IN THE PRIVY COUNCIL No. 34 of 1962

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

CHARLES MORGAN Appellant

- and -

NAJLO A. KHYATT Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (Sir Kenneth Gresson P., North and Cleary JJ.) delivered on May 7, 1962, dismissing an appeal from a judgment of Leicester J. in the Supreme Court of New Zealand, delivered on July 20, 1961, granting to the respondent a mandatory injunction and awarding her £626 damages against the appellant for nuisance arising from the encroachment on the respondent's property of roots from the Appellant's pohutukawa trees. pp.135 to 143; pp.111 to 131

2. The Appellant and the Respondent are owners and occupiers of adjoining hillside properties in Oriental Bay in the City of Wellington, the Appellant's property being No.314 Oriental Parade and lying to the north of the Respondent's property which is No. 316. The evidence was that the Appellant had occupied his property since 1939 and that the Respondent purchased hers in April, 1955. On the Respondent's property, close to the common boundary, there is a concrete wall, which was erected by a predecessor in title some fifty or sixty years before the trial; it runs down the hill for about ninety feet and was apparently built in two sections, one on top of the other. In the upper section (referred to as "the drainage block") there were embedded, inter alia, the sewage and stormwater drains thus carried from the Respondent's property towards Oriental Parade. On the Appellant's p.99, Ll.5 to 7; p.31, Ll.1 to 4; p.135, L.3 to p.136, L.30

p.137 L.11 property, close to the common boundary, there are a number of pohutukawa trees of unknown age.

3. It is in respect of encroachment upon the Respondent's land of roots from those trees and damage done by the roots through penetration into the Respondent's wall, drainage block and drains that the action in which the present Appeal arises
pp.45 to 46 was brought. From 1958 onwards the Respondent employed a plumber on several occasions to clear the drains of roots, but ultimately he found he could do nothing more by way of clearance. In his evidence at
p.45 L.52 to p.46, L.8 the trial he said, "It was absolutely impregnated and you couldn't get a pencil through ..... It had started to disintegrate with the pressure of roots in the drain." Accordingly new pipes were installed.
p.51, L.50 to p.52, L.24 Instead of being encased within the wall (which would have been more expensive) they were fixed on timber bolted to the lower part of the wall. The damages
pp.130 to 131 awarded in the action represented the cost of this work, £556, plus a contribution, £70, towards the estimated cost of repairs to the wall.

pp.23 to 25 4. By her statement of claim, dated April 14, 1960, the Respondent after alleging inter alia that the roots had penetrated, obstructed and forced open the drains, pleaded in paragraph 11

> 11. THE Defendant has been several times requested by the Plaintiff to discontinue or desist from the trespass or to abate the nuisance hereinbefore described but has refused and continues to refuse to do so and the Defendant still continues and unless restrained will continue the said trespass or nuisance by permitting the growth of trees whose roots have caused the trespass, nuisance and damage as aforesaid.

The Respondent then prayed for certain orders and injunctions and for damages in the sum of £726 for repairs to the wall and drains.

5. The Appellant's defence, in the form it finally
pp.28 to 30 assumed was set out in an amended statement of defence, dated July 1, 1960. It took the form of, first, a general denial of most of the Respondent's allegations, coupled with statements that the Appellant did not know whether the drains alleged to have been damaged had been in use for many years or whether the drains and the wall were laid upon the Respondent's property.

The Appellant then pleaded five further defences, which may be summarised as follows:-

(i) An allegation that any damage caused by the roots was completed prior to the date when the Respondent became the occupier of her property and that the protrusion of roots from the Appellant's property had "prior to such date ceased to be the cause of any damage (which damage is denied) that might have occurred after such date".
(Paragraph 13) p. 29

(ii) A plea of the Limitation Act, 1950, to bar the whole of the Respondent's claim or such part thereof as might be referable to damage caused more than six years prior to April 14, 1960, the date when the action was commenced.
(Paragraph 15)

(iii) An allegation that any damage suffered by the wall was "because of its faulty and poor construction, the said wall being constructed of concrete with no strength or stability and no reinforcement."
(Paragraph 17)

(iv) A plea that by requesting and approving the cutting of the roots the Respondent elected to have the alleged nuisance abated and was now debarred from pursuing any claim for damages or an injunction.
(Paragraph 19)

This defence was abandoned at the trial. p.106, Ll.21 to 24, p.126, Ll.16 to 20

(v) Allegations that the respondent had suffered any damage caused by the roots partly as a result of her own fault, said to consist in failure to abate or request the Appellant to abate the nuisance after the Respondent first became aware of it, and failure to take measures to prevent or mitigate the damage.
(Paragraph 22)

6. The action came on for trial before Leicester J. The trial occupied six days (April 18, 19, 26, 27, 28 and May 23, 1961), a great deal of evidence being called and full argument being heard from counsel on both sides. The learned Judge took time to consider his judgment, and his reserved judgment was delivered on July 20, 1961. In his judgment he dealt with the pp.31 to 110

history of the dispute and summarised and discussed
pp.111 to 124 the evidence of the respective witnesses at some length. Having done this, he stated his main findings of fact in this way:

p.124, L.37 to p.125, L.27

"The major part of the evidence is that given by experts on either side and, as is not uncommon with experts, they disagree upon a number of factors. Upon a consideration of their evidence, and all the other evidence called and upon the balance of probabilities, I consider that the facts upon which this Court has to ~~find~~ found its decision can be stated shortly as follows:-

1. The deterioration of the plaintiff's wall and drainage pipes by encroaching roots is due to a gradual process extending over a period of thirty or more years.

2. The plaintiff knew or ought to have known of the existence of this process within a year of the purchase of her property in 1955.

3. The defendant knew of the existence of the process as early as 1944 and, beyond topping the trees, has done nothing to arrest the process and offers no co-operation now towards that end.

4. The process consisted in the invasion into cracks in the plaintiff's wall of encroaching roots with the result that cracks occurred in the enclosed drainage pipes providing moisture and causing roots in quest of such moisture ultimately to expand and explode the pipes, and this process has been accelerated since 1954.

5. It is immaterial whether the cracks in the plaintiff's wall were caused by the pressure of the tree trunks and roots upon it or whether they were caused by the weight of the drainage block on the lower portion of the wall or whether they were caused by a fracture in the joint or joints arising from the pouring of concrete over the drainage block or whether there has been a failure to make provision for the contraction and expansion of the pipes; and had it not been for the roots the wall would have remained

sound and stable for the purpose for which it was required."

7. Turning to the relevant principles of law, the learned Judge referred to authorities, including the decision of the Court of Appeal in England in Davey v. Harrow Corporation [1958] 1 Q.B. 60, showing that an action for nuisance lies and a mandatory injunction and damages may be granted where damage is caused by the spreading of roots of trees beyond the boundary of the owner's land. He said that he regarded the present case as a plain instance of a continuing nuisance, citing in this connection the statement of Viscount Maugham in Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 894: p.125, L.28 to p.130, L.4 p.126, Ll.30 to 31

"In my opinion an occupier of land 'continues' a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end though with ample time to do so."

8. In the course of his discussion of the authorities, Leicester J. also said that no right to have roots encroaching could be acquired by prescription; nor could it be any defence that cracks in a concrete wall leading to cracks in sewerage pipes encouraged the roots to extend their quest for moisture; nor that the adjoining owner came to the nuisance. p.126, L.23 to p.127, L.5

9. After pointing out that, in cases of continuing nuisance, continuance of the cause plus fresh damage constitutes the cause of action, Leicester J. went on to consider the question of an injunction. He indicated that the evidence which would justify the Court in requiring the owner to remove his trees must go further than evidence which would be sufficient for an injunction that does no more than restrain him from permitting the roots to encroach upon the adjoining land. In his opinion, the conduct of the defendant in regard to cessation of the nuisance provided a test as to whether the injunction should be mandatory or qualified. Having mentioned authorities bearing on this point, he said: p.127, L.6 to p.128, L.25

"The evidence in this case establishes not only the invasion of a common law right but a reasonable belief that, without an injunction, there is likely to be a repetition of the wrong. In such circumstances I feel that there p.128, Ll.13 to 25

should be a mandatory injunction to remove the trees when the attitude of the defendant gives a clear indication that he is not disposed to do anything about the roots. No suggestion is put forward by him that a real remedy can be found for the invasion of the roots other than in the removal of the trees from which the roots emanate. In the absence of any such suggestion, I fail to see why it should be left to the Court to speculate upon what lesser corrective could afford the relief to which the plaintiff is entitled."

p.131, Ll.25 to 30 p.132

10. The injunction granted was accordingly that within a period of three months from the date of the order (July 20, 1961) the Appellant remove from, upon and alongside the boundary of the two properties the pohutukawa trees and that he remove from the land of the Respondent the roots of such trees or otherwise destroy or render them impotent.

p.128, L.26 to p.130, L.4

11. As to the plea of the Limitation Act and its bearing on damages, the learned Judge referred to authorities, including Backhouse v. Bonomi (1861) 9 H.L.C.503 and Darley Main Colliery Co. v. Mitchell (1886) 11 App. Cas. 127, for the view that in nuisance, where it is the damage consequent on the act or omission rather than the act or omission itself which provides a cause of action, the action is not maintainable until the damage is sustained. In general, he said, the period of limitation under the Act begins to run where the cause of action accrues; but, where there has been a continuance of the damage, a fresh cause arises from time to time as often as the damage is caused.

p.128, Ll.38 to 40

12. Leicester J. then applied the foregoing principles to the claim for damages in the present case. The claim was made up of £556 for the cost of installing new drains, which work was done in 1960, and £170, being the estimate of the cost of repairing the wall given by the witness Bruce Elwin Orchiston, an architect called for the Respondent. Mr. Orchiston recommended that the wall be repaired by a plasterer after the trees are removed and the roots rendered impotent; and there was confirmatory evidence from witnesses for the Appellant that no repairs would be effective for any period as long as the trees were there. The Judge thought it indisputable that the weight of the evidence was to be found in these and similar expressions of opinion.

Exhibit F p.150

p.55, L.50 to p.56, L.2

p.130, Ll.29 to 34, p.78, Ll.30 to 43

RECORD

13. As to the renewal of the drains, Leicester J. said that with the exception of the evidence of one witness, whom he was unable to accept as a reliable or competent witness in this regard, the evidence showed that the total figure claimed was not unreasonable. A number of efforts had been made by the Respondent's plumber and drainlayer to effect repairs to the drain, but the position had become hopeless and the Respondent had to have installed an outside drain fixed on timber and bolted through to the concrete. The Judge saw no reason to reject the evidence of the plumber and drainlayer concerned that an alternative method of dealing with the erection of a new drain would probably have cost a further £500. He said: p.130, Ll.11 to 26

> "It has been urged upon me that it would be unjust were the defendant called upon to bear the total of these costs when the process that has led to the necessity for a new drain and for repairs to the wall arose prior to the purchase by the defendant of his property. Even if occupiers of a property do not create the continuing nuisance or add to it in any shape or form, it has been held that, where the fact of its existence has been brought very pointedly to their notice, and where having had ample time to put the matter right they have done nothing, they are equally responsible with the owner of the freehold and with the actual tortfeasor for the adverse consequences of the tort. Maberley v. Peabody & Co. /1946/ 2 All E.R. 192 at p.195. p.130, Ll.34 to 47

He accordingly held that in all the circumstances the Appellant was liable on the claim for £556, arising as it did as a fresh cause of action due to the continance of the nuisance, plus the fresh damage involving the necessity to abandon the old drain and erect a new one. p.130, Ll.47 to 52

14. As to the claim for the estimated cost of repairing the wall, Leicester J. said:

> "Several witnesses have described the wall as weak and deteriorated. It seems, however, to have stood up for fifty years. It may be that one who continues a tort, such as nuisance, is affected by the "thin skull rule" and must take his victim as he finds him; but whether this principle applies to specially sensitive property, such as a root-infested wall, has yet to p.131, Ll.4 to 24

be decided. While I have accepted the theory that the cracks in the wall and the consequential damage to it have their origin in the pressure of the trunks and the roots, I think it impossible to say when the process first began and whether, when it did begin, there were inherent features in the construction of the wall itself which assisted in the continuance of the process. I feel that it would be inequitable to call upon the defendant to pay the whole cost of the estimated repairs for the wall. As I have said, the plaintiff should have been aware of the condition of the wall within a year of her purchase and if earlier attention had been given to repairing it, I do not think that the cost as now estimated would have been nearly as great. I propose to allow the sum of £70 to the plaintiff towards the estimated cost of the repairs to the wall."

15. Judgment was therefore given in the Supreme Court for an injunction in the terms quoted in paragraph 10 hereof, damages in the sum of £626, and costs.

16. The Appellant appealed from that judgment to the Court of Appeal, where the case was heard on February 19 and 20, 1962. On this occasion the Appellant was not represented by counsel. The Court took time to consider their decision, and judgment was delivered on May 7, 1962.

pp.135 to 138

17. In their judgment, delivered by Cleary J., the Court of Appeal first recapitulated some of the facts, mentioning in the course of doing so that there was some difference of opinion between the witnesses as to whether the lower wall and the superimposed drainage block had both been erected at the same time. This the Court regarded as quite immaterial, as all the witnesses were agreed that, whatever process had been followed, there remained a line of probable weakness in the join between the drainage block and the lower wall, that cracks must have developed along this line of weakness, and that the roots from the pohutukawa trees eventually entered these cracks. Likewise the Court considered that nothing turned on a difference of opinion between the witnesses as to the cause of the cracks, for the witnesses were all agreed that the roots had entered the cracks and in the course of time had caused a gap to develop between the drainage block and the lower wall, which varied from one to three inches in width and extended along the greater portion of the wall. It was

also agreed that the roots, having entered the cracks, thereafter found entrance into the drainage pipes and caused damage. The joints of the pipes were of mortar, and although they may have more readily enabled the roots to gain entrance to the pipes than would modern joints, the Court could not regard this as material.

18. After referring to the evidence of the master plumber and drainlayer engaged by the Respondent, the Court of Appeal went on to say that they thought that Leicester J. was "wholly justified in the findings of fact set out in his judgment". They regarded his crucial findings as being those numbered 4 and 5, quoted in paragraph 6 hereof. They then said: p.137, Ll.37 to 40

> "The appellant's evidence shows that the trees were growing on his property when he acquired it in 1939. He had not planted the trees, and after going to his property he did nothing positive or active to cause injury to his neighbour's property, which came about through the growth and spread of the tree-roots over the years. He presented his case to us in person, and quite understandably his presentation of the case was influenced by the considerations we have just mentioned. In these circumstances it may be appropriate to refer to some of the principles applicable to the law of nuisance, which are well known to lawyers but may not be fully appreciated by laymen. Nevertheless they must be applied by the Courts in the cases that come before them for determination." p.138, Ll.12 to 24

19. The Court of Appeal accordingly discussed the relevant principles, taking as a starting point a passage in the title Nuisance in 28 Halsbury's Laws of England, 3rd Ed. 133-134, which includes the proposition that "Where ..... the roots ..... of trees and shrubs encroach upon the land of an adjoining owner and there cause damage to either his property or cattle, an action for nuisance will lie irrespective of whether the trees were planted or self-sown." The Court next referred to Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880 as having settled some previously controversial aspects of this branch of the law, and made several citations from the speeches of Lord Atkin and Lord Maugham in that case, including Lord Atkin's statement that "..... if a man permits p.138, L.25 to p.139, L.47

RECORD

an offensive thing on his premises to continue to offend, that is, if he knows that it is operating offensively, is able to prevent it, and omits to prevent it, he is permitting the nuisance to continue; in other words he is continuing it." The Court of Appeal considered that, if this be so when the work was originally done by a trespasser, it must be all the more so when the original work was done by a predecessor in title of the defendant, as was the position here with the planting of the trees. The fact that the nuisance might arise from the natural growth of trees did not afford a ground for exemption from liability: Davey v. Harrow Corporation /1958/ 1 Q.B. 60. The present appellant had never pretended to deny that he knew the roots from his trees were invading his neighbour's soil. Prima facie, then, liability must follow.

p.139, L.47 to p.141, L.32

20. But what the Appellant had stressed in his argument was that the spread of the roots had become so obvious that the position must have been plain to the Respondent when she bought in 1955, and he went on to argue that the Respondent was not entitled to claim in respect of damage which had then already taken place. The Court therefore turned to this contention, which related rather to damages than to an injunction. It was agreed by her counsel that the Respondent could not recover in respect of injury which had already manifested itself at the time she purchased the property. The Court of Appeal considered that notwithstanding certain comments by the trial judge and strictures made by the Appellant, not without justification, as to the Respondent's reliability as a witness, it did not follow, and a Court would not be entitled to say that it followed, that the Respondent bought the property with knowledge that the drains were damaged. Indeed, although there was some evidence of blockages in 1952, 1955 and 1956, there was really no evidence that the drains became fractured by the roots until well after the Respondent's purchase, perhaps not until 1958. The mere fact that the Respondent should have known, or did know, at the time when she bought the property that there was root intrusion of some sort was not enough to deprive her of the right to damages for injury which afterwards arose, as was shown by Davey v. Harrow Corporation. Nor could it be said that the Respondent failed to take reasonable steps to mitigate damage.

RECORD

21. So far as the £70 allowed towards repairing the wall, the Court of Appeal thought that the trial Judge had taken into account all matters properly in the Appellant's favour. As to the £556 allowed for the installation of the new drains, the Court said that, notwithstanding certain deficiencies in the evidence, the fact remained that the Respondent did pay that sum for the work, and they thought that the principle to be applied was that the Court should be slow to interfere with the cost of work done pursuant to the advice of a competent adviser: Lodge Holes Colliery Co. Ltd. v. Wednesbury Corporation /1908/ A.C. 323, 325. In these circumstances their Honours did not think it had been made out that the amount of damages awarded against the Appellant was excessive, particularly when regard was had to the fact that Mr. Holmes (a witness called for the Appellant) estimated the cost of carrying out remedial work along different lines at £600.

p.141, L.33 to p.142, L.11

p.79, Ll.43 to 49

22. As to the injunction, the Appellant objected to Leicester J.'s order that it ignored the fact that it was improbable that any further damage would be caused from the roots now that the drainage block had been abandoned and a new drainage system installed. Considering the evidence as a whole in the light of this contention, the Court of Appeal said that the conclusion that the removal of the trees was necessary (because, if they are allowed to remain, their roots will damage the Respondent's wall) emerged from the evidence of witnesses called on both sides. The Court thought that Leicester J. was justified in making the order he did, and that they would not be entitled on the evidence to interfere with that order. The appeal was therefore dismissed.

p.142, L.11 to p.143, L.13

23. The Respondent will contend that this case is, as the learned trial Judge said, a plain instance of continuing nuisance. It is submitted that the facts establishing the Appellant's liability and justifying the injunction and the damages awarded are the subject of concurrent and virtually inevitable findings in the Courts below.

p.126, Ll.30 to 31

24. The two surveyors called, one on each side, were agreed that the wall which has been damaged was entirely on the Respondent's property.

p.66, Ll.6 to 10 p.97, Ll. 6 to 8

25. With regard to the injunction to remove the trees, it is submitted that Leicester J. was right in saying that the evidence established a reasonable belief that, without such an injunction, there was

p.128, Ll.13 to 15

RECORD

likely to be a repetition of the wrong. On this question, the Respondent will refer to the evidence of the Appellant in cross-examination and in answer to the Judge. As the relevant passages p.104, L.10 to p.107, L.25 are somewhat long, they are not reproduced here, but their tenor is indicated by the following question and answer in cross-examination:

> "Mrs. Khyatt asks for it to be done - are you prepared to cut swathe and remove the trees? It is not necessary. The answer is No because I do not regard it as being necessary."

As to necessity, it is submitted that it was substantially common ground between the expert witnesses that if the roots are allowed to continue to spread they will damage the wall further and push it over or cause it to disintegrate wholly or partly. Reference will be made inter alia to the evidence of the witness Breedon at page 42, lines 31 to 44; Davies at page 52, lines 12 to 33; Orchiston at page 55 line 50 to page 56 line 2, page 60, line 30, and page 63, lines 15 to 16; and, of the Appellant's witnesses, Holmes at page 81, lines 51 to foot; Sterling, page 87, lines 1 to 35; and Clendon, page 93, lines 44 to 48. These and other passages in the evidence amply warrant, it will be contended, the conclusion that, p.143, Ll.2 to 4 in the Court of Appeal's words, "the trees could not remain without the likelihood, if not the inevitability, of further damage."

26. With regard to damages, it is submitted that here, too, there are concurrent findings of fact based on correct principles. In addition to the authorities relied on by Leicester J. and the Court of Appeal, there is now a passage in the speech of Lord Pearce in Cartledge v. E. Jopling and Sons Ltd. /1963/ 2 W.L.R. 210, 221; /1963/ 1 All E.R. 341, 349, dealing with subsidence cases, which cases (it is submitted) are analogous as regards the accrual of causes of action to such cases of continuing nuisance as the present:

> "Mr. Waller supported his second contention by drawing an analogy from subsidence cases where the cause of action accrues not when the support is withdrawn but when the actual damage is caused by its withdrawal (Backhouse v. Bonomi) (1859) E.B. & E. 646; (1861) 9 H.L.C. 503. If the result of the withdrawal of support is that one

damage is done today and another subsequently, there is nothing to prevent a fresh action as often as fresh damage is inflicted (Darley Main Colliery Co. v. Mitchell 11 App. Cas. 127; see also Harrington v. Derby Corporation /1905/ 1 Ch. 205; 21 T.L.R. 98. The damage recoverable in such cases is, however, that which has actually occurred; it cannot include future damage or even present depreciation of value due to apprehension of future damage (West Leigh Colliery Co. Ltd. v. Tunnicliffe & Hampson Ltd. /1908/ A.C. 27; 24 T.L.R. 146).

In the present case it was not until 1960 that the damage which necessitated the replacement of the drains occurred; until then the plumber and drainlayer had been able to clear the drains of roots from time to time. The position in 1958, when he was first called in, is described in the following passage of his evidence:

"I was first called on to make an inspection in 1958. I called to clear up a blocked drain which I did. It was blocked at that time by a few roots, nothing of consequence. We cleared it. That was the first time I have visited the premises. The stormwater drain is the lower pipe and the sewer pipe is the top one. The pipes were entirely encased in concrete. As a drainlayer, I regard that as a particularly satisfactory way of dealing with them. It was obviously quite a sound method of laying the drains. I had no occasion when inspecting the drains to break into the concrete. The first time there was evidence of roots that had broken out of the concrete and we did not have to open up the wall. They were in the side layer of the wall. In 1958 there were a few light roots around, there were a few cracks in the wall but not of any great consequence. I wasn't worried at that stage. We cleared them and I thought it was going to be alright. There was one crack where the top part superimposed on the lower portion of the wall. The only roots I saw there were small fibrous ones. There weren't any big ones. There were only cracks on the side. Some of the facing on the wall had come off. There wasn't very much concrete over the side, and after we put our drains in .... the concrete had been lifted off by the roots and there was a crack in the drain in one of

p.45 Ll.23 to 48

the joints. There was a fibrous mass of roots but we put our rods through and cleared all those out."

In answer to the Judge he said that after the first occasion the roots became progressively worse until they got to the stage in 1960 when the plumbers could not penetrate the drains, and he then told the Respondent he could do nothing more. Cast iron drains were then installed on the side of the wall, and it is submitted that the cause of action for the damages claimed in relation to the drains did not arise until that work (or some other form of replacement of the drains) became necessary. The Respondent acted reasonably by not having the drains replaced until it became essential and then by adopting a mode of replacement less expensive than having them embedded in a wall. In the passage in his speech in Lodge Hole Colliery Co. Ltd. v. Wednesbury Corporation /1908/ A.C. 323, 325, mentioned by the Court of Appeal, Lord Loreburn L.C. said:

"Now I think a Court of justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. When a road is let down or land let down, those entitled to have it repaired find themselves saddled with a business which they did not seek, and for which they are not to blame. Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrong-doer in a minute scrutiny of the expense, as though they were his agents, for any mistake or miscalculation, provided they act honestly and reasonably. In judging whether they have acted reasonably, I think a Court should be very indulgent and always bear in mind who was to blame. Accordingly, if the case of the plaintiffs had been that they had acted on the advice of competent advisers in the work of reparation and had chosen the course they were advised was necessary, it would go a very long way with me; it would go the whole way, unless it became clear that some quite unreasonable course had been adopted."

27. The Respondent submits that the judgments of the Court of Appeal and Leicester J. are right and should be

affirmed, and this Appeal should be dismissed, for the following among other

R E A S O N S

1. FOR THE REASONS given by the Court of Appeal and by Leicester J.

2. BECAUSE there are concurrent findings of fact in the Courts below that the Appellant is responsible for a continuing nuisance causing damage to the Respondent.

3. BECAUSE on the evidence in this case, considered in the light of the authorities, no other conclusion is open.

4. BECAUSE the evidence established that further damage will be caused to the Respondent unless the encroachment of the Appellant's roots is prevented, that the ~~Respondent~~/ Appellant intends to take no step to this end, and that a mandatory injunction as granted is necessary.

5. BECAUSE the damages were rightly awarded.

R. B. COOKE

P. McKENZIE

No. 34 of 1962

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

CHARLES MORGAN ... Appellant

- and -

NAJLO A. KHYATT ... Respondent

CASE FOR THE RESPONDENT

~~Appellant in Person~~
~~C/o New Zealand House,~~
~~415 Strand,~~
~~London, W.C.2.~~

~~BUDDLE ANDERSON KENT & CO.~~,
~~c/o~~ WRAY SMITH & CO.,
1, King's Bench Walk,
Temple, London

Solicitors for Respondent