KEYSTONE SHINGLES AND LUMBER LIMITED (*Plaintiff*) APPELLANT: *Feb. 20, 21, 22, 25, 26, 27 June 26 1957

AND

ROYAL PLATE GLASS AND GENERAL INSURANCE COMPANY OF CANADA AND STANLEY FYFE MIDDLETON MOODIE AND ALFRED JOHN TUTTLE AND EDWARD T. BERNIER AND ARNOLD BERNIER CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF BERNIER BROS. AND BERNIER BROS. LOGGING CO. AND EDWARD T. BERNIER (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Judicial sales—Duty of officer conducting sale—Allegation of conspiracy between buyer and sheriff's officer—Whether sheriff's officer obtained reasonable price for goods sold—Evidence of value.

The plaintiff company appealed from the dismissal of an action for damages arising out of the sale of its goods under writs of extent issued in respect of unpaid income tax and excess profits tax. The action was based principally upon allegations that (i) the defendant T (the sheriff's officer in charge of the sale) had conspired with other defendants who bought the goods to arrange a fraudulent "wash sale" and thus to deprive the plaintiff of the opportunity of buying the goods, and (ii) the sheriff and T had negligently carried out their duties and had failed to obtain a reasonable price for the goods.

Held (Rand and Cartwright JJ. dissenting in part): The appeal should be dismissed.

Per Kerwin C.J. and Locke and Abbott JJ.: As to the allegation of conspiracy, there were concurrent findings in the Courts below that the evidence did not support these allegations and the Court should not interfere with these findings. As to the claim based on negligence, the onus was on the plaintiff to establish a sale at an undervalue and the evidence as to value was unsatisfactory. T had been negligent in making no proper inventory or appraisal, but damage was the gist of the action and there were concurrent findings that damage had not been proved.

Per Rand and Cartwright JJ., *dissenting in part*: While the evidence raised suspicion as to some of the dealings, the Court would not be justified in setting aside the concurrent findings in the Courts below negativing the existence of the alleged conspiracy. As to the claim based on negligence, however, the evidence did support a finding that T had not exercised due care to obtain the best price possible for the goods sold and that he could have obtained at least $700 more. The appellant was therefore entitled to judgment for $700 against T.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Abbott JJ.

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APPEAL from a judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Wood J. (2) dismissing the action. Appeal dismissed, Rand and Cartwright JJ. dissenting in part.

A. Bull, Q.C., and *S. M. Toy*, for the plaintiff, appellant.

Douglas McK. Brown and *R. E. Ostlund*, for the defendant insurance company, respondent.

G. F. H. Long, for the defendants Moodie, Tuttle and Bernier, respondents.

L. S. Eckardt, for the defendants Bernier Bros., Bernier Bros. Logging Co. and Arnold Bernier, respondents.

The judgment of Kerwin C. J. and Locke and Abbott JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1), which dismissed an appeal of the present appellant from the judgment of Wood J. (2), dismissing the action.

The appellant is a lumber company which formerly carried on its operations in New Westminster and engaged in logging operations at Acteon Sound in the county of Vancouver.

On February 6, 1950, a writ of extent issued out of the Exchequer Court of Canada directed to the sheriff of the county of Westminster, in respect of an indebtedness of $10,984.40 for income and excess profits taxes due to the Crown. A second writ of extent was issued in like manner on July 8, 1950, directed to the said sheiff for the sum of $2,653.95.

On July 7 and July 8, 1950, two concurrent writs of extent were issued by the Exchequer Court directed to the respondent Moodie, the sheriff of the county of Vancouver, directing him to seize the goods and chattels of the appellant for the recovery of the said debts, to diligently appraise and extend the same and not to sell the same "until We shall otherwise command you".

(1) 7 D.L.R. (2d) 245.

(2) 16 W.W.R. 273, [1955] 4 D.L.R. 53.

Acteon Sound is on the mainland approximately 200 miles north of Vancouver and, at this place, the appellant had carried on logging operations for some time prior to the month of December 1948, when they were discontinued. At that time the buildings and logging equipment were leased by the appellant to a third party. Operations were apparently terminated about April 1, 1950. Thereafter, the appellant maintained a watchman at the camp.

On June 16, 1951, the assets of the appellant at Acteon Sound were seized by the respondent Tuttle on the direction of the sheriff under the concurrent writs of extent. These consisted of various donkey engines, trucks, trailers, pumps, blocks and lines, tools and other equipment of the nature commonly used in small logging operations on the Pacific coast. In addition, there were certain booming equipment, floats, furniture, a quantity of steel rails, a launch and two smaller boats. While this equipment was described in great detail in the voluminous evidence directed to the question of its value, I consider it unnecessary, in view of my conclusion, to describe it in further detail.

On June 27, 1951, upon the application of the Crown, an order was made by the Registrar of the Exchequer Court at Ottawa directing the sheriff of the County of Vancouver to

> sell by private sale or public auction the goods or chattels now under seizure by virtue of a Concurrent Writ of Extent issued out of this Honourable Court on the 7th day of July, A.D. 1950.

No question is raised in these proceedings at to the propriety of the making of this order.

On June 15, 1951, Raymond Bernier, since deceased, who was apparently a member of the firm of Bernier Bros., saw the sheriff, saying that they were interested in purchasing the seized chattels. Tuttle was sent by the sheriff to Acteon Sound in company with Bernier and made a very rough inventory of the goods under seizure. Thereafter, Bernier opened negotiations with H. W. Kellond, an official in the Vancouver office of the Department of National Revenue, and made an offer of $4,500. This offer was subsequently increased in negotiations with Tuttle, the last offer made by Bernier, according to him, being in the amount of $5,300. On July 7, 1951, according to the latter, Bernier came to the sheriff's office and signed a letter written for him by

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Tuttle, offering that amount for the "machinery & equipment presently under seizure by your office, owned by Keystone Shingles & Lumber Ltd.".

According to Kellond, while negotiations were going on with Bernier, Gail W. Beach, the president of the appellant company, had been negotiating with him for a settlement of the Department's claim. Kellond says that on July 6 he told Beach that, if the Keystone company would pay $5,000 then and $3,000 at some later time to be arranged, he would recommend its acceptance. At Beach's request, he wrote out a memorandum which read:

> If you will offer settlement of $8,000 for FULL SETTLEMENT, we will give the offer favourable consideration.

Kellond says that he told Beach to pay the sheriff the $5,000 on account of the claim for taxes and that, if this was paid, a sale of the assets would be "withheld" and that Beach left his office agreeing to do this. Kellond then telephoned to Tuttle telling him that he did not want the sale to proceed if the $5,000 was paid.

There is a direct conflict between Beach and Tuttle as to what followed thereafter.

According to Beach, it was on July 5 that Kellond agreed to recommend the settlement and gave him the memorandum and he says that, on the same afternoon, he went to see Tuttle telling him of the arrangement made with Kellond and that he wanted to make a payment of $5,000 on the taxes and stop the sale. According to him, Tuttle said that he would not accept the payment on account and that he would have to bid for the purchase of the assets seized. Beach does not say that he showed the memorandum he had received from Kellond to Tuttle, nor did he ask him to telephone to Kellond and verify his statement that the $5,000 was to be paid on account of the taxes, nor did he himself telephone to Kellond to ask him to instruct the sheriff. He says that Tuttle told him he had a private bid for the goods but that it was not for a very large sum and that if he (Beach) brought in a cheque for $5,000 to purchase them it would be all right. Beach says that, as Tuttle refused to accept the payment on that footing, he left the office returning on the morning of July 7 at about 10.30

with a letter addressed to the sheriff signed by Beach on behalf of Westminster Mills Ltd., a company of which he was also an officer. This letter read:

> We attach hereto cheque for $5,000 which we are offering for sale to us of goods and equipment which you seized belonging to Keystone Shingles & Lumber Ltd. at Acteon Sound B.C.
>
> This tender is made for immediate acceptance, otherwise please return the cheque to us without delay.

According to Beach, it was because Tuttle insisted that the matter could only be handled in this way that the offer of purchase was made. He says that he was aware of the fact that it was Bernier who had been negotiating to purchase the assets but had understood from Tuttle that $5,000 was more than any offer Bernier had made. Kellond was unavailable on July 7, which was a Saturday. Beach, after leaving the sheriff's office, went to the law office of Mr. C. S. Arnold, a solicitor, but found the office closed and left a memo with certain instructions. He then was called out of town to Harrison Lake in connection with some other business and did not again reach Vancouver until early afternoon of July 9, in the interim having no communication of any kind with Tuttle or Kellond.

Mr. Arnold, in giving evidence, said that he had received a written message from Beach on the morning of July 9 and telephoned the sheriff's office saying that he understood that he was making some kind of a sale under an execution against one of Beach's companies, that he did not wish to act for Beach and had telephoned to the latter's office but found that he had not returned to New Westminster, having been held up by the floods in the Fraser valley. According to him, Tuttle said that Beach had called on him the previous week and made an offer of $5,000 but that he (Tuttle) had a higher offer and that he had told Beach that he would give him until noon that day. Arnold said that he then asked him if he could not extend the time since Beach was caught up at Harrison but that Tuttle declined, saying that 12 noon was the deadline and if Arnold was to get hold of Beach he should tell him to go to the Income Tax Department and try to make a deal with them himself. Tuttle asked Arnold if he wanted to make a bid but was told that his instructions were so vague that he was not in a position to do so.

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Tuttle's evidence directly conflicts with that of Beach on most of the material matters. He says that he had been told by Kellond on the afternoon of July 6 of the proposed settlement and that Beach was to pay to the sheriff $5,000 on account of the claim for taxes and a further $3,000 later. Beach did not, according to Tuttle, see him either on July 5 or 6 but appeared at the sheriff's office on the morning of July 7 at about 10.30 with two letters bearing that date: one, the letter from Westminster Mills Ltd. above referred to; the other, also dated that day, signed by Beach on behalf of the appellant company, which stated that the writer had called at the sheriff's office the previous day to obtain details of the seizure and had been informed that the sheriff had received a private bid for the equipment and intended to accept it, unless he received a higher offer immediately. Tuttle said that he asked Beach if he would not alter the letter so that the $5,000 offered would be a payment on account of the settlement of $8,000 arranged tentatively with Kellond. At the same time, he says that he told Beach that he had received a bid of $5,300 and, accordingly, could not accept a bid for the property for a lesser amount. Tuttle says that Beach refused to change the letter and that he then told him that he would hold his cheque in the meantime and give him until 12 noon on the following Monday to make the payment of $5,000 on account. On cross-examination, he said that Beach might alternatively have made a higher bid than the $5,300 offered by Bernier, though he does not say that he told him so. Beach then left and Tuttle reported the matter to Kellond on Monday morning, July 9. At this time he heard from Mr. Arnold who, he says, informed him that he had been trying to get in touch with Beach but did not ask him to defer the sale, saying that if Arnold had done so he would have agreed. According to him, Mr. Arnold had said that he did not want to act in the matter and, apparently, the discussion only amounted to a request to know what was being done.

Not having heard from Beach by noon on July 9, Tuttle says that he notified Bernier that his offer of July 7 was accepted. On July 23 Westminster Mills Ltd. wrote to the

sheriff enclosing two cheques totalling $6,000 to increase the amount of its previous offer. The sheriff returned these with a letter dated July 24.

The learned trial judge, in a considered judgment, dealt with this aspect of the matter in the following terms (1):

> Various negotiations went on between Mr. Beach and the department which resulted in something concrete on July 6 when the department agreed to accept $8,000 in full settlement of all taxes owing by the Company of which $5,000 was to be paid in cash and the balance later, the sale being in the meantime postponed indefinitely.
>
> Beach then repaired to the sheriff's office armed with a memorandum reading: "If you will offer settlement of $8,000 in full settlement we will give the offer favourable consideration." But instead of paying the $5,000 on account of taxes he made no mention of this memorandum or of his arrangement. By letter dated (Friday) July 7, he made an offer on behalf of Westminster Mills, another of his companies, to buy the goods for $5,000. This letter was accompanied by an unmarked cheque payable to the sheriff. However, Bernier Bros. made a new offer of a larger amount, namely $5,300 of which Beach was advised. He, therefore, had an opportunity of making a larger offer and had he done so no doubt that larger offer would have been accepted.
>
> Instead of that he left town leaving some indefinite instructions with Mr. C. S. Arnold, a solicitor in Vancouver, but no money. Beach had been advised that the sale would take place on the following Monday and nothing further being heard in the meantime from him, except a telephone call from Mr. Arnold, the Bernier Bros. offer was accepted.

In a later passage the learned judge, after saying that he was asked to find on the evidence that Tuttle and the deceased Raymond Bernier had fraudulently arranged a "wash sale", held that this was not established and that the evidence "forms no sufficient basis for a finding of conspiracy and fraud against the defendants".

The offer of $5,300 had not, according to Tuttle, been made after Beach made the offer on July 7, but before. Beach had denied that he was advised of this, but the learned trial judge accepted Tuttle's evidence in preference and, while he did not deal in further detail with the conflict in the evidence of the two witnesses, made what I construe to be a finding that Beach did not offer to pay the $5,000 in accordance with his arrangement with Kellond.

The reasons for the unanimous judgment of the Court of Appeal were delivered by Mr. Justice Sheppard (2). After finding that it had been agreed between Kellond and Beach on July 6 that $5,000 should be paid in cash and $3,000 at some later date to be arranged, and that what Beach had

(1) 16 W.W.R. at pp. 281-2. (2) 7 D.L.R. (2d) 245.

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done was to make the offer of Westminster Mills Ltd. to buy the assets for $5,000, it was said that Tuttle had told Beach that day that the sheriff had a higher offer and that they would allow Beach until noon on Monday July 9 to increase his offer and that, as he did not do so, the assets had been sold. The Court concurred in the finding of fact made at the trial that the evidence did not support the charge of fraudulent conduct against Tuttle and Raymond Bernier and formed no sufficient basis for a finding of conspiracy and fraud against the defendants.

If, as Beach asserted, Tuttle, having been informed, as he admits, by Kellond of the arrangement made with Beach the day previous, had told Beach that he could not accept the payment on account and postpone the sale, but insisted that the matter could be dealt with only by a sale under the writs of extent and refrained from telling Beach of Bernier's offer of $5,300, his conduct would have been clearly fraudulent. That he did so has been negatived by the concurrent findings of the learned trial judge and of the Court of Appeal. Both Courts have accepted Tuttle's version as to what took place at the discussion on the morning of July 7. No finding is made as between Mr. Arnold's statement that he had asked that the sale be delayed until he could get in touch with Beach and Tuttle's evidence that no such request was made. If, however, Tuttle was mistaken in this, his refusal to extend the time in the circumstances narrated by him would not, in my opinion, afford any basis for a charge of fraudulent conduct on his part.

The statement of claim alleged negligence on the part of the sheriff and of Tuttle in carrying out their duties under the writs of extent in a number of particulars, which included failing to make an inventory and appraisal of the goods seized and in failing to obtain a greater price at the sale. It further alleged that there was a conspiracy between the sheriff, Tuttle and the Berniers to sell the property seized to the latter for a grossly inadequate amount, it being claimed that the property sold was of the value of at least $97,000.

Under the authority of the writs of extent, Beach had been examined on oath on June 20, 1950, in his capacity of president of the appellant company as to its assets. A

transcript of this examination was put in evidence at the trial and contained statements by Beach which, while not being particularly explicit, were clearly capable of meaning that the property of the company at Acteon Sound was worth only approximately $5,000. In dealing with the question of the value of this property, the learned trial judge referred to these statements and to the further fact that, in his dealings with Tuttle on July 7, Beach had only offered $5,000 for the property under seizure which, he considered, confirmed the opinion expressed previously as to the value.

The judgment of the Court of Appeal, after reviewing generally the evidence of value adduced on the part of the appellant and pointing out that the onus was on the plaintiff in the action to establish a sale at an undervalue, agreed with the learned trial judge that this had not been done.

The evidence as to the value of the property in question was, in my opinion, unsatisfactory. The sheriff's officer, Tuttle, who seized the property in June 1951, expressed the opinion that it was only of value as scrap and not worth more in the aggregate than $3,000 or $4,000. However, no proper inventory was taken by him or appraisal made and he had no qualifications as a valuator and it is rather upon the failure of the appellant to prove by acceptable evidence that the sale was not made for a reasonable price that both Courts have proceeded. There was, in my opinion, a failure on the part of the sheriff and his officer to discharge their duty of making a proper inventory and appraisal of the goods but, as pointed out by Sheppard J. A., damage is the gist of the action and there are concurrent findings that damage has not been shown.

The argument addressed to us by learned counsel for the appellant, in which everything that could be fairly urged on its behalf has been said, has failed to satisfy me that these findings are clearly wrong. I would accordingly dismiss this appeal with costs.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting in part*):—The salient facts out of which this litigation arises are set out in the reasons of my brother Locke.

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The two main grounds of appeal urged before us were (i) that the Courts below erred in rejecting the appellant's claim based on conspiracy, and (ii) that the appellant suffered damages as a result of the breach of the duty to use reasonable care to obtain as high a price as possible for the goods of the appellant sold pursuant to the writs of extent.

As to the first of these grounds, while the evidence appears to me to raise suspicion as to the nature of some of the dealings between the respondent Tuttle and the Berniers, I agree with my brother Locke that we would not be justified in setting aside the concurrent findings in the Courts below negativing the existence of the alleged conspiracy.

As to the second ground, counsel for the respondents concede that there rested upon the respondent or respondents responsible for the conduct of the sale of the appellant's goods a duty to use reasonable care to obtain as high a price as possible; their contention is that there was no breach of that duty.

In support of this ground counsel for the appellant stress the following points, (i) that no detailed inventory of the goods to be sold was made, (ii) that even if the lowest figures given by any of the witnesses called by the respondents be taken in valuing the goods sold, their total value was greatly in excess of the amount realized, (iii) that it was unreasonable of Tuttle to accept the Berniers' offer of $5,300 at noon on Monday July 9, 1951, when he had been advised by the late Mr. Arnold that Beach was out of town and delayed by the floods, as he ought to have anticipated that Beach, on his return, would make a better offer, and (iv) that as the Berniers' offer had been accepted conditionally on their cheque being honoured on presentation Tuttle ought to have cancelled the sale to them when the cheque was dishonoured and given Beach an opportunity to make a higher bid.

The failure to make a more detailed inventory does not appear to have caused any damage. The only prospective purchasers of the equipment were the Berniers and Beach, or his nominees, and both had knowledge of what was being offered for sale. The evidence shows that it was reasonable to make a sale *en bloc*.

The value placed upon the equipment, after the event, by the various witnesses does not, in all the circumstances of the case, establish that the price of $5,300 obtained at the forced sale was such that a reasonable business man in the position of Tuttle would not have accepted it. It must be remembered that Beach, who was at all relevant times in full control of the appellant company, had consistently belittled the value of the equipment in his dealings with the Income Tax officials, particularly when he was examined on oath as to the appellant's assets, and that the bid which he had made in the name of Westminster Mills Ltd. a few days before the sale to the Berniers was for only $5,000. At the trial counsel for the appellant repudiated the suggestion that this bid was in reality made on behalf of the appellant.

As to the third point mentioned above, there is first the difficulty of the conflict between the evidence of Tuttle and that of the late Mr. Arnold. The latter says that on Monday morning July 9, he spoke to Tuttle on the telephone and proceeds as follows:

> I said to Mr. Tuttle, "Tuttle, I have a letter from Mr. Beach in which he tells me that you have some execution process against one of his companies"—now which one it was, I am not sure—I said, "I have just telephoned Mr. Beach's office to speak to him", because I said, "I do not wish to act for Mr. Beach." I said, "The office tells me that Mr. Beach went to Harrison on Saturday. They expected him back Sunday but he isn't back, the floods are raging and they can't get through by telephone and they can't tell me when he will be in." Mr. Tuttle said, "I have a Writ of Extent from the Income Tax Department," and he said, "Mr. Beach was in last week and made an offer of $5,000." He said, "I have a higher offer than that," and he said, "I told Mr. Beach that I would give him until to-day at noon." And I said to Mr. Tuttle, "Well, in view of the fact that he is caught up at Harrison Lake, can't you extend that along further?" And he said, "No, 12.00 o'clock noon is the deadline. If you are able to get hold of Mr. Beach tell him to go to the Income Tax Department and try and make a deal with them himself." So that was about all that took place.
>
> MR. MURPHY: Q. Mr. Arnold, when you asked him to extend the time, do you remember—or will you please try and remember so far as you can the words that he used?
>
> A. I can't say whether he said "I will not" or "I cannot extend the time past 12.00 o'clock noon."
>
> THE COURT: Q. That was noon of that very day?
>
> A. That was noon of that day.

Tuttle's account of this telephone conversation is that Mr. Arnold told him that he could not get in touch with Beach but did not ask him to postpone the sale. Tuttle

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says that if Mr. Arnold had asked him to postpone the sale he would have done so. The learned trial judge makes no finding as between these two versions of the conversation. On the probabilities of the case it appears to me unlikely that Mr. Arnold would have failed to request a postponement under the circumstances and it is significant that he was not cross-examined, but for reasons which will appear I do not find it necessary to endeavour to decide this question of fact.

The fourth point mentioned above is not specifically dealt with in the reasons in the Courts below. It seems clear that at noon on July 9, the offer of Bernier Bros. was accepted and a receipt, ex. 82, was handed to Arnold Bernier on which the words "subject to acceptance of cheque" were written in two places. The meaning attached to these words by Tuttle as stated on his examination for discovery and accepted by him at the trial was as follows:

> Q. Were you asked these questions and did you make these answers:
> "941. Q. And you gave him a receipt for that cheque?
> A. I imagine it was subject to acceptance of the cheque.
> 942. Q. It was an unconditional acceptance of his offer?
> A. Subject to acceptance of his cheque.
> 943. Q. What do you mean by that?
> A. Well, if the cheque is no good, the sale would have been null and void."
> A. That is right.

Tuttle goes on to say that he said nothing to Arnold Bernier as to the significance of this notation on the receipt. The cheque of Bernier Bros. was drawn on the Powell River branch of the Canadian Bank of Commerce. It appears to have been deposited to the credit of the sheriff's account in the Robson District branch of the same bank in Vancouver. On July 11 payment of the cheque was refused at the Powell River branch, the rejection slip is marked "Not sufficient funds" and "Refer to drawer" and has written on it the words "Refer to Mr. Tuttle—Sheriff's office". The cheque was apparently redeposited in the sheriff's account in the Robson District branch on July 13 and was paid in due course.

In the meantime under date of July 10, 1951, a letter addressed to the sheriff of the County of Vancouver and signed "Keystone Shingles & Lumber Ltd. By G. Beach" was sent to the sheriff. At the trial this letter was produced

by counsel for the respondents Moodie and Tuttle at the request of counsel for the appellant and it does not appear to have been suggested that it had not been received by the addressee in due course. In this letter the appellant took the position that the sale to Bernier Bros. was void and said in part:

> (18) Bids are definitely available by us or others, exceeding the sum purported to have been received at the so-called sale.
>
> (19) Numerous requests have been received by us for sale of various items of equipment, and we have just received another this morning from a logger at Simoon Sound.
>
> Responsibility for irregularity rests on you and associates and all parties concerned.
>
> It is requested that the money received be returned to the parties who made tender, and the sale nullified and cancelled. A larger offer will then be made by ourselves and others.

No attention seems to have been paid to this letter. Under date of July 13 the sheriff wrote to Westminster Mills Ltd. returning that company's cheque for $5,000 and stating that a greater sum had been tendered and accepted for the equipment in question. On July 23 Westminster Mills Ltd. forwarded to the sheriff cheques totalling $6,000. These were returned by the sheriff with a letter of July 24 stating that the equipment had been sold on July 9.

The learned trial judge did not deal expressly with the claim of the appellant based on Tuttle's alleged breach of duty and the Court of Appeal disposes of the point by holding that there was no proof that the sale was not made for a reasonable price. Consequently we are not confronted, as in the case of the allegation of conspiracy, with concurrent findings of fact.

After considering the evidence bearing on this branch of the matter I have reached the conclusion that Tuttle did not exercise due care to obtain the best price for the equipment. Granted that the conduct of Beach was most unsatisfactory, it must have been apparent to Tuttle that he or one of the companies he controlled was a prospective purchaser of the equipment. I can find no adequate explanation of Tuttle's conduct in insisting on carrying out the sale at noon on Monday, July 9 after his conversation with Mr. Arnold, even on the assumption that the latter did not expressly request a postponement, nor for his failure to make any inquiry as to what Beach or Westminster Mills

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Ltd. was prepared to offer after the cheque of Bernier Bros. had been dishonoured. On the preponderance of evidence I think it is established that, had he exercised reasonable care and judgment, Tuttle could have obtained at least $6,000 for the equipment. On the other hand I do not think it was proved that he could have obtained more than this.

In the result I would allow the appeal to the extent of awarding the appellant judgment for $700 damages against the respondent Tuttle. Having reached this conclusion it would next become necessary to consider (i) whether the respondent Moodie is also liable for this amount, (ii) whether the respondent Royal Plate Glass and General Insurance Company of Canada is liable under its bond, and (iii) what order should be made as to costs; but as the majority of the Court are of opinion that the appeal fails *in toto*, no useful purpose would be served by my exploring these difficult questions.

Appeal dismissed with costs, RAND *and* CARTWRIGHT JJ. *dissenting in part.*

Solicitor for the plaintiff, appellant: Robert D. Ross, Vancouver.

Solicitor for the defendant insurance company, respondent: L. St. M. DuMoulin, Vancouver.

Solicitors for the defendants Moodie and Tuttle, respondents: Long & Long, Vancouver.

Solicitors for the defendant Edward T. Bernier, respondent: Howard and Anderegg, Vancouver.

Solicitors for the defendants Bernier Bros., Bernier Bros. Logging Co. and Arnold Bernier, respondents: Jestley, Morrison, Eckardt & Goldie, Vancouver.