(b) objects and powers which, by their very nature, are necessarily ancillary to some legitimate object of the company will not achieve the status of independent objects by virtue of the operation of a *Cotman* v. *Brougham* clause. Such a clause must be read as subject to an exception where the context so requires it.

C. S. Withnall.

[N.B. The decision of Buckley J. reviewed above has since been affirmed by the Court of Appeal: *Introductions Ltd.* v. *National Provincial Bank Ltd.* [1969] 2 W.L.R. 791. Ed.]

CONTRACT LAW

1. *Offer and Acceptance*

In *Partridge* v. *Crittenden* [1968] 1 W.L.R. 1204, the appellant had been convicted of "offering for sale" Bramblefinch birds which could be sold, by virtue of s. 6 (1) of Schedule 4 of the Protection of Birds Act 1964, only if the birds were bred in captivity and had closed rings on their legs.

The appellant inserted an advertisement in the classified advertisement section of a periodical stating inter alia:

> Bramblefinch cocks,
> Bramblefinch hens, 25s. each.

Such phrases as "for sale", "offered for sale" etc. appeared nowhere in the advertisement. On appeal against conviction it was held the advertisement was an invitation to treat. *Fisher v. Bell* [1961] 1 Q.B. 394 was applied despite the advertisement appearing in the classified advertisements. Some importance was attached by the Court to the fact that no such phrases as "for sale" appeared in the advertisement.

Willets v. *Ryan* [1968] N.Z.L.R. 863. The respondent gave the appellant an option to purchase a property. The price and deposit were expressed in the option, but the terms of payment of the balance was left open to be mutually agreed upon in the future. The appellant purported to accept the offer contained in the option and, also specified the manner in which he would pay the balance. The respondent refused to continue with the sale.

The question put to the Court of Appeal was whether or not the option contained an offer capable of acceptance. Turner J., in the course of delivering the judgment of the Court said, at 868, with reference to contracts for the sale and purchase of land:

> But, although it is not necessary that the parties should express their agreement as to the time and manner of payment and although if they do not do so the Court will take them to have agreed to abide by such terms as the Court may think reasonable in this regard, it is otherwise where they have expressly reserved such a matter as one for later negotiation and agreement.

It was further felt by the Court that in such cases it was clear the parties meant to negotiate further before their pactum was to be given legal force.

There being no agreement on this point, there was consequently no concluded offer capable of acceptance and the appellant's purported acceptance amounted to no more than a counter-offer.

2. *Implied Terms*

Charnock v. *Liverpool Corporation and Another* [1968] 1 W.L.R. 1498. The plaintiff's car was damaged in a collision with the first defend-

ant's car owing to the negligence of the driver of that car. The plaintiff took his car to the second defendants' repair shop where the latter agreed to repair it. The plaintiff informed the second defendant that his insurance company's assessor would view the car next day. The assessor inspected the car. The second defendant sent the insurance company an estimate for the cost of repairing the car. This was agreed to by the company, who accepted liability for payment. The plaintiff, during the eight weeks it took to repair his car, hired a rental vehicle. It was proved that the repairs should have taken no longer than five weeks. It was also proved that the second defendants were, at the time they accepted the job, aware of factors which would cause the delay, but they did not inform the plaintiff of this. The first defendant agreed to pay for the hire of the car for the first five weeks. The plaintiff obtained judgment for the balance against the second defendants.

On appeal the judgment was affirmed and it was held:

(a) there was a contract between the insurers of the plaintiff's car and the second defendants to pay, and also a contract between the plaintiff and the second defendants which arose by inference from the conduct of the parties;

(b) it was an implied term of the latter contract that the repairers would do the work with reasonable skill and within a reasonable time (namely, within five weeks), in consideration of the plaintiff giving his car to the second defendants to repair.

Young & Martin Ltd. v. *McManus Childs Ltd.* [1968] 3 W.L.R. 630. The respondent sub-let a contract for the roofing of houses it was building to the appellant. The appellant sub-let to another contractor who actually did the work. The respondent by virtue of the terms of the contract nominated the brand of tiles to be used. In fact these were obtainable from one supplier only. The nominated brand of tiles was fitted but it later proved to have a latent defect. The respondent sued the appellant who appealed against judgment entered against him at first instance and confirmed on appeal.

The House of Lords held that the appellant was liable on an implied warranty of quality despite the nomination by the respondent of a brand known to be obtainable from only one supplier. However the effect of such a nomination did negate the implied warranty in contracts for work and materials i.e. that the materials are fit for the purpose. It was also pointed out that it depends on the facts of each case whether either or both warranties may be excluded. (For an example see *Gloucestershire County Council* v. *Richardson* [1968] 3 W.L.R. 645.)

3. *Fraud, Mutual Mistake, Remedies of Parties*

Bronwhite v. *Worcester Works Finance Ltd.* [1968] 3 W.L.R. 760. The appellant appealed from a decision of the Court of Appeal in which the Court refused to allow the recovery of a deposit on a car bought on hire-purchase. The hire-purchase agreement was void for mutual mistake and the hirer (appellant) sued for the recovery of his deposit as money being had on a total failure of consideration and in the alternative as money being had by the agent of the respondent on the respondent's behalf.

The appellant traded in his car for £130 when he purchased another car at an agreed price of £430, the balance of £300 to be had on hire-purchase. The appellant signed an application for hire-purchase terms

which however was left for the dealer to fill in before he handed it to the respondent.

The dealer increased the price fraudulently and then in the usual way sold the car to the respondent. The respondent in settling with the dealer deducted the £130 the dealer received from the appellant. On refusing to pay the instalments the respondent sued the appellant. The appellant counter-claimed for the return of his deposit. Both claims failed at first instance and in the Court of Appeal. The respondent could not enforce the contract which was void for mutual mistake and the appellant was unable to recover his deposit. Both courts relied on the Court of Appeal's decision in *Campbell Discount Co. Ltd.* v. *Gall* [1961] 1 Q.B. 431, where it was held the party in the place of the appellant is restricted to his rights as against the fraudulent party.

However the House of Lords held on appeal from the Court of Appeal by a majority that the deposit of £130 received by the dealer and credited to him by the respondent on settlement must be treated as "being had" by the respondent for a consideration that failed (the respondent re-possessed the car). Accordingly the respondent was ordered to account to the appellant. The respondent, while being innocent too was left to his remedy against the rogue.

4. *Contracts Contrary to Public Policy*

Dobersek v. *Petrizza* [1968] N.Z.L.R. 211. The plaintiff sued the defendant for breach of promise to marry. The plaintiff knew at the time of the promise that the defendant was married.

It was held that the agreement to marry in such a case was void as being contrary to public policy and that this will be so even when the agreement is to marry when the existing marriage ends by death or divorce. Only after a decree nisi may an enforceable agreement to marry be made.

This decision would seem to clear up an area of some uncertainty in New Zealand especially in the field of family law.

5. *Illegality*

Fenton v. *Scotty's Car Sales Ltd.* [1968] N.Z.L.R. 929. The appellant entered into a customary hire-purchase agreement for the purchase of a car. He paid a deposit and then drove the car away. He later found the car to be defective and returned it to the vendor, demanding the return of his deposit. On the vendor's refusal to do so the appellant brought an action in the Magistrate's Court. An alternative cause of action pleaded by the appellant was that contrary to Reg. 53 of the Traffic Regulations 1956, the vendor failed to deliver a warrant of fitness no more than thirty days prior to delivery of the vehicle. The Magistrate followed *Dromorne Linen Co. Ltd.* v. *Ward* [1963] N.Z.L.R. 614 and awarded damages equivalent to the cost of the appellant getting the car to a warrant-worthy state.

On appeal to the Supreme Court Woodhouse J. refused to follow the *Dromorne Linen* case and also *Berret* v. *Smith* [1965] N.Z.L.R. 460 which was decided on the same basis as the *Dromorne Linen* case. He held:

(1) Reg. 53 is not intended to affect the rights of parties to a contract for the sale of motor vehicles. It is penal only and does not give rise to civil remedy.

(2) That the contract was illegally performed by the respondent but that the illegality was incidental in the sense explained in *St John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267.

(3) Consequently the appellant's rights against the respondent depended on the terms of the contract.

The law in regard to Regulation 53 is thus far from being settled.

Carey v. *Hastie* [1968] N.Z.L.R. 276. The appellant agreed to do certain work for the respondent which required the obtaining of a permit from a local authority before the work could be commenced. Originally the respondent undertook responsibility for obtaining the permit. But for various reasons he did not obtain it and the appellant took it on himself to acquire it. As it was not anticipated that the permit would not be issued, the appellant started and completed the work before it was found that the permit could not be obtained. The respondent refused to pay the balance owing under the contract. The appellant was successful in obtaining judgment in the Magistrate's Court but the judgment was reversed on appeal to the Supreme Court. The Court of Appeal held: that the contract was illegal in performance and the party performing the contract could not therefore claim under it. The Court felt that it was the duty of the builder to acquire the permit unless he contracted out of that duty in which case he should inspect the permit before commencing work.

6. *Repudiation, Damages and Account*

Denmark Productions Ltd. v. *Boscobel Productions Ltd.* [1968] 3 W. L. R. 841. The respondent was the manager of a "pop group" known as "The Kinks". The agreement between the respondent and The Kinks did not preclude the respondent from employing the services of others to undertake some of the work. In fact the respondent employed the appellant in return for 10% of The Kinks gross takings and an assignment of any compositions that the group might make. The arrangement suited the group for some time, until they became dissatisfied with the person undertaking the work. They informed the respondent that they no longer wished the appellant's employee to work with them. The respondent then wrote to the appellant requesting termination of the agreement from the date The Kinks refused to accept the services of the appellant's servant. The appellant brought an action against the respondent, (a) requiring the respondent to account for 10% of the group's gross takings from the time the appellant's services were refused until judgment and (b) an injunction restraining the respondent from assigning The Kinks' compositions elsewhere.

The litigation ended up in the Court of Appeal where it was held by a majority:

(1) The appellant was entitled to an account from the time The Kinks refused the appellant's services until the time of the respondent's purported repudiation. Any compensation from that time until judgment would have to be by way of damages in an action grounded on wrongful repudiation (as damages were not claimed the Court did not have to decide whether the repudiation was good or bad).

(2) The injunction was not granted as the appellant failed to show it suffered any loss thereby (the compositions were assigned directly to another company for little or no consideration).

7. *Lump Sum Contracts and Quantum Meruit*

Gilbert and Partners (a firm) v. *Knight* [1968] 2 All E. R. 248. The appellant agreed to do certain work for the respondent at an agreed fee of £30. Later additional work was requested by the respondent. However, no mention of extra payment for the additional work was made by either party. On completion of the work the appellant sent a bill for £140, being the original £30 plus additional work at scale rates, £110. The respondent paid only £30. The appellant's suit for £110 failed at first instance.

On appeal the Court of Appeal affirmed judgment entered in the court below. The Court of Appeal felt that on its facts the contract was for a lump sum. It was also stated that no recovery by way of a quantum meruit could be made, as it had not been shown, as required, that there was a new contract to pay a fee in respect of the additional work and it was quite clear that the parties had not discharged their original contract.

Moral of the story—in contract leave nothing unexpressed or unagreed.

8. *Divisible Contracts and Specific Performance*

Loan Investment Corporation of Australasia Ltd. v. *Bonner* [1968] N.Z.L.R. 1025. The appellant agreed to purchase from the respondent certain land. The written agreement contained inter alia:

Clause 9	This offer is subject to clause 9a.
Clause 9a	On settlement, the vendor shall deposit with the Loan Investment Corporation of Australasia Ltd. the sum of £11,000 for a term of 10 years at 7½% p.a., interest payable by equal quarterly instalments. Such loan to be personally guaranteed by the purchaser Michael G. Francis.

In seeking specific performance of the agreement the appellant was unsuccessful. The Court of Appeal by a majority held:

On a proper construction of the agreement it gave rise to two separate but interdependent obligations one of which, as a matter of law, the Court would not enforce by way of granting specific performance (the agreement in clause 9a—damages being an adequate remedy in the case of money lending agreements). Accordingly specific performance of the whole agreement was refused as the obligations were interdependent.

It is worth noting that Wild C.J. in the Supreme Court and Richmond J. dissenting in the Court of Appeal felt that the agreement was an indivisible one being solely an agreement for the sale and purchase of land, but one which contained an unusual provision as to the mode of settlement.

It appears from the judgments delivered in the Court of Appeal that care in the wording of such provisions is necessary. The majority of the Court of Appeal proceeded on the basis that the parties intended that the appellant would give the respondent a cheque for the full price of the land and then the respondent would give the appellant a cheque for £11,000. It is respectfully submitted the decision is unfortunate in that it was unduly harsh so far as the appellant was concerned and it

also appears to ignore the realities of commercial practice. Furthermore, as pointed out by Richmond J. the Courts have granted specific performance of one part of a contract and awarded damages for breach of the remainder—see 36 *Halsbury's Laws of England* (3rd Ed.) 351.

9. *Domestic Proceedings Act 1968*

The question of intention to create legal relations, family arrangements and such may arise as a result of ss. 125 and 54 of the Domestic Proceedings Act 1968. Section 125 (2) raises the question of liability of infants under maintenance agreements.

Cases such as *Balfour* v. *Balfour* [1919] 2 K.B. 571 and *McGregor* v. *McGregor* (1888) 21 Q.B.D. 424 may need re-examination in New Zealand in light of the Act.

K. N. Sharpin.

EQUITY AND LAW OF SUCCESSION

Powers and Duties of Trustees

Purchase of Trust Property by Trustee

In *Holder* v. *Holder* [1968] 2. W.L.R. 237, reversing in part the decision of Cross J. ([1966] 3 W.L.R. 229) which was noted in 1 Otago Law Review 246, the Court of Appeal held that a trustee should not be penalised for purchasing trust property at a public auction in every case. In this case, the trustee's interference with the administration of the estate had always been minimal, his knowledge of the property was acquired as a tenant and not as an executor, the beneficiaries had full knowledge of the facts, and the remaining executors, acting as vendors, had not been influenced by the trustee, in any way, in connection with the sale.

Investment of Funds by a Charitable Association

It was held by Cross J. in *Soldiers' Sailors' and Airmen's Families Association* v. *Attorney-General* [1968] 1 W.L.R. 313 that where a charitable association is incorporated by a charter empowering the association's Council to invest the funds of the association "in such securities as shall be determined from time to time by the Council", then the Council is in the position of a trustee as to those funds. Accordingly, unless a special or unlimited power of investment is given in the trust instrument (the charter in this case), then the Council is restricted to authorised trustee investmens.

Management of a Trust Business

In *Re Luckings Will Trusts, Renwick* v. *Lucking and Another* [1968] 1 W.L.R. 866, the majority shareholder in a private company, by his will appointed the minority shareholder his sole trustee. After the death of the majority shareholder, the minority shareholder carried on the company business with the aid of a managing director, who, over a period of years, made several large over-drawings on the company, and did not substantially repay any of them. The trustee was aware of these over-drawings, and accepted unquestioningly the explanations given for them, and on the subsequent dismissal and bankruptcy of the managing director, it was held by Cross J. that the trustee "had failed in his duty as a trustee to conduct the business of the trust with the same