that "revenue departments base their valuations . . . upon the tittle tattle of the market place" (per Orr L. J., 864).

The Court held that the claim for Crown privilege for documents of a routine kind which would and should be disclosed in ordinary litigation should not be sustained for there was no public interest which required them to be withheld from production but the commissioners were entitled to the privilege attaching to all litigants to withhold from production information freely entrusted by third parties in confidence for a restricted purpose. On that ground alone those documents were privileged from production.

Leave to appeal to the House of Lords has now been granted: [1972] 1 W.L.R. 833.

R. Ah Keni

COMMERCIAL LAW

Moneylenders

The importance of the Moneylenders Act 1908, and the complications which may arise in its interpretation have been emphasised in three recent New Zealand cases. In *Re A. R. Mackay Limited (In Liquidation), Farmers Finance Limited* v. *Craig and Another* [1971] N.Z.L.R. 289 proceedings were instituted to determine the validity of a second debenture executed in favour of the appellant by A. R. Mackay Ltd to secure the sum of $2000 plus further advances. Two forms of financing were used, the first involved discounting hire purchase agreements wherein the advances were secured by assigning to the appellant by mortgage hire purchase agreements. The other form was called 'D plan financing'. Originally the appellant advanced the purchase price of each vehicle, the advance was repayable after 30 days and was secured by a conditional hire purchase agreement showing the appellant as owner and Mackay Ltd as the purchaser. Later Mackay Ltd was not required to repay the loan until the vehicle was sold and to secure the advance Mackay Ltd sold the vehicle to the appellant who resold it to them. The appellant was not a registered moneylender.

The Court of Appeal refused to accept either system of 'D plan financing' as a series of sales and repurchases, but affirmed the judgment of Macarthur J. in the lower court that the system resulted in a series of loans. Detailed consideration was given to what constitutes moneylending for the purposes of the Moneylenders Act and the court quoted with approval Macarthur J.'s judgment in *Best* v. *Sutcliffe* [1965] N.Z.L.R. 750, 758 that "it is always a question of fact in each case whether a person is carrying on business of moneylending". The appellant claimed that the financing system was a recognised mercantile service and they were therefore not moneylenders. The court held the appellant had not confined their lending to providing a recognised mercantile service to Mackay Ltd as they had loaned money for the latter's general purposes and they had also loaned money to other companies. This being so, as the appellant was not registered as a moneylender the debenture was void and unrecoverable as an unsecured debt.

In *Combined Taxis Cooperative Society Ltd v. Slobbe* [1972] N.Z.L.R. 354 the plaintiff was a society registered under the Industrial and Provident Societies Act 1908. Most of its members were taxi drivers and the principal object was to provide loans to members. The defendant obtained a loan and signed an instrument by way of security. The plaintiff was not a registered moneylender under the Moneylenders Act 1908 and did not comply with s. 8 of that Act as to the memorandum of the terms of the loan.

Wild C. J. applied *Re A. R. Mackay Ltd* in holding that the business of the plaintiff was that of moneylending, by lending money systematically and regularly they were not within the exceptions provided in s. 2 of the Moneylenders Act. He then considered s. 7(1) Illegal Contracts Act 1970 and held that it precluded the court from exercising its power to grant relief by way of validating an illegal contract if any other enactment expressly declares that the contract in question is illegal or void. However he considered that the Moneylenders Act contained no express provision that a contract made by an unregistered moneylender is illegal or void and that the contract could be validated by the court. He then discussed s. 8 Moneylenders Amendment Act 1933 which provides in the absence of a note or memorandum in writing, a contract for repayment of money lent is unenforceable, but pointed out that under s. 55 Statutes Amendment Act 1936 the court may declare that a contract shall be enforceable. No note or memorandum in terms of s. 8 had been given and the contract was therefore unenforceable but he gave great weight to the fact that the plaintiff was a cooperative society, the interest charges were lower than those normally available and there was no public interest to be served by holding the contract was unenforceable. He felt it was a suitable case for the exercise of discretion under s. 55 Statutes Amendment Act 1936 allowing him to declare such a transaction legal or that such a contract is enforceable.

This decision then leaves the position that non-registration may be overcome by the Illegal Contracts Act and non-compliance with s. 8 may be overcome by the Statutes Amendment Act 1936. The facts for application of the Statutes Amendment Act were obviously exceptional but the need for compliance with s. 8 has been further abrogated by the next case to be considered.

In *Re Mountain View Property Holdings Ltd. (In Liquidation)* [1972] N.Z.L.R. 1 a second mortgage had been executed in favour of Lowanna Enterprises Ltd, a registered moneylender. No note or memorandum of contract was signed and delivered in terms of s. 8 Moneylenders Amendment Act 1933.

Wild C. J. held that as the borrower was a company and not an individual Lowanna Enterprises Ltd was not required to comply with s. 8. He quoted with approval the reasoning in *Motel Marine Pty. Ltd.* v. *I.A.C. (Finance)* [1964] 110 C.L.R. 9, a decision based on a provision similar to s. 8 in s. 13 Lending of Money Act 1915 (Tas.) that no security given by a borrower should be enforceable unless "a note or memorandum in writing of the contract is made and signed personally by the borrower". In the *Motel Marine* case Dixon C. J. declared that, 12, "the borrower, the plaintiff appellant is an incorporated company, and I do not think that s. 13 has any application to a borrower who is an incorporated company." He argued that s. 13 required the note or memorandum be signed "personally" by the borrower and that an incorporated company cannot sign anything personally. He felt that

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