Supreme Court of Canada
In re Bozanich / A.H. Boulton Co. Ltd. v. Trusts and Guarantee Co. Ltd., [1942] S.C.R. 130
Date: 1942-03-03

In the Matter of the Bankruptcy of George Bozanich.

The A.H. Boulton Company Limited *(Defendant) Appellant;*

and

The Trusts and Guarantee Company Limited *(Plaintiff) Respondent.*

1941: November 14; 1942: March 3.

Present: Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Bankruptcy—Bankruptcy Act, R.S.C. 1927, c. 11, ss. 60, 61, 62, 64—"Settlement" within meaning of ss. 60, 62 (3)—Chattel mortage to creditor for debt incurred in store business—Constitutional law—Ontario legislation as to preferences superseded by s. 64 of Bankruptcy Act—B.N.A. Act, s. 91.

On April 5, 1939, B. gave to appellant a chattel mortgage on certain chattels in B.'s store to secure payment of indebtedness to appellant incurred by B. in the course of business. On October 21, 1939, B. made an authorized assignment in bankruptcy. Respondent, the trustee in bankruptcy, attacked the validity, as against it, of the security of the chattel mortgage.

Held (reversing judgment of the Court of Appeal for Ontario, [1941] O.R. 21): The chattel mortgage was not a "settlement" within the meaning of ss. 60 and 62 (3) of the *Bankruptcy Act,* R.S.C., 1927, c. 11, and is valid and effectual as against respondent.

The enactment in s. 62 (3) that, for the purpose of ss. 60, 61 and 62, "settlement" "shall include any conveyance or transfer of property" does not so extend the ordinary meaning of the word "settlement" as to bring within its scope all conveyances or transfers of property.

Per the Chief Justice and Davis and Kerwin JJ.: In enacting said sections Parliament adopted in substance provisions in the English Act which had been the subject of discussion and decision in the English courts,

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and it is proper to assume that Parliament intended to adopt those provisions as construed by the English courts and applied in the administration of the bankruptcy law in England; and the settled law in England had been that, although in the form of definition the words now in said s. 62 (3) purport to enlarge the meaning of the term "settlement", they must, by reason of the context, be restricted in their scope. Broadly speaking, the settled

principle in England was that those words had not the effect of bringing within the scope of the term “settlement”, as used in provisions corresponding to said ss. 60, 61 and 62, transactions which have none of the essential elements of a “settlement” as that term is commonly understood. Reading said ss. 60, 61 and 62 together with s. 64 (as to preference given to a creditor) and considering these enactments in the light of the history of the law in relation to preferences, it must be held that such a transaction as that in question does not fall within the intendment of “settlement” as employed in said sections; it belongs to the class of transactions the validity of which is to be determined by the application of s. 64.

The provisions of the Ontario Act, R.S.O. 1927, c. 162, in relation to preferences are superseded by s. 64 of the *Bankruptcy Act,* and the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of said s. 64, suspended in virtue of the concluding paragraph of s. 91 of the *B.N.A. Act.*

Per Rinfret and Crocket JJ.: Said ss. 60 and 62 are directed against a “settlement of property”, and it is apparent that in using the word “settlement” Parliament intended to connote a particular kind of gift or grant, excluding other kinds. Secs. 60 and 62 were adoption of provisions in the English Act, and the construction of the word had been settled in England and had there acquired an established meaning. A settlement in the ordinary sense of the word is intended; the transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer (*In re Player, Ex parte Harvey,* 15 Q.B.D. 682, at 686-7, and other cases, cited). The words “conveyance or transfer” in s. 62 (3) must be qualified by the word “settlement” in s. 60, and it is only such a conveyance or transfer as comes within the meaning of “settlement” in s. 60 that is by s. 60 declared void. The transaction in question had not any of the necessary elements of a settlement. (Doubt expressed whether an arrangement with a creditor may ever be considered a “settlement”; and inclination expressed to the opinion that, generally speaking, “settlement” involves the idea of a clear gift or that type of cases where provision is made for a trust of some sort. It should not be taken to include an ordinary business transaction between a debtor and a creditor.)

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario[1].

On April 5, 1939, one Bozanich (hereinafter called the debtor) executed and delivered to appellant a chattel mortgage on certain chattels in the debtor’s store to secure payment of indebtedness to appellant incurred by the

[1] [1941] O.R. 21; 22 C.B.R. 143; [1941] 1 D.L.R. 570.

debtor in the course of business. On October 21, 1939, the debtor made an authorized assignment in bankruptcy. Respondent, the trustee in bankruptcy, attacked the validity, as against it, of the security of the chattel mortgage.

By an order in the Supreme Court of Ontario in Bankruptcy, Urquhart J. directed the trial of an issue in the County Court of the County of Essex before His Honour J.J. Coughlin, Esquire, Senior Judge of the said Court, in which the trustee in bankruptcy should be plaintiff and the present appellant (in said order called the creditor) should be defendant. The following question was ordered to be tried on the said issue:

> Is the chattel mortgage made by the said debtor to the said creditor on the 5th day of April, 1939, for the sum of $900 valid and effectual as against the said trustee and does the said creditor, by virtue of the said chattel mortgage, hold a valid security on the goods and chattels described in the said chattel mortgage?

(The question of the validity of a certain lien note, attacked by the trustee, was also ordered to be tried on said issue. This question was decided by the County Court Judge against the present appellant and no appeal was taken from this decision.)

The County Court Judge found that the chattel mortgage was valid and effectual as against the plaintiff and that the defendant by virtue of it held a valid security on the chattels described therein. He held that the transaction was not a “settlement” in the sense in which that word is used in s. 60 of the *Bankruptcy Act.*

On appeal by the plaintiff, Urquhart J.[2], feeling himself bound to follow the decision in *Re Trenwith*[3] (but intimating that, if not so bound, he would have held otherwise), held that the transaction in question was a “settlement”; but he directed a new trial before the County Court Judge on the question whether the chattel mortgage was made in favour of the incumbrancer “in good faith and for valuable consideration” within s. 60 (3) (*b*) of the *Bankruptcy Act.*

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[2] 22 C B.R. 143, at 144-149.

The decision of Urquhart J. was affirmed by the Court of Appeal for Ontario[4], Henderson J.A. dissenting, who would have restored the judgment of the County Court Judge.

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The defendant appealed to the Supreme Court of Canada (special leave to do so was granted by a Judge of this Court).

Paul Martin K.C. for the appellant.

Lorne R. Cumming for the respondent.

The judgment of the Chief Justice and Davis and Kerwin JJ. was delivered by

THE CHIEF JUSTICE.—The material facts are stated in the respondent's factum, as follows:—

> The debtor, George Bozanich, operated a small retail grocery and meat market in the City of Windsor, under the name and style of "Goodwill Market" from January, 1936, until July, 1939, when he discontinued business. On October 21st, 1939, he made an authorized assignment under the Bankruptcy Act. The appellant company is a wholesale grocery firm with which the debtor had substantial dealings from the commencement of the business until April, 1939.
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> On April 5th, 1939, the debtor executed a chattel mortgage in favour of the appellant to secure the sum of $900, the amount of a long past due indebtedness owing by the debtor to the appellant company. The chattel mortgage covered most of the debtor's store fixtures other than his cash register and it is alleged that the said fixtures at the time of the chattel mortgage and also at the time of the subsequent assignment constituted by far the greater part of the debtor's realizable assets.
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> At the same time the appellant also took from the debtor a so-called lien note on the cash register as security for the sum of $361.45.

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[3] [1934] O.R. 326.
[4] [1941] O.R. 21; 22 C.B.R. 143; [1941] 1 D.L.R. 570.

Upon bankruptcy occurring the appellant claimed to be a secured creditor by virtue of both the chattel mortgage and the lien note, and the respondent, the trustee in bankruptcy, attacked the validity of both securities in a motion instituted in the Supreme Court of Ontario (in Bankruptcy) heard before the Honourable Mr. Justice Urquhart on April 1st, 1940.

The learned Bankruptcy Judge directed the trial of an issue before the Senior Judge of the County Court of the County of Essex to determine the validity of the questioned securities. The trustee was made plaintiff in the issue and the present appellant was made defendant and the trial Judge was directed to find as to the validity of the chattel mortgage and the lien note and to find for or against the right of the appellant company to rank as a secured creditor under either or both of the said documents.

On the trial of this issue the lien note was set aside and there has been no appeal from this decision. The County Court Judge, however, reported that the chattel mortgage was valid and effectual as against the trustee in bankruptcy and that it did not constitute a "settlement" within the meaning of Section 60 of the Bankruptcy Act.

An appeal was taken by the trustee in bankruptcy from the finding of the trial Judge with respect to the chattel mortgage and on this appeal the Honourable Mr. Justice Urquhart held that the chattel mortgage did constitute a "settlement" under the provisions of the said

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section of the Bankruptcy Act and ordered a new trial before the County Court Judge on this basis, directing also that both parties might adduce further evidence.

The trial Judge having failed to make any finding as to good faith and valuable consideration within the meaning of Section 60, subsection 3 (*b*), of the *Bankruptcy Act,* and the learned Bankruptcy Judge finding himself unable to determine this question on appeal, the new trial was directed for the purpose of deciding this question and it was directed that the onus of establishing good faith and valuable consideration would be on the creditor, the present appellant.

From the decision of the Bankruptcy Judge an appeal was taken by the present appellant to the Court of Appeal for the Province of Ontario on the ground that the finding that the chattel mortgage was a "settlement" was erroneous, and that in any event the decision of the trial judge amounted to a finding of good faith and valuable consideration. The trustee cross-appealed from the portion of the judgment of the Bankruptcy Judge directing a new trial on the ground that the onus being on the creditor to establish good faith and valuable consideration, the failure of the trial judge to find affirmatively in favour of the creditor on these points was sufficient to entitle the trustee to the relief sought.

> The appeal and cross-appeal came on for hearing on December 9th, 1940, before the Honourable Mr. Justice Riddell, Acting Chief Justice, the Honourable Mr. Justice Henderson and the Honourable Mr. Justice Gillanders. On December 21st, 1940, the majority of the Court delivered judgment dismissing the appeal and the cross-appeal and confirming the decision of the Bankruptcy Judge that the chattel mortgage was a "settlement" within the meaning of the Bankruptcy Act, Section 60, and also the directions of the Bankruptcy Judge for a new trial. The Honourable Mr. Justice Henderson dissented from this judgment and would have allowed the appeal and restored the report of the trial judge on the ground that the transaction was not a "settlement".

The question raised by the appeal concerns the interpretation of sections 60 to 62 inclusive and section 64 of the *Bankruptcy Act,* which are under the caption "Settlements and Preferences". Sections 60, 61 and 62 were enacted in 1919 and section 64 in the following year. These were, in substance, re-enactments of sections 42 and 44 of the English *Bankruptcy Act, 1914.*

The controversy turns upon the effect of section 62, subsection 3, which is in these words:—

> For the purpose of this section and sections sixty and sixty-one "settlement" shall include any conveyance or transfer of property.

It is contended that by force of this section the ordinary meaning of "settlement" is extended in such a manner as to bring within its scope any conveyance or transfer of property. The corresponding provision in the English *Bankruptcy Act,* which was found in the Act of 1869, was the subject of discussion and decision before the enactment

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of the Canadian *Bankruptcy Act* of 1919; and it may, I think, properly be said that in 1919 when these provisions were adopted by Parliament it was the settled law in England that, although in the form of definition these words purport to enlarge the meaning of the term "settlement", they must, by reason of the context, be restricted in their scope. Broadly speaking, the settled principle in England is that this clause has not the effect of bringing

within the scope of the term “settlement”, as used in the sections corresponding to sections 60, 61 and 62 of our Act, transactions which have none of the essential elements of a “settlement”, as that term is commonly understood.

In the treatise on Bankruptcy and Insolvency in the 2nd edit. of Halsbury by Lord Justice Luxmoore, it is stated that the term “settlement” “implies an intention that the property shall be retained or preserved for the benefit of the donee in such a form that it can be traced”. This construction was well settled in the year 1919 when the relative provisions of the English statute were enacted as part of the bankruptcy law of this country. It is proper to assume that it was the statute as it had been construed by the English courts and applied in the administration of bankruptcy law in England that Parliament intended to adopt.

I pass now to section 64 which deals with transactions between an insolvent person and his creditor. The history of the law relating to such transactions is familiar. At common law there is nothing to prevent a debtor preferring one creditor to another. The Statute, 13 Elizabeth, Chap. 5, did not prohibit such transactions. This common law privilege is obviously opposed to the fundamental principle of bankruptcy law—the equitable distribution of assets among all entitled to share; and the law of fraudulent preference was originally developed by the courts on the basis of the principles of the Bankruptcy Acts. The principle of section 64 was first formulated by statute in section 92 of the *Bankruptcy Act* of 1869. In Canada in most of the provinces there were, prior to the *Bankruptcy Act,* statutory enactments making voidable transfers of property by an insolvent made with the intention of giving a particular creditor an “unjust preference”.

When sections 60, 61 and 62 of the *Bankruptcy Act* are read together with section 64 and these enactments are

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considered in light of the history of the law in relation to preferences, I find it impossible to convince myself that such a transaction as that with which we are now concerned falls within

the intendment of “settlement”, as employed in those sections. It belongs, I think, to the class of transactions, the validity of which is to be determined by the application of section 64.

I may add that, in my opinion, the provisions of R.S.O. 1927, Chap. 162, in relation to preferences are superseded by section 64 of the *Bankruptcy Act,* and that the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of section 64, suspended in virtue of the concluding paragraph of section 91.

The appeal should be allowed and the report of His Honour, Judge Coughlin, restored, with costs throughout.

The judgment of Rinfret and Crocket JJ. was delivered by

RINFRET J.—This case is a bankruptcy matter.

An order was made by the Supreme Court of Ontario in Bankruptcy that the parties proceed to the trial of the following issue:

Is the chattel mortgage made by the bankrupt debtor to his creditor (the appellant), on the fifth day of April, 1939, for the sum of $900, valid and effectual as against the trustee in bankruptcy (the respondent); and does the said creditor, by virtue of the said mortgage, hold a valid security on the goods and chattels described in the said chattel mortgage?

Another matter (in respect of a lien note) was also made the subject of the issue; but it has been disposed of in the bankruptcy court, and there is no appeal as to it.

The chattel mortgage was given by the debtor to the appellant on the 5th of April, 1939. The bankruptcy occurred on the 21st of October, 1939.

Section 64 of the *Bankruptcy Act* provides that:

> Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, * * * by any insolvent person in favour of any creditor * * * with a view of giving such creditor a preference over the other creditors shall, if the person * * * is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making * * * the same, * * * be deemed fraudulent and void as against the trustee in the bankruptcy * * *

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> 2. If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, * * * it shall be presumed *prima facie* to have been made * * * with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

In this case, the chattel mortgage was given almost seven months before the date of the bankruptcy, and it does not come within that section.

There are, however, other sections of the *Bankruptcy Act* on which the respondent relies:

> 60. Any settlement of property made after the thirtieth day of June, one thousand nine hundred and twenty, shall, if the settlor becomes bankrupt or makes an authorized assignment within one year after the date of the settlement, be void against the trustee.
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> 2. Any such settlement shall, if the settlor becomes bankrupt or makes an assignment as aforesaid at any subsequent time within five years after the date of the settlement, be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.
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> 3. This section shall not extend to any settlement made
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> * * *

(*b*) in favour of a purchaser or incumbrancer in good faith and for valuable consideration.

* * *

62. (3) For the purpose of this section and sections sixty and sixty-one "settlement" shall include any conveyance or transfer of property.

The question is whether the chattel mortgage comes under those parts of sections 60 and 62 above reproduced.

His Honour the County Judge of the County of Essex determined that the chattel mortgage in question was valid. The trustee appealed to the Supreme Court in Bankruptcy, where Urquhart J., although holding the same view as the County Judge, felt bound by the decision of the Court of Appeal in the case of *Re Trenwith*[5] and said:

I cannot, in view of the very clear words of the Court of Appeal, see how I can distinguish the *Trenwith* case[5], although I realize that the circumstances there approach more nearly a settlement than the purely commercial transaction which occurred in the case at bar. I therefore feel bound to follow it.

He thought, however, that the question might come within the exception contained in subsection 3 (*b*) of sec-

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tion 60 "in favour of a purchaser or incumbrancer in good faith and for valuable consideration"; and, for that reason, he directed a new trial and that the matter might "be remitted to the County Court Judge for reconsideration on the evidence as adduced and extended and such further evidence as either the parties or the Judge may desire", so that the appellant may be able "to establish the question of good faith and valuable consideration".

[5] [1934] O.R. 326.

In the Court of Appeal, this judgment was affirmed, Henderson, J.A., dissenting on the ground that the case could be distinguished from *Re Trenwith*[6].

As will have appeared, the case is simple, but by no means an easy one.

If one confines himself to the literal meaning of the material portions of ss. 60 and 62, which have to be construed, what is first to be noted is that the agreement against which these sections are directed is the agreement known as a "settlement of property". The word "settlement" is the one exclusively used in subsections 1, 2 and 3 of section 60.

Whether, therefore, "settlement" is or not a technical expression, it is apparent that, in the mind of the legislator, the use of the word "settlement" was intended to connote a particular kind of gift or grant excluding the others. Both sections 60 and 62, since over a quarter of a century, had been in the English Act in similar language; and the Canadian *Bankruptcy Act* borrowed them from the English statute. The construction of the word had been settled in England for some appreciable time and it had there acquired an established meaning.

It need not be stated that all conveyances or transfers of property are not settlements; nor can it be said that a settlement is a settlement because it happens to be a conveyance or a transfer.

Without attempting to give a definition of the word—and more particularly of that word as used in section 60—it seems to me sufficient for the purpose of interpreting the section to adopt a passage of Cave J., in the case of *In re Player; Ex parte Harvey*[7]:

> One must look at the whole of the language of the section in applying that definition, and consider what is meant by "settlement". Although "settlement", by the 3rd subsection, "shall for the purposes of

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[6] [1934] O.R. 326.
[7] (1885) 15 Q.B.D. 682, at 686-687.

> this section include any conveyance or transfer of property", yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person.

This view was concurred in by Mathew and Wills JJ.

In the *Player* case[8], a gift of money to a son, made for the purpose of enabling him to commence business on his own account, was held not to be a "settlement of property" within the meaning of the section of the English *Bankruptcy Act* which renders such settlements void in certain specified cases as against the trustee in bankruptcy of the settlor.

In the case of *In re Vansittart; Ex parte Brown*[9], upon an application under the section in the English Act (again, it should be noted, expressed in identical language with sections 60 and 62 (3) of the Canadian Act) to avoid a gift of valuable jewelry by the bankrupt, it appeared that such jewelry had been given by him as a present to his wife within two years of his bankruptcy. It was held that, to bring a transfer of personal property within the section, it must be manifest, from the nature and circumstances of the case, that it was the object of the transferor that the subject-matter of the transfer should permanently remain the property of the transferee; and, in the premises, it must be taken that the bankrupt contemplated the retention by his wife of the present which he had given her. In that case, Vaughan Williams J. approved the construction of Cave J. in the *Player* case[8]; and, applying it to the facts in the case then before him, he found that the donor contemplated the retention by his wife of the present which he gave her, and accordingly held the gift void against the trustee in bankruptcy.

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[8] (1885) 15 Q.B.D. 682.
[9] [1893] 1 Q.B. 181.

Again, the Court of Appeal, in the case of *In re Plummer*[10]—Lord Alverstone, M.R., Rigby and Collins, LL.JJ.—approved of the principle stated in *In re Vansittart*[9] and *In re Player*[8] and held that the mere fact that some business had been acquired by the son partly by means of money obtained from or paid by the father was not sufficient to make the transaction a "settlement" within

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the section. "Settlement", in the English *Bankruptcy Act,* was held to mean such a conveyance or transfer by the donor as contemplates the retention of the property by the donee, either in its original form or in such a form that it can be traced, and does not extend to a conveyance or transfer of property which cannot be traced, as, for instance, where there is a gift of money to be employed in a business or in the purchase of a business and the money is so employed or spent, the business itself not being settled.

[10] [1900] 2 Q.B. 790.

In his judgment, Rigby, L.J., referred to what Cave, J., had said (as above reproduced) in the *Player* case[11] and observed:

> I do not think that that judgment has been impeached by any of the later authorities that have been referred to.

Collins, L.J., expressing the same view, said:

> It is impossible, in my opinion, to treat such a transaction as the subject-matter of a "settlement" within the section.

It seems that the word "settlement" used in the *Bankruptcy Act* does not embrace the set of circumstances constituting the facts of the case at bar. I doubt whether an arrangement with a creditor may ever be considered a settlement; and I would incline to the opinion that, generally speaking, "settlement" involves the idea of a clear gift, or that type of cases where provision is made for a trust of some sort. It should not be taken to include an ordinary business transaction between a debtor and a creditor.

The transaction in the case at bar was one to secure a past and future indebtedness. The chattel mortgage in question was given in the course of an ordinary commercial transaction. The mortgagor settled nothing on the mortgagee.

Subsection 3 of section 62 provides that "settlement" shall include any conveyance or transfer of property; but the section which declares the transaction void against the trustee is section 60. That section uses the word "settlement". It follows that "conveyance or transfer", in section 62 (3) must be qualified by the word "settlement" in section 60. The mere fact that the transaction is said to include any conveyance or transfer does not make the transaction a settlement. The transactions which are

[11] (1885) 15 Q.B.D. 682.

declared void under section 60 are such conveyances and transfers as come within the meaning of the word in section 60.

As pointed out by Henderson, J.A., the necessary elements of a settlement were found in the *Trenwith* case[12]; but they are not to be found in the case now under review, where the transaction does not include any of the elements which one must find present in a settlement.

The Act, as broad as it is, allows of a clear distinction between settlements though effected by a conveyance or transfer of property and conveyances or transfers of property not in the nature of a settlement.

In the circumstances of the present case, I think the appeal ought to be allowed and the decision of the County Court Judge restored with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Martin & Laird.

Solicitors for the respondent: Croll & Croll.

[12] [1934] O.R. 326.