessity for natural justice in these areas. It is not proposed to deal with them, beyond observing that the recent developments to be discussed may necessitate a degree of re-examination and re-formulation of some hitherto accepted rules.

Apart from the property, club and office cases, the question whether a fair hearing must be afforded will almost always arise concerning the exercise of power conferred by legislation, whether primary, subordinated or delegated. Generally the statute will grant some official[3] power to do something "if he is of opinion that" or "if he sees fit", and there will often be some vaguely stated qualifications

32 (1967) 40 A.L.J.R. 330.

33 (1967) 41 A.L.J.R. 1.

* *Barrister and Solicitor of the Supreme Court of Western Australia.*

1 [1967] 2 All E.R. 152. For another commentary on this case, see Wade, *Unlawful Administrative Action: Void or Voidable?*, (1967) 83 L.Q.R. 499.

2 See BENJAFIELD & WHITMORE, AUSTRALIAN ADMINISTRATIVE LAW 145 (3rd ed.).

3 If this is, e.g., a department head, the maxim *nemo debet esse judex in propria sua causa* may be impliedly excluded; often the department will be interested in the subject matter, but if this disqualified the head a power vacuum would result. The hearing requirement may well remain, however.

or criteria. Rarely indeed is any direction given as to whether the decision is to be arrived at in the inscrutable interstices of the official's mind, or thrashed out in public.

For several decades past the question whether or not the audi alteram partem principle was applicable has generally been decided by a process of statutory construction and interpretation.[4] Great importance has been placed on the classification of the power, and, unless it could be categorized as judicial, natural justice need not be done. The courts were forced to strain at many gnats and swallow numerous camels to ensure that a fair decision was reached in most cases. In *Nakkuda Ali v. Jayaratne*[5] Lord Radcliffe, speaking for the Privy Council, held that the existence of a power to affect rights, coupled with the requirement that there be "reasonable grounds", was not enough to attract the duty to act judicially, that is in accordance with the dictates of natural justice; he said there must be found in legislation some further indication that the person in whom the power is vested is to follow a quasi-judicial procedure.[6]

Durayappah v. Fernado[7] marks a point of departure from what had come to be accepted as the correct approach.

In Ceylon municipal councils are constituted under the Municipal Councils Ordinance and are corporations with perpetual succession, having power to own property and charged with the administration of matters relating to public health, public utility services, public thoroughfares and so on within their respective districts. Their constitution, duties and powers are very comparable to those of local authorities in Western Australia. In 1963 a council was elected in Jaffna, a major centre in Ceylon. During the next two and a half years the council had a chequered history; there were four mayors during this period, and numerous complaints were made to the Minister of Local Government about the council and sundry councillors. Finally the Minister despatched a Commissioner of Local Government to enquire into the complaints and report immediately. The Commissioner spent two days at Jaffna, and inspected the council minutes; he did not ask questions of, or request the views and comments of, the council or any individual councillor.

The Commissioner reported that the council was not competent to perform the duties imposed upon it. Immediately the Minister issued

4 This may be the only wholly subjective science.
5 [1951] A.C. 66.
6 Id. at 77-78.
7 [1967] 2 All E.R. 152.

an order dissolving the Council. He purported to do this pursuant to the following section of the Ordinance:

> If at any time . . . it appears to the Minister that a municipal corporation is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law . . . the Minister may by order . . . direct that the council shall be dissolved. . . .

Three Commissioners were appointed in the place of the council.

The appellant, elected as Mayor by the Council shortly before the dissolution, commenced proceedings against the Commissioners and the Minister, seeking writs of certiorari and quo warranto, an interim injunction, and a declaration that he was entitled to act as Mayor until the election of a new Mayor according to law. He said he was entitled to have been heard before the dissolution. At nisi prius his claim was dismissed. The trial judge followed a previous decision which laid down that words like "when it appears to" or "if X is satisfied that", standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially.[8] The Judicial Committee, on appeal, said this approach was wrong, for these various formulae 'are introductory of the matter to be discussed and give little guidance on the question of audi alteram partem'.[9]

The correct approach is to look firstly to the statute. If it is silent as to whether or not there should be a hearing, then 'the justice of the common law' may supply the ommission.[10] No attempt has been made to give an exhaustive classification of those cases where a fair hearing is necessary, and no such attempt should be made. No general rule can be laid down, but three matters must always be taken into account in deciding whether the principle is applicable. They are:

(a) What is the nature of the property, the status enjoyed or the services to be performed by he who claims that justice has been denied him?

(b) In what circumstances is the person exercising control entitled to do so?

(c) What sanctions can the person exercising control impose?

In the case before the Judicial Committee, the council was a public corporation with important duties, the activities of which should not

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8 Sugathadasa v. Jayasinghe, (1958) 59 N.L.R. 457.

9 [1967] 2 All E.R. 152, 155.
Note there is no reference to 'the duty to act judicially', or 'the judicial nature of the exercise'.

10 Cooper v. Wandsworth Board of Works, (1863) 14 C.B.N.S. 180, 194.

be lightly interfered with, and so the Minister should not have the right to dissolve without a hearing unless the statute clearly said so. Secondly, the Minister was empowered to exercise his right of dissolution on any of three stated grounds. Lord Upjohn speaking for the Privy Council said that when a person or body was alleged to have failed to perform a duty imposed by law, or persistently refused to comply with the law, he must have the right to put forward a defence. The ground on which the Minister had acted was incompetence, and in the context the right to be heard extended to that third ground. Finally the consequence of the Minister's action were as widespread as could be imagined, as dissolution of the council inevitably amounted to a confiscation of its property.

It was also held that the council was entitled to be heard on another ground, namely that the consequence of the order was to deprive it of its property; in their Lordships opinion the case fell within the principle in *Cooper's*[11] case, where it was held that no man is to be deprived of his property without having an opportunity of being heard.

Their Lordships accordingly had no doubt that the Minister should have observed the principle audi alterem partem. But for one further point which will be dealt with later, the appeal would have been allowed and the order held to have been inoperative.

Ridge v. Baldwin[12] was a watershed decision, and it rightly attracted a great deal of critical comment. *Durayappah's* case does not have the virtue of novelty and so has not aroused the same interest, but it is of even greater significance to lawyers in this country, for it comes from a judicial body the opinions of which are binding on our courts.[13] The decision has the great virtue of unanimity; *Ridge v. Baldwin*[14] is a far more complex, involved and difficult case. Finally, one important point left undecided has been cleared up.

Given an obligation to do natural justice, and a denial thereof,

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11 (1863) 14 C.B.N.S. 180.

12 [1963] 2 All E.R. 66.

13 See Corbett v. Social Security Commission, (1962) N.Z.L.R. 878. Decisions of the Privy Council made before the abolition of appeals to it recently announced by the Federal Government will remain binding on all Australian courts for all time, unless (perhaps) inconsistent with a later decision of the House of Lords, which might indicate a disposition in the Privy Council to change its mind, as it is entitled to do. Even after that abolition, decisions of the Privy Council will remain binding on State courts until appeals from them are abolished. Whither an Australian common law?

14 [1963] 2 All E.R. 66.

what is the consequence? In *Ridge v. Baldwin*[15] there were violently conflicting opinions between those who held the decision to have been voidable only and those who held it to be void and a nullity. The question was important for two reasons. The defendants claimed that at a special meeting after the dismissal without hearing, the plaintiff was heard through his solicitor, and so the fault was rectified; the plaintiff said a nullity did not admit of rectification. More importantly, the plaintiff had appealed to the Home Secretary, whose decision after a re-hearing was 'final and binding'. The House of Lords held that his decision to dismiss the appeal could not make valid that which was a nullity.

The Privy Council has authoritatively decided the point with clarity and commonsense. Had no steps been taken to vitiate the Minister's decision, then clearly it would have stood. It must, therefore, be voidable at the option of the council and not a complete nullity. However a successful challenge by the council would have rendered the dissolution void ab initio as far as the council was concerned; between the time of the purported dissolution and the Court's decision the order would not have had any limited effect against it. The critical importance for the appellant was that any person having "standing" can take advantage of a nullity (for example where there is jurisdictional error), but a decision arrived at in defiance of the audi alteram partem rule is voidable, and only at the option of the person who has been denied justice. The order had been made against the council, but the council had not complained. The Mayor was not the council and he had no independent right to complain. His appeal was therefore dismissed, with no order as to costs: it could probably be said that Durayappah lost the battle but won the war.

Durayappah v. Fernando goes further than *Ridge v. Baldwin* in laying down the mode of ascertaining whether natural justice is relevant to statutes of the type mentioned previously, though the line of development was indicated in the earlier case. It is most noteworthy that in *Ridge's* case their Lordships' close examinations of the relevant statute occupied a great part of the judgments, and Professor Goodhart's comments on the case[16] concentrates on the statute, its history, antecedents and "meaning", while in the later case there is very little of this. It is now clear beyond doubt that the attempt to construe the statute is only the first step in deciding whether

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15 Ibid.

16 Goodhart, *Ridge v. Baldwin: Administration and Natural Justice,* (1964) 80 L.Q.R. 105.

natural justice must be done, and it is no longer incumbent on the court to find an answer to this question, yea or nay, from the express or implied terms of the legislation. If the statute says nothing we see whether the common law will supply the deficiency, bearing in mind the three considerations laid down by the Privy Council.

No more than guide lines have been provided. It may be objected that the new approach is no more precise than the old which concentrated on the legislative "meaning". However, lawyers now know what the relevant considerations are, and the new approach at least amounts to an admission that the dictates of natural justice are binding when the justice of the case demands it, and have little to do with implied legislative intent.

At no point in the opinion of Lord Radcliffe is the Minister's power to decide categorized as judicial, and in fact when one looks closely at the wording of the relevant section it is hard to avoid the conclusion that by the traditional classification the power is a ministerial or administrative one. But that this point was not raised in the decision is of great significance, as in the cases since about 1920 the nature of the power has been regarded as almost critical. Confusion has arisen because the writs of prohibition and certiorari, initially used to control inferior courts, came to be the normal remedies by which administrative authorities were compelled to afford natural justice even though there was no express statutory requirement that there should be a hearing. These prerogative writs would only lie in respect of bodies charged with a judicial function, and it came to be thought that, if they did not lie, then natural justice need not be done. The two questions, in truth distinct though closely allied, came to be treated as one.

In *R. v. Electricity Commissioners,*[17] a case where prohibition and certiorari were sought on the ground of jurisdictional error, Lord Atkin in the Court of Appeal said that bodies having legal authority to affect the rights of citizens *and* having the duty to act judicially, were subject to the controlling jurisdiction of the courts exercised in the prerogative writs. Despite the fact that in that case the judicial element was inferred from the nature of the power, the Court of Appeal held in *R. v. Legislative Committee of the Church Assembly*[18] that the duty to act judicially must be "super-added" to the power to affect rights. This approach was adopted by the High Court of Aus-

[17] [1924] 1 K.B. 171, 205.
[18] [1928] 1 K.B. 411, 416.

tralia and has not been departed from by that Court.[19] *Nakkuda Ali's* case[20] may be regarded as the high point of this doctrine; as has been said, the decision in that case, that the duty to act judicially and hence to observe the natural justice rules did not exist unless there was some indication in the legislation that a quasi-judicial procedure should be followed, amounted to saying that the natural justice rules need not be observed unless the statute says they must be.[21]

In *Ridge v. Baldwin* Lord Reid in particular criticized the construction which had been placed on Lord Atkin's words in the *Electricity Commissioner's* case in the later cases, and held that part at least of the *Nakkuda Ali* decision was wrong. In *Durayappah's* case Lord Upjohn agreed that the judicial element could be inferred from the nature of the power, but warned against the assumption that the Privy Council necessarily agreed with Lord Reid's analysis of *R. v. Electricity Commissioners* or his criticism of *Nakkuda Ali v. Jayaratne.*

The law on these points is in a state of flux. It is suggested, however, that in Commonwealth countries the old necessity for a "superadded" judicial power or element has gone by the board so far as both the prerogative writs and the audi alteram partem rule are concerned. It of course remains necessary that there should be a power to affect rights, and a binding decision be made, before certiorari and prohibition will lie and natural justice must be done. Further, so far at least as the natural justice requirements are concerned, classification of the nature of the power is no longer of such great importance.

Durayappah v. Fernando says nothing about the contents of the audi alteram partem rule. As has always been the case, the manner in which the opportunity to be heard must be afforded will vary greatly in different cases, ranging from a full judicial hearing to a mere disclosure of the ground of complaint and the evidence in support of it followed by the reception and consideration of written submissions. Unless some procedure is laid down, all that is necessary is a dispensation of openhanded justice; certainly counsel in robes are not always a necessary element. This rightly so. In fact almost all the reported decisions are cases where a hearing of any sort was completely denied. It would be a bold lawyer who advised his client that a hearing actually afforded him was an inadequate one, when the basis for that hearing was the implication from the statute or the common law, not express words of the statute.

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19 R. v. Commonwealth Rent Controller, (1947) 75 C.L.R. 361.
20 [1951] A.C. 66.
21 BENJAFIELD & WHITMORE, AUSTRALIAN ADMINISTRATIVE LAW 150.

In closing a brief comment on *Testro Bros. v. Tait*[22] is warranted. That case was roughly contemperaneous with *Ridge v. Baldwin* in the House of Lords, and is a good example of the way the High Court has of recent times dealt with cases of the type discussed above. The question was whether an inspector appointed under the Companies Act to investigate a company's affairs was bound to hear the company before issuing his report, which might well reflect adversely on the company and was admissible in evidence in any legal proceedings. The joint judgment of McTiernan, Taylor and Owen JJ. (three of the majority of four) approved the judgment of the Full Court of the Victorian Supreme Court in *R. v. Coppel; ex parte Viney Industries Pty. Ltd.*[23] which was in turn based to a large extent on cases like *R. v. Electricity Commissioners, R. v. Legislative Committee of the Church Assembly* and *Nakkuda Ali v. Jayaratne.*

The High Court said the question was whether the inspector was a person 'having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially',[24] who was therefore bound to comply with the natural justice rules and subject to control by the prerogative writs, or whether the investigation was administrative and not to be carried out by a process analogous to the judicial one, in which case prohibition would not lie. The answer was said to depend on the legislative intention, and it was pointed out that the Act imposed no obligation on the inspector to act in a quasi-judicial way. It seems clear that both the formulation of the question and the answer to it are widely at variance with the opinion in *Durayappah's* case. There may be more merit in the second conclusion, namely that the report could not of its own force prejudicially affect the company's rights. Kitto J. handed down a strong and persuasive dissenting judgment. It is submitted that the decision in *Testro Bros. v. Tait* is of doubtful authority in view of *Durayappah v. Fernando;* certainly the former case must henceforth be read together with the latter on questions concerning operation of the prerogative writs and the right to be heard.

IAN D. TEMBY*

22 (1963-4) 37 A.L.J.R. 100.
23 [1962] V.R. 630.
24 (1963-4) 37 A.L.J.R. 100, 101, quoting from R. v. Electricity Commisisoners, [1924] 1 K.B. 171.

* *Barrister and Solicitor of the Supreme Court of Western Australia.*