794 (C.A.) (currently under review by the Judicial Committee of the Privy Council). In this case the appellant companies respectively sold and hired T.V. sets. They had the same shareholders and directors. The hiring company bought sets under conditional purchase agreements from the selling company and hired them out. The finance for these operations was obtained from the respondent finance company. Both the appellant companies got into financial difficulties and were served with demands signed on the respondent company's behalf. In considering whether or not an order for winding up the two appellant companies had been correctly made by Macarthur J. the Court was required to consider inter alia whether or not these conditional purchase agreements: (a) contravened Regulation 3 of the Hire Purchase and Credit Sales Stabilisation Regulations and were therefore illegal and void; (b) were shams got up by the parties in an attempt to disguise money lending transactions as dealings in customary chattels.

As to (a) the Court held that the agreements did not fall within these Regulations because they were sales "otherwise than at retail" and were therefore exempted from the provisions of these Regulations by Regulation 2(3). As to (b) the Court also rejected the submission that the documents were shams on the basis that the documents did not represent the dealings between the parties as being anything other than what they actually were.

The other case, *Turner* v. *B. V. Wright Ltd.* [1969] N.Z.L.R. 1073, shows that even a marginal failure to comply with the provisions of the Regulations is fatal to an agreement. In this case T agreed to buy a second hand car for $530.00, the minimum deposit of one half as then required to be provided by a trade-in of $260.00 and $5.00 in cash. T did not have $5.00 with him but the defendant company handed over the car to him on an undertaking that T would pay the $5.00 on the following day. He did in fact do this but later he wished to withdraw from the transaction. He raised the argument that at the time the car was disposed of by the seller the minimum deposit had not been paid and therefore the hire purchase agreement was void. The Magistrate at first instance applied the maxim *de minimis non curat lex* and dismissed the action. The plaintiff appealed to the Supreme Court and Woodhouse J., albeit reluctantly, allowed the appeal saying (*ibid.*, 1074):—

> In my opinion the language at the Regulations is so plain and unambiguous that it admits of only one construction. They contain no discretion to give relief for the avoidance of what might seem to be a hard result; and I think a failure to meet the rigid obligations they outline is fatal.

J. L. Millar

COMPANY LAW

Winding Up

In *Ross* v. *P. J. Heeringa Ltd.* [1970] N.Z.L.R. 170 the shareholders of a small private company passed a resolution in the following terms: "That the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily, and that [the plaintiff] be nominated as liquidator." Subsequently the shareholders passed a resolution purportedly rescinding the above. No liquidator was nominated by any creditor in accordance with section 285 Companies Act 1955.

The question to be decided by Haslam J. was whether the first

resolution was rendered a nullity by the latter resolution. No reference to revocation of winding up is made in the Act, and since section 270 provides that "a voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up," the company was in a state of liquidation with the plaintiff the liquidator at the time of the second resolution.

The English Court of Appeal in *Re Clifton Place Garage Ltd.* [1970] Ch. 477 had an application before it under the English equivalent of section 222 Companies Act 1955 to validate a disposition of a company's property made after the commencement of winding-up of that company. A receiver appointed prior to an order winding up the company made advances to the company so its business could be continued. After winding up the receiver claimed the moneys advanced.

The court found that in the circumstances this claim was reasonable and approved the disposition of the company's property. The approval was given on the grounds that: the receiver had acted in good faith in deciding to carry on the business, he was only getting back part of the money he had advanced, and the company and its creditors had had the benefit of the moneys advanced.

In *Re Bayswater Trading Company Ltd.* [1970] 1 W.L.R. 343 the Court held that the English equivalent of our section 219 (1)(a)(ii) clearly permits the administrator of a deceased shareholder to present a petition for the winding up of a company.

A further case before the Chancery Division was *Re Fildes Bros.* [1970] 1 W.L.R. 592 where a petition under the English equivalent of section 217 was presented. The petition for winding up was presented on the basis that it was "just and equitable" to do so. The shareholders were equal partners and the petition was presented by one of them who alleged that this was " . . . a case of a partnership carried on in the guise of a company . . . " and so *Re Yenidje Tobacco Company Ltd.* [1916] 2 Ch. 426 was applicable. Based on this it was sought to prove that there was " . . . such a lack of confidence between [the partners] as would justify the dissolution of a partnership . . . " and so that it was "just and equitable" that the company be wound up.

Although the judge dismissed the petition he adopted the statement by Simonds J. in *Re Cuthbert Cooper and Sons Ltd.* [1937] Ch. 392, 398, as follows:

> The question whether it is right for me applying here the principles of partnership to the question of dissolution to wind up this company or not largely depends on what are the contractual rights of the parties as determined by the articles of association.

His lordship then said, in effect, that as it was the contract between the parties which was of importance, the whole of the arrangement must be considered and not just what the articles stated. He also thought that enquiry would go beyond any contract "to a settled and accepted course of conduct."

Two other matters were discussed by the judge. First, he was of the opinion that (*ibid.*, 597):

> If on the facts existing when the petition was presented it was then just and equitable to wind up the company, but subsequently it had ceased to be so, I do not think a winding up order should be made.

The question must thus be answered on the facts at the time of the hearing. Secondly the judge declared that "The petitioner is confined to the heads of complaint set forth in his petition" (*ibid.*, 597).

Re Westbourne Galleries Ltd. [1970] 1 W.L.R. 1378 was another Chancery Division case concerned with a petition from an equal partner for the winding up of a company. The petitioner's complaint was that he had been removed from the board. The court found that, although the removal was lawful and done in accordance with the articles of association

> . . . it was an abuse of power and a breach of the good faith which partners owe to each other to exclude one of them from all participation in the business upon which they have embarked on the basis that all should participate in its management. (*ibid.*, 1389.)

An alternative petition under the English equivalent of our section 209, that the petitioner's shares be purchased by the other shareholders, failed on the grounds that the petitioner could not establish " . . . a course of oppressive conduct continued up to the date of the petition" (*ibid.*, 1390).

A recent Australian case on fradulent preference is of relevance to us as the appropriate legislation is similar to ours. The case is *Calzaturificio Zenith Pty. Ltd.* (*in liquidation*) v. *N.S.W. Leather and Trading Co. Pty. Ltd.* [1970] V.R. 605. This case is commented on in [1971] N.Z.L.J. 51.

Directors

The court was concerned in *Pergamon Press Ltd.* v. *Maxwell* [1970] 1 W.L.R. 1167 with the control of a director's discretionary fiduciary power. The plaintiff, a company incorporated in Great Britain, sought an injunction to order the defendant, the president of a New York company controlled by the plaintiff, to call a special meeting of the New York company to, inter alia, replace certain directors including the defendant.

Pennycuick J. held that such an order would not be made because, inter alia: (i) the New York court was the only proper tribunal in which the members of the New York company could seek to control the exercise of the defendant's power to call a special meeting. (ii) even though the British company had a controlling interest in the New York company it could not seek an order directing the defendant to exercise his discretion in a certain manner as this required an application by all the members.

Criminal Liability

The Queen v. *Murray Wright Ltd.* [1970] N.Z.L.R. 476 was before the Court of Appeal on appeal from the decision of Henry J. who had refused to quash an indictment against the company for manslaughter. The Court of Appeal considered *R.* v. *I.C.R. Haulage Ltd.* [1944] K.B. 551 but found that in New Zealand the company could not, in law, be so indicted.

This finding was inevitable in view of the facts and of the wording of section 158 of the Crimes Act 1961 which defines homicide as " . . . the killing of a human being by another".

The Crown's argument that "human being" is a synonym for "person" was not accepted, nor, was the contention that the company be held vicariously responsible, or personally responsible through the *alter ego* doctrine of *R.* v. *I.C.R. Haulage Company Ltd., supra,* for the act or

omission of an employee. Approval was given to the statement of Henry J. that " . . . the only type of killing of which the [criminal] law takes cognisance is a killing of one human being by another directly or indirectly . . . . "

Priority of Charge

In *Re (C. L.) Nye Ltd.* [1970] 3 W.L.R. 158 the English Court of Appeal had an application, from the liquidators of a company in voluntary winding up, which raised the following questions: (i) does the power to rectify the register of charges given by our section 108 enable the court to order the deletion of a whole registration? (ii) is a charge void against the liquidator of a company under our section 103 if submitted within twenty-one days of an erroneous date but more than twenty-one days after the actual date? (iii) is the certificate of registration provided for by our section 105 conclusive although a wrong date is included? The answers, given to these questions were, respectively: (i) No—only an omission or misstatement may be corrected; (ii) No; (iii) the certificate of registration of the charge was conclusive and so the charge was valid and effective and binding on the liquidator. But, if there had been evidence that any other person had given credit to the company between the dates when the charge should have been, and the date when it was, registered then the maxim that no one can take advantage of his own wrong would have applied and the answer above would have been different.

Rights and Duties of a Receiver

The court had in *Airlines Airspares Ltd.* v. *Handley Page Ltd.* [1970] Ch. 193 to consider the rights and duties of a receiver appointed by debenture holders. The plaintiffs sought an injunction to restrain a sale by the receiver of a company of certain operations over which the plaintiffs had commission rights. The receiver had, in view of the proposed sale, refused to adopt the plaintiffs' contract.

Graham J. declined the injunction and said (*ibid.*, 198):

> . . . is a receiver and manager, appointed by the debenture holders, in a stronger position, from the legal point of view, than the company itself, in respect of contracts between unsecured creditors and the company? Assuming that the company on the authority of *Southern Foundries* (1926) *Ltd.* v. *Shirlaw* [1940] A.C. 701, cannot put it out of its own power to perform contracts it has entered into, can a receiver in effect do so on its behalf if, at the same time, he has made it clear that he is not going to adopt the contract any way and, if, as is, in my judgment, the case here, the repudiation of the contract will not adversely affect the realisation of the assets or seriously affect the trading prospects of the company in question, if it is able to trade in the future?

He adopted a passage in *Buckley on the Companies Acts* (13th ed.) 244, and answered this question in the affirmative.

M. V. Rockel

CONTRACT

Fundamental Breach

The English Court of Appeal has in the last year twice had the opportunity to consider the doctrine of fundamental breach as pronounced by the House of Lords in *Suisse Atlantique Societe d'Armament Maritime S.A.* v. *N. V. Rotterdamsche Kolen Centrale* [1967]