Perhaps the best that can be hoped for is that in future "inference and common sense" will be defined with greater certainty. In this respect the old approach of classifying the challenged Acts may not be completely obsolete. There is nothing, for example, to prevent the Court from holding that an Act relating to matters of health, providing that it does not amount to a prohibition whether absolutely or subject to discretion,[56] does not infringe s.92 because such a law is part of the framework within which the prohibition of s.92 operates. The *nature* of the particular Act then and not the direct legal effect is the important consideration.

> Such a view, indeed, was contemplated by Kitto, J. in *Breen* v. *Sneddon*: . . . the class of law which, though placing restrictions or other burdens upon individuals engaged in inter-State trade, commerce or intercourse, yet do not detract from the freedom of the individual's interstate trade, commerce or intercourse itself, is distinguished not by the lightness of the burdens imposed but by *the nature of the laws that impose them* . . . . (Italics added.)[57]

Of course such an approach proposes no more than a different formula but it at least has the virtue of being more certain than the plain criterion of "inference and common sense". Within the formula, as in other formulae so far advanced by the Court, a considerable discretion may be exercised by the Court in the process of classification.[58] This is inevitable. "The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a Court of law."[59]

K. S. WEE, Case Editor — Third Year Student.

CROWN PRIVILEGE OF DOCUMENTS

CONWAY v. *RIMMER*

EX PARTE ATTORNEY GENERAL; RE COOK

> The privilege is a narrow one, most sparingly to be exercised. "The principle of the rule . . . is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires."[1]

This statement has been the object of much judicial discussion in later cases on Crown privilege, and although it has become a rather hallowed text in administrative law there is, to say the least, a dichotomy of views defining the limits and extent of the rule. It is in this atmosphere of doubt that the recent House of Lords decision, *Conway* v. *Rimmer*,[2] generates a light in the darkness and a clear authority on degree and scope, if not on principle.

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[56] It seems that such laws cannot now be held valid on any view: see *Hughes & Vale (No. 1)*, *supra* n.7, esp. at 26.

[57] *Supra* n.10 at 416.

[58] See P. H. Lane, "Judicial Review or Government by the High Court" (1966) 5 *Sydney L.R.* 203 at 214-16.

[59] Per Lord Porter in *Commonwealth* v. *Bank of N.S.W.*, *supra* n.36 at 639.

[1] *Per* Lord Blanesburgh in *Robinson* v. *South Australia* (No. 2) (1931) A.C. 704 at 714. The quotation is from 1 *Taylor on Evidence* (12 ed. by R. P. Croom-Johnson and G. F. Bridgman, 1931) §939.

[2] *Conway* v. *Rimmer* (1968) 2 W.L.R. 998; (1968) 1 All E.R. 874.

The facts in *Conway* v. *Rimmer* were briefly, as follows: the appellant, Conway, was a probationer police constable in the Cheshire Constabulary. In December, 1964, another probationer constable lost a torch which was later found in Conway's locker. The respondent, Rimmer, a Superintendent in the same force, investigated the matter and later told Conway that his probationary reports were adverse and that he, Conway, ought to resign. Conway refused and Rimmer's report on the incident was submitted to the Chief Constable and finally to the Director of Public Prosecutions. A charge of larceny was brought against Conway at the instigation of Rimmer but the jury found him not guilty. Another probationary report was prepared and Conway was dismissed from duty on the ground that he was unlikely to become an efficient police officer.

In an action against Rimmer for malicious prosecution Conway sought discovery of the probationary reports and the report on the torch incident but a claim for Crown privilege was made on the ground that "production of documents of each such class would be injurious to the public interest".[3]

In the Court of Appeal[4] the majority (Davies and Russell, L.JJ.) followed the decision in *Duncan* v. *Cammell Laird & Co. Ltd.*[5] and held that the claim of privilege being in proper form (in an affidavit of the Home Secretary) was conclusive and that the Court of first instance had no power to judge for itself the validity of the claim. On appeal to the House of Lords this decision was reversed and, *semble*, the rule in the *Cammell Laird Case* was finally rejected.

Duncan v. *Cammell Laird & Co. Ltd.*, the earlier decision of the House, was the famous "Thetis" submarine negligence action. The House had held that a Minister should claim privilege only where the "public interest would otherwise be damnified",[6] but that a Minister's objection to production is conclusive. About ten years earlier the Privy Council had taken a different and more liberal approach and ruled that a court has in its reserve a power to inspect the documents in question and to decide for itself whether the claim for privilege is justified.[7]

In *Conway* v. *Rimmer* Lord Upjohn gave three reasons[8] why the *Cammell Laird* decision should not govern this case.

First, it was now clear that *per incuriam* the House in the *Cammell Laird Case* misunderstood the law of Scotland. (Lord Simon had relied in part for his judgment on the assumption that Scottish and English law both treated a ministerial objection as conclusive.)[9]

Secondly, his Lordship did not think that the observations of Lord Simon were intended to bind the courts to accept the Minister's Certificate as conclusive in every case: For (a) in that case "the claim was based on a 'contents' basis . . . and so Lord Simon's remarks were, in relation to class documents, strictly obiter"[10] and (b) Lord Simon did not have in mind such documents as routine reports on a probationary constable when he made his general observations on the law.

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[3] (1968) 2 W.L.R. at 1002.
[4] (1967) 1 W.L.R. 1031; (1967) 2 All E.R. 1260.
[5] (1942) A.C. 624.
[6] *Id.* at 642 (Viscount Simon, L.C.).
[7] *Robinson* v. *South Australia, supra* n.1. See Note (1942) 58 *L.Q.R.* 436 at 437.
[8] (1968) 2 W.L.R. at 1047-8.
[9] (1942) A.C. at 641. The Scottish position has been explained in *Glasgow Corporation* v. *Central Land Board* (1956) S.C. (H.L.) 1. See the Notes by E. C. S. Wade in (1956) *Cambridge L.J.* 133; (1957) *id.* 9.
[10] Compare Davies, L.J. (1967) 1 W.L.R. at 1047: "I can see no possible distinction in principle or in logic between contents cases and class cases. If the Minister's objection to the production of a specific document is . . . conclusive, how can it make any difference that the Minister's objection on the ground of public interest is not merely to the production of a specific document, but to all and any of a specific class of documents?"

Thirdly, in this field the courts are entitled from time to time to make a reappraisal in relation to particular documents of what it is that the public interest demands in shielding them from production.[11]

These remarks were echoed by all their Lordships — although none of them doubted that the *Cammell Laird Case*, in the context of its particular facts, was rightly decided.[12]

The House decided that in all cases[13] the courts do have a reserve power to inspect the documents the subject of a claim for privilege, and to evaluate for themselves the merits of such a claim. In this case the documents were ordered to be produced for inspection.

The tests to be applied by the courts to see whether public interest demands that documents be privileged were discussed by Lord Pearce in the following way:

> It is conceded that under the existing practice there can be no weighing of injustice in particular cases against the general public disadvantage of disclosure and its effect on candour. But it is argued that a Judge, who is the only person who can properly weigh the former, is incapable of weighing the latter. It is a Judge's constant task to weigh human behaviour and the points that tell for or against candour. He knows full well that in general a report will be less inhibited if it will never see the light of public scrutiny, and that in some cases and on some subjects this may be wholly desirable. He also knows that on many subjects this fact has little if any important effect. Against this he can consider whether the documents in question are of much or little weight in litigation, whether their absence will result in a complete or partial denial of justice to one or other of the parties or perhaps to both, and what is the importance of the particular litigation to the parties and the public. All these are matters which should be considered if the Court is to decide where the public interest lies.[14]

Class and Contents (England)

The supposed distinction in law between the "class" cases and the "contents" cases seems to have evolved from Lord Simon's speech in the *Cammell Laird Case* when his Lordship observed that the test of privilege in the case of public interest may be satisfied either:

(a) by having regard to the contents of the particular document, or
(b) by the fact that the document belongs to a class which . . . must as a class be withheld from production.[15]

Lord Simon probably only meant that there were two ways of demonstrating "public interest". However, some confusion has arisen, with some judges holding that different results flow in law depending on whether privilege is sought on a "contents" basis or on a "class" basis.[16] For this reason it is worthwhile considering the views of each of their Lordships on this matter.

In Lord Reid's opinion, however wide the power of the court might be, cases would be very rare in which it could be proper to question the view of the responsible Minister that it would be contrary to the public interest

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[11] In relation to this third point, his Lordship commented (at 1048) on the fluctuating nature of public policy: "the Court should not be unduly fettered by what has been said in Courts in earlier days, and the observations of Judges must be read in the light of the general circumstances at the time and the particular type of document before the Court."

[12] See, e.g., Lord Reid at 1003.

[13] With the possible exception of Lord Pearce. See *infra* at nn. 24-25.

[14] At 1044 (and see 1045).

[15] (1942) A.C. at 636.

[16] See, e.g., Lord Denning, M.R. in *Conway* v. *Rimmer* in the Court of Appeal (1967) 1 W.L.R. at 1039, 1041.

to make public the contents of a particular document.[17] Since his Lordship later mentions that the courts have always had a reserve power to question the finality of a Minister's Certificate,[18] and in view of his opening statement, ("however wide the power of the Court may be . . .") it would seem that in his Lordship's opinion the distinction is merely one of degree; although the court always has *power* to overrule the Minister, in most cases it will not be *proper* to do so.

Lord Morris of Borth-y-Gest would agree with this view:

> I see no difference in principle between the consideration of what have been called the contents cases and the class cases. The principle which the Courts will follow is that relevant documents normally liable to production will be withheld if the public interest requires that they should be withheld.[19]

Lord Hodson would not regard the classification which places all documents under the heading either of "contents" or of "class" as wholly satisfactory. Instead his Lordship distinguishes classes of documents such as Cabinet Minutes and plans of warships, as in *Cammell Laird*, in which privilege can be properly applied without the necessity of the documents being considered individually, from documents requiring protection on the ground that "candour" must be ensured.[20] Lord Hodson agreed that each case is to be decided by the court after private inspection if necessary.[21] Once more the difference is not one of principle although there may be a presumption that high documents of State ought not to be produced.

Although one of Lord Upjohn's grounds for distinguishing the *Cammell Laird Case* was that Lord Simon was there concerned with a claim of privilege on a "contents" basis,[22] his Lordship makes it clear that even in such a case the court has the legal power to overrule the Minister after inspection of the documents. His Lordship also endorses the rider that "a claim made by a Minister on the basis that the disclosure of the contents would be prejudicial to the public interest must receive the greatest weight. . . ."[23]

Problems arise, however, in interpreting the judgment of Lord Pearce. Commenting on the "contents" principle, his Lordship says:

> If the Crown on the ground of injury to the public objects to the production of the plans of a submarine, as in *Duncan's case*, it is obvious that the Court would accept the matter without further scrutiny. In a less obvious case the Court might require more detailed elaboration by the Crown to show that what on the face of it seems harmless would in fact be harmful.[24]

His Lordship continues: "In the lower ranges of importance the Judge can . . . satisfy himself by inspection."

It would seem then that Lord Pearce is creating a dichotomy within the "contents" category, and injecting a specified set of documents with immunity from forced production in litigation.[25] It is arguable, however, that his Lordship did not intend to depart from the view of the majority. His Lordship admits that *Robinson's Case* represents the more correct approach and states

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[17] (1968) 2 W.L.R. at 1008.
[18] *Id.* at 1014-15.
[19] *Id.* at 1031.
[20] The "candour" principle involves the protection of documents to ensure a frank and uninhibited narrative. Usually the documents within this principle are Public Service reports and the like. See *supra* n.14.
[21] At 1038.
[22] At 1047-8.
[23] At 1049-50.
[24] At 1042.
[25] His Lordship seeks to justify this view by arguing that it is given statutory force rules made for the purpose of the Act shall be such as to secure that the existence of a by the U.K. Crown Proceedings Act, 1947, s.28(2) which provides *inter alia* that any

that "the Court always had an inherent power to inspect and order the production of a document . . .".

In view of the fact that the former conclusion of Lord Pearce's judgment seems to be contrary to the reasoning of the majority of the Court, the better view is that there is no fundamental difference in law between a claim on a "contents" basis and one on a "class" basis.[26] In no case is the Minister's Certificate conclusive. Each case will depend on the facts and the documents in question: if the case for privilege seems manifest the courts will allow it, otherwise they can request fuller specification of reasons or examine the documents themselves.

Ex parte Attorney General; Re Cook

This decision on Crown privilege by the New South Wales Court of Appeal[27] does little to clarify the position in this State and at the same time restricts the liberal approach taken by the same Court in *Ex parte Brown; Re Tunstall*.[28]

Cook was one of several persons charged with assaulting the police, resisting arrest and offensive behaviour. At the trial Cook's counsel asked that certain statements obtained as a result of a police departmental inquiry into matters concerning the conduct of police at the time of the arrest of the defendants be made available to him. A summons was issued requiring production of these documents and the case was adjourned to enable the Crown to make a claim of privilege.

The claim was overruled by the magistrate after inspecting the documents, and they were made available to the defendant. The prosecution unsuccessfully requested an adjournment and now sought an order for certiorari to quash the order of production.

Before considering the decision in *Cook* it is worthwhile to note the previous decision of the same Court in *Ex parte Brown; Re Tunstall*.[29] The facts are similar to those in the later case, with the exception that during the trial the prosecution had access to copies of documents in the file the subject to the claim for privilege, and actually used them in the conduct of its case. This situation occurred despite the fact that the magistrate, following the *Cammell Laird Case* and the earlier New South Wales decision of *Nash* v. *Commissioner of Railways*,[30] upheld the claim for privilege without examination of the documents in question. The Court of Appeal found that this state of affairs constituted a denial of natural justice and prohibition issued.

> The Court discussed generally the law of Crown privilege and held that: . . . the Courts have a residual or reserve power to override the executive's claim to privilege, although such reserve power should only be used sparingly and in rare cases and not at all where, from the description of the documents, it is apparent that they relate to such matters as defence,

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document will not be disclosed if, in the opinion of the Minister of the Crown, it would be injurious to the public to disclose the existence thereof. This argument was expressly rejected by Lord Hodson (at 1038) who did not regard the language of the Act as limiting the power of the courts to make declarations as to the law or in any way crystallizing the law as contained in a judicial decision. There is some confusion in Lord Pearce's approach to the statute, which may not give the wide protection to the Crown which his Lordship contemplates. The better view is that it merely makes the Crown subject to the general law of discovery with a minor statutory provision (s.28(2)) directed at rules of Court.

[26] *Cf.* Lord Denning, M.R. (dissenting) in the Court of Appeal (1967) 1 W.L.R. at 1041: "Crown privilege can be claimed for injurious 'contents' but not for the whole 'class' ". See also *supra* n.10.

[27] *Ex. p. A.-G.; Re Cook* (1967) 86 W.N. (Pt. 2) 222.

[28] (1965) 84 W.N. (Pt. 2) 13; see Note (1966) 40 *A.L.J.* 235.

[29] *Supra* last n. The Court consisted of the same judges on both occasions.

[30] (1963) S.R. (N.S.W.) 357.

high policy, departmental minutes on matters of State and the like.[31]

More particularly, their Honours added that even if the magistrate's ruling before the hearing (to refuse production) was correct, it should have been altered during the hearing in the light of the access given to the prosecution.[32]

One would be forgiven for interpreting this decision as having laid down a general rule for New South Wales Courts to follow. In *Cook*, however, the Court of Appeal seems to have somewhat regretted its liberality and has very deliberately restricted *Tunstall* to its peculiar set of facts.

Holmes, J.A. distinguished *Tunstall* in the following terms:

> There was present . . . the fact that the Police Prosecutor had elicited evidence in chief from two constables of matter in respect of which the privilege was claimed. This clearly destroyed the privilege in respect of those matters. The Premier who had in good faith made the claim for privilege was not to know that one of his officers, albeit unwittingly, would cut the ground from under his claim.[33]

Having disposed of *Tunstall*, Holmes, J.A. went on to outline the true New South Wales position in relation to claims of Crown privilege. The outline, with respect, is somewhat confusing and in at least three different parts of his judgment he makes different and, *semble*, in some cases, conflicting statements as to the law.

The first such statement appears at page 237 where his Honour states:

> It was conceded . . . that the learned magistrate had the right to look at the documents and that this was in accordance with *Ex parte Brown; Re Tunstall*. I do not agree with this construction of our decision in that case and I should say at once that in my opinion nothing had transpired which should have led him to think either that the claim to privilege was not validly made, or that it did not continue to be valid. Furthermore there was nothing disclosed to indicate that the documents did not belong to the class to which the Premier said they did. Nor is there anything in *Ex parte Brown* which indicates that the Court *may, let alone must,* look at the documents to test the claim.

From these observations then:

(a) the claim must continue to be valid, and
(b) the documents must belong to the "class" mentioned in the claim to privilege.

Furthermore, his Honour's last sentence leaves open the possibility that the courts may have no power of inspection at all, and that a Minister's Certificate is conclusive.

His Honour's second statement is that "in the appropriate case" the court has a reserve power to inspect the documents in respect of which the claim for privilege was made.[34]

Finally, at page 241, his Honour comments that the fact that in *Tunstall* the claim was no longer valid "shows why in the end the Court *must* be able to determine the validity of the claim to privilege".

The first two statements can be read together if "appropriate" means that the claim is "valid" and that the documents in fact belong to the "class" set out in the claim for privilege. The last sentence of the first statement, however, is inconsistent with the generality of the third statement and also with the preceding observations in the context of that first statement. With due respect, his Honour gives the impression that he is saying:

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[31] (1965) 84 W.N. (Pt. 2) at 22.
[32] *Id.* at 24.
[33] (1967) 86 W.N. (Pt. 2) at 240-1.
[34] *Id.* at 240.

(a) In *all* cases the courts have a reserve power to go behind the Minister's Certificate.
(b) In *no* case does the court have this power.
(c) The court has the right to inspect the documents if certain conditions are satisfied.

The present writer feels that the third view must be the one his Honour meant to lay down as binding, for earlier in his judgment his Honour gives "general guidance" to the courts as to when documents, the subjects of a claim to privilege, should be disclosed.[35]

> Some real ground must be disclosed which shows that despite the public interest the *interests of justice must in the particular case prevail.* As has been said before, that will be a very rare case and it would be impossible by a formula to state in advance what it is. This case clearly was not such a one *because it contained in it no more than* is always contained in any claim for privilege, that is to say a *competition between the interests of the public and the interests of justice* in the particular case.

These then, must be the requirements necessary to make a claim "valid" and "appropriate". It seems to me, however, that the test is vague and confusing[36] and the last sentence a far cry from some of the observations of their Lordships in *Conway* v. *Rimmer*.

On the particular facts of the case in hand, his Honour held that in general what was said by officers of the public service in relation to their own conduct and for the purposes of the administration of the public service do not even call for inspection by the court.[37] The order for certiorari[38] was granted although the harm had already been done and certainly the magistrate should not have ordered disclosure before allowing the Minister to appeal from his decision.[39]

Jacobs, J.A. concurred with Holmes, J.A.; and Wallace, P. in a dissenting judgment followed the decision in *Tunstall's Case*. His Honour held that the magistrate acted correctly when he examined for himself the documents in question but that he expressed the wrong reason for allowing access. The test, his Honour commented, is not "relevance" but "lack of reasonable grounds".[40]

Holmes, J.A.'s distinction of *Tunstall's Case* seems contrary to the liberal approach taken in that case,[41] and it is interesting to compare a passage in the judgment of Lord Reid in *Conway* v. *Rimmer*:

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[35] *Id.* at 239.

[36] *Cf.* the first sentence with his Honour's final sentence. No clear test is propounded by the Court.

[37] *Id.* at 239. See also *id.* 240.

[38] It is important to note the Privy Council decision in *Durayappah* v. *Fernando* (1967) 3 W.L.R. 289 with regard to *locus standi* for certiorari. In this case the Board has, *semble*, liberated the prerogative writ from the chains of the super-added duty to act judicially but has added some problems on *locus standi*. The Board held that in respect of a "voidable" decision only an aggrieved *party* would have *locus standi* to quash the decision. This could mean that in future, if the Crown is *not* a party to the action, it will not have the right to have an adverse decision on production or discovery reviewed in this way. The Privy Council also gave a new meaning to the word "voidable". These problems are dealt with at some length by G. Nettheim, Note (1967) 41 *A.L.J.* 128; and see now his article "The Place of the Declaratory Judgment in Certiorari Territory", *supra* p. 184.

[39] It is important to note that the Law Lords in *Conway* v. *Rimmer* stressed that the Crown should have a right of appeal before the document is produced: see, e.g., Lord Reid at 1016. The fact that in *Cook* the magistrate had erred in this manner may have influenced Holmes, J.A. to take what seems to be an extreme view. At 241 his Honour states: "By not permitting an adjournment and allowing the documents to be seen by the defendants a situation which is irreparable has been created." It could be that if an appeal had been allowed *before* the documents had been inspected by the defendants his Honour might have taken a more liberal attitude.

[40] At 226.

[41] *Supra* n.31. Also at 22 and 24 their Honours state: "there is a reserve power and the learned Magistrate was in error in not recognising that he had this power."

> The Attorney-General did not deny that, even where the full contents of a report have already been made public in a criminal case, Crown privilege is still claimed for that report in a later civil case. And he was quite candid about the reason for that. Crown privilege is claimed in the civil case not to protect the document — its contents are already public property — but to protect the writer from civil liability should he be sued for libel or other tort.[42]

If this be correct, then the distinction of *Tunstall's Case* in *Cook* must be invalid — the fact that the documents have been made public does not, *per se*, negative a claim for privilege.[43]

What is needed now is a decision of the High Court or of the Court of Appeal clarifying the position in New South Wales beyond all doubt. It is submitted that such a decision would either follow *Tunstall's Case* or take the even more liberal approach of the House of Lords.

Class and Contents (New South Wales)

In both *Tunstall* and *Cook* the relevant certificate from the Minister was in the "class" form:

> That all the said documents belong to a class of documents, i.e., communications with and within the Public Service, which ought not to be produced because of the necessity of ensuring complete candour and freedom of expression in such communications.[44]

Wallace, P. discusses the "class" basis and concludes that the courts can examine the documents[45] in that situation. With regard to the "contents" basis, his Honour comes to the same conclusion as the majority of the Lords in *Conway* v. *Rimmer*. His Honour cites the English case of *Re Grosvenor Hotel*,[46] where the Court of Appeal, in effect, admitted that the ultimate power to override the Minister's objection was vested in the courts[47] but as Harman, L.J. added, "That in a case where documents have privilege properly claimed for them on the grounds of their content, the Court ought not to inspect. . . ."[48] These views — which would be acceptable to their Lordships in *Conway* v. *Rimmer* — are stated by Holmes, J.A. to be applicable in New South Wales.[49] The courts always have the power to overrule the Minister, but ought not to in certain cases where it is obvious documents should be protected.[50]

Holmes, J.A., too, found the reference to classes "not to indicate very much".[51] So he, too, would disregard the distinction between "class" and "contents" although, as we have seen, he would limit the power of the court to inspect documents the subject of a claim, whether on a "class" or "contents" basis in most cases.

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[42] At 1007.

[43] *Cf.*, however, the decision of the Northern Territory Supreme Court in *Christie* v. *Ford* (1957) 2 F.L.R. 202. where the documents in question were police reports of a road accident. Copies of the statements had been given to the parties before the action. Kriewaldt, J. stated at 209: "In my opinion the privilege claimed ceases to exist if there has been a prior publication of the documents or information for which privilege is sought." His Honour cites Lord Simon in the *Cammell Laird Case*, *supra* n.5 at 629-630, where his Lordship seems to reach the same conclusion, though holding that the limited circulation in that case was not sufficient to defeat the claim. These statements throw some doubt on the authority of Lord Reid's statement; and the Australian decision might be followed in preference to the *dictum* in the House of Lords.

[44] (1967) 86 W.N. (Pt. 2) at 235.

[45] *Id.* at 226.

[46] (1965) Ch. 1210.

[47] *Id.* at 1245 (Lord Denning, M.R.) and 1261-62 (Salmon, L.J.). The Court was bound by the *Cammell Laird Case* but sidestepped the effect by requiring the utmost particularity in a Minister's claim in order to be "in proper form".

[48] *Id.* at 1253. Lord Denning also admitted (at 1245) that it would be rare for the court to override a Minister's objection.

[49] (1967) 86 W.N. (Pt. 2) at 228.

[50] See *supra* at nn.17-25; *infra* nn.52-8.

[51] (1967) 86 W.N. (Pt. 2) at 238.

Conclusions

The decision in *Conway* v. *Rimmer* vests in the courts the ultimate task of evaluating and weighing the merits of a claim of privilege — resolving the competition between two public interests, the efficient functioning of the public service on the one hand and administration of justice on the other.

In its more extreme application this result could cause calamity to State security and national safety — but the Law Lords themselves have laid down rules regulating this power. The courts should not order disclosure of Cabinet minutes,[52] policy-making documents,[53] documents relating to defence and security[54] and other documents on high State matters.[55] Nor will production be ordered where such action could be of the slightest use to criminals and the underworld[56] nor perhaps where the documents are merely statements by the parties to the action.[57] Their Lordships generally agreed that the claim of privilege ought to be refused if it is made *mala fide* or is actuated by irrelevant or improper considerations or is based on a "false premise".[58]

In New South Wales the safeguard is similarly entrenched, as even on the basis of *Tunstall's Case* the court should not go behind a Minister's Certificate relating to documents on matters of "defence, high policy, departmental minutes on matters of State, and the like".[59]

In conclusion it should be noted that in *Duncan* v. *Cammell Laird & Co. Ltd.*, Lord Simon stated:

> The judgment in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same.[60]

By restricting the "reserve" power of the court, the New South Wales Court of Appeal has perhaps negatived this principle. The position seems now to have been reached where the House of Lords has given more equitable rights to the individual litigant in a civil action than the New South Wales Court of Appeal will admit to a defendant in a criminal action prosecuted by the State.

K. R. WIDDOWS, Case Editor — Third Year Student.

LEGISLATIVE OVERRULING OF JUDICIAL DECISIONS: THE CONCEPT OF "LEGISLATIVE JUDGMENT"

CLYNE v. *EAST*

The decision of the New South Wales Court of Appeal (Herron, C.J., Sugerman and Asprey, JJ.A.) in *Clyne* v. *East*[1] is of some interest in the field of constitutional law, at both State and federal levels. Explicitly at the former level, but potentially at the latter as well, the case raised basic

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[52] *Per* Lord Reid at 1015.
[53] *Ibid.*
[54] *Per* Lord Hodson at 1038.
[55] *Per* Lord Upjohn at 1050. *Cf.* the *dictum* in *Hazeltine Research Inc.* v. *Zenith Radio Corp.* (1965) 7 F.L.R. 339 at 340. But *quaere* whether applications for an import licence are really "high State" matters.
[56] *Per* Lord Upjohn at 1051.
[57] *Per* Kriewaldt, J. in *Christie* v. *Ford*, *supra* n.43 at 210.
[58] See Lord Hodson at 1037 and Lord Morris at 1019.
[59] *Supra* n.31.
[60] *Supra* n.5 at 633-4.
[1] (1967) 68 S.R. 385.