the sellers, although they had supplied similar goods previously, had never dealt in "King Size". This view endorsed the restrictive interpretation placed on "that description" in subs. (2) by the Court of Appeal.

Norsildmel was held liable to Hill in breach of s.14(1) and because under the contract of sale between them, Hill's right to recover damages for breach of contract was not excluded. However the third party was not in breach of s.13: the inclusion in the contract of a reference to Norwegian herring meal of "fair average quality" was not part of the description, but a warranty of quality.

In finding unacceptable the restrictive "description" arguments advanced and adopted in the Court of Appeal, the House of Lords has removed a double-limbed straitjacket of construction that would have tested the hair-splitting propensities of counsel and judges to the fullest extent. The present law governing the sale of goods largely evolved from the mercantile conditions prevalent in the nineteenth century: its survival may very well depend on its application in a manner that does not ignore reality and does not unduly impede the course of modern commercial practice.

K. E. Dawkins

COMPANY LAW

Articles of Association

In *Black, White and Grey Cabs Ltd.* v. *Gaskin and Others* [1971] N.Z.L.R. 552 the facts were as follows: Taxi Company A, in return for a levy, provided its members with certain services from Supply Station C, many of whose shareholders were members of Taxi Company A. Taxi Company B had a similar kind of arrangement with Supply Station D. The two taxi companies merged to form a new larger company, the shareholders of Taxi Company B being admitted as members of Taxi Company A and of Supply Station C. The new members, however, persisted in trading with their old partners, Supply Station D. This was contrary to the wishes of the directors of the new combined company, who had power under Article 87a of the Articles of Association to make rules concerning the control and management of the company. Using this power the directors under Rule 38 made it obligatory for members to deal with Supply Station C alone. Rule 47 provided for fines and penalties for breaches of the rules of the company.

The Court of Appeal had to consider the effect of section 34(1) of the Companies Act 1955, which stated:

> Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been executed as a deed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

In delivering the judgment of the Court Richmond J. pointed out that, purely for convenience, matters may be included in the articles of association which do not come within the ambit of section 34(1). The test as to the application of this section, he said, 'depends on whether or not that article purports to confer rights or impose obligations upon

members of the company *in their capacity as members*'. Here the court found that the obligation to patronise one particular supply station was not something which could be enforced by section 34(1) as the article did not purport to deal with the members of the company as such but could have also included "owners, operators and licensees of various types of vehicles (whether members of the company or not) who choose to subject themselves . . . to the control or management of the company". (*ibid.*, 557). The court further found that Article 87a was not sufficiently widely expressed to empower directors to lay down the consequences of non-observance of rules, although they could prescribe procedures "whereby such persons can be kept subject to the centralised control of the company". Thus implicit in the judgment are two points: first, members of a company must be affected as members and not, for example, in some other capacity (such as through a term of a contract implied between the company and a member) before section 34(1) can be invoked in support of the articles; second, empowering provisions in the articles will be construed strictly.

Priorities

Re Manurewa Transport Ltd. [1971] N.Z.L.R. 909. In this case Speight J. had to decide whether a debenture creating a floating charge over the assets of a company took priority to an instrument by way of security over a specific chattel, in this instance, a Commer truck. The debenture had been executed and registered under section 102 of the Companies Act 1955 prior to the execution and registration of the instrument by way of security under the Chattels Transfer Act 1924. Speight J. found that the floating charge had crystallised (i.e. attached on the chattel) prior to the registration of the instrument. The reason for this conclusion was that the company had breached the terms of the debenture by attempting to mortgage the truck in executing the instrument by way of security, that is, the condition of non-charging without written consent was a limitation on the company's right to deal with the property "in the ordinary course of business". Crystallisation of the floating charge therefore immediately took place, and it followed that the debenture holder had priority over the holder of the instrument by way of security.

"Charges" under section 102 Companies Act 1955

In *Paintin and Nottingham Ltd.* v. *Miller Gale and Winter* [1971] N.Z.L.R. 164 the Court of Appeal held that a conditional hire purchase agreement is not a security over the purchaser company's property, and is not a charge within the meaning of section 102 of the Companies Act 1955. In this case the charge over a dredge had been registered under the Chattels Transfer Act 1924. The Court considered that this did not come within the definition of "charge" as used in section 102. As Turner J. put it: "I think that the word 'charge' must signify the giving of a security by way of mortgage, lien or encumbrance or to the like effect over property the ownership of which is and remains in the grantor".

English decisions

Two recent English decisions should be of interest to students of this branch of the law: the first is *Panorama Developments (Guildford) Ltd.* v. *Fidelis Furnishing Fabrics Ltd* [1971] 3 W.L.R. 440 in which

the Court of Appeal was faced with the vexing problem of "ostensible authority", this time when a company secretary hired cars in the company's name but for his own use. The second case, *In re Holders Investment Trust Ltd.* [1971] 1 W.L.R. 583, touches on the equally contentious issue of a majority exercising a power to a minority's detriment. On this occasion the court found that, in reducing the capital of the company, the majority shareholders had not asked what was best for the preference shareholders as a class.

Legislation

Looking ahead, it seems it may not be long before a new Companies Act will replace the present one. In May, 1968 a Special Committee was appointed to review and report upon the provisions and working of the 1955 Companies Act. In August of 1971 this Special Committee produced an Interim Report on its work to date: "We do not think that any fundamental change in the framework of the existing Act is required", the Committee said, "but we do think it has been shown there are now a number of matters upon which we have received a good deal of evidence to the effect that amendment of the existing law is required." (at p. 4). Those matters referred to by the Special Committee included the powers of companies including consideration of the *ultra vires* doctrine and pre-incorporation contracts, accounts and audit and accounting disclosure, prospectuses and the protection of investors, takeovers, registration of charges, obligations of directors, inspection and investigation into company affairs, and generally the enforcement of the performance of the duties imposed upon companies and their officers by the Companies Act. Hopefully, the work of this committee will soon be transformed into law, in the shape of a more streamlined and up-to-date Companies Act.

R. G. R. Eagles

CONTRACTS

Exclusion Clauses

In *Thornton* v. *Shoe Lane Parking Ltd.* [1971] 1 All. E.R. 686 the English Court of Appeal applied a well established principle to a novel situation. The plaintiff, having driven his car into an automatic carpark and received a ticket from a machine, later returned to collect it and was injured, partly as a result of the park owner's negligence. The issue was whether the latter had limited its liability by an exemption clause.

The Court held it had not. His Lordship relied on *Parker* v. *South Eastern Railway Co.* (1877) 2 C.P.D. 416, and the dicta of Mellish L.J. to the effect that the customer in cases of this nature is bound by an exempting condition only if he knows that the ticket is issued subject to it; or if the company does what is reasonably sufficient to give him notice of it. And this, it was conceded, Shoe Lane Parking Ltd. had not done. The Master of the Rolls reiterated what he had said in *J. Spurling Ltd.* v. *Bradshaw* [1956] 1 W.L.R. 461, at 466—that the clause was so wide and so destructive of rights that to be effective it would need to be printed in red ink with a red hand pointing to it or something equally startling.