

1936
 * Feb. 11.
 * June 17.

THE ROYAL BANK OF CANADA }
 (DEFENDANT) } APPELLANT;

AND

WORKMEN'S COMPENSATION }
 BOARD OF NOVA SCOTIA (PLAIN- }
 TIFF) } RESPONDENT.

APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA *in banco*.

Priorities—Bank Act, R.S.C. 1927, c. 12—Security under section 88 of the Act—Subsequent lien under section 79 (2) of the Workmen's Compensation Act, R.S.N.S. 1923, c. 129—Whether Dominion and provincial statutes conflict—Direct taxation for provincial purposes—Section 92 (2) B.N.A. Act—Banking—Section 91 (15) B.N.A. Act.

The lien of the Workmen's Compensation Board, under section 79 (2) of the *Workmen's Compensation Act* takes priority over the security under section 88 of the *Bank Act*. Judgment appealed from (8 M.P.R. 482) *aff.*

Per Duff, Rinfret, Crocket and Kerwin JJ.—Although the provisions of section 88 of the *Bank Act* are provisions which strictly relate to Banking and are therefore within the competency of the Dominion Parliament under section 91 (15) of the B.N.A. Act, the Parliament, in enacting them, did not intend to remove any property, which might be assigned to a bank by way of security thereunder, from the operation of any statute by the legislature of the province, in which the property is situated, in the legitimate exercise of its power in relation to direct taxation for provincial purposes under section 92 (2) of the B.N.A. Act.—The assessment authorized by section 57 of the *Workmen's Compensation Act* is a direct tax upon the employers in each of the specified classes of industry, imposed for provincial purposes within the meaning of section 92 (2) of the B.N.A. Act. Cannon J. expressing no opinion as to whether or not such assessment is an indirect tax.

Per Davis J.—On the particular facts of this case, if the assessment and levy of these workmen's compensation dues is taxation, it is direct taxation within the province and competent to the provincial legislature.—The securities under section 88 of the *Bank Act* do not operate to transfer absolutely the ownership in the goods, but such transaction is essentially a mortgage transaction and subject to the general law of mortgages except where the statute has otherwise expressly provided. *Bank of Montreal v. Guaranty Silk Dyeing and Finishing Co. Ltd.* ([1934] O.R. 625) *ref.*

APPEAL from a judgment of the Supreme Court of Nova Scotia *in banco* (1) upon a case stated by consent under the provisions of Order 33 of the *Judicature Act* to determine the question of priority between a security under

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and

section 88 of the *Bank Act* and a lien created under section 79 (2) of the *Workmen's Compensation Act*.

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

C. B. Smith K.C. for the appellant.

F. P. Varcoe K.C. for the Attorney-General of Canada.

L. A. Lovett K.C. for the respondent.

The judgment of Duff C.J. and Rinfret, Crocket and Kerwin JJ. was delivered by

CROCKET J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia *in banco* on a special case stated by the parties for the opinion of the Court as to whether the respondent had the right to levy on a quantity of hardwood flooring and lumber in the possession of Annapolis Hardwood Company, Limited, in priority to a security held by the appellant thereon under s. 88 of the *Bank Act*, ch. 12, R.S.C., 1927.

The bank's security consists of an assignment, which it obtained from the Hardwood Co. on March 30, 1931. It strictly follows the form of schedule C of the *Bank Act* and purports to assign to the bank all the products of the forest and goods, wares and merchandise then owned and in the possession of the company, in consideration of an advance of \$5,327 as security for the payment of a series of demand notes specified in a schedule annexed thereto aggregating the amount of the stated advance. The goods are described as "all the lumber and products thereof and special dimension hardwood," situated at five different places in Nova Scotia and at the company's mill and millyard and wharf at Annapolis Royal, and are stated to be "free from any mortgage, lien or charge thereon (except previous assignments to the bank)."

The Workmen's Compensation Board, having received notice from the Hardwood Co. on March 15, 1931, that it had entered into a logging contract with one A. S. Bent, thereafter, on April 11, 1931, assessed Bent and the company under s. 77 (1) and other relevant sections of the Nova Scotia *Workmen's Compensation Act* in the sum of

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\$90 in respect of Bent's payroll for the year 1931, and later made two further assessments against them for additional sums in respect of Bent's payroll for the year 1930 as well as for the year 1931. On October 9, 1931, the Board recovered a judgment in the Supreme Court of Nova Scotia against Bent for \$197.53, the amount of the assessments then outstanding against him, and \$4.53 for costs, and issued execution thereon directing the sheriff to levy the sum of \$206.95. Nothing presumably having been realized from the execution against Bent the Board later, on March 3, 1932, recovered another judgment against the Hardwood Co. for \$243.89, the amount of the outstanding assessments against Bent and the company in respect of Bent's payrolls for the years 1930 and 1931 together with penalties and the further sum of \$4.55 for costs. Execution was forthwith issued upon this judgment and on March 4, 1932, the sheriff of Annapolis levied on all the hardwood flooring in the company's mill and on all the lumber in its yard at Annapolis Royal. This levy was withdrawn on the undertaking of the bank to pay the amount due under the execution if the court should determine that the Board had the right to levy on the said flooring and lumber in priority to the bank's claim.

The special case after setting forth the facts, the essential features of which I have attempted to summarize, states:

By section 79 (2) of the *Workmen's Compensation Act* the amount of the assessments above referred to and of the cost, if incurred, of recording a certified copy of such assessment in the registry of deeds and any judgment with respect to same, is declared to be a first lien on all the property, real, personal or mixed, used in or in connection with or produced in or by the industry, with respect to which the employer is assessed, though not owned by the employer, subject only to municipal taxes;

and that the Board under s. 79 (2) and other relevant sections of the *Workmen's Compensation Act* claims a lien in priority to the claims of the bank on the property levied upon on the ground that the said property had been produced in or by the industry with respect to which the employer was assessed, though not owned by the employer, subject only to municipal taxes.

The questions submitted to the court were as follows:—

First: On the facts as hereinbefore stated does the claim of the said Board to the property levied upon take priority to the claim of the said bank?

Second: If the answer to the first question is in the affirmative, is the claim of the said Board limited to so much of the property levied upon as was actually produced by the operations of said Bent in respect of which the said assessments were made or does it extend to all property produced in or by the industry of lumbering and the manufacture of lumber and all work incidental thereto as carried on by the said Annapolis Hardwood Company, Limited?

The majority of the court, Graham, Ross and Hall JJ. answered the first question in the affirmative and held in answer to the second question that the claim of the Board extended to all the goods produced in or by the industry with respect to which the company, the employer, was assessed. Mellish and Carroll JJ. held that the first question should be answered in the negative.

While we have no doubt that the provisions of s. 88 the *Bank Act* are provisions which strictly relate to banking, and are therefore within the competency of the Dominion Parliament under s. 91 (15) B.N.A. Act, we are of opinion that in enacting them Parliament did not intend to remove any property, which might be assigned to a bank by way of security thereunder, from the operation of any statute enacted by the legislature of the province, in which the property is situated, in the legitimate exercise of its power in relation to direct taxation for provincial purposes under s. 92 (2) B.N.A. Act.

In *Canadian Pacific Railway v. Corporation of the Parish of Notre Dame de Bonsecours* (1), the Judicial Committee of the Privy Council considered an appeal from a decree of the Court of Queen's Bench of the province of Quebec, which condemned the appellant company to pay a fine of \$200 for failure to clean and put in good order a ditch along the right of way of the company. The railway, as all railways extending beyond the limits of the province, came within exception (a) of 92 (10) B.N.A. Act regarding local works and undertakings and consequently under enumerated head 29 of s. 91 B.N.A. Act, and it was contended by counsel for the appellant that no provincial legislature was competent to enforce the performance of any Act affecting the physical condition of the railway. The Board held that by the true construction of the B.N.A. Act, s. 91, ss. (29) and s. 92, ss. (10), the Dominion Parliament had the exclusive right to prescribe regulations

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for the construction, repair and alteration of the appellant railway, and that the provincial legislature had no power to regulate the structure of a ditch forming part of its authorized works, but that the provisions of the Municipal Code of Quebec, which prescribed the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land were *intra vires* of the provincial legislature. In delivering the judgment of the Board, Lord Watson said:

The *British North America Act*, whilst it gives the legislative control of the appellants' railway quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes.

It is admitted by the appellant that the assessment authorized by s. 57 of the *Workmen's Compensation Act*, ch. 129, R.S. of Nova Scotia, is a tax and we have no doubt that it is a direct tax upon the employers in each of the specified classes of industry, imposed for provincial purposes within the meaning of 92 (2) of the B.N.A. Act. S. 79 (2) of the provincial *Workmen's Compensation Act* provides that

The amount of any assessment and of the cost, if incurred, of recording certified copy of such assessment in the registry of deeds, and any judgment with respect to same shall be a first lien upon all the property real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer is assessed, though not owned by the employer, subject only to municipal taxes, and the amount levied under execution upon any such judgment to the extent of the amount due upon such execution shall forthwith be paid by the sheriff or his deputy to the Workmen's Compensation Board.

We think that this section—79 (2)—must be regarded as an enactment properly made in relation to the direct taxation authorized by s. 57 of the provincial Act under the second enumerated head of s. 92 of the B.N.A. Act.

Section 88 of the *Bank Act* itself creates no lien, though it provides that a bank may lend money to dealers in certain products upon the security of such products in a form set forth in schedule (c), and that by virtue of such security the bank shall acquire the same rights and powers in

respect of such products as if it had acquired the same by virtue of a warehouse receipt. No lien results except by agreement between the bank and its customer. Section 79 (2) of the provincial *Workmen's Compensation Act* itself directly creates a lien for a public tax or charge. There is, therefore, no conflict between the federal and provincial statutes on the face of the enactments themselves, and no conflict in their operation, as disclosed in this case, unless it be that s. 88 of the *Bank Act* contemplates that no property assigned to a bank under its provisions shall be subject to provincial taxation under 92 (2) of the B.N.A. Act. We think that such is not the intendment of the federal enactment and that the provincial enactment must therefore prevail.

The appeal should be dismissed with costs.

CANNON J.—The question of the validity of the tax sought to be collected by priority over the appellant's lien was first raised before this Court. The stated case only questioned the respective rank to be given to these two claims. Confining myself strictly to that feature of the case, I would answer both questions in the affirmative and agree to the dismissal of the appeal. I do not wish to commit myself nor decide in the premises whether or not, by the cumulative effect of sections 57, 77 (1) and 79 (2) of the *Workmen's Compensation Act* of Nova Scotia it might be found that the levy or tax is an indirect one and therefore *ultra vires* of the provincial legislature.

DAVIS J.—This appeal raises a difficult question of law upon a contest between the appellant bank and the respondent Workmen's Compensation Board as to priority of their respective claims upon the lumber and products thereof of a lumbering company. The real question is whether or not the bank's security, prior as to time, taken under section 88 of the *Bank Act* (Dominion legislation), can maintain its priority in the face of the statutory lien that subsequently arose (by provincial legislation) in favour of the Workmen's Compensation Board and declared to be "a first lien upon" the property. Counsel admitted that the company was insolvent and unable to pay both claims in full.

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The facts were not in dispute and the parties agreed to refer the question upon a stated case to the Supreme Court of Nova Scotia *in banco*, pursuant to the provisions of Order XXXIII of the Rules of the Supreme Court of Nova Scotia. The majority of that Court (Mellish and Carroll JJ. dissenting) decided in favour of the claim to priority of the Workmen's Compensation Board and from their decision the court gave leave to the bank to appeal to this Court.

The competency of the Dominion Parliament to pass section 88 of the *Bank Act* is not questioned. Nor is the competency of the provincial legislature to pass the *Workmen's Compensation Act* questioned except in so far as the Act may have the effect of impairing the bank's security. It becomes necessary therefore to consider carefully the exact meaning and effect of the legislation involved in the point raised.

Dealing firstly with the position of the bank. It acquired its security (the validity of the security is in no way questioned) on March 30, 1931, under the provisions of section 88 of the *Bank Act*. That was prior in date to the first of the several assessments made by the Workmen's Compensation Board. What was the nature, then, of the security that the bank acquired? The relevant sections of the *Bank Act* are sections 88 (1), 88 (7), 86 (1) and 86 (2a). Briefly stated, for they are very familiar sections, they provide that a manufacturer may give security to the bank on his goods, wares and merchandise to secure the repayment of moneys loaned by the bank and "all the right and title" to such goods, wares and merchandise "vest" in the bank from the date of the acquisition thereof, subject to a proviso whereby unpaid wages for three months and unpaid purchase money under certain circumstances are made a prior charge. The legal estate passes to the bank. There is however a penalty against the bank selling until default and there is an express right to the customer, on repayment of the moneys loaned, to regain the title to the goods. This type of security is peculiar, so far as I know, to our *Bank Act* and it may be that in view of the civil law of the province of Quebec, the draftsman of the Act refrained from setting up the

English form of mortgage involving the equitable doctrines (unknown to the Quebec civil law) of redemption and foreclosure. In Quebec, the hypothecary system of the Roman law prevails. The mortgagor merely hypothecates or charges the land in favour of the mortgagee, in effect acknowledging the indebtedness as a personal obligation, but retaining the title in himself; on default, the mortgagee may recover judgment on the obligation and bring the property to sale at the hands of the sheriff and is entitled to be paid the amount of the hypothec as a preferred claim out of the proceeds of the sale.

I had occasion in *Bank of Montreal v. Guaranty Silk Dyeing and Finishing Co. Ltd.* (1) to consider this particular form of security and came to the conclusion, contrary to the very able argument of counsel for the bank in that case, that the security did not operate to transfer absolutely the ownership in the goods but that the transaction was essentially a mortgage transaction and subject to the general law of mortgages except where the statute has otherwise expressly provided. No appeal on this branch of that case was taken. Section 88 set up by the *Bank Act* enables manufacturers, who desire to obtain large loans from their bankers in order to carry on their industrial activities, to give to the bank a special and convenient form of security for the bank's protection in the large banking transactions necessary in the carrying on of industry throughout the country. Until the moneys are repaid, the bank is the legal owner of the goods but sale before default is prohibited and provision is made for the manufacturer regaining title upon repayment. To say that Parliament did not use language to expressly provide that the bank shall have a first lien on the goods is beside the mark. The bank acquires ownership in the goods by the statute. In the case with which we have to deal, the bank acquired ownership in the goods before any of the Workmen's Compensation Board's assessments were levied and the bank continued throughout all material times to hold such ownership. The nice question of law is whether or not the provincial legislature has the power, assuming the language of the provincial statute is clear enough to have

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(1) [1934] O.R. 625, at 632.

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that effect, to undermine the bank's security by creating a first lien upon the goods in question in favour of the Workmen's Compensation Board. The conflicting views as presented to us may be summarized as follows:

The bank contends that having taken this security, the legal estate vested in it and being competent to the legislative authority of the Parliament of Canada, a province has no right to legislate to cut down the security so acquired by creating liens upon it in favour of a provincial institution. The Board, on the other hand, contends that banks when they come into a province to do business must submit to local provincial laws of a general character affecting all industries alike and that the bank cannot be regarded as exempt from provincial enactments of a general nature. The bank supports its contention upon the principle, well established, that if there is a conflict in the operation of Dominion and provincial legislation the Dominion legislation must prevail. Reliance is put upon the judgment of the Privy Council in *Attorney-General for Canada v. Attorney-General for British Columbia* (1), where the proposition laid down in *Grand Trunk Railway v. Attorney-General for Canada* (2) was restated in the following language:

There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

The Board, on the other hand, relies upon the language in the *John Deere Plow case* (3), where it was said

It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation, and upon the language in *Bank of Toronto v. Lambe* (4),

They (their Lordships) cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking or with the power of incorporating banks.

The question is a difficult one but upon the best consideration that I have been able to give to it I have reached

(1) [1930] A.C. 111.

(2) [1907] A.C. 65.

(3) [1915] A.C. 330, at 341.

(4) (1887) 12 A.C. 575, at 586.

the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security, were property in the province of Nova Scotia

used in or in connection with or produced in or by the industry with respect to which the employer (was) assessed though not owned by the employer

and became subject to the lien of the provincial statute the same as the goods of other owners become liable to the burden of Workmen's Compensation assessments when the industry in which the goods are used or produced falls within the provisions of the *Workmen's Compensation Act*. It is a provincial measure of general application for the benefit of workmen employed in industry in the province and is not aimed at any impairment of bank securities though its operations may incidentally in certain cases have that effect. In my opinion this is not a case where there is any conflict of legislative authority. If it is possible to do so the different enactments should be construed and applied so as to give an adequate and proper place and function to each of them. When banks in this country take, as is well known they so often do, section 88 security on all the raw materials and goods in process of manufacture of a customer, and thereby accept a qualified ownership in the property used in or produced by the industry of its customer, they cannot expect to hold such property free and clear of those burdens on the industry that are of general application throughout the particular province in which the bank is doing business. Provision for compensation to workmen injured or contracting an industrial disease while engaged in industry has become a well understood public object of the provinces throughout Canada and the fact that a Dominion corporation holds the ownership in the property used or produced by an industry subjected to Workmen's Compensation legislation in the province cannot deprive the province of the right to impose contributions on the industry and to secure the payment of the assessments by a lien on the property used in or produced by the industry.

The word "industry" in sec. 79 (2) is not an apt word but it is plain from a reading of the whole statute that it is not used in the subsection with which we are con-

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cerned in the sense of an industry taken as a whole, i.e., the lumbering industry throughout the province, but in a limited sense applying to the main but particular business in connection with the operations of which the workmen are employed either directly or indirectly, for example, workmen engaged in any operations of the Annapolis Lumber Company, Limited, whether employed directly by the company or indirectly by independent contractors, such as Bent, who carry on certain operations necessarily incidental in the manufacture of the products of the company. The employer is clearly the person in respect of whose payrolls the assessment is made.

The court raised the questions whether these Workmen's Compensation assessments were not taxation and if so were they indirect taxation so far as the facts of this case are concerned? Counsel for the appellant stated that he did not think these questions were really open to him upon the stated case. In any event both counsel indicated that they did not desire this aspect of the matter to be raised, preferring a determination of the issue as to priority on the assumption that the legislation was valid except in so far as it might undermine the bank's security. Assuming, without so deciding, that the imposition of assessments under the *Workmen's Compensation Act* for the creation of a general fund available for distribution throughout the province among workmen who suffer accidents in the course of their employment, is taxation, it is inappropriate that we should dispose of the matter on any hypothetical basis that it is direct taxation, as suggested by counsel, because if the lien created by the provincial legislature to secure payment of the assessments involved in this case was beyond the competence of the provincial legislature as indirect taxation, then the bank's security is not affected by the invalid lien set up against it by the provincial Board. Whether taxation is direct or indirect must be determined in each case upon the particular facts of the case. What the Nova Scotia Act attempts to do in this case, and what is more or less the general scheme of Workmen's Compensation Acts in the different provinces, is that the business, as such, is really looked to for payment of the assessment. Take, for instance, the large pulp and paper companies in this country. Many of them, as is well known, carry on their

woods operations by aid of independent contractors who undertake the cutting and delivery of wood in different sections of the company's limits. Then the subsequent logging operations in getting the wood down to the mills by water is frequently undertaken by independent logging contractors. Hundreds of men are thus engaged in the woods and in logging operations on the rivers and streams who are virtually part and parcel of the business of the company, although strictly they are not employees of the company but of these independent contractors. Now the general scheme of workmen's compensation legislation, and in particular of the Nova Scotia Act with which we are concerned, is to make an assessment in respect of all these workmen and for convenience a woods operator on his return of his employees and a logging contractor on his return of his employees, are charged the appropriate amount for the creation and maintenance of the general fund available for accidents throughout the province. The company itself is in effect required to hold back from the payments that fall due from time to time to these independent contractors the amounts of the assessments from time to time made against them respectively by the Board but if for any reason that is not done then the company itself must pay these assessments. It is a system of collection and recovery of the assessments. The point is that the business of a particular company is regarded as liable for all workmen's compensation assessments whether imposed in respect of those workmen who may strictly be said to be its own employees or with respect to those workmen who are strictly employees of independent contractors but are virtually engaged in the essential operations of the particular company. I cannot regard that as indirect taxation, something incompetent to the legislature as outside the proper meaning to be attributed to the words, "direct taxation within the province." There are cases where upon their special facts the definition of John Stuart Mill as to the distinction between direct and indirect taxation is sufficient to determine the matter. But as a matter of law that statement of economic theory is not to be exclusively and rigidly applied in determining, upon every given state of facts, whether the tax is or is not a direct tax.

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Lord Hobhouse in *Bank of Toronto v. Lambe* (1), said at

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First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers, and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

In *In re A reference under the Government of Ireland Act, 1920, and Section 3 of the Finance Act (Northern Ireland, 1934)* (2), Lord Thankerton, in delivering the judgment of the Privy Council, said that in the opinion of their Lordships,

it is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery—often complicated—by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax.

If the assessment and levy of these workmen's compensation dues is taxation, I am of the opinion that on the particular facts which are before us in this case, it is direct taxation within the province and competent to the provincial legislature.

The appeal should be dismissed, with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. B. Smith.*

Solicitor for the respondent: *L. A. Lovett.*

(1) (1887) 12 App. Cas. 575.

(2) [1936] A.C. 352, at 358.