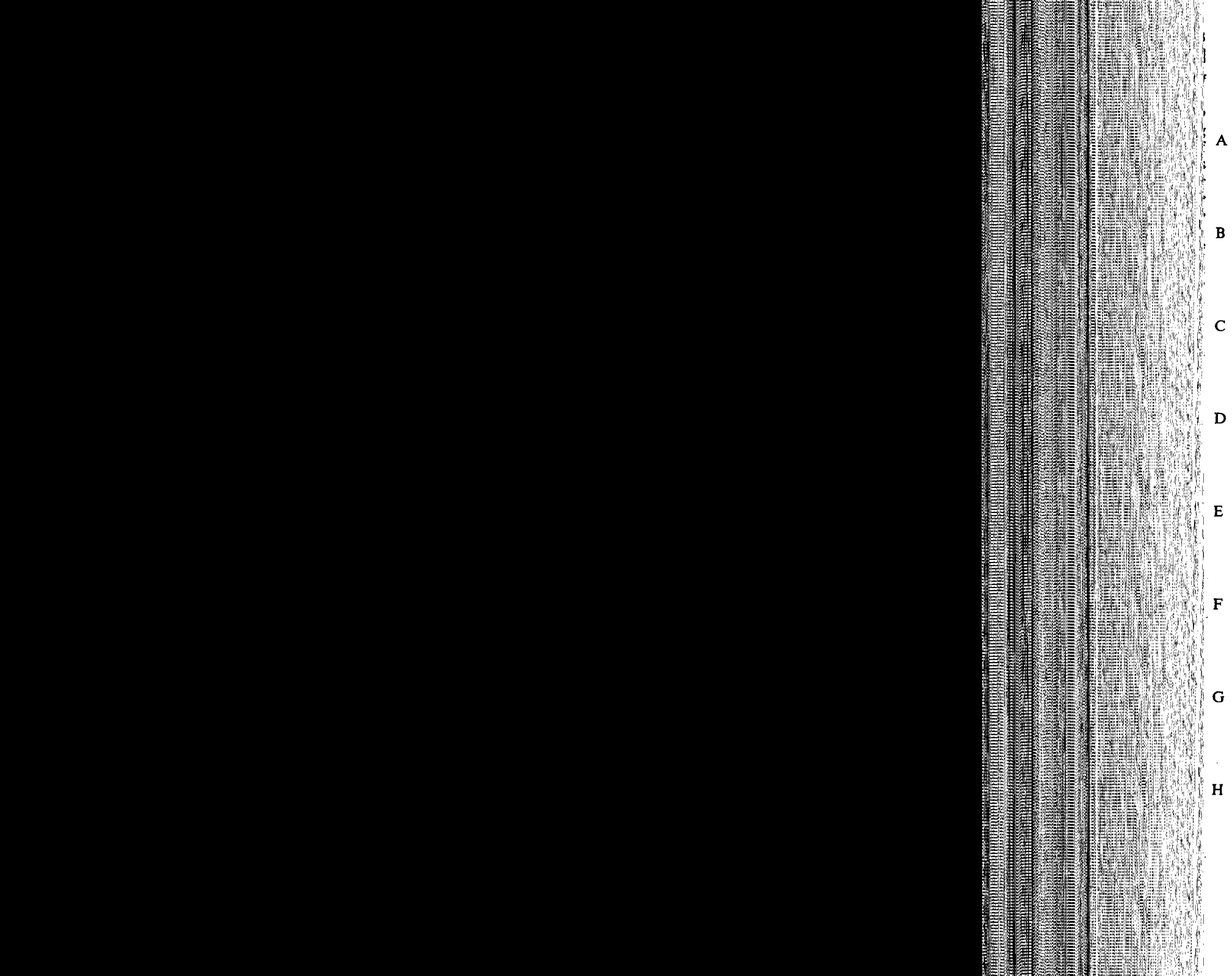
A
B
C
D
E
F
G
H

property and that upon the termination of the lease they were to revert to the lessor means that any presumption which may exist that a lessee annexes materials for temporary and not permanent use is of no assistance in this case in determining whether the disputed items are movable or immovable. *De Beers Consolidated Mines* v *London and South African Exploration Co* (1893) 10 SC at 372. In the light of the decision in *Van Wezel* v *Van Wezel's Trustee* 1924 AD at 418 it would appear that Burge *Commentaries on the Civil Law of Holland* chap 7 s 1 para VII does not represent our law, at least insofar as it is stated that movables which would be immovables if affixed by the owner, continue as movables as between the owner and his tenant. The fact that the items might have had to be refurbished or updated or that the whole or parts thereof might have had to be replaced during the currency of the lease would not have prevented them from becoming immovables upon annexation to the building. Cf *Western Bank Bpk* v *Trust Bank van Afrika Bpk* 1977 (2) SA at 1022C; *Johannes Voet* 1.8.14. It may be noted that, in addition to the case of *Vaudevile Electric Cinema* v *Muriset* (1923) 2 Ch at 87 it was held in the New Zealand case of *College* v *H C Curlett Construction Co Ltd* 1932 NZLR 1060 referred to in *The English and Empire Digest* vol 31 (1) (Landlord and Tenant) at 441 para 1234 that tip-up seats in a theatre had been sufficiently affixed to the freehold to cast upon the plaintiff the *onus* of showing that they remained chattels, which *onus* the plaintiff had failed to discharge. *Re* the emergency lighting plant and dimmer board the factors indicate that these plants were installed with the intention that it would remain in the theatre permanently.

Shaw QC in reply.

Cur adv vult.

Postea (May 30).

VAN WINSEN AJA: Respondent, who is the owner of a building situate in Smith Street, Durban, known as the Playhouse theatre, applied for an order in the Durban and Coast Local Division interdicting appellants from removing certain items of equipment from the Playhouse upon the termination of a lease between respondent and first appellant relative to that building. The issue between the parties was whether the items of equipment in question had become part of respondent's building and thus the property of respondent. The Court *a quo* found that they had and this finding is challenged on appeal.

The relevant facts relating to the erection of the Playhouse, and the contractual relationship between the parties are succinctly set out in the judgment of MILNE J (in the Court *a quo*) and I can do no better than to quote the following passage from the judgment:

"The applicant (respondent on appeal) is the owner of certain immovable property situate at the corner of Smith Street and Albany Grove in Durban. A building (comprising a theatre, restaurant and other accommodation), which is known as 'The Playhouse', stands upon such property. By notarial agreement of lease entered into on 6 December 1926 this property was leased by the individual persons who were then the owners thereof to The African Theatres Ltd. The original lessors formed the company Butcher Brothers (Pty) Ltd and transferred the immovable property to it in 1930. By a notarial agreement entered into on 11 May 1931 Butcher Brothers (Pty) Ltd and African Theatres Ltd amended the terms of the original lease in certain respects. In terms of the lease as amended:

(*a*) the lease was for a period of 50 years from 1 January 1927 to 31 December 1976.
(*b*) the lessee had the right to renew the lease for a further 49 years from 1 January 1977 to 31 December 2025.
(*c*) in the event of the lessee desiring to renew the lease it was obliged to give notice of its intention to do so to the lessor between 1 January 1976 and 30 June 1976.
(*d*) the lessee undertook to proceed with the erection of theatre and other buildings on the said immovable property to a value of not less than £55 000.
(*e*) the lessee undertook to commence the erection of these buildings within six months from 9 February 1931.
(*f*) on termination of the lease or any renewal from any cause whatever all buildings and improvements on the immovable property were to 'revert to and *ipso facto* become the absolute property of the lessors without their having to pay or being liable to the lessees for any compensation in respect of the said buildings or improvements'. (Clause 15)

The original lessee duly erected the theatre and other buildings upon the immovable property and such buildings were named 'The Playhouse'. The buildings were solidly constructed and were elaborately finished and ornamented in a manner designed to give the appearance of an early English theatre.

The buildings were large, comprising a theatre providing seats on two levels numbering 1 762 seats, a foyer, gallery, restaurant and other accommodation. The building was equipped with all that was necessary for its use as a theatre or cinema and restaurant complex and was put to use for these purposes. The building has been used for the said purposes ever since. Amongst the equipment installed in the building when it was erected, were theatre seats, fitted carpets, lighting and cinema projection equipment, and air-conditioning equipment with the necessary ancillary fittings and ducting.

The original lessee ceded its rights under the agreement of lease of 6 December 1926 as amended to Fox Theatres South Africa (Pty) Ltd under notarial deed of cession of lease dated 18 June 1956 and registered on 28 June 1956. Fox Theatres South Africa (Pty) Ltd thereafter underwent certain changes of name and in terms of the last of these changes which took place on 20 December 1971 it assumed the name Theatre Investments (Pty) Ltd. Theatre Investments (Pty) Ltd is the first respondent.

In September 1963 Butcher Brothers (Pty) Ltd became Butcher Brothers Ltd, the applicant. Thus the applicant became the lessor and the first respondent became the lessee.

All this is common cause."

Second appellant claimed to be the sub-lessee of the Playhouse and although this is disputed by respondent nothing turns on the dispute. Second appellant's claim that it is the owner of the equipment is, on the assumption that the equipment is not part of the building, not in dispute.

Negotiations for a renewal of the lease were conducted between the parties before the expiry date of the lease but these came to nothing and the lease lapsed at the end of the 50 year period on 31 December 1976. At that date there were attached to the building certain items of equipment alleged by second plaintiff to be movable and of which it claimed to be the owner. It asserted the right to remove them at the termination of the lease. Respondent challenged second appellant's right to do so on the ground that in terms of clause 15 of the lease – which is quoted above in the extract from the judgment of the Court *a quo* – these items constituted improvements which became the absolute property of respondent when the lease expired. When no agreement could be reached between the parties

respondent as indicated above applied to the Court *a quo* for an order interdicting appellants from removing the disputed items. The dispute relative to one of these items, viz. an air-conditioning plant, was resolved in respondent's favour by appellants waiving their claim thereto. A further item, viz fitted carpets, which respondent claimed in the application for an interdict to have adhered to the building, was found by the Court *a quo* to be a movable and, since there is no cross-appeal in regard to this finding, the matter of the carpets need not be further referred to. This leaves three disputed items of equipment viz:

(1) 1 762 theatre seats,

(2) an emergency lighting plant with a control panel and ancillary fittings and attachments, and finally,

(3) a projection room dimmer-board with ancillary fittings and attachments.

All three of these items were found by the Court *a quo* to constitute immovable property and thus not to be removable by appellants.

The nature of these three items is set out in the judgment of the Court *a quo* and I quote the relevant passages.

(1) Theatre seats.

"(*a*) As is usual, the theatre seats have been installed in rows. At either end of each row there is a metal support, carrying an arm rest, and there is also a metal support, of lighter construction, and which also carries an arm rest, between each seat.

(*b*) Each support is fitted with a swivel and metal bracket to receive and hold the portion of the seat which is sat upon and to enable it to be tipped up. Each support also has a metal bracket to receive and hold the back rest. Each support which is between seats and not at the end of a row carries the necessary swivel and bracket for the seats on either side of it.

(*c*) The portion of the seat which is sat upon can be pulled out of the brackets which hold it, and the back rest for each seat can be removed by unscrewing it from the supports on either side. In this way, no doubt, repairs or re-furnishing or re-covering could be effected and the seat and back rest portions re-attached to the supports.

(*d*) Each support is attached to the concrete floor of the theatre by means of metal bolts which are set in the concrete and protrude from it and then pass through holes in the foot of each support. Nuts are then fastened to hold each support to the floor. Each support appears to be held by at least two bolts and the end supports, it would seem, by three or four bolts.

(*e*) The rows of seats are curved. It appears that it would not be possible, if the rows were removed, to set them in a different curve, or in straight rows, without adjusting the size and shape of the portions of the seats which are sat upon and the back rests.

(*f*) Some of the seats are set upon a raked portion of the theatre floor and others are set on tiers, which appear to be level, and each of which carries a row of seats. The consequence of this fact is that the supports for the seats on the raked portion of the floor differ from the supports for the seats on the tiers. This has obviously been necessary in order to obtain the same angle for the seats whether they are set on the raked floor or on tiers.

(*g*) The rows of seats are set in blocks and, in those places where a block fronts on to an aisle, a brass rail with attachments to receive a curtain has been screwed or bolted to the floor to separate the aisle from the front row of seats. The dimensions of these blocks differs (*sic*) in different parts of the theatre and therefore the dimensions of these rails differ.

(*h*) The metal supports at each end of the rows of seats are elaborately styled and, in addition to carrying a letter to denote the row, are embellished with what appears to be a metal visor or mask (as from the helmet of a suit of armour). The intention appears to have been to design these supports in a manner which fitted in with the early English style of the theatre building itself and also to receive an electric light bulb behind the visor or mask to cast a shaded light upon the portion of the aisle adjacent to the end of the row of seats.

(*i*) The seat supports give the appearance of being old, somewhat shabby and of having been in position for a long time.

(*j*) The portions of the seats which are sat upon and the back rests both show signs of considerable wear and some of them have split open."

Save that appellants denied that the metal supports at the end of each row of seats were embellished with a metal visor or mask the above-quoted description of the seats and the method of their attachment to the floor was not in dispute between the parties. As a result of an inspection *in loco* — held at the request of the parties — MILNE J from his own observations resolved this dispute in favour of respondent and accordingly the description set out in quoted paras *a-j* above can be taken to represent the true position.

(2) Emergency lighting plant and control panel.

The description of this item and the way it is attached to the building is explained in the judgment of the Court *a quo* as follows:

"The emergency lighting plant and control panel is situated in a basement or well at the rear of the theatre in an enclosure containing other necessary electrical gear such as the two generators. The emergency lighting plant consists of a piece of heavy machinery which is bolted by means of substantial bolts to a concrete plinth of the same dimensions which rises approximately one foot above the floor level. This plant is essential in any theatre the size of 'The Playhouse' as a standby in case of power failure. The metal pipes leading to the control board of the emergency lighting plant are set in concrete. In order to reach the plant it is necessary to descend by means of a vertical wooden ladder into the well or basement. It is possible to remove the lighting plant without damage to the plant or to the structure of the building, but to do so the lighting plant would have to be dismantled into sections and the wooden ladder would have to be removed. Although it is not so stated in the papers nor in the notes of the inspection *in loco*, counsel were agreed in argument that these sections would have to be and could be winched out of the well or basement if the plant were to be removed."

(3) Projection room dimmer-board.

This is described in that judgment as follows:

"(*a*) It is an essential item of cinema equipment which controls the intensity of the light in the theatre portion of the 'Playhouse'.

(*b*) The apparatus is installed in and is attached to a metal frame or cabinet of dimensions approximately 7 ft high, 2½ ft wide and 5 ft long. At each corner this installation is bolted to the floor of the projection room and the bolts are apparently set in the cement floor with the nut end uppermost and each nut is approximately 1 ft above floor level where it protrudes through the base of the dimmer board.

(*c*) The four metal tubes which contain wiring leading from the floor into the dimmer board appear to be set into concrete but it is common cause that the dimmer board assembly can be unscrewed from these metal pipes.

(*d*) The dimmer board is fitted with a number of fuses and switches controlling the various groups of lights in the theatre. Protruding from one end of the frame are three wheel switches which enable a whole bank of switches to be raised or lowered simultaneously as each wheel is turned.

(*e*) The dimmer board was installed not later than 1958 but there is no information as to who installed it.

(*f*) No damage to the dimmer board or the premises would be caused by its removal."

MILNE J held, for stated reasons, that the seats in question were clearly designed and manufactured specifically for the Playhouse theatre and that they could not without adaptation be used in another theatre. This he stated tended to indicate that the person who annexed the seats to the floor of the building intended that they should remain there permanently. The learned Judge also placed reliance upon the terms of the lease which he said conveyed to him that the parties thereto had contemplated that upon the termination of the lease the lessor would have returned to it a theatre building in a good state of repair and able to be used and leased as such. This fact, so he said, afforded an important guide as to the intention of the lessee when it installed the seats and taking this fact in conjunction with the "physical features of the seats" he concluded that the annexor of the seats intended that they should remain part of the theatre buildings permanently.

With reference to the second and third items the learned Judge concluded, regard being had to the manner of their fixing to the building, to the fact that they are both essential items of equipment in a theatre and to the terms of the lease that the person annexing these items to the building never intended that they should be removed at the termination of the lease.

It was argued in this Court on behalf of appellants that respondent had failed to establish on a balance of probabilities that the three items of movable equipment had become part of the building and that the Court *a quo* should have so held. A generally accepted test (see the cases referred to in *Standard-Vacuum Refining Co of SA (Pty) Ltd* v *Durban City Council* 1961 (2) SA 669 (A) at 677) to be applied to determine whether a movable, capable of acceding to an immovable and which has been annexed thereto, becomes part of that immovable is to enquire whether the annexor of such a movable did so with the intention that it should remain permanently annexed thereto. Evidence as to the annexor's intention can be sought from numerous sources, *inter alia*, the annexor's own evidence as to his intention, the nature of the movable and of the immovable, the manner of annexation and the cause for and cicumstances giving rise to such annexation. The *ipse dixit* of the annexor as to his intention is not to be treated as conclusive evidence thereof but, should such evidence have been given, it must be weighed together with the inferences derivable from the other sources of evidence above-mentioned in order to determine what, in the view of the Court, was in fact the annexor's intention. In cases where no evidence is forthcoming from the annexor, a court will be constrained to determine the issue upon such inferences as may legitimately be drawn from the sources aforementioned. If a court, on a consideration of all the evidence, direct and inferential, were to conclude on a balance of probabilities that the annexor intended a permanent annexation it would hold that the movable had become part of the immovable. If on the other hand it were to conclude on a balance of probabilities that, in the light of such evidence, the annexor's intention was not to effect a permanent annexation or if it found itself unable to draw any inference one way or other as to the annexor's intention then it would conclude that the annexed movable had not lost its character as such.

The situation in the present case is that the three items in question were

all movables capable of attachment to the building, and were in fact attached to the building in the manner described above. Furthermore no evidence was laid before the Court *a quo* by anyone claiming to have made the annexations in question. Accordingly that Court was required from the evidential sources available to it to determine, as a matter of inference, what the annexor's intention was when each of the three items were affixed to the Playhouse building.

I can find no fault with the sources to which the Court *a quo* had reference in order to draw an inference as to the annexor's intention, viz to the nature of the movable, the method of its annexation to the building, the effect that a detachment of the movable would have on the building, the contractual relationship between the parties in so far as it provided a context within which to view the annexation and to the condition of the building which it was contemplated would prevail when the lease had run its course.

Per contra it seems to me that the assistance which Mr *Shaw*, for appellants, sought to derive from the fact that, generally speaking, a lessee when he affixes a movable to a building hired by him would not be considered to have intended it to remain affixed thereto permanently (Burge *Commentaries on the Civil Law of Holland* chap 7 s 19 para VII; *McDonald Ltd* v *Radin NO and The Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454 at 478) is not of such persuasive force in the present case.

The contract between the parties contemplated that it would be the lessee who would erect, *inter alia*, a theatre building on respondent's land and after equipping the building in a way he considered suitable for the purpose, he would use the building as a theatre. This is not a case where the lessee hires another's extant building on a short lease and installs his equipment therein in order to enable him to carry out for the duration of such a lease the object for which he hired the building. Here the building and the equipment were designed by the lessee to be appropriate to each other and the contract contemplated that this state of affairs would exist for 50 years and possibly for a further 49 years thereafter.

Although the evidence no doubt discloses that, after adaptation, the chairs could today be used in other theatres, this casts little light on the intention of the annexor at the time when in the early thirties at the beginning of a very long lease they were installed in the building. Despite the absence of reliable evidence as to who or what the designer of the chairs sought to depict by the metal visor or mask attached to the metal supports at each end of the rows of seats, the design appears to be wholly appropriate to a building in the early English style and their installation is a pointer to the fact that the annexor intended the chairs to be there for the initial period of the lease. The curve in which the rows of seats are designed and the diferences in length of the front and back legs of many of the seats to fit in with the different angles of rake in different parts of the theatre is a further pointer to the fact that they were designed especially for the Playhouse theatre.

No doubt the chairs could be easily removed *in toto* by unscrewing the retaining nuts on the holding-down bolts but the effect of this would be to leave a great number of bolts, grouted into the cement, standing proud of the floor. The fact that these would either have to be dug out of the cement

or sawn off at ground level justifies the conclusion that the removal of the chairs would cause not inconsiderable damage to the fabric of the building. The manner in which the chairs were annexed to the floor, the fact that they appear to have been purpose-designed for that particular theatre and that it was contemplated that they, or their subsequent replacements, would be *in situ* for 50 years and perhaps a further 49, seem to me to raise the reasonable inference that the annexor contemplated that they were to remain there permanently. Such an inference is strengthened when regard is had to the terms of the lease. I have no quarrel with the following conclusion arrived at by MILNE J as appears from the following extract from his judgment,

"... that the terms of the lease seem to me to indicate that the parties intended that at the termination of the lease what the lessor would get would be the theatre building in a good state of repair both externally and internally and able to be used and therefore leased as such."

Quite clearly this result could not be effected if any of the three items of essential theatre equipment in issue in this case were not to be left in the building.

Mr *Shaw* drew the Court's attention to the fact that the lease nowhere, in terms, obliges the lessee to conduct throughout the period of the lease a theatre in the building erected by it. That is correct. Nevertheless the lease does oblige the lessee forthwith to "proceed with the erection of theatre and other buildings" and that it was in the contemplation of the parties that a theatre would be conducted in a building erected in terms of the contract is amply demonstrated by the fact that, after the building had been equipped for that purpose, this is in fact what the lessee did throughout the period of the lease.

It is not disputed that the emergency lighting plant and the dimmer-board are essential features of a theatre and the same considerations as these mentioned above apply to them, viz that their presence in the building is essential if at the end of the period of the lease the lessor is to be handed back a theatre which is able to be used as such. Both the dimmer-board and emergency lighting plant are firmly bolted to the building. The dimmer-board is installed in and attached to a metal frame bolted into the cement floor, while the emergency lighting plant is bolted onto a concrete plinth. It is not in dispute that both can be unbolted with no damage to themselves or to the building save to the minor extent that the frame for the dimmer-board would be left implanted in the floor as well as the bolts that held down the lighting plant and will have to be dug out or sawn off at their base. Both these pieces of equipment are integrated into the electric wiring system of the theatre, although here, too, the wires can be disconnected.

Mr *Shaw* argues that the conclusion of the Court *a quo* that these items of essential equipment were intended to remain in the building for as long as it would be used as a theatre, failed to draw a distinction between the equipment of a theatre and that of a theatre building. If it can be deduced — as I think it can — from the contract and the actions of the lessee in pursuance of the contract that no such distinction was intended by the parties then this ground of criticism falls away.

If regard is had to the intended duration of the original contract as well

carpet + air-conditioning

as to the period of its possible extension, to the fact that the building was erected for the purpose of conducting therein a theatre and that the seats, the emergency lighting and dimmer-board constitute equipment essential to the effectuation of such a purpose then it is difficult to avoid the conclusion that such items of equipment when they were attached to the building were intended to remain there indefinitely. In my view no good reasons have been advanced for concluding that the Court *a quo* was wrong in deciding that these three items of equipment became part of the theatre building and as such the property of respondent which, by the terms of clause 15 of the contract between the parties, had to revert to respondent without any obligation on its part to pay compensation for the building or improvements thereto.

The appeal is dismissed with costs, such costs to include all those consequent upon the employment of two counsel.

WESSELS ACJ, CORBETT JA, HOFMEYR JA and KLOPPER AJA concurred.

Appellants' Attorneys: *Ditz & Partners*, Durban; *McIntyre & Van der Post*, Bloemfontein. Respondent's Attorneys: *Shepstone & Wylie*, Durban; *Webber & Newdigate*, Bloemfontein.

VERSTER v MOTOR VEHICLE ASSURANCE FUND

(APPELLATE DIVISION)

1978 *May* 25, 30 WESSELS ACJ, MULLER JA, MILLER JA, KLOPPER AJA and TRENGOVE AJA

Insurance—Compulsory Motor Vehicle Insurance Act 56 of 1972—Claim against the MVA Fund—When valid—Peremptory provision in reg 6 (1) (a) (iv) of regulations under s 32 of Act that Fund not liable where there is no physical contact with the unidentified vehicle— Such regulation not obliterated or rendered ineffective by reg 6 (1) (a) (iv) on ground that certificate of Minister obtained under s 6 (1) (b).

As a result of an accident in which the motor vehicle in which appellant and his wife had been travelling and another unidentified motor vehicle had been involved, and in which appellant's wife had been injured, appellant sued the MVA Fund in a Provincial Division for damages suffered. In the particulars of claim it was alleged that the accident had been due to the negligent driving of the driver of the unidentified vehicle, that they had not been able to trace the driver or owner thereof or the registered insurer, despite taking all reasonable steps to do so; that they had complied with all the requirements of Act 56 of 1972 and the regulations promulgated thereunder; and that the Fund and the Minister of Transport had consented in writing to the institution of action against the Fund. Concerning that "accident" it was alleged (1) that an actual collision had occurred between their vehicle and the other or, alternatively, (2) that the latter had been driven in such a manner that the driver of their vehicle had been forced to leave the road in order to avoid