the requirements so expressed were not directed at the protection of companies. Wild C. J. approved this reasoning and added that he did not think the provisions could apply to any but "natural persons".

Combined Taxis Cooperative Society Ltd v. *Slobbe* and *Re Mountain View Property Holdings Limited* appear to indicate a less rigid application of the Moneylenders Act. The more flexible interpretations given were desirable in the circumstances. In the former case the plaintiff was providing a valuable service at lower interest rates than were otherwise available and it would have been manifestly unfair had the contract been enforceable. In the latter case the loan was advanced to a company who would have had the benefit of full legal advice before entering such an agreement. Most companies have access to legal advice when obtaining loans and it is desirable that s. 8 is no longer merely a "way out" of contracts entered into with full knowledge. The two cases show the courts' ability to deal with cases under the Moneylenders Act on individual merit. A penalty for non-registration is still of course open by way of fine.

Sale of goods

H.R. Sainsbury Ltd. v. *Street* [1972] 1 W.L.R. 834 arose on a contract to buy 275 tons of barley from the defendant. The defendant denied the making of the agreement and alleged in the alternative that if he agreed to sell it was a condition precedent that he should harvest a crop of at least 275 tons and he in fact harvested only 140 tons. His failure to harvest the larger crop excused him from delivery of any of the barley. The plaintiffs conceded they were not entitled to damages for the defendant's failure to sell barley that he did not harvest but asserted they were entitled to recover damages for his failure to deliver the 140 tons actually harvested.

MacKenna J. held that there was no implied term in the contract that the seller need not deliver to the buyers the actual tonnage harvested in the event of his inability through no fault of his own to produce the whole amount. He further decided that ss. 5(2) and 61(2) Sale of Goods Act 1893 (U.K.) (corresponding to ss. 7(2) and 60(2) of the New Zealand Sale of Goods Act 1908) preserve the rule in *Howell* v. *Coupland* (1874) L.R. 9 Q.B. 462, that a contract for a portion of a specific crop must be subject to an implied condition that the parties should be excused, if before breach, performance becomes impossible owing to the failure of the crop without the seller's default.

N. W. King

COMPANY LAW

Winding up—"just and equitable"

It is provided by s. 217 Companies Act 1955 that a company may be wound up by the court if it is of the opinion that it is just and equitable that the company should be wound up. The equivalent English provision was considered by the House of Lords in *In re Westbourne Galleries Ltd.* [1972] 2 W.L.R. 1289, H.L. It was argued before their lordships that it was "just and equitable" that a company

be wound up where one of three directors had, by ordinary resolution passed in general meeting by the voting power of the other two directors, been excluded from all participation in the business in which they had embarked on the basis that all should participate in the management. Noting also that the excluded director had to rely on the remaining directors for a share in the profits which had hitherto been distributed as directors' remuneration, and that he could not dispose of his interest without their consent, their lordships restored the decision of Plowman J., reversing the Court of Appeal, holding that the proper course was to wind up the company.

In considering the words "just and equitable", Lord Wilberforce said:

> The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. . . . The "just and equitable" provision does not . . . entitle one party to disregard the obligation he assumes by entering the company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

His lordship went on to make some very useful comments about the situations in which this was likely to arise. In the present case he found that the respondents were not entitled, in justice and equity, to make use of their legal powers of expulsion. This was strongly supported by the denial of the expelled directors undoubted status as a "partner", and the loss of his right to remuneration.

The Court of Appeal had held that a winding up order under the "just and equitable" clause could not be obtained unless it could be shown that the power of removal from the directorship had not been exercised "bona fide in the interest of the company". The House of Lords held on appeal that this was an inappropriate test to apply, for it may become little more than an alibi for a refusal to consider the merits of the case, and to confine the application of the just and equitable clause to proved cases of mala fides would be to negative the generality of the words.

Thus this decision may be seen as endorsing a long line of authority on the application of the just and equitable clause to exclusion cases (i.e. cases where directors have been excluded from participation in management) including the decision of the New Zealand Court of Appeal in *Tench* v. *Tench Bros Ltd.* [1930] N.Z.L.R. 403 which was referred to by Lord Wilberforce, except that some of the cases are open to the criticism that the courts may have been too timorous in giving the clause full effect.

Winding up—validity of charges

Re Mountain View Property Holdings Ltd. (In Liquidation) [1972] N.Z.L.R. 1 was primarily concerned with the operation of s. 103 Companies Act 1955, which relates to the validity of charges against the liquidator and creditors. This section provides that charges to which this section applies are void against the liquidator unless they are registered in the manner and within the time prescribed by the Act. Section 103(1) provides that the section applies to the comprehensive

list of charges referred to in s. 102(2) but specifically excludes "charges registerable under any Act other than . . . this Act." This case concerned the validity of, inter alia, five mortgages which had been registered under the Land Transfer Act 1952 prior to the winding up. Wild C. J. affirmed what might have been thought the indisputable view that land transfer mortgages were charges registerable under an Act other than the Companies Act within the meaning of s. 103(1). Of some interest, however, is the obiter dictum that until registration the five land transfer mortgages were void against the liquidator or any creditor because of the operation of s. 41 Land Transfer Act 1952. The undoubted effect of s. 41 is that no legal estate was conferred on the mortgagees until registration. However, the courts have consistently recognised that despite s. 41 the holders of an unregistered mortgage may still have an equitable interest. *Quaere* that the effect of s. 41 is to make equitable mortgages void against the liquidator when their validity against the company in equity cannot be questioned.

Service of documents

In *B.P. (New Zealand) Ltd.* v. *Pines Services Ltd.* [1972] N.Z.L.R. 97 an important question relating to the service of documents was raised. A writ had been served on the defendant pursuant to R. 45 of the Code of Civil Procedure which provides:

> 45. Unless otherwise provided by statute, service may be effected on—
>
> . . .
>
> (b) Incorporated companies, by delivering a duplicate of the writ to the president, chairman, managing director, or secretary of such company, or to anyone performing the duties incidental to any of those offices, or to anyone appearing to have charge of the business of the company at its registered office or principal place of business in New Zealand . . . .

No defence was filed by the defendant, but the Registrar refused to enter judgment by default. He was of the opinion that service on an incorporated company is not effective unless in accordance with s. 4610(1) Companies Act 1955 which provides:

> 460 (1) A document may be served on a company by leaving it at the company's registered office, or by sending it through the post in a registered letter addressed to the company at that office.

This was a motion before Beattie J. for an order rescinding the decision of the Registrar. The question for determination was whether R. 45 of the Code, and s. 460 of the Act, provide alternative or complementary methods of service on a company or whether s. 460 alone is the permitted method. The learned judge considered the history of the legislation and compared the equivalent English provision. He noted that the whole issue was finely balanced but that long standing practice and practical considerations were in favour of a liberal interpretation. To this end, s. 5(j) Acts Interpretation Act 1924 was invoked against a restrictive result which would exclude some 9 or 10 alternative modes of service upon a company. Service under R. 45 is therefore complementary to, and not excluded by, s. 460.

Oppression of minority shareholders

Re Empire Building Ltd. [1972] N.Z.L.R. 683 was an action bought under s. 209 Companies Act 1955. It was alleged that the affairs of Empire Building Ltd were being conducted in a manner oppressive to part of the shareholders and the court was asked for an order altering the articles of the company. Empire Building Ltd. was a land owning

company. It had acquired the land and building known as the Empire Hotel, and the members owned blocks of shares which gave them the right of occupancy of particular parts of the premises. The value of the blocks of shares thus corresponded with the value of the suite to which they related. The dispute arose when the premises were sold and the company was being wound up. The articles provided for an even distribution pro rata amongst all the shareholders and did not differentiate between the values of the various suites which the holdings of shares in effect represented. Thus if distribution proceeded in accordance with the articles the owners of the less valuable suites would have received a fortuitous enrichment on the distribution of the capital whereas those with the more valuable suites (the petitioners) would receive back amounts which failed to reflect the relative value of their suites in comparison with others in the building, in one case receiving back less than was originally paid for the shares. Despite entreaties by the directors on behalf of the minority, the majority shareholders refused to amend the articles to provide for a fair and equitable distribution. The minority then brought this action under s. 209, alleging that the conduct of the majority amounted to oppression. It was argued in reply that conformity with the articles of association which properly constituted meetings of the company had refused to alter did not amount to oppression.

Haslam J. held that there had been no oppression. He said:

> It must be remembered that a limited liability company is not designed to be an egalitarian Utopia, and in my view, if a fortuitous financial accretion is derived by one section of the shareholders who do no more than strictly adhere to their rights, no moral censure can attach to them for so doing. The petitioners are seeking a form of palm tree justice on the ground that the documents, which defined their rights and obligations when they first acquired their shares, now no longer suit them, and they wish more fortunate members to surrender part of the proceeds of the distribution which will come their way if article 121 be strictly followed.

However, the learned judge went on to say that it might defeat the major purpose of s. 209 to invoke in every instance strict compliance with the letter of the articles as a complete answer to a petition for relief, but that the onus rests upon the petitioners to show more than bare insistence upon rights. But in this case there was "no evidence . . . of browbeating, nor of overbearing of any group, nor of a sinister combination of a majority to manoeuvre themselves into a situation of uncovenanted advantage."

The judgment of Haslam J. on this point was affirmed by the Court of Appeal—[1973] 1 N.Z.L.R. 214, which also dealt with a subsidiary point referred to, but apparently not specifically considered by, Haslam J. It was contended on behalf of the appellants that the conduct of the directors also amounted to oppression in that they had sought out and obtained from the purchaser of the property an offer which did not take acount of the differences in the value of the suites. (A previous offer had done so). Also, it was said that oppression could be found in the directors' action in not insisting that there be a change in the articles. Both parts of this argument were rejected. Perry J., delivering the first judgment, adopted the definition of oppressive conduct which appears in the judgment of Buckley L. J. in the most recent English case on the subject, *Re Jermyn Street Turkish Baths Ltd.* [1971] 1 W.L.R. 1042, 1060; [1971] 3 All E.R. 184, 199 where the learned Lord Justice, delivering the judgment of the Court of Appeal, said:

Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

Fiduciary duties of directors

The equitable principle that a man can not be allowed to place himself in a position in which his fiduciary duty and his private interest conflict was considered and applied in relation to a company directorship in *Industrial Development Consultants* v. *Cooley* [1972] 1 W.L.R. 443. Applying *Phipps* v. *Boardman* [1967] 2 A.C. 46, H.L.(E.) and *Keech* v. *Sandford* [1726] Sel. Cas. Ch. 61, and referring inter alia to *Regal (Hastings) Ltd.* v. *Gulliver* [1967] 2 A.C. 134; [1942] 1 All E.R. 378, H.L.(E.), Roskill J. held that the principle is an overriding one, and that the director (Cooley), was liable to account to the plaintiffs for all profits in respect of contracts obtained as a result of a course of conduct which put his personal interests in conflict with interests of the company.

The case is a good illustration of the application of the strict rule of equity and is of particular interest on two points. The contracts had been obtained by the defendant as a result of information communicated to him which he had failed to pass on to his principals, the plaintiffs. It was argued on behalf of the defendant that he was not in a fiduciary relationship with the plaintiffs in respect of the matter because the information had been communicated to him privately. Roskill J. rejected this argument, holding that the defendant had one capacity only in which he was carrying on business at that time and that was as the plaintiff's managing director. Counsel had relied on Lord Blanesburgh's speech in *Bell* v. *Lever Brothers Ltd.* [1932] A.C. 161, 193, where he said that a company could not make a director accountable for a profit unless it appeared—and this was an essential qualification—that in earning the profit he had made use either of the property of the company or of some confidential information which had come to him as director of the company. Roskill J. pointed out that the dichotomy was not complete and that there was a third class of case where a director might be called upon to account, namely, where he had misused his position as a director of the company.

It was further argued that even if a conflict of interest arose, accountability did not, for the plaintiffs could not have any interest in a contract, which, it was shown, they could not have obtained in any event. (Roskill J. assessed the likelihood of the plaintiffs obtaining the contract at no more than a 10 per cent chance). Thus the equitable doctrine relied upon would give the plaintiffs a benefit which it is unlikely they could have got for themselves, even if the defendant had complied with his duty. The learned judge found however, that the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant.

Partnership

Robertson v. *Brent and Haggitt* [1972] N.Z.L.R. 406 concerned the dissolution of a partnership between solicitors. The case is reported only on the dispute regarding payment for "work in progress" to the retiring partner. The parties had agreed upon "heads of agreement" for the dissolution of their practice, including a certain sum for the

purchase of the plaintiff's capital. The plaintiff claimed that in addition to the amounts stated in the heads of agreement he was entitled to be paid for "work in progress" at the time of the dissolution of the partnership.

Wilson J. held that the plaintiff was not entitled to payment for work in progress. In the circumstances of this case, the expression was used to denote professional work for which instructions had been received by the firm but which had not been completed when the plaintiff retired. His Honour said that in a solicitor's practice the giving and accepting of instructions gives rise in each case to a contract for professional services for which (in the absence of special arrangement) no payment is due by the client until the services have been rendered. Therefore, in regard to uncompleted work, no monys were owing and it followed that no asset was then in existence; all that existed was a probability of future income which would not become income until the work was finished.

On the basis of this case it would seem that practitioners should make special provision for work in progress if they wish it to be taken into account in the event of dissolution. On the other hand, it may be sufficient that as a matter of accounting practice work in progress is valued, for this may amount to an implied term in the partnership agreement.

G. S. MacAskill

CONSTITUTIONAL LAW

Section 3D Police Offences Act 1927

The appellant in *O'Connor* v. *Police* [1972] N.Z.L.R. 379 had been convicted in the Magistrate's Court under s. 3D Police Offences Act 1927 on the charge of behaving in a disorderly manner. While the appellant was in a bottle store making a purchase, a girl companion, who was with him, was questioned as to her age by a police sergeant. It was revealed that the girl was aged eighteen; consequently the police sergeant warned her that her presence on the premises was illegal and told her to leave. The couple left the hotel and with another companion joined a group of people waiting to cross at an intersection. Unknown to the appellant the police sergeant followed them and heard the appellant remark in a loud voice "officious bastard", upon which remark the sergeant took the appellant into custody and subsequently charged him under s. 3D.

The Supreme Court, following *Melser* v. *Police* [1967] N.Z.L.R. 437, held that conduct, in order to be disorderly within the meaning of s. 3D, does not have to be such as is calculated to provoke a breach of the peace, but has to be something more than just fitting the description of disorderly. The court has to apply an objective test and determine, as a matter of time, place and circumstances, whether it was likely to cause serious annoyance or disturbance to some person or persons. There was no evidence to show that the appellant knew the sergeant was in a position to overhear the remark and the appellant said in evidence that he had addressed the remark to his girl companion "by way of consolation to the girl who was still embarrassed." Rich-