1931

*Apr. 29, 30.
*Oct. 6.

OVERN *v.* STRAND

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages—Alleged seizure of goods and chattels—Conversion—Solicitors—Authority to act—Ratification—Supreme Court action tried by consent in county court—Validity of judgment—Effect of as award—Execution—Liability of sheriff and purchaser.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Morrison C.J.S.C., on a verdict of a jury in favour of the plaintiff appellant.

In this action the plaintiff appellant, Mrs. Overn, claimed damages for loss suffered by reason of the wrongful sale of her goods and chattels. She claimed against the defendants respondents, Wilson & Wilson, a firm of solicitors at Prince George, British Columbia, because, purporting to act as her solicitors, they consented, on her behalf without authority from her, to have an action which was brought in the Supreme Court of British Columbia tried by a judge of the County Court of Cariboo. She claimed against the defendant Strand, who was plaintiff in the

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

(1) (1930) 44 B.C. Rep. 47; [1931] 1 W.W.R. 694.

Supreme Court action referred to, because he issued execution on what purported to be a judgment made by the judge of the County Court of Cariboo, which judgment she alleged was a nullity, and also because he caused her goods to be seized and sold to satisfy an execution which he had against one John Weisner. She claimed against the defendant respondent Peters, because, as sheriff of the county of Cariboo, he wrongfully seized and sold her goods and chattels; and she claimed against the Hudson's Bay Company, also respondent, because, having received her goods from the sheriff, they converted them to their own use. The relevant facts are: In the spring of 1908 one John Weisner, who for many years had been trading with the Indians in northern British Columbia, decided to give up business and to sell his river outfit. On April 9, 1928, he entered into the following agreement with Mrs. Overn:—

This is to certify

That I

John Henry Weisner have on this ninth day of April nineteen twenty-eight sold and delivered over to Elizabeth Overn, White River B.C. all my interest in building and business situated on the east side of Finly River two hundred yards west of White River, one boat forty feet long eight feet beam & one Kermath Marine engine 35 horse power, two Johnson Kicker eight horse power, one Lockwood Kicker, one small boat, for the sum of one thousand dollars, good canadian money, $1,000.00

J. H. Weisner.

Witness
J C Hasler

Mrs. Overn states that she paid the $1,000 in cash and there is no evidence to the contrary. She also states that she received no goods whatever from Weisner except those specifically mentioned above. After purchasing his river outfit Mrs. Overn employed Weisner to run the boats for her. In May, 1928, she took the boats to Prince George. While there Weisner introduced her to his solicitors, Wilson & Wilson, whom she consulted as to necessity of having the document of April 9th registered as, on the way out, Weisner had been served with a writ of summons at the instance of one Strand who claimed that Weisner owed him $2,286. On May 20th Mr. J. O. Wilson drew up a new bill of sale from Weisner to Mrs. Overn which was registered, and also an agreement in which Weisner authorized her to use his

1931
OVERN
v.
STRAND.

name in her business. She then purchased from the wholesale houses in Prince George and Edmonton goods to the amount of some six or seven thousand dollars for trading purposes. These she assembled in Prince George during the first half of June and placed them on board the boats. Shortly afterwards she started north. Some days later she and Weisner were served with writs of summons in an action by Strand to set aside the bill of sale. On June 29, Weisner, who could not read and who could only write sufficiently to sign his name, had Mrs. Overn draft a letter for him to his solicitors, Wilson & Wilson, asking them to act for him in the action. On the same day Mrs. Overn wrote a letter to the same solicitors in which she said:—

Mr. Weisner have instructed me to write you I am not takin this case up with any lawyer in Prince George.

Mrs. Overn then went to the Post on White Water River, arriving there on July 15. The goods which she brought up she put in new buildings which she had erected for the purpose. On July 26, Wilson & Wilson wrote to Weisner, as follows:—

We have your letter, also Mrs. Overn's letter and from what she says we take it she does not wish us to defend this action on her behalf. You might point out to her that if she does not defend the action, she will have no chance of defending it by way of an appeal later, as there is no appeal from a default judgment.

* * * * *

We would like to have a word as to when you could possibly be here for trial, and whether Mrs. Overn wishes us to defend the action on her behalf.

This letter Mrs. Overn admits reading but says she did not consent to have Wilson & Wilson act for her. Weisner then went to Prince George and, according to Mr. Wilson, told him that Mrs. Overn wanted his firm to act for her as well as for himself. Wilson, however, because of Mrs. Overn's former letter, would not take the responsibility of acting on her behalf without something from her. Weisner then brought in Charles Overn, husband of Mrs. Overn, who, according to Mr. Wilson, told him his wife desired he should act on her behalf. Believing this, Mr. Wilson, on August 21, signed the following consent:—

The plaintiff, by his solicitor, Mr. E. J. Avison, and the defendants, by their solicitor, Mr. P. E. Wilson, do hereby agree that the County Court of Cariboo, holden at Prince George, and His Honour Judge Robertson, the judge of that court, shall have jurisdiction and power to try this action; but this agreement shall not prejudice or effect any right of appeal of any of the parties.

The trial took place the following day with the result that the bill of sale from Weisner to Mrs. Overn was set aside as fraudulent. The formal judgment, after declaring the sale set aside, contained the following paragraph:—

> And this court doth declare that all stock-in-trade in the possession of the defendant, Elizabeth Overn, is in law the property of the defendant, John H. Weisner, and subject to the claims of his creditors.

On September 14th Strand issued execution against the goods of Weisner for $2,705.63 and the following day he issued execution against the goods of Mrs. Overn and of Weisner for $497.25 being the costs taxed against them in the action setting aside the bill of sale—costs of execution and poundage. These writs were handed to the sheriff who forwarded them to J. D. McIntosh, his agent, who, on September 28, against the protests of Mrs. Overn, seized not only the river outfit but all the stock-in-trade which she, two months before, had brought to the Post and which, she says, were there worth $12,000. Next morning she left for Prince George. On October 4th McIntosh sold all the goods to the Hudson's Bay Company by private sale for $4,850. Some days later Mrs. Overn reached Prince George and called upon the defendants, Wilson & Wilson, and asked them for the papers in connection with the action, and a copy of the evidence. At this time these defendants knew she was on her way to Vancouver to consult her solicitors in reference to the matter. Next morning she went to Vancouver, consulted solicitors, and, on their advice, brought an appeal from the judgment of Judge Robertson. The Court of Appeal held that the appeal did not lie. Mrs. Overn then brought this action. It was tried before Chief Justice Morrison and a jury. The jury brought in a general verdict for the plaintiff giving her $10,000 for loss of stock-in-trade, and $1,000 general damages. Judgment was accordingly entered for her for $11,000. The defendants appealed and the Court of Appeal allowed the appeal and set aside the judgment below as to all defendants, except the defendant Strand, who did not appear to prosecute his appeal.

The Supreme Court of Canada, after hearing counsel for the appellant and counsel for the respondents, reserved judgment; and, later on, rendered judgment allowing the appeal with costs and restoring the judgment of the trial

1931

OVERN v. STRAND.

judge, with the following variations: judgment against the respondents Wilson & Wilson to be restricted to the sum of $497.25 and the judgment against the other respondents, the sheriff Peters and the Hudson's Bay Company, for the balance of the sum of $11,000, and the amount for which judgment will be entered against the two last mentioned respondents to be settled by the Registrar if the parties differ as to same.

Anglin C.J.C., in his reasons for judgment, stated that, on the evidence, it appeared that the plaintiff appellant "never knowingly consented to any adjudication by the County Court of Cariboo, or by His Honour Judge Robertson, upon the validity of the Bill of Sale given to her by Weisner, and that she never knowingly or willingly acquiesced in, or ratified, the course taken by Messrs. Wilson & Wilson, who purported to represent her. The implied findings to that effect of the jury before which this action was tried, based, as they were, on a fair charge, to which the respondents took no exception at the trial, and of which they cannot now complain, are conclusive on this aspect of the case, the questions of original authority and ratification, primarily questions of fact, having been properly submitted for its determination; and, in so far as ratification may involve a question of law, in my opinion it has been satisfactorily dealt with by Lamont J. That being so, it follows that the judgment of Robertson Co.J., was pronounced without jurisdiction."

Lamont J., after having given his opinion on the questions of facts in this case, added the following remarks:

"The main defence of Wilson & Wilson, however, was that the appellant had, after full knowledge of what had been done in her name, ratified their acts.

"To constitute a binding adoption or ratification of an act done without previous authority in the name of a supposed principal, it must be established that the principal unequivocally adopted the act after full knowledge of all essential facts relating to the transaction, unless the circumstances warrant the clear inference that the principal was assuming all risks from the acts of the agent. The onus of proving such ratification rests upon the person al-

leging it who must also prove full knowledge on the part of the principal. *Wall* v. *Cockeril* (1). Ratification of an act may be express or implied. It will be implied whenever the conduct of the person on whose behalf the act was done is such as to shew that he intends to adopt or recognize the unauthorized act. Bowstead on Agency, 7th ed., 59. Ratification must be intentional. By it the principal is bound because he intends to be bound. If that intention cannot be shewn to exist no ratification can be held to have been established. In most cases the intention of the principal is to be gathered from his conduct and statements rather than from any express declaration of ratification. There are, however, certain classes of cases in which the courts have held that the conduct of the principal raised, in point of law, a conclusive presumption of his intention. Where goods have been wrongfully taken and sold the owner may either treat the taker as a tortfeasor and sue him for damages for wrongful conversion, or he may treat him as his agent to make the sale and sue him for the purchase price as money had and received.

"If he adopts this latter course and the taker pays over the purchase money received by him, the courts hold the owner to have elected conclusively to waive the tort and to treat the taker as his agent, and he cannot afterwards treat him as a wrongdoer. In *Smith* v. *Baker* (2), Bovill C.J. said:—

> The law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so and bring his action for money had and received for the proceeds of goods wrongfully sold.
>
> * * *
>
> But if an action for money had and received is so brought that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way. The principles which govern the subject are very well illustrated in the case of *Buckland* v. *Johnson* (3), where it is held that the plaintiff having sued one of two joint tortfeasors in tort could not afterwards sue the other for money had and received. There may be other instances where an act may amount to a conclusive election in point of law to waive the tort. But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law.

(1) [1863] 10 H.L.C. 243. (2) (1873) L.R. 8 C.P. 350, at 355.
(3) (1854) 15 C.B. 145.

1931

OVERN v. STRAND.

Lamont J.

"With this statement of the law A. L. Smith L.J. in *Rice* v. *Reed* (1), said he entirely agreed.

"In the case at Bar the respondents rely on two acts of the appellant as conclusively establishing ratification. They are:

(1) That when she came out to Prince George in the early part of October, after the seizure of her goods, and obtained the papers relating to the action from Wilson & Wilson, she did not repudiate the acts done in her name or intimate that she did not consent thereto, and

(2) That she took an appeal from Judge Robertson's order without setting up any want of authority on the part of Wilson & Wilson.

"As to the failure of the appellant to disavow the solicitor's acts on the ground of want of authority, it is, on the evidence, in my opinion, very doubtful if she had any clear comprehension of what had been done or of how the seizure of her goods had come about. Further, it has not been established that she had the necessary information to enable her to form any just conception of her rights. She had been in the wilderness, four hundred miles north of Prince George among the Indians, where there was not even a justice of the peace and where mail was delivered only once in every two or three months. She says that when her husband and Weisner came to White Water River, after the trial, they told her the case had been dismissed. She evidently learned that her husband had employed Wilson & Wilson but the respondents knew before she came down that she repudiated her husband's right to do this and also knew that when she did arrive she was on her way to consult solicitors in Vancouver as to her position and to ascertain by what right her goods had been taken. Wilson & Wilson were not under any impression that she was approving of what they had done; nor were they in any way misled.

"In support of their contention on this point counsel for the respondents referred to the language by Blackburn J. in *Reynolds* v. *Howell* (2), where, at page 400, that learned judge said:—

> I may add that, in my opinion, if a plaintiff after action brought in his name by an attorney without authority hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's acts.

(1) [1900] 1 Q.B. 54, at p. 66. (2) (1873) L.R. 8 Q.B. 398.

"This rule, without doubt, is applicable to cases where, in the absence of repudiation, the solicitor and the other parties to the action would assume that authority had been given and that it was being continued, but it is not applicable, in my opinion, to cases where the work which the solicitor undertook, without authority, to do has been completed without the knowledge or consent of the principal. In *De Bussche* v. *Alt* (1), Thesiger L.J., said:—

> If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.
>
> * * *
>
> But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal.

"The appellant's failure to disavow the acts of Wilson & Wilson in signing the consent of August 21, cannot, in my opinion, as a matter of law be said to indicate an intention on her part to adopt as her own an act against which she has always protested as the cause of her trouble.

"Then can it be said that we are obliged upon any rule of law to hold that, by appealing to the Court of Appeal against the order of Judge Robertson, without setting up a want of authority on the part of Wilson & Wilson, the appellant has conclusively elected to ratify the consent given in her name?

"As already pointed out there are cases in which the taking of judicial proceedings by a principal, after knowledge of the unauthorized act of a person purporting to act as his agent, is conclusive of an election to ratify the act of such agent. The principle upon which these cases have been decided, as I read the authorities is that the principal by his judicial proceedings is held to have ratified the agent's act because the rights claimed by the principal in these proceedings can only be predicated upon the existence of the relationship of principal and agent, and could not be justified upon any other hypothesis. There are other cases, however, in which the taking of judicial proceedings,

(1) (1878) 8 Ch. D. 286, at 314.

1931

OVERN v. STRAND.

Lamont J

do not necessarily imply an intention to ratify the act of the agent. In these cases the question of intention is dealt with rather as a question of fact for the jury than as a question of law for the court.

"In *Morris* v. *Robinson* (1), a cargo of indigo had been improperly sold under an order of the Vice Admiralty Court and the proceeds paid into court. The owner of the cargo through his agent applied to have the money paid out to him. It was held that the application for payment out did not in law bar the owner from bringing an action in trover against the purchaser of the indigo. In his judgment Bayley J. pointed out that the application had not been successful and the owners were, therefore, in the same position as if no application had been made to the court.

"In *Rice* v. *Reed* (2), the plaintiff's servant had wrongfully sold the goods of his master to the defendant who knew that the servant was improperly dealing with them. The servant paid the proceeds of the sale into his account at his bank. The owner brought an action against the servant and the bank, claiming, as against the servant, damages for the conversion of the goods and in the alternative for money had and received; and, as against the bank, an injunction to restrain them respectively from drawing out the sum of £1,500 then standing to the servant's credit at the bank. The plaintiff applied for and obtained an interim injunction but no further steps in the action were taken. An agreement was arrived at between the owner and the servant that £1,125, out of the £1,500 in the bank, should be paid over to the owner in full settlement of all his claims against the servant, but without prejudice to his claim against the defendant. The owner then brought an action against the defendant for conversion. It was held that the owner had not by obtaining an interim injunction in the former action and by his dealing with the servant elected to affirm the sale and to waive the tort, and the action against the defendant was maintainable. In his judgment Lord Russel C.J., at page 64, said:—

This case would seem to establish the proposition that an application of a judicial kind to a judicial court to obtain the proceeds of goods improperly converted is not conclusive proof of election to affirm the sale. In the present case there was no application by the plaintiff to have the money in the bank paid out to him.

(1) (1824) 3 B. & C. 196; 107 E. R. 706.

(2) [1900] 1 Q.B. 66.

In *Ewing* v. *Dominion Bank* (1), Lord Davey said:—

Whether the circumstances were such as would raise either an estoppel against the petitioners, or would amount to what Lord Blackburn in *McKenzie* v. *British Linen* (2) calls a "ratification for a time" by the supposed makers of the note of their signature, is, in the opinion of their Lordships, absolutely a question of fact.

"In the circumstances of the case at Bar the taking of the appeal does not, in my opinion, necessarily imply an intention to ratify the unauthorized acts of Wilson & Wilson. The order appealed from contained a clause which, taken by itself, would amount to a holding that all the stock-in-trade in possession of the appellant no matter how or from whom obtained, was the property of Weisner. And it may well be that the appellant's advisers thought that until the order was set aside on appeal that clause would be a bar to any action brought to recover the value of her goods. As this construction of the clause received support in the court below and was urged upon us, it is not unreasonable to say that the appeal may have been brought to set aside the order without any intention of ratifying the consent given by Wilson & Wilson. Ratification, not being necessarily implied from the taking of the appeal, the question of the appellant's intention was a question of fact for the jury and they negatived any such intention. The defence of Wilson & Wilson therefore fails, and they must be held liable for the loss suffered by the appellant by reason of their act. This loss, it is contended, was only the damage caused by the issue of the execution directing a levy on her goods for $497.25, and that the liability of these respondents should be limited to that item. In my opinion this contention is right. *Marsh* v. *Joseph* (3); *Jones* v. *Woodhouse* (4).

"The defence of the sheriff is:—

"(1) That in seizing and selling the property in question he was merely carrying out the direction of the court, and

"(2) That in any event all the goods seized and sold were the goods of Weisner.

"The sheriff seized under two writs of execution, one commanding him to make out of the goods of Elizabeth

(1) [1904] A.C. 806.
(2) (1881) 6 App. Cas. 82, at p. 101.
(3) [1897] 1 Ch. 213.
(4) [1923] 2 Ch. 117.

1931

OVERN v. STRAND.

Lamont J.

Overn and John H. Weisner the sum of $497.25; and the other to make out of the goods of John H. Weisner the sum of $2,705.63. Both writs were issued out of the Supreme Court Registry.

"It has long been established law that where a sheriff seizes and sells property under a writ of execution which is regular on its face and was issued out of a court of competent jurisdiction, he is protected by the writ unless the goods are not in fact the goods of the execution debtor. This protection he enjoys even although the order in which the writ is founded may, subsequently, be set aside for irregularity or is in fact a nullity.

"In *Barker* v. *Braham* (1), the Lord Chief Justice stated the rule as follows:—

A sheriff, or his officers, or any acting under his or their authority, may justify themselves by pleading the writ only, because that is sufficient for their excuse, although there be no judgment or record to support or warrant such writ; but if a stranger interposes and sets the sheriff to do an execution, he must take care to find a record that warrants the writ, and must plead it; so must the party himself at whose suit an execution is made.

"Whether the judgment or order justifies the issuing of the writ is in each case a question to be determined by the court issuing it, and not by the sheriff.

"In *Ramanathan Chetty* v. *Meera Saibo Mariker* (2), the Privy Council said:—

A distinction must be drawn between the acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorized the seizure, the seizure is lawful, and no action will lie in respect of the seizure, unless the person complaining can establish a remedy by some such action as for malicious prosecution. If, however, the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice.

"The writ against the appellant's goods for $497.25 was regular on its face and the Supreme Court of British Columbia was competent to issue it. The sheriff was, therefore, justified in realizing out of her goods the amount called for by that writ. In doing so he was acting with judicial sanction and no action lies against him therefor. He, however, proceeded to sell the balance of the appellant's goods under an execution directing him to levy on the goods of John H. Weisner. The goods sold to satisfy this execution were the stock-in-trade of the appellant, pur-

(1) (1773) 95 E.R. 1104. (2) [1931] A.C. 82.

chased with her own money and situate in her own buildings. These goods could not in any way be said to be the goods of Weisner. In this statement of claim the sheriff seeks to justify the sale of these goods on the ground that in the order of Judge Robertson of August 22, all goods in the possession of the appellant had been declared to be the property of Weisner and, therefore, when he seized and sold them he was selling Weisner's goods.

"I find it difficult to believe that Judge Robertson intended to hold that all the stock-in-trade in the appellant's possession, no matter by whom it was in fact owned, was the property of Weisner. To reach that conclusion the judge would have to be satisfied that the business she was carrying on was the business of Weisner, or that the money with which she purchased the stock-in-trade was Weisner's money. The appellant has explained that she obtained the money to make payments on the stock-in-trade she purchased in 1928, by taking over, in 1927, trading supplies which Weisner had brought to Ingenika but which, through illness, he was unable to trade with the Indians. These supplies she took to the White Water Post under an agreement in writing with Weisner and traded them through the fall of 1927 and the winter of 1927-8, making a profit thereon. Neither in this action nor in the action before Judge Robertson has anyone challenged the bona fides of that transaction, or alleged that the profit which she obtained from such trading was not rightfully her money. In the case before Judge Robertson all the allegations in the statement of claim and all the evidence given at the trial (Exhibits in the present case), were directed against the bill of sale, and, in the examination of Weisner for discovery put in evidence by counsel for Strand, the questions impliedly admit that the goods taken north in 1928 were the property of the appellant. For example:—

Q. In the spring of 1928 did you buy considerable goods and get them to Summit Lake, for Mrs. Overn and take them out to Whitewater?

A. Yes, sir.

* * *

Q. What weight of freight did you take up for Mrs. Overn in the spring of that year?

A. All goods. I think there was 16 tons, might have a little over or under.

"The only statement before Judge Robertson which is apparently not consistent with the evidence that the money

1931

OVERN v. STRAND.

Lamont J.

with which the goods were bought was the appellant's money, is that of Weisner who thought she made the original purchase in 1927 for her husband's business, which was that of trapping. The husband, however, said that "Practically Mrs. Overn owns the business." In view of the allegations and the evidence it is, to my mind, hardly conceivable that Judge Robertson intended to make the sweeping declaration contained in the clause in question in his order, although no doubt the language used, if taken by itself apart from the context, is sufficiently wide to carry the construction sought to be put upon it. The clause to my mind should be construed in accordance with the well known maxim that general words may be aptly restrained to the subject matter with which the speaker or writer is dealing. *Broom's Legal Maxims,* page 415; Willes J., in *Chorlton* v. *Lings* (1); *Moore* v. *Rawlins* (2). Construing it thus the declaration would apply only to the contents of the bill of sale. If, however, the language of the clause be given its broad and literal meaning it still affords no protection to the sheriff for the declaration, as well as the rest of the order in which it is found, is, as I have already pointed out, a nullity having been made without jurisdiction and, as such, cannot support or justify anything purporting to be done under it. It is from the writ of execution and not from the judgment or order on which it is founded that the sheriff derives his protection. Moreover there is no evidence that the sheriff had any knowledge of the existence of the order. What he had was a letter from Strand asking him to instruct his deputy to seize all the goods and chattels of Weisner and the appellant, including the goods in the appellant's store. There was nothing in the writ of execution indicating that the goods in the possession of the appellant belonged to Weisner, so that in carrying out the instructions in Strand's letter the sheriff was not following the directions in the writ, but was acting as Strand's agent. The goods sold not being the property of Weisner he sheriff is equally liable with Srand for their conversion.

"It was also argued that as the sheriff was entitled to seize and sell the appellant's goods under the execution against her, the sale of all her goods was valid even if excessive because no claim had been expressly made for ex-

(1) (1868) L.R. 4 C.P. 374, at 387.

(2) (1859) 141 E.R. 467, at 480.

cessive seizure. The claim that he had no right to seize or sell any of the appellant's goods is, in my opinion, sufficient to cover a claim for excessive seizure. The sheriff's duty was to sell sufficient of the appellant's goods to satisfy the execution against her. When he had done that she was entitled to immediate possession of the remainder.

"In *Batchelor* v. *Vyse* (1), it was held that:

If the sheriff sells under an execution more goods than are sufficient to satisfy the debt and costs he is liable in trover in respect of the excess.

To the same effect is the case of *Stead et al* v. *Gascoigne* (2), where Dallas C.J., with whom the other members of the court concurred, said:—

A sheriff has no right to sell more than is necessary: the defendant in this case has, in my opinion, committed a tortious act; and trover is the proper action.

"In the present case there was no occasion to sell the appellant's goods in bulk—they consisted of groceries, dry goods, hardware and tobacco, and were, therefore, saleable in small packages.

"The defence of the respondents, the Hudson Bay Company, is that they were *bona fide* purchasers for value from the sheriff of goods sold by him under execution.

"A sale by a sheriff is not a sale in market overt and the purchaser acquires thereby only the interest in the goods which the sheriff has the right to sell. Unless, therefore, the goods sold are the goods of the execution debtor, the sheriff does not, by his writ, acquire any right to sell them and cannot transfer any right to a purchaser as against the real owner.

"The rights of a purchaser at a sale under execution were discussed by the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh* (3), and it was pointed out that if the court issuing the execution had jurisdiction, a purchaser was not bound to inquire into the correctness of the order or judgment upon which the execution issued. A purchaser, therefore, at a sale under execution is under no obligation to go behind the writ, but, in order to make sure that he will acquire title to the goods he buys, he must see that the court issuing the writ had jurisdiction to do so; that the writ is

(1) (1834) 4 Moore & Scott 552. (2) (1818) 129 E.R. 488.
(3) (1875) 3 Indian Appeals 106.

1931

OVERN v. STRAND.

Lamont J.

regular on its face, and that the goods sold by the sheriff are the goods of the execution debtor.

"The writ for $497.25 against the appellant's goods, as I have already pointed out, fulfilled these requirements. The title to the goods sold to satisfy that writ, therefore, passed to these respondents and no action lies against them for their conversion. They, however, unfortunately for themselves, did not see that the remainder of the goods which they purchased were the goods of the execution debtor mentioned in the writ under which they were sold. And as they were not his goods these respondents obtained no title whatever to them and, having taken possession of them, must account to the appellant for their value. I am, therefore, of opinion that the respondents are liable for the loss suffered by the appellant, but I do not think each of the respondents is liable for the whole loss.

"For the reasons I have given, the respondents, Wilson & Wilson are responsible for the loss caused by the sale of the appellant's goods to satisfy the writ for $497.25; the other respondents are liable for the balance. The total damage suffered was $11,000; the amount of the two writs was $3,202.88. The liability of each respondent is, therefore, a matter of calculation. If the parties do not agree as to the amounts the matter may be referred to the Registrar for computation.

"The appeal will therefore be allowed as to all the respondents; the judgment below set aside, and the judgment of the trial judge restored but modified in the way I have indicated as to the amount for which each respondent is liable. The appellant is entitled to her costs throughout against all the defendants."

Appeal allowed with costs.

J. A. MacInnes for the appellant.

J. W. de B. Farris K.C. for the respondents Wilson et al.

D. H. Laird K.C. and *D. N. Hossie* for the respondent The Hudson Bay Co.

E. Pepler for the respondent Peters.