1935
*Feb. 7, 8.
*Apr. 15.

THE MINISTER OF FINANCE OF BRITISH COLUMBIA ..... APPELLANT;

AND

HIS MAJESTY THE KING (AT THE PROSECUTION OF ANDLER ET AL)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Real property—Land Registry Act, R.S.B.C., 1924, c. 127, ss. 216, 217, 218, 226—Liability of assurance fund—Whether judgment recovered is one for "damages" within meaning of the Act—Certificate of the court shewing award of damages—Mandamus to Minister of Finance—Whether Minister servant of the Crown.

The prosecutors, now respondents, had been given judgment on October 27, 1933, in an action in which they alleged that the defendants in that action had fraudulently obtained a deed of conveyance which had been placed in escrow and had fraudulently registered it under the provisions of the *Land Registry Act* and then raised money upon the property by way of mortgage. The charge of fraud was sustained by that judgment, and the land was vested in the prosecutors respondents subject to the mortgage, and the judgment further pro-

PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

vided for a reference to the district registrar to ascertain the amount received by the wrongdoers under the mortgage and also rents and profits and that the prosecutors recover "the sum found due on the taking of such account." A certificate of the district registrar on the reference directed by the judgment was dated November 22, 1933. This amount having been so fixed at a sum of $34,730.95, the district registrar, without making any further application to the court, entered judgment on December 30, 1933. Writs of execution having been issued on such judgment and returns of *nulla bona* made thereto, a demand was made upon the Minister of Finance pursuant to section 218 of the *Land Registry Act*, for payment of the amount of the judgment out of the assurance fund provided for by the Act. This demand being refused, the prosecutors obtained from D. A. McDonald J. an order for a writ of *mandamus* commanding him to pay. The Court of Appeal held that the order had been properly made under sections 216 and 218 of the Act.

Held, reversing the judgment of the Court of Appeal ([1935] 1 W.W.R. 113), that, upon the facts and circumstances of this case, the Minister of Finance was entitled to refuse the demand made upon him and that a writ of *mandamus* should not have been issued to compel him to pay to the respondents the sum demanded, or in fact any other sum. Upon the analysis of this case, this Court could not ascertain what if any damages were in fact sustained in consequence of the fraudulent registration; and it was precisely in order to avoid questions of fact such as have been raised in the present proceedings that the *Land Registry Act* expressly provides that the certificate of the Court shewing an award of damages, in an action between the lawful owner and the wrongdoer, is a necessary foundation to a proper claim against the Minister of Finance under section 218 of the Act. The alternative would be that this Court would resettle for the Minister the statement of the damages, if any, sustained by the person wrongfully deprived of land in consequence of a fraudulent registration by another person; and the words of the statute completely negative the right of any further tribunal to review the decision in the action.

Held, also, that in a proper case a *mandamus* lies against the Minister of Finance to compel payment out of the assurance fund when there is no suggestion that the fund itself is not sufficient to meet the claim without resort to any moneys of the Consolidated Revenue Fund. Distinction must be made between a Minister acting as a servant of the Crown and acting as a mere agent of the legislature to do a particular act. Under the provisions of the statute, a particular fund is established by the legislature and created by the setting aside of a certain proportion of the fees paid by persons registering documents under the *Land Registry Act* so that a fund may be available to compensate those persons who have registered their documents and become deprived of their land or some interest therein in consequence of some fraud by other persons in procuring registration of documents under the Act. The fund is not public money of the Crown but the Minister of Finance for the province has been designated by the legislature to pay out of that fund damages sustained by those persons, upon proof by certificate of the court of certain conditions prescribed by the statute.

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APPEAL from the judgment of the Court of Appeal of British Columbia (1), affirming the order of D. A. McDonald J., whereby he ordered that a peremptory writ of *mandamus* should issue commanding the appellant to pay to the prosecutors respondents the sum of $34,730.95 damages and $381.95 costs, and to charge the same to the account of the Assurance Fund provided by the *Land Registry Act,* R.S.B.C. 1924, chapter 127.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

C. W. Craig K.C. for the appellant.

Alfred Bull K.C. for the respondent.

The judgment of the Court was delivered by

DAVIS J.—This appeal arises out of proceedings by way of *mandamus* instituted by the respondents, who alleged that they were wrongfully deprived of certain land or an interest therein situate in Victoria, B.C., in consequence of fraud in the registration of a certain deed of conveyance, against the Minister of Finance of the province of British Columbia, to compel payment of the amount of their damages by him out of the Assurance Fund under the *Land Registry Act,* R.S.B.C. 1924, c. 127.

Under the terms of an agreement of purchase and sale of the lands in question, the deed of conveyance was put in escrow to be taken up by the purchaser upon payment of the purchase price. The respondents as vendors alleged that the purchaser fraudulently obtained possession of the deed without payment of any of the purchase price, registered the same under the provisions of the *Land Registry Act* and then raised money upon the property by way of mortgage. The deed of conveyance was dated September 25, 1925, and was registered October 13, 1925. The $30,000 mortgage to which we shall later refer was registered on May 13, 1926, and the respondents' action to set aside the registration of the deed of conveyance and to revest the property in them was commenced April 8, 1927. The judgment in the action in favour of the respondents as plain-

(1) [1935] 1 W.W.R. 113.

tiffs was delivered October 27, 1933, the certificate of the district registrar on the reference directed by the judgment was dated November 22, 1933, and the final judgment, dated December 30, 1933, adjudged that the respondents as plaintiffs recover against the defendants in the action who were responsible for the fraud the sum of $34,730.95 and costs. The defendants in the action appealed but they subsequently abandoned their appeal and it was formally dismissed by the Court of Appeal of British Columbia on March 7, 1934. A return of *nulla bona* having been made by the sheriff to a writ of *fieri facias*, the respondents on March 21, 1934, demanded payment from the Minister of Finance under the provisions of s. 218 of the *Land Registry Act* of the amount due on the said judgment, $34,730.95 and certain costs. The Minister refused to comply with the demand and the respondents then on April 18, 1934, moved for an order directing that a writ of *mandamus* do issue directed to the Minister of Finance commanding him to pay the respondents the above amounts awarded by the judgment in the action to which we have referred. The Minister had by notice of motion dated April 9, 1934, made application to the Chief Justice of British Columbia for leave to intervene in the said action and for an extension of time within which to appeal from the judgment in the action but this application was dismissed on April 13, 1934. Mr. Justice D. A. McDonald on May 3, 1934, in the proceedings instituted by the respondents against the Minister granted an order directing a peremptory writ of *mandamus* to issue directed to the Minister commanding him to pay to the respondents the amount of damages and costs—namely, $34,730.95 damages and $381.95 costs—awarded by judgment in the said action. The Minister appealed to the Court of Appeal of British Columbia (1), which court dismissed the appeal on October 2, 1934, Martin and McPhillips, JJ., dissenting. The Minister now appeals to this Court.

Before entering upon a discussion of the particular facts of the case, we should review briefly the legislation of the province of British Columbia respecting the creation and maintenance of the Assurance Fund under the *Land Registry Act* of that province.

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The fund appears to have been first created by s. 14 of the *Land Registry Act*, c. 29 of the statutes of British Columbia of 1898, which section became s. 136 of the Revised Statutes of 1911, c. 127, and read as follows:

136. The Assurance Fund shall be formed by deducting from the amount of fees received by the registrar after the thirtieth day of June, 1898, for the purposes of the *Land Registry Act* the amount of twenty per centum per annum, and accumulating the same with interest thereon until the fund shall reach the sum of fifty thousand dollars, after which the twenty per cent shall not be deducted unless at any time the fund shall be diminished by payment, when the addition to it of a like sum of twenty per cent shall be resumed until the fund shall again reach the amount of fifty thousand dollars, and so on in perpetuity; and all sums of money so received and deducted, together with all interest and profits which may have accrued thereon, shall from time to time be invested by the Minister of Finance and Agriculture in such securities as may from time to time be approved of by the Lieutenant-Governor in Council for the purposes herein provided.

Other sections of the 1911 Act to which reference should be made are secs. 127 and 174, which read as follows:

127. The Minister of Finance and Agriculture shall pay the amount of any judgment obtained, payable out of the Assurance Fund, notwithstanding that there may not be a sufficient sum to the credit of the Assurance Fund.

174. There shall be paid to the registrar, in respect of the several matters mentioned in the Third Schedule hereto, the several fees therein specified or such other fees as the Lieutenant-Governor in Council may from time to time by Order direct; and all fees paid to the registrar pursuant to this Act shall be paid into the Provincial Treasury, and shall, less twenty per cent thereof, which is to be placed to the credit of the Assurance Fund, while the amount to the credit of same does not exceed the sum of fifty thousand dollars, be carried to the Consolidated Revenue Fund.

The Act of 1911 and subsequent amendments were repealed by the *Land Registry Act*, being c. 26 of the 1921 statutes. The Assurance Fund was continued by s. 228 which is now s. 228 of the Revised Statutes of 1924, c. 127, and reads as follows:

228. The Assurance Fund of fifty thousand dollars existing on the thirty-first day of May, 1921, under the Acts repealed by chapter 26 of the statutes of 1921 shall be continued for the purposes of this Act, and together with all interest and profits which have accrued or accrue thereon shall from time to time be invested by the Minister of Finance in securities approved by the Lieutenant-Governor in Council. If at any time the Assurance Fund is reduced to an amount below the sum of fifty thousand dollars by the payment of claims, it shall again be brought up to that sum by deducting one-fifth of all fees received by the registrars and adding the amounts so deducted to the fund.

Section 127 of the 1911 Act remains the same in the present Act as s. 220. Section 174 in amended form is now s. 254.

It is to be observed then that the Assurance Fund was created by setting aside a portion of the registration fees collected under the *Land Registry Act* until the sum of $50,000 was reached, the balance of the fees collected being paid into the Consolidated Revenue Fund. Provision was made that if the Assurance Fund should become reduced below $50,000, a certain portion of the registration fees should again be set apart to reimburse the fund and in so far as the fund might be insufficient at any time to meet the lawful claims upon it, what is in effect a loan from the Consolidated Revenue Fund is made available to bring the fund up to the fixed amount.

For the purpose of these proceedings it may be assumed that the Assurance Fund was at the time of the demand and refusal of payment thereout of the amount claimed sufficient without any encroachment upon the Consolidated Revenue Fund, for it appears to have been stated by counsel for the respondents on the hearing for the issue of the writ of *mandamus* and not challenged by counsel for the Minister that the Assurance Fund at the time in fact exceeded the sum of $140,000.

We may now turn to the provisions of the *Land Registry Act* governing the rights of persons who are wrongfully deprived of their land in consequence of fraud in the registration of documents under the Act. The relevant sections of the *Land Registry Act* (R.S.B.C. 1924, c. 127) read as follows:

216. Any person wrongfully deprived of land, or any estate or interest in land, in consequence of fraud or misrepresentation in the registration of any other person as owner of such land, estate or interest, or in consequence of any error, omission, or misdescription in any certificate of title, or in any entry in the register may bring and prosecute an action at law for the recovery of damages against the person by whose fraud, error, omission, mispresentation, misdescription, or wrongful act such person has been deprived of his land, or of his estate or interest therein. The bringing or prosecuting of an action as aforesaid shall not prevent proceedings being taken against the registrar in respect of any loss or damage not recovered in such action: Provided that no action shall in such case be brought against the registrar without first proceeding as above provided unless authorized by the fiat of the Attorney-General.

217. Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of the estate or interest in respect of which he is registered as owner, any purchaser or mortgagee *bona fide* for valuable consideration of land, on the plea that his vendor or mortgagor may have been registered as proprietor through fraud or error, or may have derived from or through a person registered as owner through

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fraud or error; and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.

218. In case the person against whom such action for damages may be brought as aforesaid shall be dead, or cannot be found within the province, then in such case it shall be lawful to bring such action for damages against the registrar as nominal defendant for the purpose of recovering the amount of the said damages and costs against the Assurance Fund; and in any such case, if final judgment be recovered, and also in any case in which damages may be awarded in any action as aforesaid, and the sheriff shall make a return *nulla bona*, or shall certify that the full amount, with costs awarded, cannot be recovered from such person, the Minister of Finance, upon receipt of a certificate of the Court, shall pay the amount of such damages and costs as may be awarded, or the unrecovered balance thereof, as the case may be, and charge the same to the account of the Assurance Fund.

226. In any case where it appears that the Assurance Fund is clearly liable for any loss or damage to any person under any of the provisions of this Act, and where it appears that the claim for loss or damage is a fair and reasonable one, the Minister of Finance may, without an action being first brought, pay the amount of any such claim: Provided that no such claim shall be paid unless the Minister of Finance is authorized to do so by the reports, advising such payment, of the Attorney-General and the registrar of the district in which the land which is the subject of such claim lies or is registered.

The statute requires that the respondents shew that they were wrongfully deprived of land or of any estate or interest in land in consequence of fraud in the registration of some other person as owner of such land, estate or interest and that they recovered damages in an action at law brought and prosecuted by them against the person by whose fraud they were deprived of their land or of some estate or interest therein, and that the sheriff has made a return of *nulla bona*. Upon receipt of a certificate of the court, the Minister of Finance shall pay the amount of such damages and costs as may be awarded, or the unrecovered balance thereof as the case may be, and charge the same to the account of the Assurance Fund.

Counsel for the appellant contends at the outset that proceedings by way of *mandamus* do not lie against the Minister of Finance in respect of the claim in question upon the ground that the Minister of Finance is a servant of the Crown and as such is not amenable to the ordinary process of the courts. Reliance is put upon the words of Cockburn, C.J., in *The Queen* v. *Lords Commissioners of the Treasury* (1):

(1) (1872) L.R. 7 Q.B. 387, at 394.

I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction.

and upon the words of Lush, J., at p. 402 of the same case:

When the money gets to the hands of the Lords Commissioners of the Treasury, who are responsible for dispensing it, it is in their hands as servants or agents of the Crown, and they are accountable theoretically to the Crown, but practically to the House of Commons, and in no sense are they accountable to this or any other Court of Justice.

If the Minister of Finance was acting as a servant of the Crown in discharging his duties with reference to the Assurance Fund there can be no doubt that he would not be subject to a writ of *mandamus* to compel him to pay the respondents out of that fund, for it is beyond question that a *mandamus* cannot be directed to the Crown or any servant of the Crown simply acting in his capacity of servant. As Lord Esher, M.R., said in *The Queen* v. *The Secretary of State for War* (1):

Assuming that the Crown were under any obligation to make this allowance to the claimant, a *mandamus* would not lie against the Secretary of State, because his position is merely that of agent for the Crown, and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not: he has no legal duty as such agent towards any individual.

But a classic statement of the distinction between a Minister acting as a servant of the Crown and acting as a mere agent of the legislature to do a particular act is that of Sir George Jessel when counsel in *The Queen* v. *The Lords Commissioners of the Treasury* case (2):

Where the legislature has constituted the Lords of the Treasury agents to do a particular act, in that case a *mandamus* might lie against them as mere individuals designated to do that act; but in the present case, the money is in the hands of the Crown or of the Lords of the Treasury as ministers of the Crown; in no case can the Crown be sued even by writ of right. If the Court granted a *mandamus*, they would be interfering with the distribution of public money; for the applicants do not shew that the money is in the hands of the Lords of the Treasury to be dealt with in a particular manner.

Here we have a particular fund established by the legislature and created by the setting aside of a certain proportion of the fees paid by persons registering documents under the *Land Registry Act* so that a fund may be available

(1) [1891] 2 Q.B. 326, at 338. (2) (1872) L.R. 7 Q.B. 387, at 389.

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to compensate those persons who have registered their documents and become deprived of their land or some interest therein in consequence of some fraud by other persons in procuring registration of documents under the Act. The fund is not public money of the Crown but the Minister of Finance for the province has been designated by the legislature to pay out of that fund damages sustained by persons who have been wrongfully deprived of their land in consequence of fraudulent registrations, upon proof by certificate of the court of certain conditions prescribed by the statute. We are of opinion that in a proper case a *mandamus* lies against the Minister to compel payment out of the fund when as here there is no suggestion that the fund itself is not sufficient to meet the claim without resort to any moneys of the Consolidated Revenue Fund.

But counsel for the Minister takes the position that even if *mandamus* lies in a proper case, there has been in this case no action at law in which damages have been awarded. Taking the pleadings in the action and judgment therein it was, he submits, plainly an action for a declaration that a deed of conveyance was fraudulently registered and for an order setting aside the same and for an account of the rents and profits and of any payments made under the contract of purchase and sale and not a common law action for damages. The statutory obligation of the Minister to pay is upon an award of damages by the court in an action. Upon the very face of the record of the action no damages, strictly speaking, were either sought or awarded. I confess to have been much impressed by this argument during the hearing but upon reflection I have concluded that if the substantial effect of the judgment in the action was the establishment of the amount of the damages actually suffered by the respondents in consequence of the fraudulent registration, we should not allow the form of the action or judgment to becloud the real substance of the matter.

That brings us to a consideration of the judgment in the action in an effort to ascertain what if any damages were in fact established. The lands were by the judgment revested in the respondents but subject to the $30,000 mortgage that had been charged against them. No ques-

tion is raised as to the *bona fides* of that mortgage in the hands of innocent third parties, and though the value of the lands was not proved except in so far as the contract of purchase and sale fixed the price at $55,000 on terms of payment of $10,000 in cash and the balance by a promissory note to be secured by a mortgage on properties in California, we may reasonably infer, I think, that the lands were worth at least the amount of the mortgage. It was proved that the amount of the mortgage was actually received by the parties who committed the fraud. If the fact of the $30,000 mortgage stood alone, we might not feel much difficulty in dealing with the matter on the basis that the damages were the amount of the mortgage with which the respondents found their property charged upon its return to them by the vesting order of the court made in the action. But the judgment directed a reference as to payments made upon the contract of purchase and sale and as to the rents and profits and these, together with the $30,000 mortgage, were respectively debited and credited in arriving at the final sum of $34,730.95 for which, with certain costs, the respondents demanded payment from the Minister out of the Assurance Fund as damages awarded to them for the wrongful deprivation of their property or some interest therein in consequence of the fraudulent registration. Now it is to be observed that the account of the rents and profits was taken by the registrar for a period of time that not only commenced thirteen days prior to the date of the fraudulent registration but extended beyond the date of the judgment. Not only this, but it would appear that in the action a receiver had been appointed by the court *pendente lite* and that the accounts for the period covered by the reference were divided into two groups, one relating to the period prior to and the other to the period subsequent to the appointment of the receiver. The balance of the moneys in the hands of the receiver, some $3,721.75, should be treated as moneys to which the respondents as successful plaintiffs in the action were entitled. But in any event the loss of the rents and profits did not arise "in consequence of the fraudulent registration," to use the exact words of the statute, and stand in a totally different position to the registered mortgage. The rents and profits therefore cannot properly be

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taken into account in arriving at the damages sustained in consequence of the fraudulent registration. If we disregard then the rents and profits and consider only the mortgage the damages might be said to be $30,000, but the matter is not so simple as that. The property has been revested in the respondents subject to the mortgage and the contract of purchase and sale has been rescinded. Substantial cash payments, however, were found by the registrar to have been made by the purchaser on account of the purchase price, $2,000 on the 1st December, 1925, and $8,000 in June, 1926, to which amounts the registrar added interest calculated to the date of his certificate, in the aggregate sum of $5,320, making the total payments so found with interest $15,320. With the property revested in the respondents the total principal payments of $10,000 on the purchase money at least must be taken into account if the actual damages suffered by the respondents are to be arrived at. Moreover, very substantial improvements were made to the buildings upon the lands. The defendants in the action in giving particulars of their statement of defence stated that they had expended the sum of $11,525 between February, 1926, and January, 1927, for altering the front of the building and show windows, redecorating the interior, replacing radiator, rewiring basement, installing awning fixtures and for architect's fees in respect of alterations; and while the repairs and improvements are not specifically dealt with in the registrar's certificate, the total disbursements during the first period for maintenance of the premises are given at $5,043.23, and during the second period at $32,457.68; and it does not seem unfair, therefore, to infer that the item in the particulars of the statement of defence relating to alterations and improvements and amounting to $11,525 was correct. If the true amount of damages is to be ascertained, it may be necessary to take this amount into consideration. The utter confusion into which one falls in attempting to deal with the subject matter of the judgment as substantially one of damages, though in form something quite different, is best evidenced by extracting from the judgment certified by the Court to the Minister the following paragraphs from the findings of the registrar on the reference:

> And I do further certify that the moneys received for the period from the 12th day of April, 1927, to the 18th November, 1933, on account of

rents and profits of the said lands and premises amount to $49,241.93; and that the total disbursements during the said period for maintenance of the said lands and premises amount to $32,457.68; and that after deducting the said total disbursements from the total receipts for the said period there remains a balance of $16,784.25, being the net rents and profits during the said period; and after deducting therefrom the sum of $3,721.75 now in the hands of the said receiver, J. C. Bridgman, there remains the sum of $13,062.50, being the moneys received by the defendants or any of them from the rents and profits of the said lands and premises during the said period.

Upon that state of facts, the courts below directed the issue of the old peremptory writ of *mandamus* against the Minister to compel him to pay to the respondents out of the Assurance Fund the full amount of the judgment in the action, $34,730.95, in effect as damages. Obviously that sum is not the amount of the damages and it is elementary that before *mandamus* will lie there must be a strict legal right and a proper and sufficient demand.

Even with the analysis of the case that I have sought to make, I cannot approximately arrive at the amount of damages sustained in consequence of the fraudulent registration. I cannot help thinking that it was precisely in order to avoid questions of fact such as have been raised in these proceedings that the statute expressly provides that the certificate of the Court shewing an award of damages, in an action between the lawful owner and the wrongdoer, is a necessary foundation to a proper claim against the Minister under s. 218. It seems to me that it is the duty of this Court to hold that there be such a certificate. The alternative is a very difficult alternative. It really amounts to this, that the Court should direct the Minister upon the question what is to be considered as damages and what is to be omitted. In other words that the Court should resettle for the Minister the statement of the damages, if any, sustained by the person wrongfully deprived of land in consequence of a fraudulent registration by another person. The words of the statute completely negative the right of any further tribunal to review the decision of the action. This is in substance the language of Lord Hewart, C.J., in considering the certificate of value by the district auditor in the recent case of *Rex* v. *Ayton, Ex Parte Cardiff Corporation* (1).

(1) [1935] 1 K.B. 225, at 234.

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However widely we might be disposed to relax the rigour of the strict requirements governing the right to the issue of a peremptory writ of *mandamus* in order to effectuate the spirit and intention of the legislation for the payment of claims out of the Assurance Fund, we cannot go so far as to say upon the facts and circumstances of this case that the Minister was not entitled to refuse the demand and that a writ of *mandamus* should be peremptorily issued to compel him to pay to the respondents the sum demanded or in fact any other sum. We are conscious of the probability, if not the certainty, that the respondents suffered substantial damages in consequence of the fraudulent registration complained of, but we cannot give the relief sought in these proceedings upon that basis. We feel confident, however, that the responsible advisers of the Crown in the province of British Columbia will not fail to see that in some way the respondents are fully compensated out of the Assurance Fund to the extent of any just claim they may have. We would respectfully draw the attention of the Minister of Finance to s. 226 of the statute, to which we have referred earlier in this judgment, as affording ample authority for doing justice in the matter.

The appeal must be allowed and the judgments below set aside.

Appeal allowed.

Solicitor for the appellant: *Eric Pepler.*

Solicitors for the respondents: *Walsh, Bull, Housser, Tupper & Ray.*