New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"In legislation dealing with entirely new matters, one can have no conception of the difficulties facing the draftsman. He has to provide for all contingencies in novel situations for which novel remedies are being provided, and one can well forgive contradictions here and there in such circumstances. One has to look at a statute such as this on broad lines."

—His Honour Mr. Justice Blair, on the National Expenditure Adjustment Act, 1932, in *Shashour v. Young.*

Vol. VIII. Tuesday, December 6, 1932 No. 21

Legal Problems Relative to Radio.

When the law finds itself in a new atmosphere, as when a wholly novel situation gets into Court, judges are not at liberty to look squarely at the facts, and to decide in the light of a broad public interest what new criteria should be established and what new principles applied. Such, theoretically, is the function of the Legislature. So, under the genius of the Common Law, the lawyer must find analogies in the troubles of the past. For a ready-to-hand instance of this, we have only to refer to the protracted legal battle which has lately engaged the attention of our Court of Appeal, arising from the death of an aeroplane passenger, and from the application to new circumstances of well-defined principles. The same position confronts those who seek to advise on problems consequent on the invention of wireless telegraphy, and, more particularly, of radio broadcasting and its increasing operation. As an American jurist said recently:

> "Just as in the early days of broadcasting the D-X hunter (sometimes known as the radio golfer) delighted in seeing how many stations, good or bad, he could tune-in to in an evening, so there have been lawyers combing the advance sheets for every case where the word 'radio' has been mentioned accidentally or otherwise, as well as for every case where, by substituting the word 'radio' for some other word in the report, the result is not nonsense."

It is not our purpose here to delve deeply into the possibilities of the law as affecting radio. We hesitate to think that any new branch of law will evolve from the use of this far-reaching invention. It seems to us that most of the new legal problems consequent on the advent of radio fall naturally into ready-made compartments of our Common Law, such as contract, defamation, unfair competition, nuisance, copyright, and patents. For instance, though we are aware that there has already been considerable academic wrangling as to whether defamation by broadcasted lectures, etc., is technically libel or slander, no one denies that it comes within the scope of the law relating to defamation generally. As Mr. Louis G. Caldwell, formerly General Counsel to the U.S. Federal Radio Commission has found, "Like other industries, the radio industry has legal problems that extend into most of the chapters of the *Corpus Juris.*"

Still there remain problems which are inseparable from the use of radio, and which may yet cause considerable argument in the Courts and among the textbook writers. For instance: Who owns the ether? The ether is the greatest of intangibles. We have yet to learn that the law busies itself with the ownership of a commodity which may or may not exist. Until scientists have composed their differences, how may the jurists move in so problematical an arena? Perhaps, like the closing chapter in the *Wizard of Oz*, when the spectacles are taken off and the mysterious dazzling light is removed, the scene will be found to contain only a wizened old man known to science as an hypothesis. A recognition of property rights cannot rest on so fragile a foundation. We leave it meanwhile to some of our American friends, who are so concerned with the freedom of the seas, to declare, as they did, in a bill which did not pass Congress: "The ether is hereby declared to be the sole and inalienable property and possession of the people of the United States."

But a real difficulty arises from the use of air space. Quite a large number of radio communications can go on simultaneously and universally, if the wavelengths of the world's stations can be sufficiently differentiated from one another so that a receiving-set can be made to respond to one to the exclusion of the others. If, however, radio stations are permitted in excessive numbers to propel waves into the air (or ether), then the resulting interference will assuredly decrease the usefulness of the new medium of communication, and, if great enough, will make its uselessness worldwide. This trouble cannot be controlled by any purely local legislation, however effective. Does any other kind of business present this dilemma? Consequently, the argument shifts from the ownership of the ether to the control of radio transmission. This at once raises questions of international law as well as of the rights of individuals. The solution is not to be found in legal delimitation, since it is ruled by the possibilities and exigencies of radiophysics.

What has the law to say about nuisance by radio? We do not refer to atmospheric or static interference which is something about which the scientists can tell us little except to expose their helplessness to eliminate it. But there is also the permanent possibility of other forms of interference with radio reception. This is called "inductive interference," and is explained as "man-made interference." This may infringe various kinds of rights. Yet it may come from X-ray plants, vacuum cleaners, faulty electric-power lines, and from a host of other sources. This could well be a matter for domestic, or even municipal, legislation, if it be admitted to have only local effect and to be within the law-making authority of our Legislature "for the peace, order, and good government of New Zealand." But what about its effect that extends extra-territorially?

In addition to its abuses, the loud-speaker has its uses; but to many of us it comes comprehensively and instinctively within any accepted definition of a "nuisance"; and further media of inductive interference with rights can easily be brought to mind. Indications of the very real problems arising from the use of radio in relation to patent law and the law of copyright must be excluded here for reasons of space. It is sufficient to say there remain many possibilities of litigation arising out of the construction of Part XI of the Post and Telegraph Act, 1928, and of s. 32 of the Patents, Designs, and Trade-marks Act, 1921-22. On some future occasion we hope to return to a consideration of the "breadth and finer spirit" of that legislation in relation to broadcasted programmes.

Court of Appeal.

Myers, C.J.
Herdman, J.
Kennedy, J.

September 28; October 19, 1932.
Wellington.

TARANAKI ELECTRIC-POWER BOARD v. THE NEW PLYMOUTH BOROUGH.

Local Authority — Interpretation — Local Authority of any Adjoining District — Meaning of "Adjoining" — Municipal Corporations Act, 1920, s. 282 (b).

Originating summons for an order interpreting s. 282 of the Municipal Corporations Act, 1920.

Since the year 1924, the New Plymouth Borough Council has been supplying electricity from its central power station to the Boroughs of Inglewood and of Waitara, under contracts with them respectively. The Taranaki Electric Power Board asked this Court in effect to declare that the continued supply of electricity by the New Plymouth Borough to Inglewood Borough and Waitara Borough is beyond the power conferred on the New Plymouth Borough by the Legislature in terms of s. 282 (*b*).

The contest in this action turned on the precise meaning to be attributed to the word "adjoining" as used in s. 282 (*b*) of the Municipal Corporations Act, 1920.

The Borough of New Plymouth is bounded on one side by the sea. Except to the extent to which it is so bounded it is surrounded on all sides by the Taranaki County, which extends for many miles. The Borough of Inglewood is distant eight miles, and the Borough of Waitara six miles, from New Plymouth. In the latter case the Taranaki County intervenes: in the former the County of Taranaki and the County of Inglewood. The position of the Borough of New Plymouth is exceptional in that as to most of, if not all, the other substantial boroughs in New Zealand, each of them has a number of other boroughs, town districts, or other districts in direct contact with it.

The question for determination was whether the boroughs of Inglewood and Waitara could be said to be districts "adjoining" the Borough of New Plymouth within the meaning of para. (*b*) of the section. The learned Judge in the Court below had answered the question in the affirmative, and the present appeal was made against that decision.

Held, *per totam curiam,* allowing appeal: That neither the Inglewood Borough nor the Waitara Borough is an "adjoining" district to the New Plymouth Borough within the meaning of s. 282 (*b*); and nothing in the language of the statute or the surrounding circumstances warrants the conclusion that any secondary or extended meaning should be given to the word "adjoining" in the section.

Per Herdman, J.: The words "adjoining district" in s. 282 (*b*) mean "be next or continguous to; border upon."

Per Kennedy, J.: There is no context sufficiently showing that the word "adjoining" as used in s. 282 (*b*) in any other sense than its sense of "lying next to" with nothing in between.

Weir for appellant.

Quilliam for respondent.

MYERS, C.J., after setting out the facts given in the headnote, said that in **Mayor of Wellington v. Mayor of Lower Hutt** [1904] A.C. 773, the Privy Council had to consider the meaning of the word "adjacent," and said, "It is not confined to places adjoining, and it includes places close to or near." Here the word used is not "adjacent" but "adjoining," and it would seem that in the opinion of Their Lordships the primary meaning of that word when used in a statute of this kind is "lying next to" or "in actual contact."

The actual word "adjoining" had itself been the subject of several decisions. In **Rex v. Hodges,** Moo. & M. 341, Mr. Justice *Parke* had to consider the words "adjoining any dwelling house" and he said that he felt bound to hold that ground cannot be properly said to adjoin a house unless it is absolutely contiguous, without anything between them. It was true that the learned Judge was construing a penal statute, but his view as to the meaning of the word "adjoining" had been adopted in several cases where it occurred not in a statute but in a conveyancing document: **Vale and Sons v. Moorgate St. and Broad St. Buildings Co., Ltd.,** 80 L.T. 487; **Ind Coope and Co. v. Hamblin,** 84 L.T. 168 (reversing the decision of *Buckley,* J., to the contrary, 81 L.T. 779); **Derby Motor Cab Co. v. Crompton and Evans Union Bank,** 29 T.L.R. 673. And in **Cave v. Horsell** [1912] 3 K.B. 533, the authority relied upon by the respondent in this case, *Fletcher Moulton,* L.J., expressly said that he accepted the authority of **Vale and Sons v. Moorgate St. and Broad St. Buildings Co.** and **Ind Coope and Co. v. Hamblin,** but that in the case then under consideration the Court had not to decide the abstract question of the meaning of the word "adjoining" apart from the context, but was entitled and bound to bear in mind the surrounding circumstances, including the object of the covenant, and had then the duty to construe the words as a whole. He had then proceeded to consider the words of the particular covenant that had to be construed and came to the conclusion that the word "adjoining" as there used should not be restricted to actual contiguity without anything between. The language of the context, he said, was absolutely inapt to express such a restricted meaning as the defendant suggested. *Buckley,* L.J., came to the same conclusion. *Vaughan Williams,* L.J., differed from the majority of the Court. He said that in his view it was important that the word "adjoining" so often used in respect of houses and land, selected by the parties to the document, should be construed in its ordinary and grammatical sense.

The **Derby Motor Cab Co.** case came before *Eve,* J., a year after **Cave v. Horsell** was decided. There the defendants in a lease of premises covenanted not to let the "adjoining" premises as a motor garage and office without giving the plaintiff the first refusal. The defendants having let premises which were near to, but not next door or physically adjoining, those let to the plaintiffs as a lock-up show-room for motor cars without giving the plaintiffs the first refusal the plaintiffs claimed an injunction. It was held that the premises were not "adjoining" those let to the plaintiffs. *Eve,* J., in delivering judgment, said that as the question with regard to the word "adjoining" had been argued at some length he thought it right to express his opinion upon it. He said that he did not altogether take the view which had been taken of the decision in **Cave v. Horsell,** and that counsel for the plaintiffs had taken an exaggerated view of that decision. *Prima facie,* he said, the word "adjoining" bore the meaning put upon it by Mr. Justice *Parke* in **Rex v. Hodges,** and Mr. Justice *Cozens-Hardy* in **Vale v. Moorgate St. etc. Co.** and adopted in **Ind Coope and Co. v. Hamblin.** The report of Mr. Justice Eve's judgment in the *Times Law Reports* proceeds: "The result of *Cave v. Horsell* was this: that the Court of Appeal while accepting the decision in *Ind Coope and Co. v. Hamblin,* thought that there might be cases in which there was a context which imposed a secondary meaning on the word, and in the case before the Court of Appeal there was such a context. Adopting that view of *Cave v. Horsell,* could "it be said that there was in the present case a context which imposed a secondary meaning on the word?" His Lordship did not think there was anything in the covenant which controlled the ordinary meaning. Unless he had regard to what he assumed to be the intention of the parties, he could not see any reason for giving to the word a larger meaning. There was not in the present case the word 'any' as there was in *Cave v. Horsell.* He could not therefore hold that there was anything in the context to put a wider construction on the word."

The learned Chief Justice went on to say that here it was a section of a statute and not a covenant in a deed that had to be construed, but the same question arose as in the case decided by *Eve,* J. Mr. Justice *Mac Gregor* was of opinion that para. (*a*) of s. 282 was of assistance in giving an extended meaning to the word "adjoining" in para. (*b*). He said that to restrict the meaning of the word "adjoining" would involve the absurd result that the New Plymouth Borough Council could apparently supply any person in Inglewood or Waitara with electricity while it would be forbidden to contract with the local authority of either borough for the supply of electricity. The learned Chief Justice found himself unable to agree with the conclusion arrived at by the learned Judge. He very much doubted whether the words "any person residing beyond the borough" which appear in para. (*a*) could be given the very wide interpretation that His Honour suggested. Except for the powers conferred by s. 282 the activities of the Council would be confined to its own Borough. It was considered advisable to grant the power conferred by para. (*a*), but it could never have been within the contemplation of Parliament that a borough council could supply electricity to any person anywhere outside the borough without limit, simply by obtaining the consent of the local authority of the district in which the supply is given. His Honour could not help thinking that some limit must be placed upon the words of this paragraph, though with the precise interpretation of these words the Court is not now concerned. It was sufficient to say that different language

is used in para. (*b*) from that contained in para. (*a*). Para. (*b*) does not confer power upon a council to contract with the local authority "of any district beyond the borough," which are the words of para. (*a*), but gives power to contract with the local authority of "any adjoining district." Having regard to the difference between New Plymouth and the other boroughs throughout the Dominion, to which His Honour had earlier referred, he doubted very much whether the question that now arose could arise in the case of any other borough. In any case, he could find nothing in the language of the statute or the surrounding circumstances, to use the expression of *Fletcher-Moulton*, L.J., in **Cave v. Horsell,** that in his opinion warranted the conclusion that any secondary or extended meaning should be given to the word "adjoining" in s. 282. He thought, therefore, that the appeal should be allowed and the questions in the Originating Summons answered by saying that neither the Inglewood Borough nor the Waitara Borough is an "adjoining" district to the New Plymouth Borough within the meaning of para. (*b*) of s. 282. The provisions of the Local Legislation Act, 1931, did not affect the question. That section validated the agreements up to September 30, 1933, but there was an express provision that nothing in the section should affect the validity or invalidity of either agreement in respect of the remaining portion of its term.

HERDMAN, J., after outlining the facts, said that the primary meaning of the word "*adjoining*" is "to lie next or contiguous to; to border upon; to lie close together; be in contact; as, the fields *adjoin*." This is the meaning given to the word in the Standard Dictionary.

In **The Mayor of Lower Hutt v. The Mayor of Wellington,** 23 N.Z.L.R. 1118, *Edwards*, J. contrasts the word "adjacent" with the word "adjoin" and to the latter word apparently ascribes the meaning "lying next to" or "bordering." That was the inference His Honour now drew from the criticism of the word "adjacent" by *Edwards*, J., and from the use which he makes of the word "adjoining."

In the case **Cave v. Horsell** [1912] 3 K.B. 533 it was necessary to interpret the word "adjoining" as used in a lease in the circumstances detailed by His Honour who proceeded to say that it was to be noted that the lessor bound himself not to let "any" of the adjoining shops for certain purposes. The word "either" was not used. Out of the row of five shops owned by the landlord, the lessee selected No. 4 which was bounded on one side by No. 3 and on the other side by No. 5. Subsequently the landlord leased No. 6 to a cabinetmaker. It is obvious that the undertaking relating to adjoining shops was meant to apply to the set of shops owned by the defendant.

Fletcher-Moulton, L.J., said that in deciding the abstract question of the meaning of the word "adjoining" the Court had to consider the context, to bear in mind the surrounding circumstances, and it could take into account the object of the covenant. Applying these principles, he came to the conclusion that it was intended by the parties that no one of that row of shops should be let for the purposes of a trade of cabinetmaker.

Keeping in mind the rule expressed by *Fletcher-Moulton*, L.J., His Honour said he could find nothing in the present case which afforded justification for an extension of the normal and ordinary meaning of the word "*adjoining*." If the word "adjoining" as used in s. 282 was to be interpreted as authorising the supply of electricity to local authorities six or eight miles distant, what was to be the limit of a Council's powers? Was a local authority 20 miles distant to be regarded as "adjoining" the territory controlled by the New Plymouth Borough Council? Where and how is the line to be drawn? If the term as used in subsection 2 meant that authority was given to a Council to make terms for the supply of electricity to a local authority immediately bordering upon its territory no difficulty would arise; the limit of its authority was circumscribed and definite. But if the section was to be interpreted as authorising a local authority to use ratepayers' property and ratepayers' money for the benefit of a district situated far beyond its own territorial limits it will be extremely difficult to decide when a district was or was not an "adjoining district."

His Honour said he could find nothing in the particular provision relied upon or in the relevant legislation which justified him in concluding that the Legislature intended to confer upon a Borough Council power to supply power within the indefinite limits contended for by the New Plymouth Borough Council. He must, therefore, respectfully dissent from the view expressed by the learned Judge in the Court below and return the following answers to the questions stated in the originating summons:

To Question No. 1: The words "*adjoining district*" as used in para. (*b*) of s. 282 of the Municipal Corporations Act, 1920, mean "to lie next or contiguous to; to border upon." To Questions Nos. 2 and 3: No. To Question No. 4: Yes.

KENNEDY, J., said he found it unnecessary to express an opinion as to the exact scope of the power to supply persons residing beyond the borough; for any argument based upon the assumed wideness of such a power is offset by the change in the language used. The powers conferred upon a borough are in general territorially limited to the area of the borough, and if the word "adjoining" means "neighbouring" the limits of the power are vaguely defined. His Honour thought no great help was to be derived from these considerations, and he approached the construction of the section adopting the words of *Eve*, J., in **The Derby Motor Cab Co. v. Crompton and Evans Union Bank** (*supra*) that "*Prima facie* the word 'adjoining' bore the meaning put upon it by Mr. Justice Parke in *Rex v. Hodges* (1 Moo. and K. 341) and Mr. Justice Cozens-Hardy in *Vale v. Moorgate-street-buildings* (*Limited*) (80 L.T. 487), and adopted in *Ind, Coope and Co. v. Hamblin* (84 L.T. 168)." The words construed in **Rex v. Hodges** (*supra*) were "adjoining a dwelling-house." Upon a charge of theft of trees adjoining a dwelling-house, *Parke, J.*, expressed himself thus: "This enactment must be strictly construed; and I think, I am bound to say, that ground cannot be properly said to adjoin a house unless it is absolutely contiguous without anything between them." In the two subsequent cases mentioned, this meaning was given to the word in covenants as to the user of premises. Such was the meaning in which the word "adjoining" was used by Sir *Arthur Wilson* when delivering the judgment of the Privy Council in **Mayor of Wellington v. Mayor of Lower Hutt** (*supra*), when he said: "'Adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near." His Honour thought its ordinary meaning is that given in *Murray's New English Dictionary* as "lying next," so that it is possible to pass from one area to the other without passing through an intervening area; for the word implies actual physical contact. The case of **Cave v. Horsell** (*supra*) is in no way in conflict with the above decisions. It is authority for saying that the word "adjoining" may have a secondary meaning as well as a primary meaning. Both such meanings are according to *Fletcher Moulton*, L.J., normal uses of the word, and it is not correct to say that the one is always entitled to be adopted in preference to the other, unless its adoption would lead to inconsistency or absurdity. The context may show that the secondary meaning is intended and that meaning should then be adopted, although you cannot go so far as to say that the adoption of the primary meaning would lead to inconsistency or absurdity. *Vaughan Williams*, L.J., who dissented, with reference to **Ind Coope and Co. v. Hamblin** (*supra*) said the Court of Appeal treated the word "adjoining" as a word having an ordinary sense and not as a word meaning in its ordinary sense "near to or substantially adjoining." *Fletcher Moulton*, L.J., expressly said that he recognised the authority of **Rex v. Hodges** (*supra*), **Vale v. Moorgate-street-buildings (Ltd.)** (*supra*), and **Ind Coope and Co. v. Hamblin** (*supra*), and his observations at pp. 542 and 543 are specially directed to the supposed application of the rule laid down by Lord *Wensleydale* in **Grey v. Pearson** (1857) 6 H.L. Cas. 61; while *Buckley*, L.J., after discussing the words "adjacent," "adjoining" and "contiguous" said that each of these words might, by its context, be shown to convey the meaning of "neighbouring" without the necessity of physical contact. The result is correctly stated by *Eve*, J., when, in **The Derby Motor Cab Co. v. Crompton and Evans Union Bank** (*supra*), he said: "The Court of Appeal, while accepting the decision in **Ind Coope and Co. v. Hamblin,** thought that there might be cases in which there was a context which imposed a secondary meaning on the word, and in the case before the Court of Appeal there was such a context." There was, in His Honour's view, no context sufficiently showing that the word "adjoining" is used in s. 282 in any other than its sense of "lying next to" with nothing in between. The questions asked in the originating summons were, in his view, to be answered thus: Neither the Borough of Inglewood nor the Borough of Waitara is an adjoining district to the New Plymouth Borough within the meaning of s. 282 (*b*) of the Municipal Corporations Act, 1920.

His Honour agreed that the appeal should be allowed accordingly.

Appeal allowed.

Solicitors for appellant: **Syme and Weir,** Eltham.

Solicitors for respondent: **Govett, Quilliam and Hutchen,** New Plymouth.

Supreme Court

Smith, J.

October 11, 22, 1932.
Auckland.

ASHBY v. BUCHANAN.
ASHBY v. CASTLE.

Transport — Construction — "Passenger-service vehicle" — Whether Taxicab may be used for purpose of Hire for Carriage of Passengers without a Certificate of Fitness—Transport Licensing Act, 1931, Ss. 2, 38.

Two appeals from the determination of the Magistrate's Court at Auckland. Each of the respondents was charged with using a passenger-service vehicle, to wit, a taxicab, for hire or reward for the carriage of passengers between Epsom Trotting Course and Customs Street, Auckland, when no certificate of fitness as required by s. 38 of the Transport Licensing Act, 1931, had been issued in respect of such vehicle. The Magistrate dismissed each information.

By s. 2 of the Transport Licensing Act, 1931, "'Passenger-service vehicle' means a motor-vehicle used for hire or reward for the carriage of passengers, with or without goods, and includes a trackless trolly-omnibus, but does not include a motor-vehicle which: (*a*) Is designed for the carriage of persons not exceeding eight in number including the driver; and (*b*) Is available for hire to any member of the public on terms which do not require expressly or impliedly the payment of separate fares by each passenger; and (*c*) Is used for such purpose otherwise than on defined routes."

Held, allowing appeal: That the literal meaning of the words "such purpose" is the purpose for which an exempted motor-vehicle is available. As the object of the definition is to specify a purpose for which the exempted vehicle is used, there is no justification for seizing upon the purpose specified for "passenger-service vehicle"; and the words "such purpose" in s. 2 (*c*) refer to the purpose for which the exempted vehicle is available, and it follows that one of the requirements of exemption is that the motor-vehicle must be used upon terms which do not require expressly or impliedly the payment of separate fares by each passenger.

Stanton and **Meredith** for the appellant.

Northcroft for the respondents.

SMITH, J., said that the appeals raised for consideration a question of construction upon the definition of "passenger-service vehicle" in s. 2 of the Transport Licensing Act, 1931. It was common ground that in order to escape from the net spread by this definition, the respondents must show that their taxicabs complied with each and all of the grounds of exemption. It was admitted that the taxicabs complied with the first ground, namely, that relating to their design. It was in dispute whether they complied with the second ground, namely, that relating to the nature of the terms upon which they were available for hire upon the particular occasion. It was also in dispute whether they complied with the third ground, namely, that relating to the way in which they were used.

In His Honour's opinion, he had to deal only with the third ground. This ground of exemption specifies two requirements in respect of the use of a vehicle, namely: (1) use for a certain purpose, described in the statute as "such purpose," and (2) use otherwise than on defined routes. The meaning of the words "used for such purpose" does not appear to have been discussed before the Magistrate. The word "purpose" is not otherwise used in the definition, but it obviously refers to some object for which the exempted motor-vehicle is to be used. Mr. *Northcroft* submitted that that purpose was the purpose for which a passenger-service vehicle was used, namely, "for hire or reward for the carriage of passengers"; and that the object for which the exempted vehicle must be available (as set out in para. (*b*) of the definition) was to be regarded as a means of carrying out that purpose. This was a distinction of some subtlety, but His Honour was unable to accept it. There seemed to him to be no escape from the view that the words "used for such purpose" in para. (*c*) must mean either "used for the purpose for which the exempted vehicle is available" or "used for the purpose for which a passenger-service vehicle is used." The word "available" itself may import purpose. In *Webster's Dictionary* it is defined to include "capable of being used to accomplish a purpose" and the word "usable" is given as an equivalent of this meaning. In *Funk and Wagnall's Dictionary* "available" is defined to include the meanings "capable of being employed or made use of with advantage; suitable for the accomplishment of a purpose; usable." *Murray's Oxford Dictionary* defines it to include the meanings "capable of producing a desired result" and "capable of being made use of, at one's disposal, within one's reach." In His Honour's opinion, subpara. (*b*) of the definition clearly showed that the exempted vehicle must be so disposed as to be capable of being used for the purpose specified in subpara. (*b*), namely, for hire by any member of the public on terms which do not require expressly or impliedly the payment of separate fares by each passenger. Subparas. (*b*) and (*c*) are joined by the word "and" just as are subparas. (*a*) and (*b*). They all relate to the noun "motor-vehicle," which denotes the exempted vehicle and not the passenger-service vehicle. In His Honour's opinion, the words "such purpose" in subpara. (*c*) refer to the purpose last stated in connection with the exempted vehicle. He could see no justification for making a leap to the purpose stated in respect of the non-exempted vehicle. In **Ex parte Barnes** [1896] A.C. 146, the House of Lords applied the words "any such report" to the last-preceding report mentioned in s. 8 of the Companies (Winding-up) Act, 1890. That was a company matter and the ambit of the particular statute had, of course, to be considered. But Lord *Halsbury* made an observation upon what the literal meaning was (at p. 150, *q.v.*). So here, in His Honour's opinion, in that the literal meaning of the words "such purpose" must be the purpose last mentioned, which is the purpose for which the exempted vehicle is available, and that as the object of the definition is to specify a purpose for which an exempted vehicle is used, there can be no justification in the reason of the thing for seizing upon the purpose specified for a "passenger-service vehicle." Furthermore, the purpose of a passenger-service vehicle, according to the definition, is that it is a motor-vehicle used for hire or reward for the carriage of passengers with or without goods. Obviously that purpose permits of the payment of separate fares by passengers. In His Honour's opinion, that was not an appropriate description of the purpose of a vehicle which must be available for hire to any member of the public on terms which do not require expressly or impliedly the payment of separate fares by each passenger. If it were, then he must attribute to the Legislature an intention to require a motor-vehicle to be available on terms not requiring the payment of separate fares by each passenger and at the same time an intention to permit that vehicle to be used for the carriage of passengers at separate fares. He was not prepared to impute any such intention to the Legislature. He concluded that the words "such purpose" occurring in sub-paragraph (*c*) of the definition refer to the purpose for which the exempted motor-vehicle is available. It followed that one of the requirements of exemption is that the motor-vehicle must be used upon terms which do not require expressly or impliedly the payment of separate fares by each passenger. Whether the exempted motor-vehicles should or should not be freed from such a requirement on special occasions such as race meetings, public gatherings, and the like was a matter of policy with which His Honour was not concerned. In the present cases, it was clear that the taxicabs were not used for a purpose for which the Magistrate finds they were available, namely, for hire to any member of the public on terms which did not require the payment of separate fares by each passenger. In the appeal of **Ashby v. Castle,** the passengers all paid separate fares at the rate of 2/- per head to the defendant. In the appeal of **Ashby v. Buchanan,** the driver clearly indicated to the passengers that the fares would work out at 2/- each. The handing of these separate fares to one passenger to hand to the driver was a subterfuge. It did not affect the substance of the transaction any more than did the device of soliciting voluntary contribution in the case of **Cocks v. Mayner,** 70 L.T. 403, alter the substantial fact that the vehicle there in question was "plying for hire."

The appeals must, therefore, be allowed and remitted to the Magistrate's Court with a direction to deal with the informations upon the basis that a conviction must be entered in each case. Security has been found in the sum of £7 7s. 0d. on each appeal, but the appeals have been heard together. The appellant is allowed the sum of £5 5s. 0d. for costs on each appeal, making a total sum of £10 10s. 0d.

Solicitors for the appellant: **Stanton and Johnstone,** Auckland.

Solicitors for the respondents: **Earl, Kent, Massey and Northcroft,** Auckland.

Smith, J. August 12; September 21, 1932. Auckland.

COLLEDGE v. THE H. C. CURLETT CONSTRUCTION CO. LTD.

Chattels Transfer—"Instrument"—Fixtures—Tip-up Seats secured to Floor of Motion-picture Theatre—Whether Chattels or Fixtures—Onus of Proof—Chattels Transfer Act, 1924, s. 2.

Action commenced in the Magistrate's Court between the plaintiff and one H. C. Curlett as defendant. The action was removed into the Supreme Court and, by consent, the H. C. Curlett Construction Company Ltd. was substituted as the defendant in lieu of H. C. Curlett. The plaintiff claimed against the present defendant the recovery of 337 padded, tip-up, theatre chairs now in the La Scala Theatre at Howick, alleging that they were wrongfully detained by the defendant company; and, in the alternative, the plaintiff claimed the sum of £297 17s. 6d. in case their possession cannot be had and £50 damages for their detention.

The parties agreed upon a statement of certain facts and in addition certain oral evidence was given for the plaintiff. The issue between the parties appears from the facts as found, and which are so set out.

Prior to the month of December, 1929, one Griffith was the lessee of the Oddfellows' Hall at Howick. He used this Hall on two or three nights per week for the showing of pictures except during the Christmas Holidays when he showed pictures continuously. He also let it on other nights, as opportunity permitted, for dances, social meetings, and the like. In this Hall, Griffith had fifty tip-up seats in groups of five (per Griffith) or six (per the plaintiff), on a plank about twelve feet by one foot. These seats were moved to the side of the Hall as required when the Hall was used for general purposes. They were never fixed to the floor. Towards the end of 1929, Griffith, assisted financially and otherwise by the plaintiff, had a new theatre erected, called "La Scala." The opening date was to have been October 31, 1929, but there were delays and the opening was postponed. On November 7th, 1929, Griffith mortgaged the land upon which the new theatre was erected to one Tindall to secure the sum of £4,200, by Memorandum of Mortgage No. 201697. This mortgage was guaranteed by one H. C. Curlett. The building of the theatre proceeded. When completed, the theatre was a building about 120 feet long and 50 feet wide. No exact measurements were given with regard to the theatre, but the approximations and estimates are sufficient for the purposes of this case. The theatre had no gallery. The stage was approximately 50 feet wide and 40 feet deep. In front of the stage, the floor was flat for a distance variously estimated in the evidence. Griffith estimated the distance of flat floor at about 15 feet. Mr. Draffin, the architect, said that from one-half to two-thirds of the floor was sloped, the portion near the stage being flat. The sloped portion of the floor constituted a ramp or inclined plane of 4½ degrees. This is regarded as a slight ramp, being only half of a ramp of 9 degrees which is the permissible maximum having regard to safety in walking. Upon the completion of the building, seats were required. It was not possible to open the theatre without the seats.

About December 12, 1929, Griffith agreed to purchase theatre seats from the plaintiff. These seats were duly delivered to Griffith and most of them were used in the theatre. Some were not, but were stored in the basement. For present purposes, Griffith caused 312 of these theatre seats to be attached to the floor for the opening night. They appear to have been put in hurriedly and were tacked with brads. The brads did not hold and the seats had to be rearranged for the next performance. It was agreed that the seats were made up into rows, some rows consisting of twelve seats and others of nine. Each row was connected by a horizontal rod. When the chairs were fixed after the first performance they were grouped on the sloping portion of the floor and a space was left about one-third down the ramp of the theatre to about two-thirds down the ramp in the middle of the theatre for 60 armchairs. These armchairs constituted a block of the best seats for comfort and position in the middle of the other seats. It was said by Griffith that all the seats were put in haphazard on the first night and were never moved from that position during his occupancy, except that the armchairs were moved on to the stage for dancing. The chairs were grouped sufficiently to make the theatre usable as a theatre having regard to means of entrance and exit; also that having been rearranged after the first performance, they were arranged for convenient use by the audience. Being arranged in this manner, each individual chair was secured to the floor by one or two screws passing through each of the flanges at the feet of the standards of the seats. In the result, there were nine screws for every two chairs. The seats were stock pattern for a flat floor but not for a sloping floor and may have been to some extent uncomfortable, but the evidence shows that the ramp must be regarded as a very slight one. The chairs were arranged on this ramp and except for possibly two or three chairs they did not encroach upon the flat portion of the floor.

The theatre was opened on December 14, 1929, and on that day Griffith executed a mortgage to the defendant company to secure £3,500, being Memorandum of Mortgage No. 203310 subject to the aforesaid Memorandum of Mortgage No. 201697. On January 13, 1930, Griffith executed an Instrument by Way of Security to the plaintiff over, *inter alia*, the seats now in dispute to secure the sum of £67 9s. 3d. and "further advances." This Instrument was registered on January 18, 1930, under No. 160/1930. On January 23, 1930, Tindall, the first mortgagee, called up the principal moneys secured by his mortgage, owing to default by the mortgagor, and he also called upon the guarantor, H. C. Curlett, for payment. On February 13, 1930, the defendant company repaid Tindall, the first mortgagee, and took a transfer of the first mortgage. On the same day the defendant company transferred both the first and second mortgages to the Bank of Australasia to secure advances. On February 17, 1930, Griffith filed in bankruptcy. The theatre was closed for some time, apparently some weeks, after Griffith's bankruptcy and the defendant company then ran the theatre. On April 1, 1930, the Official Assignee abandoned his interest in the mortgaged property to the mortgagee and the mortgagee went into possession. On the same day the Official Assignee also abandoned all interest in the chattels in the theatre subject to the plaintiff's Instrument by Way of Security.

In July, 1930, after Griffith, the mortgagor and grantor, had gone out of possession and after the interest of his estate in the land and chattels of the theatre had been abandoned, the plaintiff demanded the tip-up seats affixed to the floor of the theatre which are the subject of this action, but the demand was refused. The agreed Statement of Facts did not state between what parties such demand and refusal took place, but it must be assumed that it was between the proper parties as no question has been raised on the point. The 60 armchairs which were not affixed to the floor of the theatre were handed over to the plaintiff. Some time within a year of the bankruptcy of Griffith, that is, on or before February 17, 1931, the defendant company fixed to the floor 25 of the tip-up seats which were part of the number left in the basement unfixed during Griffith's occupancy of the theatre. These 25 chairs were screwed to the floor in the same way as the 312 seats fixed by Griffith. The 312 originally affixed by Griffith plus the 25 so affixed by the defendant company, constitute the 337 theatre chairs claimed in this action. It was not contended that these 25 chairs were not *bona fide* affixed to the floor by the defendant company while it was managing the theatre and before it became the owner of the freehold. The same argument was submitted for the plaintiff with regard to these chairs as to the 312 chairs affixed by Griffith. On April 17, 1931, the mortgagee, the Bank of Australasia, exercised its power of sale under the first mortgage and sold the land comprised in the mortgage to the defendant company.

Held: The onus lay on the plaintiff to show such special circumstances as must lead the Court to the conclusion that the chairs were not fixtures. The plaintiff had not shown that it could be gathered from the general design and construction of the Hall that these chairs which were fixed ought to be regarded as chattels. It could not be inferred from the class of seat and the class of floor that the annexation was incomplete. No inference could be drawn from the facts that the intention was that the fixed chairs should be regarded as chattels, or that the chairs were in general mere chattels that were fixed only for the purpose of enabling them to be used as chattels to better advantage. They were fixed for the permanent advantage of the building as a picture theatre. The Court could not have regard to a private intention of the owner to instal the chairs in a different manner at some future time. The plaintiff, therefore, has not discharged the onus which lay on him of showing that the theatre seats remained mere chattels and did not become fixtures.

Northcroft for the Plaintiff.

Barrowclough for the Defendant Company.

SMITH, J., said that the question between the parties was whether the theatre chairs were fixtures and therefore part of the land and the property of the defendant company as owner of the land, or whether they were not fixtures but only chattels and therefore subject to the plaintiff's Instrument by Way of Security.

The question whether a chattel has become a fixture has been discussed in many cases in varying circumstances. In **Reynolds v. Ashby and Son** [1904] A.C. 466 (a case between a person who, as the owner of machines, had supplied them upon the hire-purchase system to the lessee of a factory, on the one hand, and the mortgagee of the lessee, on the other hand), Lord *Lindley* said (p. 473): "I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute." In **Leigh v. Taylor** [1902] A.C. 157 (a case dealing with tapestries and between tenant for life and remainderman), Lord *Macnaghten* said (p. 162), "The question is still as it always was, has the thing in controversy become parcel of the freehold? To determine that question you must have regard to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times."

It is the case then that each question must be determined upon its own circumstances. In dealing with those circumstances, the Court may apply at least two rules for its guidance. The first is with regard to the onus of proof. In that respect, the rule laid down by Lord *Blackburn*, then *Blackburn*, J., in **Holland v. Hodgson,** L.R. 7 C.P. 328, at 335, has been generally accepted. He said, "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." A similar view was expressed but with a difference in emphasis by Lord *Sterndale*, Master of the Rolls, in **Pole-Carew v. Western Counties and General Manure Co.** [1920] 2 Ch. 97 at 116, where he said, referring to the cases: "I think they decide generally that attachment or non-attachment to the freehold or to something which is attached to it is a most important matter to be considered but not absolutely conclusive, but where the articles claimed to be chattels are not so attached the onus lies heavily on those who deny them to be chattels." The second rule is that expressions of intention by the party who affixed the article are not relevant evidence to prove the circumstances of the case: **Hobson v. Gorringe** [1897] 1 Ch. 182. Still less can be the intention of that party which he says he has entertained but kept to himself. The main evidence to prove the circumstances is the degree of annexation and the object of the annexation. These circumstances are not exclusive and as pointed out by Lord *Lindley* in **Reynolds v. Ashby and Son** (*supra*) the Court must have regard to the circumstances under which the article was attached and to the position of the rival claimants.

His Honour now applied these principles to the present case. The 312 chairs were screwed to the floor by Griffith who owned the chairs and also owned the land. The owner of the chairs, accordingly, affixed his own chairs to the floor of his own building which was part of the land. These chairs were not ornaments. They are part of the essential equipment of a motion-picture theatre in New Zealand. This theatre could not have been opened without them. The floor was not specially prepared for receiving the standards of the chairs by means of slots or beds or other means but I think that that portion of the floor to which the chairs were affixed must be regarded as specially prepared for the audience to enable them to see the pictures shown in the theatre a little more easily than they could from a flat floor. The chairs were affixed only on the sloping portion of the floor. *Prima facie* then, and apart from special authority, the chairs being chairs for the audience and screwed to the floor on the sloping portion, by means of nine screws for every two chairs, were fixtures and part of the land. Counsel for the plaintiff submitted, however, that such an inference could not be drawn because, he said, the case was governed by the authority of **Lyon and Co. v. The London City and Midland Bank** [1903] 2 K.B. 135. In that case, chairs were hired from the plaintiffs for use in a hippodrome by the owner and occupier of the building under an agreement for hire containing an option of purchase which was never exercised. The chairs were fastened to the floor of the building by means of screws, in accordance with the requirements of the local authority. It was held by *Joyce*, J., that the chairs did not cease to be chattels because they were screwed down to the floor, and that the property in them did not pass as against the plaintiffs to the mortgagee of the freehold under a mortgage of the building and fixtures. This case was approved in the House of Lords in **Reynolds v. Ashby and Son** (*supra*) by Lord *Lindley* at page 474, where he said: "Having regard to the nature of the things affixed, the mode of fixing, and the order of the town council, the decision was, in my opinion, quite right, and in accordance with the authorities above referred to." In the same case, Lord *James* said, at page 472, that **Lyon and Co. v. The London City and Midland Bank** appeared to have been correctly decided upon the special facts of that case. In His Honour's opinion, that case is an authority upon its special facts. It was a case in which the chairs had to be fixed in accordance with the regulations of a local authority which is not shown to be the case here, and, in the second place, the chairs were hired chairs—a factor to be taken into account, he thought, in discussing such a case, in accordance with Lord *Lindley's* criteria quoted above. Counsel for the defendant company submitted, in reply to **Lyon's case,** the case of **Vaudeville Electric Cinema Ltd. v. Muriset** [1923] 2 Ch. 74. There, a limited company carrying on business as cinema proprietors mortgaged their freehold land, together with the cinema hall with its fixtures and appurtenances, to mortgagees to secure a loan and interest. The company went into liquidation and the mortgagees sold under their mortgage the hall together with all the chattels and effects therein. The cinema company claimed to recover the value of the chattels and effects. The Court held (*inter alia*) that 477 plush, tip-up seats in blocks of four and eight, attached to the floor between the seats by iron standards with iron feet, passed under the mortgage as fixtures. These seats were secured in very much the same way as the seats were secured in **Lyon's case.** *Sargant*, J., distinguished the decision of *Joyce*, J., in **Lyon's case** on the ground that the chairs were there hired and that upon the terms of the hiring agreement there could have been no intention to do anything for the permanent advantage or enjoyment of the property in question. *Sargant*, J., emphasised the fact that in the case with which he was dealing the owner of the property was the owner of the chairs and that the chairs were being affixed for the permanent advantage and benefit of the property. It followed that **Muriset's case** was more directly in point in the present case than **Lyon's case** and, in His Honour's opinion, he ought to follow it in preference to **Lyon's case.** He thought, therefore, that the onus lay upon the plaintiff to show such special circumstances in the present case as must lead the Court to the conclusion that those chairs were not fixtures.

Counsel for the plaintiff submitted that there were such special circumstances: that La Scala Theatre of Howick was, according to its design and construction, intended for the purposes not only of a cinema but of a Village Hall, and that, therefore, the Court ought to infer that any person would assume that all the chairs in that hall were chattels because it was to be expected that they would be moved from time to time for the purposes of such meetings and social functions as would take place in a Village Hall. The evidence did not, however, bear out that contention. Griffith's evidence showed that the stage was meant to be used for dancing and any theatrical performances. The stage was larger than is usual for a theatre of the size of La Scala, Howick, and was flat. Griffith said that the 60 armchairs were moved on to the stage for dancing. Whatever this might mean exactly, it did not mean that the tip-up seats had to be moved to permit dancing in the theatre. The flat portion of the hall, in front, was also available for dancing, and Mr. Draffin said that he could see that the flat portion had been used for dancing. Quite apart then from the fixed seats, the theatre could be used as a hall for dancing. With regard to meetings, there would be no need to move any of the chairs. With regard to the use of the theatre for general purposes such as socials and flower shows, it is not shown that it was necessary to move any of the fixed chairs. If the 60 armchairs were removed from the centre there would remain the stage, the flat portion of the floor and the space occupied by the 60 armchairs, with the various passages connecting them. In His Honour's opinion, the plaintiff has not shown that it could be gathered from the general design and construction

of the hall that those chairs which were fixed ought to be regarded as chattels.

Counsel for the plaintiff next submitted that as the seats were designed for a flat floor and were fixed on a sloping floor they must be regarded as temporary seats and their annexation as incomplete. His Honour thought there was no substance in that argument. The seats were ordered and accepted and neither the plaintiff nor Griffith suggested in evidence that they required different seats. They spoke only of putting these seats on battens so as to raise the front of the chairs, though it appeared that this was never done at any time material to this action; if it had ever been done. It was clear that the ramp was so slight that the seats must have been regarded as suitable for use without special battens. So used, they would not be so comfortable as if they had the proper tip, but the plaintiff himself said: "The purpose of having such a slight ramp was to give us the opportunity of arranging the chairs in such a manner that it did not matter whether there was a ramp or not." The seats as accepted and fixed must be regarded as adapted to the particular auditorium. His Honour thought, therefore, that it could not be inferred from the class of seat and the class of floor that the annexation was incomplete.

Counsel for the plaintiff further submitted that as the 60 armchairs were not fixed, and as they were used for the audience, it ought to be assumed that the intention was that the fixed chairs should be regarded as chattels. In His Honour's opinion, no such inference could be drawn. The fact that some chairs were fixed and others were not indicates only that some were moveable and others were not. Counsel for the plaintiff further submitted that chairs themselves were in general mere chattels and that the fixing of them was done merely for the purpose of enabling the chattels to be better used as chattels and not for the purpose of attaching them for the permanent advantage of the building. In his opinion, that was not shown in the present case. In **Pukuweka Sawmills Ltd. v. Winger** [1917] N.Z.L.R. 81, *Stout*, C.J., at p. 91, after referring to the tapestry case of **Leigh v. Taylor** (*supra*) said: "The mere fixing to some extent is not sufficient to enable a Court to say things are not chattels: see **Horwich v. Symond,** 112 L.T. 1011. If they were intended to remain for use in a building it might be said they were not chattels." Now here the seats were ordered and supplied as theatre seats. They were tip-up chairs joined horizontally in rows and screwed by many screws to the sloping portion of the floor. It was clear to His Honour that they were intended to remain for use in the building. They were arranged with aisles to suit the exits and the entrances. They were fixed for the permanent advantage of the building as a picture theatre. Counsel further submits that the parties themselves fixed the chairs as they did only hurriedly and that they intended at a later date to place the chairs on battens without fixing those battens to the floor except possibly by one or two screws. This evidence as to the intention of Griffith the owner was admitted subject to objection, and it was clear as had already been pointed out that this evidence must be excluded. The Court cannot have regard to a private intention of the owner to instal the chairs in the hall in a different manner at some future time.

Counsel further submitted that as Griffith's 50 seats in the Oddfellows' Hall were on moveable battens and accordingly to be regarded as chattels, the inference ought to be drawn that the fixed seats in La Scala should also be regarded as chattels. His Honour did not think that this consideration was relevant. It may show the *bona fides* of Griffith's statement as to his intentions for the future; but his intentions are not relevant. Insofar as the circumstance can be regarded, it only showed that Griffith's seats in the Oddfellows' Hall were installed differently from the seats now in question in La Scala; and that could not help the plaintiff.

His Honour accordingly came to the conclusion that the plaintiff had not discharged the onus which lay upon him of showing that the theatre seats remained mere chattels and did not become fixtures. His conclusion was in accord with certain American decisions with regard to theatre seats attached to buildings by the owners, as expressed in an annotation to the case of **Vaudeville Electric Cinema Ltd. v. Muriset** (*supra*) in Vol. XIII of an American work entitled **British Ruling Cases,** at p. 439, which counsel for the defendant company quoted in argument and supplied for perusal.

Judgment for the defendant company.

Solicitors for the plaintiff: **Earl, Kent, Massey and Northcroft,** Auckland.

Solicitor for the defendant: **Frank N. Laurie,** Auckland.

Blair, J. November 9, 1932.
Wellington.

SHASHOUR v. YOUNG.

Mortgagors' Relief—Interest Reduction—"Chattels"—Whether Mortgages of Shares are subject to Interest Reduction provisions—National Expenditure Adjustment Act, 1932, Part III, S. 31.*

Originating summons to determine whether mortgages of shares are within the provisions of s. 31 of the National Expenditure Adjustment Act, 1932, Part III, which is as follows: "Subject to the provisions of this Part of this Act, rates of interest payable under mortgages of property situated in New Zealand and rents payable in respect of land or of any interest in land or in respect of any building or part of a building so situated, payable under contracts in force at the passing of this Act, shall be reduced as provided in this Part of this Act, and the rates so reduced shall not be increased, except by leave of a competent Court, at any time before the first day of April, nineteen hundred and thirty-five."

Held: That mortgages of shares are within the benefit of the provisions of Part III of the National Expenditure Adjustment Act, 1932. The word "chattels" where used therein is not confined to tangible chattels, but extends to mortgages on public stocks, shares, patents, and all kinds of choses in action.

J. H. Dunn for plaintiff.
Young for defendant.

BLAIR, J., orally, said that he was grateful to both counsel for the very able arguments submitted to him in this matter. Mr. *Young* had shown very great ingenuity in his submissions.

One must approach the consideration of questions arising under the National Expenditure Adjustment Act, 1932, by taking into consideration the purposes of the various parts of the Statute. This case concerns only Part III. S. 27 of the Act clearly defines the intention of the Legislature, which is to make interest and rent commensurate with the reductions in salaries and wages made by the Finance Act and that Act.

Mr. *Young* submitted that a construction should be placed on this Part of the Act which would have the effect of excluding from any operation of the Statute a very large number of securities which are securities commonly offered to moneylenders throughout the Dominion. If Mr. *Young's* argument be correct then a great many securities are outside the benefit of the Act: For example, mortgages on public stocks, on shares, on patents, and in fact on securities of all kinds of choses in action. He wished His Honour to interpret the Statute as being confined to chattels as defined by the Chattels Transfer Act, 1924, *i.e.*, tangible chattels. Taking the definition of the word "mortgage" in s. 29 of the Act, and reading it as applicable to the present case, it says: "'*mortgage*' *means any deed* . . . whereby security *for the payment of moneys* . . . is *granted over chattels.*" The document in question is a deed of mortgage, it is a security for the payment of moneys lent, and it is granted over chattels, using this last-mentioned term in its ordinary sense. The document thus precisely fits the statutory definition.

Mr. *Young* had asked the Court to read the section as putting a very limited meaning on the word "chattels" and treating it as limited only to tangible chattels. On the best construction in favour of the defendant, the word chattel has more than one meaning. When a word has more than one meaning then that most consonant with the intention of the Legislature must be taken. If His Honour took the word in only one of its various meanings, he was excluding from the benefit of the Statute a large class of securities, which did not seem to him to be the intention of the Legislature. He thought he should go further and say that to do so would be disregarding the intention of the Legislature.

Mr. *Young's* argument resolved itself into this, that the word "mortgages" where used in s. 31 does not include the particular kind of mortgage which is the subject of this Summons. As His Honour read the section, and the definition of "mortgage," the defendant's mortgage was clearly included.

A great deal had been said as to the effect of the addition by the draftsman of the four subclauses to the definition of "mortgage" in s. 27. It was obvious that the draftsman

* *Cf.* Mr. C. E. H. Ball's article on "Some Problems under the National Expenditure Adjustment Act," p. 253, *ante*.

wanted to make it clear that documents such as company debentures, agreements for sale and purchase, and customary hire-purchase agreements were to be treated as mortgages. His Honour said he had difficulty in saying what was in the draftsman's mind when adding to these subclauses a reference to mortgages on life policies, but assumed that he did this for abundance of caution. Mr. *Young* had referred to various other portions of the Act which he suggested were consistent with the meaning he sought to place on "mortgages." In legislation dealing with entirely new matters, one can have no conception of the difficulties facing the draftsman. He has to provide for all contingencies in novel situations for which novel remedies are being provided, and one can well forgive apparent contradictions here and there in such circumstances. One has to look at a Statute such as this on broad lines, and His Honour saw nothing in the Statute to justify him in doubting that securities on shares were intended to be covered and are covered by the National Expenditure Adjustment Act, 1932.

Question answered in favour of the plaintiff.

Solicitor for plaintiff: **A. Dunn,** Wellington.
Solicitors for defendant: **Young, White and Courtney,** Wellington.

Reed, J. October 20, 28, 1932.
Timaru.

In re BROWN (DECD.): BROWN v. BROWN.

Administration—Bequest—Whether Class entitled to Share in aggregate fund include Children born after first Member of Class attained twenty-one years—Claim of Child then en ventre sa mere discussed.

Originating summons to determine a question arising in the administration of the estate of Andrew Brown, deceased.

It is declared by the will of the deceased that, *inter alia*, his trustees shall stand possessed of the sum of £2,140 upon trust to invest the same and pay the income thereof "to my daughter-in-law Daisy Brown wife of my son George Brown so long as she shall continue his wife or widow and after her death or widowhood or if she shall cease to be the wife of the said George Brown I declare that my said trustees or trustee shall stand possessed of the said sum of two thousand one hundred and forty pounds (£2,140) and of the investments for the time being representing the same upon trust for such children of the said George Brown as shall attain the age of twenty-one years and if more than one in equal shares."

Mrs. Daisy Brown died on the 22nd December, 1931, leaving, by her husband George Brown, two children, the elder of whom, the above-named defendant Gladys Margery, attained the age of twenty-one on the 17th June, 1932. George Brown married again on the 21st May, 1932, or within a month before his elder child attained the age of twenty-one. Gladys Margery Brown has asked the trustees for her share of the trust fund; and the trustees now ask the Court to determine whether the class of persons entitled to participate in the trust fund includes children born or to be born to George Brown after Gladys Margery attained the age of 21 years.

Held: There was nothing in the terms of the will to exclude the rule that the period of distribution is the time when the first child is entitled to receive his share, but this rule is modified to include in the class entitled to share in the distribution of the trust fund a child (if any) *en ventre sa mère* when the elder child of the first marriage attained the age of twenty-one years, and is born alive to the wife of George Brown, such inclusion being for the unborn child's benefit. *Villar v. Gilbey* [1907] A.C. 139 followed.

Inglis for plaintiffs.
Raymond for defendants.
Solomon for unborn children of G. Brown.

REED, J., said that it was not disputed, nor could it be, that in the bequest of an aggregate fund the children as a class, and the share of each child was made payable on attaining a given age, the period of distribution was the time when the first child was entitled to receive his share, and children coming into existence after that period were excluded. **Andrews v. Partington,** 3 Bro. C.C. 401; **Gillman v. Daunt,** 3 K. & J. 48, approved in **Re Emmet's estate,** L.R. 13 Ch. D. 484. The reason for the rule is stated in **Gillman v. Daunt** by Lord *Hatherley* (then Sir William Page-Wood, V.C.) to be "that the child who has attained twenty-one cannot be kept waiting for his share; and if you have once paid it to him you cannot get it back." The words in the will in that case were practically the same as in the present will, that was to say, "such as shall attain twenty-one" which the learned Vice-Chancellor held to amount to the same thing as "at twenty-one" or "when and as they shall attain twenty-one," and that the rule was applicable. This is a rule of convenience and one that best suits the interests of society." *Per Malins*, V.C., in **Gimblett v. Purton,** 12 Eq. 427, 430, 431. It is a rule the application of which may be excluded by the terms of the testator's will. **Iredell v. Iredell,** 25 Beav. 485. But there was nothing in the terms of the present will which excluded the application of the rule.

That would conclude the matter but for the fact that George Brown married again before Gladys Margery Brown attained the age of 21, and there was a possibility that there was a child *en ventre sa mère* at the latter date. It was contended that, if such proved to be the case, such child when born would be entitled to share in the fund. The terms of the will do not exclude children by a second marriage, and if any child had been actually born by such second marriage before the time fixed for distribution he would have been entitled to participate in the trust fund. **Barrington v. Tristram,** 6 Ves. 345. Was a child *en ventre sa mère* at that date also entitled to participate? It is stated in **Jarman on Wills** (7th Ed.) 1677 that "for all purposes of construction a child *en ventre sa mère* is considered as a child in *esse*." The authorities cited for this statement are cases in which the question was as to whether, under the description of "children living" or "children born," children *en ventre* were entitled to be included, and those questions have been settled in the affirmative. "The result then," it is stated, "is to read the words 'living' and 'born' as synonymous with 'procreated'; and, to support a narrower signification of such terms, words pointedly expressive of an intention to employ them in a special and restricted sense must be used." This observation required some modification. Mr. *Solomon* cited **Villar v. Gilbey** [1907] A.C. 139, where the Court of Appeal laid down, in effect, that the rule, as stated in **Jarman,** was the correct rule and declined to be bound by the decision of Lord *Westbury*, L.C., in **Blasson v. Blasson,** 2 DeG. J. & S. 665.

His Honour said his attention had not been drawn to, and he was surprised to find on independent search, that **Villar v. Gilbey** had been overruled in the House of Lords, [1907] A.C. 139, on the very question of a general fixed rule. The head-note correctly set out the decision. Lord *Loreburn*, L.C., in referring to the cases in which it had been decided that children *en ventre sa mère* at the father's death must be included in a description in a will of children "living" at the father's death, said: "From the beginning this construction was acknowledged by the Courts to be in some sense a straining of language, but was justified on the ground that such children came within the motive and reason of the gift, and should therefore be included by a fiction or indulgence, on the ground that it was for their benefit. The civil law was invoked, which authorises the treatment of posthumous children as though they were living at their father's death when it is for their advantage." The rule must, therefore, be qualified to the extent that to justify the inclusion of a child *en ventre* in the description of children "living" at the father's death it must be shown that to do so is for the benefit of such unborn child, and the same qualification applies where the description is of a child "born" at a specified time. Now the expressions "living" and "born" being a limitation on the members of the class, and yet having been held to include a child *en ventre sa mère*, His Honour thought that *a fortiori* the word children without any such limitation must be held to include a child *en ventre sa mère* at the period of distribution, when to include such child would be for its benefit. In the present case, it was clearly for the benefit of any such child that it should be included.

His Honour, therefore, answered the question submitted as follows: the class of persons entitled to participate in the trust fund includes a child (if any) that may have been *en ventre sa mère* on the 17th June, 1932, and is born alive to the wife of the said George Brown.

Costs, as between solicitor and client as taxed by the Registrar, were allowed to each of the parties represented, to be paid out of the residuary estate. "Wherever a testator by his will raises a doubt upon the meaning of it, his general property pays for settling that doubt." **Barrington v. Tristram** (*supra*).

Solicitors for the plaintiffs: **Inglis and Inglis,** Timaru.
Solicitors for the defendants: **Raymond, Raymond and Campbell,** Timaru.
Solicitors for the unborn children of George Brown: **Solomon, Gascoigne, Solomon, and Sinclair,** Dunedin.

MacGregor, J. September 6, 16, 1932.
Wellington.

In re JOSEPH DWYER (DECD.), DWYER AND OTHERS *v.* DWYER AND ANOTHER.

Insurance—Life—Will—Bequest of Estate "including the proceeds of policies of insurance on my life" Upon Trust (*inter alia*) **"to pay my debts"—Whether such words were "express words" or a "general direction"—Life Insurance Act, 1908, s. 65 (2), (3).**

Originating summons for the interpretation of the will of the late Joseph Dwyer, wherein it was provided (*inter alia*) as follows: "I give and bequeath all the rest residue and remainder of my real and personal property of whatsoever nature and wheresoever situate (including the proceeds of policies of insurance on my life) of or to which I shall die possessed or entitled to my trustees upon trust (subject to the powers authorities and discretions as to carrying on and continuing any hotel-keeping sheep and cattle farming or any other business or businesses of mine hereinafter conferred upon my trustees) to sell call in . . . upon trust: (a) To pay my debts and funeral and testamentary expenses," etc., with annual income to widow or until eldest son attains 27 years of age, when half income to widow for life and half between living children; on widow's death, residuary capital and income equally to children on attaining age of 27 years.

The most important question for consideration was the first question: "Whether, having regard to the effect of subs. 3 of s. 65 of the Life Insurance Act, 1908, the said Joseph Dwyer by his will has or has not used 'express words especially referring to life policy moneys and declared that the same should be applied in payment of his debts.'"

Held: Answering question in affirmative. The general rule laid down by s. 65 (3) is subject to the exception provided by s. 65 (2) wherever these are to be found in the will itself "express words specially referring to such moneys" declaring that the same shall be applied in payment of testator's debts. *Wright v. Roach* (1911) 30 N.Z.L.R. 456 discussed.

Buxton for the plaintiff trustees.

W. Perry for both defendants.

Cleary for the infant children of Richard Dwyer.

MACGREGOR, J., said that the answer to the question asked in the Originating Summons depended on the terms and effect of s. 65 of the Life Insurance Act, 1908. The policyholder, Joseph Dwyer, died leaving the will already referred to. He also left two insurance policies on his own life which have been realised. The policy-moneys so arising should not, according to law, be applied in payment of his debts or legacies, unless it appears that he has in his will "by express words specially referring to such moneys declared that the same shall be so applied," within the meaning of s. 65 (2). Had s. 65 stopped short at the end of s. 65 (2), there could be no doubt that the testator had so declared by his will. But it had been contended by Mr. *Cleary*, for the infant children of Richard Dwyer, that in view of the negative terms of s. 65 (3) the words of the will of the testator could not be deemed to render the policy-moneys available for payment of debts or legacies. The cardinal question to be determined was whether that contention is right or wrong.

In attempting to solve this problem, His Honour said he had found considerable difficulty, owing almost entirely to the apparently self-contradictory language used in s. 65. There could be no doubt that s. 65 (2) and s. 65 (3) appeared *ex facie* to be inconsistent, and to some extent repugnant, provisions. In the first place, it was perfectly clear what the testator has said in, and meant by, his will with respect to his policy-moneys. The bare words referring to them were unmistakable: "I give devise and bequeath . . . the proceeds of policies of insurance on my life . . . upon trust (a) to pay my debts "&c. No language could be more precise. Here, surely, there are "express words specially referring to such moneys" within the meaning of s. 65 (2). To construe them in any other sense would, indeed, appear to defeat the whole aim and object of an express trust declared in terms of precision. But, immediately following, s. 65 (3) declares that "a general direction for the payment of debts or legacies out of any fund of which under any such will the policy-moneys are made to form part" shall *not* be deemed to render any such moneys available for payment of debts. Here again was another form of words which would seem apt to include the language of the present testator regarding his policy-moneys. How were these two successive subsections, apparently inconsistent, to be reconciled? It appeared to His Honour that the answer to that query is to be found in the following weighty words of *James*, L.J., in **Ebbs v. Boulnois,** 10 Ch. App. 484: "It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments it must be seen if one cannot be read as a qualification of the other."

In the present case, there was, in effect, a general rule prescribed by s. 65 (3) for the protection of policy-moneys from debts, and a particular exception from that rule provided by s. 65 (2). The right course to follow in such cases, according to *Best*, C.J., in **Churchill v. Crease,** 5 Bing. 180, is "that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the light of an exception." His Honour thought that useful canon of construction should be adopted here. In other words, the rule laid down by s. 65 (3) that a "general direction" in a will in terms of that subsection does not make policy-moneys available for payment of debts was, in his opinion, subject to the exception provided by s. 65 (2) wherever there are to be found in the will itself "express words specially referring to such moneys" declaring that the same should be applied in payment of the testator's debts. In the will now before the Court there undoubtedly were such express words, and he thought they must be given effect to. By adopting that interpretation, he felt that he was effectuating the clearly expressed wish of the testator, and at the same time he was relieved from the apparent absurdity of declaring judicially that the precise words of this testator in his will do not mean what they say.

During the argument His Honour had been referred by counsel to the case of **Ruddenklau v. Ruddenklau,** 16 N.Z.L.R. 404, and certain other early cases on this vexed question in New Zealand. He had not so far dealt with these decisions, as they were decided on the terms of s. 33 of the Act then in force, the Life Assurance Policies Act, 1884, and, of course, are not binding authorities on the interpretation of the present s. 65, which is widely different in its terms. In 1903, however, s. 33 was amended and enlarged by s. 5 of the Life Assurance Policies Act Amendment Act, 1903. It now appears in the statute-book in its amended and consolidated form as s. 65 of the Life Insurance Act, 1908. He found, moreover, that s. 65 of the present Act was interpreted in 1911 by *Stout*, C.J., in **Wright v. Roach,** 30 N.Z.L.R. 456, when the earlier cases were also discussed and considered by the Court. In his judgment (at p. 460) the learned Chief Justice quotes the language of the will in question in that case, and points out that the will does not allude to the policy-moneys at all. Accordingly, he says, "It cannot be said that there are in this will any express words specially referring to the application of the policy-moneys for the "payment of debts or legacies." Therefore he held that the policy-moneys in that case were protected from being applied in payment of debts. That case appeared to be the converse of the present one. Had there been the requisite "express words" in **Wright v. Roach,** 30 N.Z.L.R. 456, it is obvious that the decision of the Court would have been that the policy-moneys were not protected. In that case, however, there were no such "express words" in the will, but merely a "general direction." In the present case, on the other hand, it appeared to His Honour that in the will of the testator there is something more than a mere "general direction" for payment of debts: there are "express words specially referring to" the policy-moneys, declaring that they shall be applied in payment of the debts of the testator.

His Honour answered the first question put by the originating summons in the affirmative sense. The second, third, and fourth questions did not require to be answered, in view of the affirmative answer to question 1. The fifth question did not appear to be one that the Court can properly deal with in these proceedings.

There remains to be disposed of only the question of the costs of the originating summons. In this case it appears to me that the costs of all parties were necessarily incurred in these proceedings for the benefit of the estate, and therefore should be paid out of the estate: **In re Buckton,** (1907) 2 Ch. 406. The defendants and the infant children of Richard Dwyer will each accordingly receive £10 10s. costs (and any necessary disbursements), to be paid out of the estate of the testator. The plaintiff trustees will, of course, take their costs out of the estate in the usual way.

First question answered accordingly.

Solicitors for the plaintiffs: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Solicitors for the defendants: **Perry, Perry and Pope,** Wellington.

"Fair Wear and Tear Excepted."

What Does it Mean?

By K. M. GRESSON, LL.B.

Although in successive editions of *Key and Elphinstone's Conveyancing Precedents* there has appeared a caution against qualifying a covenant to repair by the exception of "fair and reasonable wear and tear," the phrase is in common use to-day and the purpose of this article is to inquire just what, exactly, does it mean. Some discussion on the point may assist the solicitor for the lessor to have a clearer conception as to how far the "repair" clause is modified by such a qualification and the solicitor for the lessee to appreciate better to what extent his client's obligations are thereby lessened.

Let us accompany some earnest solicitor—ordinarily careful or ultra-conscientious according to the view you take of his duty—in his endeavour to clear up the uncertainty in his mind. Passing over the earlier cases and beginning with *Manchester Bonded Warehouse Co. v. Carr*, (1880) 5 C.P.D. 507, this was a case where a floor overloaded with flax gave way and the building collapsed. The tenant was held not responsible for the fall of the building, but was held liable for the repairs to the floor. The Court (Lord Coleridge, C.J., Grove and Findlay, JJ.) dealt with the exception as follows:

> "It only remains to consider whether reasonable wear and tear can include destruction by reasonable use. These words no doubt include destruction to some extent—destruction of surface by ordinary friction—but we do not think they include total destruction by a catastrophe which was never contemplated by either party."

This, however, was rather a special case. Later, in *Davies v. Davies*, (1888) 38 Ch. D. 499, the question was whether a lease exempting the lessee from liability for "fair wear and tear and damage by tempest" exceeded the power of leasing given by the Settled Estates Act, 1877, which prohibited leases by a life tenant being made without impeachment of waste. The exemption of damage by tempest was of itself sufficient to invalidate the lease, but Kekewich, J., proceeded to a consideration of the meaning of the whole phrase and said:

> "The result is that the tenant, although he is liable to the covenant to repair, is not to be liable for any repairs consequent upon or rendered necessary by fair wear and tear, or by damage from tempest. If those words were not there, any dilapidations found at any time or at the end of the term by reason of the wear and tear, the wearing-out of the walls and floor of the public-house, for example, from the constant traffic and so forth, he would be liable to replace, and if unfortunately by a storm his chimney-pot was blown down or he had his roof broken he would be bound to put it straight, and restore the place to good and substantial repair. From these things he is rendered free by that exception."

Next, in 1901, comes *Terrell v. Murray*, 45 Sol. J. 579, where the Court, comprising Bruce and Phillimore, JJ., had before them a Motion to set aside a finding by a referee imposing liability on a lessee in respect of defects present at the end of the term. The lessee's covenant was "To deliver up . . . in as good repair as it now is in, reasonable wear and tear and damage by fire excepted." The items, the subject of the finding, were: painting outside of house, repointing brickwork, and repairing part of kitchen floor which had become affected by dry rot. The Court held:

> "There was no satisfactory authority as to the meaning of the words "fair wear and tear." The meaning of the covenant was that the tenant was bound at the end of the tenancy to deliver up the premises in as good condition as they were in at the beginning, subject to the following exceptions: dilapidations caused by the friction of the air, dilapidations caused by exposure and dilapidations caused by ordinary use. Outside painting was not a thing the tenant was bound to do under the covenant."

The phrase, which was probably in as common use then as it is to-day, seems to have continued to escape any very definite or exhaustive judicial interpretation until 1918, when *Miller v. Burt*, 63 Sol. J. 117, came before a Court consisting of Darling, Coleridge, and Avory, JJ., who pronounced a formula for the guidance of an arbitrator. The covenants by the lessee were that he would at all times keep the premises in the same state of repair . . . (fair wear and tear and damage by fire, storm, and tempest excepted) and that he would deliver up the same in such repair and condition. After discussing the authorities the Court proceeded:

> "It would not be well, however, in this case to leave the arbitrator in the difficulty of puzzling out the meaning of these cases and therefore the Court had agreed upon a formula which it was hoped would be sufficient to guide him. The tenant is responsible for repairs necessary to maintain the premises in the same state as when he took them. If, however, wind and weather have a greater effect on the premises, having regard to their character, than if the premises had been sound the tenant is not bound so to repair as to meet the extra effect of the dilapidations so caused."

As a proposition of law this formula of the learned Judges is doubtless quite in accord with the authorities, but it contributes nothing to the elucidation of the question of just what, exactly, "fair wear and tear excepted" means. *Citron v. Cohen*, 36 T.L.R. 560, which followed in 1920 was rather a special case. Sankey, J., here adopted the view expressed in *Terrell v. Murray*:

> "Although one would have thought that there was abundant authority on the meaning of 'fair wear and tear' there is in fact very little. *Terrell v. Murray* is the chief case. I adopt the definition there laid down."

The only cases in New Zealand in which the phrase appears to have received consideration are, in 1901, *Baker v. Johnson and Co., Ltd.*, 21 N.Z.L.R. 268, 4 G.L.R. 270, and, in 1917, *Sim v. Mitchell*, [1917] G.L.R. 403. Both cases concerned hotel leases with covenants to do all things necessary to secure a renewal of license. Neither assists much such an inquiry as the present, and in the former, which was a decision of the Court of Appeal, there was some difference of opinion. In the Supreme Court, Edwards, J., had expressed the opinion that after about twenty years' experience as a conveyancer he was satisfied that the common understanding of conveyancers was that a tenant exempted from liability for reasonable wear and tear was not liable for the results of time and the elements. In the Court of Appeal, Conolly, J., agreed with this view, but Stout, C.J., Williams, Denniston, and Cooper took a more limited view as to the operation of the qualifying clause. Both cases were however rather special.

So the question appears to have stood until 1928, when it presented itself uncomplicated with other covenants or special circumstances. In *Haskell v. Marlow*, [1928] 2 K.B. 45, the trustees of William Leitch, who had died in 1884, proceeded against the executors of his widow, Charlotte Leitch, who had died in 1926; they alleged that in her occupancy of a dwellinghouse and garden she had neglected to observe the terms of the will which allowed her the en-

joyment of the premises provided she "kept the same in good repair and condition (reasonable wear and tear excepted)." During her forty-two year term she had done nothing actively to injure the premises, but had merely omitted almost entirely to repair them; for this long period the natural processes of decay had been unchecked with the result that the internal decorations and the outhouses were in a bad state, the greenhouses had largely collapsed, a bridge had disappeared, and the summer-houses were a wreck; generally, the whole premises had been allowed to get into a very shocking state of disrepair. They had been in a very good state of repair and condition when, at the death of her husband, she had entered upon her life tenancy.

Here was wear and tear indeed, but entirely due to natural forces; yet the exception proved an ineffective shield. Salter, J., unable to deny that the dilapidations had resulted from normal human user and normal action of the elements, introduced a further limit to the operation of the excepting clause. He held that the words "fair" and "reasonable" operated as a double qualification of the wear and tear to be excepted; that fair and reasonable wear and tear meant, not only wear and tear caused by normal user and normal action of the elements, but, also, fair and reasonable in extent. His view appears to be that not all wear and tear is excepted even though it may have been entirely due to normal use or normal action of the elements; the qualification of "fair" or "reasonable" is to apply as much to the quantum of dilapidations as to the originating causes. He says:

> "I think that two things must be shown: first, that the dilapidations for which exemption is claimed were caused by normal use or by the normal action of the elements and, secondly, that they are reasonable in amount, having regard to the terms of the contract to repair for a very long period of time. For forty-two years the widow was tenant in possession, and failed to take any steps to counteract the natural process of decay. On those facts I have some difficulty in holding that these dilapidations were not caused by reasonable wear and tear, but I am quite clear that they are not reasonable wear and tear on the ground that they are altogether unreasonable in amount and inconsistent with the plain intention of the testator."

Although the learned Judge refers to the intention of the testator, he had earlier stated that "The words . . . bear the same meaning whether they occur in a will . . . or in a lease or other contractual document imposing liabilities on tenants for years." Talbot, J., also obliged to find limitations in the excepting clause other than those of normal human user and normal action of the elements, does so by holding that though the tenant may be under no obligation to remedy defects resulting from wear and tear he is under an obligation "to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce." He says:

> "Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce. For example, if a tile falls off the roof the tenant is not liable for the immediate consequences; but if he does nothing and in the result more and more water gets in the roof and the walls decay and ultimately the top floor or the whole house becomes uninhabitable, he cannot say that it is due to reasonable wear and tear, and that therefore he is not liable under his obligation to keep the house in good repair and condition. In such a case the want of repair is not in truth caused by wear and tear. Far the greater part of it is caused by the failure of the tenant to prevent what was originally caused by wear and tear from producing results altogether beyond what was so caused. On the other hand, take the general wearing-away of a stone floor or staircase by ordinary use. This may in time produce a considerable defect in condition, but the whole of the defect is caused by reasonable wear and tear, and the tenant is not liable in respect of it."

The cumulative effect of all these decisions seems to be that to enable a tenant to take shelter behind the exception the defects must: (1) result from normal human user or normal action of the elements; (2) be reasonable in extent; (3) be directly the result of wear and tear and not the consequence of defects arising from wear and tear being left unremedied. But can one stop there? Must it not be added that "reasonable in extent" in effect means "to a very limited extent" since forty-two years tenancy did not excuse dilapidations which were extensive only because the term was long. If *Haskell v. Marlow* fixes the standard, little relief can be expected by the tenant of the average much shorter term. If, too, a tenant is to be liable for the progressive stages of what began as wear and tear, the exception becomes of so little real benefit as hardly to be worth retaining. Yet the learned author of *Key and Elphinstone's Conveyancing Precedents* (published, however, before *Haskell v. Marlow* was decided) cautions a practitioner against the use of the qualifying phrase upon the ground that it goes far to nullify the covenant to repair. Is it not rather the case that the phrase has a comfortable sound but signifies little?

The D.L.R. Thanks the Law Society

For Assistance with Hawke's Bay Titles.

It will be remembered that the Council of the New Zealand Law Society, in March of last year, recommended every District Law Society to issue a circular to practitioners in its District asking each practitioner to supply to a central organisation brief particulars of any registered deed or instrument in his possession affecting land in the Hawke's Bay registration district.

So readily did members of the profession respond in an attempt to assist in the work of reconstructing the register-books which had suffered in the earthquake that the following letter of appreciation has been recently received from the District Land Registrar by Mr. H. de Denne, Secretary of the Hawke's Bay Law Society:

> "I have the honour to acknowledge receipt of the correspondence conveying information as to titles or instruments affecting Hawke's Bay lands and held by members of the New Zealand Law Society practising outside this District.
>
> For the trouble your Society has been to I offer my thanks, personal as well as official, and would ask you to tender for me the like thanks to the New Zealand Law Society.
>
> The work thrown on the staff of this District has been exacting and difficult and it is very pleasing as well as encouraging to receive evidence in such tangible form of the fact that the Society has appreciated our difficulties and offered such practical sympathy and assistance.
>
> I have the honour to be,
> Sir,
> Your obedient servant,
> R. F. BAIRD,
> District Land Registrar."

A Visiting English Solicitor.

Tells of Present Conditions at Home.

We were glad recently to welcome to the Dominion a highly-respected Solicitor from England in the person of Mr. Harry Pearn Russell, who is on a voyage around the world. Our recent visitor is in his seventy-first year, and, when he retired from active practice a short time ago, he had completed more than fifty year's work in the solicitors' branch of the profession.

Mr. Russell was induced to talk of his experiences. He said that he had spent half of his years of practice with a London firm, but for twenty-five years he had been actively engaged on his own account at Bexley Heath, in Kent, in a varied class of work which included Parliamentary practice, and all classes of Court work exclusive of criminal cases.

"I was interested to study the effect of the fusion of the two professional branches in this country," Mr. Russell said; "but I see no signs of fusion in England. There, we have our defined scope of work, and one branch of the profession relies on the other in various ways. Apparently, however, you manage successfully to supply the requirements of the public in your dual capacity."

In reply to a question as to how the profession is faring in the Home countries to-day, Mr. Russell said that, speaking for the solicitors' profession as he knew it, there was a very great deal of conveyancing work being done at present. This, he added, is due in great measure to the large town-planning schemes in operation. Within a radius of from fourteen to seventeen miles of London, thousands of houses were being built and sold on reasonably small deposits. Estates were being cut up, and the areas zoned for business and residential purposes. Brick bungalows, on sections not less in area than fourteen to the acre, were replete with all modern improvements and sold for from £600 to £800 each.

"I have noticed a distinct change since the War," Mr. Russell remarked. "The hours worked in the London legal offices are shorter, and the younger generation of solicitors seem more keen as to costs and fees than those of us who preceded them."

Mr. Russell has acted during many years for the Public Trustee in England, it being the practice there to employ outside solicitors in the matters requiring attention.

"I had the privilege of representing the Public Trustee for New Zealand in some Probate matters," Mr. Russell continued. "I was very interested in your form of land registration which then came under my notice. In England, we have had a very great change in recent years in our system of titles. The fundamental property law has undergone little change. The difference is more a surface one, and we know it chiefly because of the vast amount of registration requirements brought into being through the new legislation."

When asked to summarise the English registration system, Mr. Russell explained that in London and for a defined area in its vicinity there has been for some time a class of titles almost similar in form and effect to our Land Transfer system. But that convenient means of registration is strictly confined to the district indicated. Before the new property legislation came into operation, many classes of property-deeds did not require registration. For instance, after investigating (or, in our phrase, searching) the mortgagor's title, the mortgage was prepared and executed and was held with the chain of title-deeds by the mortgagor. A reconveyance was required to revest the fee-simple in the mortgagor when the mortgage was repaid. Now all mortgages must be registered. They have a term of 999 years, subject to covenants for repayment or to determination by foreclosure. The object of Lord Birkenhead in creating the legislation for this form of mortgage was to keep the fee-simple vested in the mortgagor, who still remained the actual owner, while, at the same time, the mortgagee had what was in effect almost a freehold title. One convenience of the new system is that a memorandum of repayment is substituted for the more cumbersome reconveyance.

Mr. Russell said that most of the old English property law remains unchanged; it was only when using English forms relative to mortgages that our local conveyancers should be on their guard. "In other words," he concluded, "the change is more one of form and procedure than of fundamental law, and then only in a limited sense; and registration does not affect you!"

Our visitor did much war-service, a fact he was diffident to admit. Though he was too old to join the fighting forces, he drove an early-morning tram for over eighteen months to take munition-workers to and from Woolwich. He did a great amount of casual labour at Vickers. He smiled as he recalled a picture of himself, a Churchwarden, rolling unwieldy tar-barrels down the main streets of his own town on Sunday mornings. "However," he remarked, "it was a time when we were all wanted, and young and old responded in a manner that seems to-day like a dream. How could we hold back, anyhow, when we saw your splendid young men from New Zealand coming to aid the Motherland in their tens of thousands? Your boys earned the highest praise from everyone for their manly bearing and gentlemanly behaviour."

After a visit to the Supreme Court, Mr. Russell said he was delighted to note the similarity to the English Courts. It was a delightful surprise to see members of the Bar here at work; any one of them might have been a junior addressing a Judge presiding over an English Court. He was also very pleased to hear a Parliamentary debate on the Naval estimates when the Dominion's debt to the British Navy was most effectively and feelingly acknowledged.

Mr. Russell was able to spend only ten days in the Dominion, but he says that he is coming back again. He was delighted with what he had seen. Before he left us, after a most interesting chat, he said:

"I am a very modest man, and I know I am quite unworthy of being interviewed. I feel, however, that I can do one thing by means of the pages of the JOURNAL. That is, to express to my legal brethren in New Zealand my most sincere appreciation of the great courtesy and kindness that has been shown to me by them. My thanks to them all, and I hope to renew the friendships made in the Dominion at an early date."

Our Serial.

A Conveyancer Looks at "The Reprint of Statutes."

A SCENARIO IN 810 ACTS.*

I am only a Conveyancer. I am one of the waifs and strays of a noble profession. Every morning when I awake, I think of the good fortune of those spoilt children of the law—my brethren of the Common Law branch. I think of the industry with which so many men of eminence have written—and as the Replacement Volumes of *Halsbury's Laws of England* bear eloquent testimony, continue to burn the midnight oil in writing,—learned tomes for the greater enlightenment of the Common Law practitioner. As I lie in bed of a morning, I remember the array of talent which has contributed text-books to maintain, in the person of a leader of the Bar, the mythical reputation before which litigants bow, murmuring the while to themselves the wonder which grew in their devoted breasts (or should it be intellects ?) that "one small head could carry all he knew." I know that it doesn't; so I go off to my bath, singing cheerily to myself the age-old ditty:

"*I'm only a Conveyancer's daughter,*
And draw up new deeds every day."

LECTOR: Quite the little Boy Scout, eh ?

AUCTOR: But superannuated, and full of cares ! Oh, that I had the divine efflatus, which is inspirational of the poetic efforts of my learned friend, Mr. Richard Singer, and of my learned friend, Mr. H. F. von Haast (both of the Middle Temple, mark you, and consequently of the aristocratic branch), then I should burst oftener into nervous prose (after the manner of Tchekov) upon the woes of practitioners who must perforce measure their success by the yard-rule supplied in the pages of Mr. Ferguson's useful little manual about Conveyancing charges.

My Dostoievskian despair is, however, somewhat lightened on my arrival at the office when I behold the shelf upon which repose the Consolidated Statutes (in five volumes) and their recurring offspring to the number of twenty-four or so. Beside them the *Encyclopædia of Forms and Precedents* makes a brave showing, and indicates comfort and potential profits. Apart from my *Halsbury's*, and the bound volumes (eight) of the NEW ZEALAND LAW JOURNAL, there are one or two other works of value to the Conveyancer on the shelf.† But, alas ! I have not that imposing display of *Reports* (in a hundred and umpteen volumes); of text-books (arrayed, mark you, in alphabetical order), and the other accessories of a Common Law Office which strike awe even into the soul of their owners' bank-manager when he honours Counsel with a call.

While I was musing thusly, one wet morning, there came into the office the ray of sunshine that is inseparable from the appearance of one of Mr. Butterworth's bright young men. I sat myself down for a feast of reason and flow of soul, knowing Peregrinus‡ of old. He is one of those ambassadors of cheer so much needed in a time of depression (*cf.* Mr. Stanley Baldwin, and the Rt. Hon. J. G. Coates, P.C., LL.D., at Ottawa), and an ardent disciple of the doctrine that it is more blessed to give than to receive.

LECTOR: We know him, too. Get on with your story: you are as verbose as the recitals in a deed of disentailing assurance consequent on the variation of a settlement made in defiance of Grimm's law and the Statute of Quia Emptores !

AUCTOR: Quite ! Well, I thought I was in for the usual disappointment: my sense of pride in a well-stocked office is always limited by the lack of imagination on the part of the text-book writer in relation to the needs of the solicitor whose daily bread comes after painful wrestling bouts with forms and deeds, and amid the entanglements provided by our Legislature in their annual book of the words. But, No ! He actually had something that seemed to hit the very middle of the bulls-eye of my morning meditations. He said he had something that would interest *me* !

But when he said he wanted to show me a volume of "*The Public Acts of New Zealand, Reprint*, 1908-1931," I felt there was some catch in it. So I said:

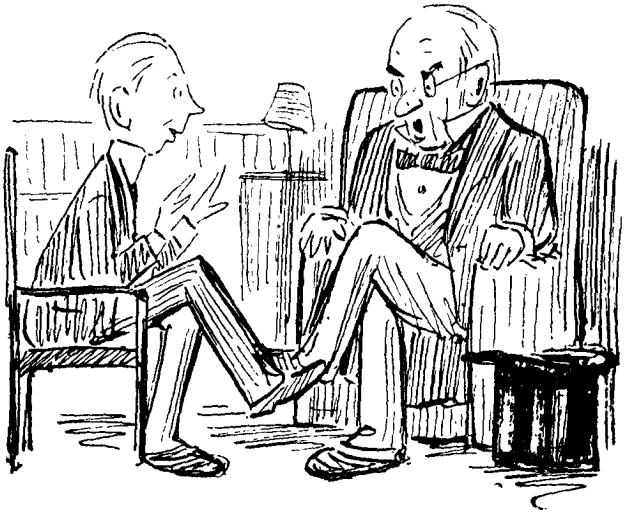
"Just cast your eyes over that well-stocked shelf ! There you see the wit and wisdom of our legislators in twenty-nine volumes; what need have I for them to be reprinted ? They are too utterly-utter, as it is !" I took down a volume. After removing from the text the overgrown jungle of pasted-on amendments that obscured its pristine beauty, I went on:

"I spend endless hours in trying to find out what the Law really is. In the far-off days, now gone beyond recall, I remember hearing it said by Professor Garrow (whom God preserve !) that we are presumed to know the law. But every time I think I have at last begun to know something about it, some imp of mischief ensconced in a later volume of the Statutes trips me up; and down comes poor Conveyancer, opinion and all. And, on occasion, I have failed to appreciate the humour with which an agile Minister armour-plates one of his half-fledged infants by sending it wrapped up in a Finance Act to withstand the blandishments of the Upper House."

And so, *totis viribus*; *sic semper*; *et al.* (as the American Reports have it), and *passim*, did I descant on the troubles of one who wrestles with our legislation: 1908-1931, to wit. It was, I said brightly and trippingly: it was a test for Tony Urlich and George Walker themselves.

"But," says my friend, Peregrinus, that pard-like spirit, beautiful and swift (*Keats*): says he to me:

"Just wait ! And I'll show you something."



"*I'll show YOU something,*" *said Mr. Butterworth's bright young man.*

Then he began. I learnt that his was not mere reprint (with a small *r*), but that it was the father and mother of all Reprints, and their rich uncle thrown in for good measure: in fine, *The Reprint*, a term that is synonymous with merit and completeness ! I saw that so great was its *mana*§ that our Supreme Court Judges and Magistrates, nay even Justices of the Peace themselves, must take judicial notice of its contents ! (Even their Lordships of the Privy Council must hear about this, one of these days. And so (I mused) why not I ?). I listened attentively. I learnt how amendments became telescoped into the context of principal Acts where they belong; how the dead wood of repeals had been removed so that the undergrowth could have a chance of displaying its (undoubted) charms; how copious notes referred one to sources of legislation, to other related Statutes, to New Zealand cases, to judgments of the whole British Commonwealth of Nations, to statutory forms, to precedents, and so on. So that, as Peregrinus observed as he concluded his burst of eloquence:

"Here you will find the law, easily accessible and thoroughly reliable: for the *Reprint* will answer any test to which you like to subject it ! ! !"

"Sez you !" said I.

CHORUS (off): Of editors, compositors, law draftsmen, printers' devils, directors, taxi-drivers, members of both Houses of Parliament, expressmen, barristers, dustmen, managers, bookbinders, law-clerks, messengers, folders, solicitors, proof-readers, and policemen, singing *lugubrioso, con molto expressione, ad lib,* "Beachcomber's" pathetic ballad:

"*Alas, hired scribblers every day,*
Must cast their choicest pearls away;
But what a fate is yours and mine,
Who cannot even choose our swine !"

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* With Annotations.

† Books such as Garrow's *Wills*, and Kavanagh and Ball's *magnum opus*, are kept on my table within handy reach.

‡ *Lat.* s., m. a traveller.

§ A Maori word signifying prestige and authority.

(*To be continued.*)

Bench and Bar.

Mr. Alexander Milliken, of the firm of Messrs. Baxter, Shrewsbury, and Milliken was recently admitted as a barrister.

Mr. Allan L. Spence, of Auckland, has completely recovered his health and hopes to return to the Dominion practise early next year.

Mr. J. D. Willis and Mr. G. A. Nicholls of Wellington have dissolved partnership. Mr. Willis will continue to practice as a Barrister and Solicitor at the same address in the T. & G. Building, Lambton Quay.

Mr. H. F. O'Leary has recently returned from a visit to California, Mr. O. C. Mazengarb from a visit to Australia, and Mr. J. F. Thompson from an extended tour of the Cook Group and the neighbouring islands of the South Pacific.

Dr. J. U. Williams, who was awarded the N.Z. University Law Travelling Scholarship for 1930, and who was awarded the Ph.D. in law by Cambridge University, has commenced practice as a barrister in Auckland. He has Chambers at 78 Yorkshire House. His recently published *Statute of Frauds* (Cambridge University Press) will be reviewed in our next issue.

The sad death of Mr. Archibald Peak, of the firm of Messrs. Peak, Kirker and Newcomb, Auckland, is greatly regretted by his brother practitioners. He commenced practice as a solicitor in Auckland thirty-two years ago. He was at one time a partner of Mr. Orr Walker, who is stipendiary magistrate at Timaru. He was born in Cornwall and came to New Zealand as a child, subsequently attending the Auckland Grammar School. At the time of his death, he was fifty-four years of age. He had suffered a succession of nervous breakdowns in recent years. The activities of the Methodist Church and its organisations were among Mr. Peak's keenest interests. He was a former vice-president of the Methodist Conference and a member of many committees connected with the work of the Church. Music was one of his hobbies, and he was organist at the Epsom Methodist Church. He was a keen member of the Epsom Bowling Club.

Judicial Brevity.

An Irish Judge, Chief Baron O'Grady, had a quick method of summing up in the case of a defendant whose previous blameless record was emphasised by the defence. In the case of a prisoner on trial for the theft of stockings, he thus addressed the jury: "Gentlemen of the jury, here is a most respectable young man, with an excellent character, who has stolen twelve pairs of stockings. You will find accordingly."

And there is the story of the same Judge, in a civil trial of an action for debt, where the defendant pleaded a set-off: "Gentlemen of the jury, this is an action for debt, and the defendant has pleaded as set-off two things: a promissory note with a long time to run, and an old gig with a very short time to run. You may find for the plaintiff."

Australian Notes.

By Wilfred Blacket, K.C.

The King's Attorney-General. The wise words of and concerning "The Office of the Attorney-General" printed on p. 268 *supra*, especially the concluding paragraph which complains of the debasement of that office by combining its duties with those pertaining to other departments, prompt me to mention a point of even greater importance. That is that the Attorney-Generals of Australia, and obviously also in New Zealand, forfeit their independence by becoming members of the Cabinet. In England His Majesty's Attorney-General although a member of the Ministry is not in the Cabinet. He is, therefore, able, as he should be, to exercise his high office free from any control of those who direct the policy of the Government. Like the Irishman at the fair whenever he sees the head of any crime against the State he hits it. Here he can proceed only when the majority of the Ministers think that it would be convenient to them, agreeable to their policy, and conducive to their popularity for him to do so. New South Wales at the present time presents a vivid illustration of the evil that I have mentioned. The Communists, who have made truthful boast of the fact that Acts passed by Lang—and still in force—have paved the way to revolution, are daily defying the powers of this State and of the Commonwealth: the latest move is to create an organisation to defeat every attempt made to enforce any provision of the Federal Crimes Act. Obviously it is the duty of the Attorney-General to prosecute this crime of sedition with determination verging upon ferocity; but the Stevens Ministry, quite certainly would not have any of the courage required to sanction such urgently necessary action.

"**Silk.**" Mr. Justice Long Innes at Sydney, when congratulating a barrister on his well-won silk, said, in effect, that of late years the practice seemed to him to have grown up of "granting silk merely on application," and sometimes preparatory to cessation of practice altogether." His Honour was certainly correct in this observation, and in his further statement that it should be conferred only upon those whose merit justified the grant. Not only is this necessary as a protection to litigants, but also for the protection of the barrister himself, the Attorney-General should exercise a discretion, for there have been many who have lost all their practice by entering the Inner Bar. The grant to them was "preparatory to cessation of practice altogether." Two men have I in mind who as juniors were making at least £3,000 a year, but as seniors failed to make one-tenth of that amount. A K.C. may not "shed his silk," and in this State he can do no other work in the legal profession.

Fair Associates. Still on matters relating to our profession I am wondering whether the judges' associates in the Dominion are sometimes girls. Mr. Justice Isaacs in the High Court set the fashion by appointing his daughter, Miss Nancy Isaacs, B.A., to that position in his Court: Judge Beeby followed the precedent and now these members of the Younger Set occur in various Courts and jurisdictions. Queensland has also adopted the usage, for Miss Claire Macrossan having

just completed her education at the Convent of the Sacred Heart, Brisbane, has been appointed associate to her father, Mr. Justice Macrossan.

The Wages of Contempt.—Mrs. Aimée Belle Edols, New South Wales, has for some time past been living a varied sort of life, but it is not very much varied. It consists in periods of imprisonment at Long Bay varied by several appearances before the Judge in Bankruptcy, and a further sentence of imprisonment for contempt for refusing to say what she did with £38,000 and other moneys that she once had. She has just been sent to the Bay for a third term of imprisonment, six months being its limit this time, but the Judge promised that he would come along at any time if she let him know that she wanted to tell him what had become of what in the argot of the Dominion is described as "the hoot," but which would in New South Wales perhaps more properly be referred to as "the dough." The rumour that Mrs. Edols, when leaving Long Bay for the City always gets a return ticket, is obviously erroneous for the tram-conductors only issue singles.

Taking his Name in Vain.—Evan Tracy married his niece, Rosamond Benn, at Randwick, New South Wales, in 1922. He was of mature years, but she was young enough to know better. Then in this month of October 1932, she applied for a decree of nullity and obtained it as of course upon proof of the facts stated, as the parties were within the prohibited list recorded in the Prayer-book and beginning with the fortunately exceptional case of a man who desires to marry his grandmother, grandfather's wife, or wife's grandmother. ("Oh my grandfather!") Once I was rung up by a clergyman who had there "waiting at the church" a girl who wanted to marry her step-father. I had to tell him that the marriage though not illegal would be voidable at any time upon application by either of the parties thereto, and so he informed them that he would not go a step father.

Fashions in Suicide.—Coroner Grant, P.M., recently spoke words of much wisdom when he asked the newspaper reporters not to publish the evidence in a suicide case lest others might be tempted to go and do likewise. This recalls to my mind the fact that the Sydney *Bulletin* many years ago in a leader asserted that the prominently displayed and detailed accounts of suicide by young girls appearing in the *Evening News*—a paper which has ceased to exist—were responsible for the frequency of such tragedies. The *News* sued in libel, and though the case was ultimately settled I had to search the newspaper files for matter in support of the defendant's plea of truth and public benefit. It was a dismal task, for I found that within six months 340 females, usually members of the Younger Set, in this State alone had made more or less serious and successful attempts to reach the world beyond. In nearly every case wax match-heads soaked in water was the suicide prescription, its cheapness and availability accounting for its wide popularity. After that fashion lost its vogue various other modes came into temporary favour, and recently the deplorable expedient of leaping from the Sydney Harbour Bridge has been adopted in several more terrible cases. On one of the northern rivers some years ago in two successive weeks girls jumped overboard from a river launch and were drowned. The owner of the launch was quite naturally very greatly perturbed. He said, "These women are just making a convenience of my steamer."

Practice Precedents.

Application for Security for Costs.

These forms are pursuant to R. 577 of the Code of Civil Procedure: *see* Stout and Sims' *Supreme Court Practice*, 7th Edn., p. 372, in an Action for infringing a patent, where the sole Plaintiff or Plaintiffs are resident out of New Zealand.

The Court has a discretion whether it will order security and as to amount of same: *Marconi's Wireless Coy. v. Huddart Parker and Coy.*, 14 G.L.R. 397 S.C.

The defendant must apply promptly after the fact of residence out of New Zealand has come to his knowledge: *Arthur v. Bertling*, 28 N.Z.L.R. 1019 S.C.

If the security is not given defendant may apply to have the action dismissed for want of prosecution. A prescribed period may be fixed.

It is to be noted that the Summons has been directed for hearing before the Chief Justice of New Zealand. This, it is suggested, may be followed in all Districts to allow the Registrar to present it to such resident or other Judge as may be available to deal with the application.

1. Summons for Order for Security.

IN THE SUPREME COURT OF NEW ZEALAND
.....District.
.....Registry. No.

BETWEEN A.B. & Coy., Ltd., *Plaintiff*,
AND C.D. & Coy., Ltd., *Defendant*.

LET the Plaintiff Company its Solicitors or Agent appear before the Right Honourable the Chief Justice of New Zealand at his Chambers, Supreme Court House, , on day the day of 19 , at 10 o'clock in the forenoon, or so soon thereafter as Counsel may be heard to show cause why the Plaintiff Company should not pay into Court such sum as may be fixed by this Court for the Costs and expenses of and incidental to this Action, or give Security for the same to the satisfaction of the Registrar of this Court and why this Action should not be stayed until such sum is paid or Security given as aforesaid UPON THE GROUNDS that the Plaintiff Company is resident out of New Zealand AND UPON THE FURTHER GROUNDS set out in the affidavits in support hereof sworn and filed herein and why the costs of and incidental to this Summons should not be costs in the cause.

DATED at this day of , 19 .

Registrar.

This Summons is issued by Solicitor for the Defendant Company whose address for service is at the Office of Messrs. , Solicitors, .

2. Affidavit in Support of Summons.

(*Heading as above*).

I, , of the City of , Solicitor, make oath and say as follows:—

1. That I am the Solicitor for the above-named Defendant Company in this action.
2. That the Writ of Summons and Statement of Claim were served upon me on the day of 19 .
3. That the Trial of this Action involves the determination of the validity of Patent Rights and of infringement of Patent Rights concerning certain Refrigerators.
4. That at the Trial of the Action it will be necessary to call a great number of expert witnesses in New Zealand and it will also be necessary to take evidence on Commission in England and elsewhere.
5. That the subject-matter of the Letters Patent upon which the Plaintiff Company relies is most intricate and expert and scientific evidence of a complicated nature will be required to be taken.
6. That the evidence referred to in par. 5 hereof can only be obtained by taking the evidence in England of the leading experts there.

7. That the Trial of this Action will also involve examination of Letters Patent granted to other Patentees in England and elsewhere.

8. That the proper Trial of this Action also involves preparation and construction of plans and models to properly present the defence to the claim.

9. It is anticipated that the actual hearing of this Action will take at least 14 days and that the costs and expenses will be very heavy.

10. That the Plaintiff Company has no registered office or place of business in New Zealand and owns no property of any kind in New Zealand.

11. That the Defendant Company has a good defence to this action on the merits.

SWORN, etc.

3. Affidavit in Opposition.

(*Heading as above*).

I, , of , Solicitor, make oath and say as follows:—

1. That I am a Solicitor in the employ of the firm of Messrs. of , Solicitors to the above-named Defendant Company, and as such have knowledge of the subject-matter of this Action.

2. That the said Defendant Company were held in the Courts of England to be infringers of the Patent granted under Letters Patent No. , which Patent forms the principal subject-matter of this Action.

3. That the Plaintiff Company having established the validity of the Patent referred to in the foregoing paragraph the only question that the Plaintiff Company should be required to give Security for is whether the system adopted and used by the Defendant Company is an infringement of the Plaintiff Company's valid Patent.

4. That the issue of infringement alone is one that can be determined without difficulty or great expense.

SWORN, etc.

4. Affidavit in Reply to Affidavit in Opposition.

(*Heading as above*).

I, , of the City of , Solicitor for the above-named Defendant Company make oath and say as follows:—

1. That I have perused the affidavit of filed in opposition to the application for Security for Costs herein.

2. That the Patent relied on by the Plaintiff Company in this Action is not identical with Patent No. referred to in paragraph 2 of the said affidavit of filed herein.

3. That I am advised by Counsel and verily believe that the Judgment obtained in relation to Patent No. not only does not assist Plaintiff Company's present case but is opposed to it.

4. That the evidence that will be adduced in this Action is distinct from that relating to Patent No. .

SWORN, etc.

5. Order for Security.

(*Heading as above*).

Before the Honourable Mr. Justice .

day the day of 19 .

UPON READING the Summons for Security for Costs issued herein on behalf of the Defendant Company and the affidavits filed in support thereof and the Affidavit filed on behalf of the Plaintiff Company in opposition thereto AND UPON HEARING Mr. of Counsel for the Defendant Company and Mr. of Counsel for the Plaintiff Company I DO ORDER that the Plaintiff Company deposit the sum of £ as Security for the Defendant Company's costs and expenses of this Suit in the Office of this Registry or give security to the satisfaction of the Registrar therefor AND I DO FURTHER ORDER that until such sum is so deposited or security given as aforesaid all proceedings herein be stayed AND I DO FURTHER ORDER that liberty be and the same is hereby reserved for the Defendant Company to apply for further security on proof that the said security is inadequate AND I DO FURTHER ORDER that the costs of and incidental to this Order be fixed at £ : : together with disbursements and that the same be costs in the case.

Judge.

Rules and Regulations.

Sharebrokers Act, 1908. Rules of the Stock Exchange Corporation of New Zealand.—*Gazette* No. 70, November 10, 1932.

Dairy Industry Act, 1908. The Dairy-Produce General Regulations Amendment No. 7.—*Gazette* No. 71, November 17, 1932.

Fireblight Act, 1922. Amended regulations declaring commercial fruit-growing districts and prescribing the time and manner in which hawthorn in such districts shall be dealt with.—*Gazette* No. 71, November 17, 1932.

Fisheries Act, 1908. Amended regulations *re* use of seine nets.—*Gazette* No. 71, November 17, 1932.

Judicature Amendment Act, 1913. Appointment of members of the First and Second Divisions of the Court of Appeal.—*Gazette* No. 71, November 17, 1932.

Judicature Amendment Act, 1913. Fixing sittings of the Court of Appeal for 1933.—*Gazette* No. 71, November 17, 1932.

Nurses and Midwives Registration Act, 1925. Nurses and Midwives Regulations 1930 amended.—*Gazette* No. 71, November 17, 1932.

Post and Telegraph Act, 1928. Revocation of Postal regulation relating to "Newspaper Exchanges."—*Gazette* No. 71, November 17, 1932.

Convention between the United Kingdom and Austria respecting Legal Proceedings in Civil and Commercial matters: Extension to New Zealand.—*Gazette* No. 71, November 17, 1932.

Judicature Act, 1908. Sittings of Supreme Court for 1933.—*Gazette* No. 71, November 17, 1932.

Orchard and Garden Diseases Act, 1928. Amended regulations relating to the sale for consumption within the Dominion of New Zealand grown fruit.—*Gazette* No. 73, November 24, 1932.

Hawke's Bay Earthquake Act, 1931. Napier Harbour Board (Finance) Regulation 1932.—*Gazette* No. 73, November 24, 1932.

Animals Protection and Game Act, 1921-22. Opossum Regulations (Amendment No. 2).—*Gazette* No. 73, November 24, 1932.

Cook Islands Act, 1932. The Cook Islands Pearl-shell Fisheries Regulations Amendment 1932.—*Gazette* No. 73, November 24, 1932.

British Nationality and Status of Aliens (in New Zealand) Act, 1928. Naturalization Revocation Rules 1932.—*Gazette* No. 73, November 24, 1932.

War Pensions Act, 1915. Amended regulation *re* payment of war pension due to Soldier Mental Patient.—*Gazette* No. 73, November 24, 1932.

New Books and Publications.

The Secretarial Primer. By H. G. Holman, F.C.I.S. (Wm. Heffer & Sons.) Price 6/6d.

Questions and Answers on Roman Law for Examiners. By R. W. Farrin. (Sweet & Maxwell Ltd.) Price 8/-.

Wolstenholme and Cherry's Conveyancing Statutes. Twelfth Edition, 2 Volumes. By Sir Benjamin Cherry, LL.B., D. H. Parry, M.A., LL.B., J. R. F. Maxwell. (Stevens & Sons Ltd.) Price 96/6d.

Studies in the History of the Admiralty and Prize Courts. By E. S. Roscoe. (Stevens & Sons Ltd.) Price 6/6d.

The Portuguese Bank Note Case. By Sir C. H. Kisch, K.C.I.E., C.B. Price 13/6d.

The Annual Practice, 1933. (Sweet & Maxwell Ltd.) Price 49/-.

The A.B.C. Guide to Practice, 1933. (Sweet & Maxwell Ltd.) Price 13/6d.

The Law Relating to Reduction of Share of Capital (With Forms and Precedents). By Paul F. Simonson, M.A. Third Edition. (Jordan & Sons Ltd.) Price 19/-.