[HIGH COURT OF AUSTRALIA.]

MINUCOE . . . . . APPELLANT;
PLAINTIFF,

AND

THE LONDON AND LIVERPOOL AND GLOBE INSURANCE COMPANY LIMITED . . . . . RESPONDENT;
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 7, 10, 27.

Knox C.J., Isaacs, Higgins and Starke JJ.

Fire Insurance—Condition—Insurance by owner—Avoidance on passing of interest from insured—Giving of bill of sale over property insured—Meaning of "owner"—Bills of Sale Act 1898 (*N.S.W.*) (*No.* 10 *of* 1898), *secs.* 4, 13.

A condition of a policy of fire insurance stipulated that, "if the interest in the property insured pass from the insured otherwise than by will or operation of law," "the insurance ceases to attach as regards the property affected unless the insured before the occurrence of any loss or damage obtains the sanction of the company."

Held, that a transfer, without the sanction of the company, of chattels insured by way of conditional bill of sale under the *Bills of Sale Act* 1898 (N.S.W.) to secure payment of an advance did not operate to pass the property from the insured within the meaning of the condition.

Decision of the Supreme Court of New South Wales (Full Court): *Minucoe* v. *London and Liverpool and Globe Insurance Co.*, (1925) 25 S.R. (N.S.W.) 185, reversed.

APPEAL from the Supreme Court of New South Wales.

On or about 1st February 1923 Theodore Minucoe signed a proposal for insurance by the London and Liverpool and Globe Insurance Co. Ltd. against loss or damage by fire of certain chattels including

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scales and weights, a cash register, tables and chairs, crockery and cutlery, a gas stove, a soda-water fountain and the stock-in-trade of fruit and confectionery in a refreshment room at Dubbo, occupied by Minucoe.

In the proposal the nature of Minucoe's interest in the property to be insured was stated to be that of " owner " ; and to the question " Is the property proposed for insurance in any way mortgaged or under bill of sale ? " the answer " No " was given. On 7th April 1923, pursuant to the proposal, the Company issued a policy of insurance for £500 to Minucoe in which he was described as " owner," and in which the agreement of the Company was stated to be " subject to the particulars in the proposal for this insurance, which shall in all cases be deemed to be inserted or furnished by the insured, and to the conditions and stipulations endorsed hereon, which proposal, conditions and stipulations constitute the basis of this insurance, and are to be considered as relevant to and incorporated in and forming part of this policy." One of the conditions endorsed on the policy was the following :—" (9) Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured before the occurrence of any loss or damage obtains the sanction of the Company signified by endorsement upon the policy by or on behalf of the Company : . . . (d) If the interest in the property insured pass from the insured otherwise than by will or operation of law."

On 10th April 1923 Minucoe executed a bill of sale of the property which was the subject of the policy of insurance to Joseph John Alam to secure repayment of a loan of £320 and interest thereon. By the bill of sale Minucoe bargained, sold, assigned and transferred to Alam the property in question, with a proviso that if Minucoe should duly pay the sum of £320 and interest thereon the bill of sale should become void and Alam would reassign the property to Minucoe. The bill of sale was filed in the office of the Supreme Court on 18th April 1923 in accordance with sec. 4 of the *Bills of Sale Act* 1898 (N.S.W.). While the bill of sale was in operation the property which was insured was damaged by fire.

An action was then brought in the Supreme Court of New South Wales by Minucoe against the Company to recover £410, being the

amount of the damage alleged to have been assessed by the defendant. One of the defendant's pleas was based on condition 9 above set out—it being alleged that before the happening of the loss or damage the interest in the property insured had passed from the plaintiff otherwise than by will or by operation of law, and that the plaintiff had not before the occurrence of the loss or damage obtained the sanction of the defendant signified by endorsement on the policy by or on behalf of the defendant or at all. The action was tried before *Ferguson* J. and a jury, and the learned Judge directed the jury that the effect of the bill of sale was not to pass the interest in the property out of the plaintiff within the meaning of the policy. The jury gave a verdict for the plaintiff for £410. Upon a motion by the defendant to set aside the verdict and enter a verdict for the defendant or a nonsuit or a new trial, the Full Court made an order setting aside the verdict and entering a verdict for the defendant with costs: *Minucoe* v. *London and Liverpool and Globe Insurance Co.* (1).

From that decision the plaintiff now appealed to the High Court.

E. M. Mitchell K.C. (with him *Pilcher*), for the appellant. The meaning of clause (d) of condition 9 is that the insured must obtain the sanction of the Company, not to any change in the nature of the interest of the insured, but to any passing of the whole of the interest of the insured from him. The words "pass from" are equivalent to the words "be transferred from." The object of the condition is only to make plain what would be the law without it, namely, that the insured must have some insurable interest in the property insured.

[HIGGINS J. referred to *Lucena* v. *Craufurd* (2).]

If the condition is ambiguous, it should be construed most favourably to the appellant (*Thompson* v. *Phenix Insurance Co.* (3); *Russell* v. *Beecham* (4)). Notwithstanding the giving of the bill of sale the appellant was still the "owner" of the property within the reasonable interpretation of that word. The bill of sale was in

(1) (1925) 25 S.R. (N.S.W.) 185.
(2) (1806) 2 Bos. & P. N. R. 269, at p. 302.
(3) (1890) 136 U.S. 287.
(4) (1924) 1 K.B. 525.

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actual substance and effect a security (see sec. 13 of the *Bills of Sale Act* 1898). [Counsel also referred to *Sovereign Fire Insurance Co.* v. *Peters* (1); *Citizens' Insurance Co. of Canada* v. *Salterio* (2); *Springfield Fire and Marine Insurance Co.* v. *Allen* (3); *Condogianis* v. *Guardian Assurance Co.* (4); *Nussbaum* v. *Northern Insurance Co.* (5); *Torrop* v. *Imperial Fire Insurance Co.* (6); *Bull* v. *North British Canadian Investment Co.* (7); *Martin* v. *State Insurance Co.* (8).]

[STARKE J. referred to *Alston* v. *Campbell* (9); *Insurance Co.* v. *Stinson* (10); *Hutchinson* v. *Wright* (11).

[HIGGINS J. referred to *Hughes* v. *Sutherland* (12).]

Boyce K.C. (with him *Maxwell*), for the respondent. The legal estate in the property insured passed from the appellant when he gave the bill of sale, and he ceased to be the owner of the property (*Maugham* v. *Sharpe* (13); *O'Connor* v. *Quinn* (14)).

[ISAACS J. referred to *Johnson* v. *Diprose* (15).]

The fact that in the proposal the appellant was required to state whether the property was mortgaged or under a bill of sale shows that one of the objects of condition 9 (d) was that the sanction of the Company should be obtained before a bill of sale was given.

E. M. Mitchell K.C., in reply.

Cur. adv. vult.

Aug. 27.

The following written judgments were delivered:—

KNOX C.J. The relevant facts and the question at issue between the parties to this appeal were stated by *Street* C.J., in the Supreme Court, in the words following:—"The plaintiff insured the stock-in-trade and plant of a refreshment business at Dubbo with the

(1) (1886) 12 Can. S.C.R. 33.
(2) (1894) 23 Can. S.C.R. 155.
(3) (1870-71) 43 N.Y. 389.
(4) (1921) 2 A.C. 125, at p. 132; 29 C.L.R. 341, at p. 346; (1919) V.L.R. 1, at p. 10.
(5) (1889) 37 Fed. Rep. 524, at p. 529.
(6) (1896) 26 Can. S.C.R. 585.
(7) (1888) 15 Ont. App. R. 421.
(8) (1882) 43 Am. Rep. 397.
(9) (1779) 4 Bro. Parl. Cas. 476, at p. 480.
(10) (1881) 103 U.S. 25, at p. 29.
(11) (1858) 25 Beav. 444, at p. 453.
(12) (1881) 7 Q.B.D. 160.
(13) (1864) 17 C.B. (N.S.) 443, at p. 464.
(14) (1911) 12 C.L.R. 239.
(15) (1893) 1 Q.B. 512, at pp. 516-517.

defendant Company against the risk of loss or damage by fire. In answer to questions contained in the form of proposal which he filled up for the purpose, he said that the nature of his interest in the property proposed to be insured was that of owner, and that it was not mortgaged or under bill of sale. In the policy which the defendant issued he was described as owner, and, as is customary in such cases, it was declared that the particulars in the proposal, and the conditions and stipulations endorsed on the policy, should constitute the basis of the insurance and were to be considered as incorporated in the policy. One of the conditions endorsed on the policy provided that the insurance should cease to attach if the interest in the property insured should pass from the insured person otherwise than by will or operation of law before the occurrence of any loss or damage, unless the sanction of the defendant had been obtained and signified by endorsement on the policy. After insuring the property the plaintiff transferred it by way of bill of sale to secure the repayment of an advance of money, and, while the bill of sale was still in existence, a fire occurred on the premises and loss was sustained. The sanction of the defendant to the giving of the bill of sale was not obtained. The plaintiff sued to recover the amount of the damage, and one of the defences relied upon by the defendant —and the only one with which we are concerned—was that the terms of the condition to which I have just referred had not been complied with. *Ferguson* J., before whom the action was tried, held that, as the plaintiff still had an interest in the property insured, the effect of the bill of sale was not to pass the interest in the property within the meaning of the condition, and the jury returned a verdict for the plaintiff."

On appeal the Supreme Court set aside the verdict and entered a verdict for the defendant. This appeal is brought from that decision.

The only question for consideration is whether by force of the bill of sale the interest of the appellant in the property insured passed from him within the meaning of the condition endorsed on the policy. The rule to be applied in construing this condition is stated by *Bowen* L.J. in *Hart* v. *Standard Marine Insurance Co.* (1) as follows:—" The same broad rules of construction apply

(1) (1889) 22 Q.B.D. 499, at pp. 501, 502.

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to the interpretation of a warranty as apply to all commercial documents. I do not think there is a better exposition of this than given by Lord *Ellenborough* in *Robertson* v. *French* (1): 'The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, namely, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.'" And in *National Protector Fire Insurance Co.* v. *Nivert* (2) Lord *Atkinson*, delivering the opinion of the Judicial Committee, said: "Conditions such as this third condition are always in Courts of law construed strictly against insurance companies, and should always be interpreted in a reasonable sense, having regard to the business nature of insurance transactions." "The interest" in this condition must, I think, mean the interest declared by the proponent when applying for insurance. In the present case the interest declared was that of "owner," and the question is whether by executing the bill of sale that interest passed from the appellant. In other words, did the appellant by executing the bill of sale cease to be the owner of the property insured? In my opinion he did not. The word "owner" is not a word of inflexible meaning: its meaning in any given document must be ascertained by reference to the context. It is true that the legal property in the chattels insured passed to the grantee of the bill of sale by force of that instrument, but the right to possession of all those chattels and the right to dispose of some of them in the ordinary course of business remained in the appellant until default in the performance of his obligations under the bill of sale. It is not unusual for either lawyers or men of business to speak of the mortgagor of property as the owner of it; it is unusual so to describe

(1) (1803) 4 East 130, at p. 135. (2) (1913) A.C. 507, at p. 513.

the mortgagee. Substantially and for practical purposes the grantor of a bill of sale by way of security for an advance remains until default the owner of the chattels comprised in it. In the Supreme Court *Street* C.J. expressed the opinion that what was meant by the condition was that any change in the nature of appellant's interest should be disclosed. If it were intended to provide for the disclosure of any such change, there would certainly be no difficulty in framing a condition to that effect, and I fail to understand why the intention was not clearly and unequivocally expressed.

In my opinion the appeal should be allowed.

ISAACS J. On 7th February 1923 Minucoe insured with the respondent Company certain goods, valued at £500, against the risk of fire until 2nd February 1924. The policy witnesses that "Theo. Minucoe as owner" having paid the premium, &c., the Company agrees, but subject to the particulars in the proposal and to the conditions and stipulations endorsed, the proposal, conditions and stipulations being the basis of the insurance and incorporated in and forming part of the policy, to insure the property against fire. No. 9 of the conditions and stipulations provides as follows:—"Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured before the occurrence of any loss or damage obtains the sanction of the Company signified by endorsement upon the policy by or on behalf of the Company: . . . (d) If the interest in the property insured pass from the insured otherwise than by will or operation of law." On 10th April 1923 Minucoe gave to a creditor, to secure £332 and interest, a bill of sale, within the meaning of the *Bills of Sale Act* 1898, over the goods so insured. No sanction of the Company was ever obtained for this bill of sale. On 20th January 1924 the goods were destroyed by fire. The one question now is: Does condition 9 (d) apply?

The argument on both sides covered many aspects of the case and cited many important authorities. In my opinion, the condition referred to does not apply. It is necessary first to interpret the words "the interest," as they have been the subject of discussion. I read that expression, "the interest," to mean the interest which

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is referred to in the policy, consisting of all that it contains directly and by incorporation. Minucoe is insured " as owner " in the body of the policy. The proposal contains among the particulars the following :—" Interest.—State the nature of the proponent's interest in the property to be insured—if owner or otherwise." Against that is placed the word " Owner." When we thus find in the proposal the phrase " proponent's interest in the property to be insured," and on the condition, the phrase, " the interest in the property " insured, I take " the interest " in the condition to be identical with that in the proposal, namely, interest " as owner." So read, condition 9 (d) appears to me to be directed against any possible liability of the Company if the insured parted with the insured interest in the property, even in such cases as are mentioned in *Paine* v. *Meller* (1) and *Rayner* v. *Preston* (2). There is no provision in the clause or anywhere else to extend the meaning of the expression " the insured " except what appears in the body of the policy, namely, " or his representatives in interest," that is, representatives by operation of law. The " sanction " mentioned in clause 9 is purely optional. Therefore I read clause 9 as simply intended to operate in derogation of rights which the insured would otherwise have under the policy. The sanction, if given, might according to the circumstances either satisfy the clause and prevent loss of rights, or it might on general principles of law effect a novation. But in any case the expression " the interest " in condition 9 (d) read as " interest as owner " does not apply to a case where the insured retains his interest as absolute owner subject only to a charge or encumbrance. The form in which that charge or encumbrance is created is immaterial. Of course equity would disregard the form and seek for the substance. And for this purpose it is the same thing at law. That is shown by *Ward* v. *Beck* (3). As a defence to an action on a policy of marine insurance the fourth plea set up a condition of the policy that " in case of transfer of the subject matter of the said insurance, the said insurance should cease, and a proportionate part of the premium be returned by the defendant to the plaintiff." The facts established that by bill of

(1) (1801) 6 Ves. 349. (2) (1881) 18 Ch. D. 1.
(3) (1863) 13 C.B. (N.S.) 668.

sale under the *Merchant Shipping Act* the insured transferred his interest as security for an advance. The facts did not show a simultaneous transfer of the policy; so that the protection, as indicated in *Powles* v. *Innes* (1), was not afforded. Further difficulty was suggested by reason of the provisions of the *Merchant Shipping Act* as to mortgages. Nevertheless *Willes* J., who delivered the judgment of the Court, said :—" The case now before us is the case of a complete transfer : and the only question is whether there is anything in the statute which prevents us from allowing that which was the real intention of the parties, namely, that the instrument should operate as a security only for the money advanced, the absolute interest remaining in the transferor, to prevail. We are clearly of opinion that the matter stands upon the same footing as it did before the passing of the statute relied on by Mr. *Lush*, that an interest still remained in the transferor, and that neither by the general law nor by reason of the special clause in the policy has that interest been at all affected." This is supported by what *Bowen* L.J. says in *Castellain* v. *Preston* (2). The Lord Justice says :—" What is it that is insured in a fire policy ? Not the bricks and the materials used in building the house, but *the interest* of the assured in the subject-matter of insurance, *not the legal interest only, but the beneficial interest.*" Applying those principles to the present case, it is clear that " the interest " of Minucoe " as owner " of the goods had not passed within the meaning of condition 9 (d). He retained the full equitable ownership; he merely gave a security (see sec. 13 of the *Bills of Sale Act*) over the goods; the legal transfer was only for the purpose of being used in case it ever became necessary to deprive Minucoe of his ownership, and he had therefore the right of indemnity. By parity of reasoning from other cases, depending on other words, particularly some Canadian cases, such as *Sovereign Fire Insurance Co.* v. *Peters* (3), *Enright* v. *British Crown Assurance Co.* (4) and others, the result might well be arrived at in a very similar way. But the considerations above stated appear to lead directly to the conclusion that the condition relied on does not apply to defeat the claim.

(1) (1843) 11 M. & W. 10.
(2) (1883) 11 Q.B.D. 380, at p. 397.
(3) (1886) 12 Can. S.C.R. 33.
(4) (1923) 4 Dom. L.R. 454, at p. 457.

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In the result the ruling of *Ferguson* J. at the trial was in my opinion correct, and the judgment of the Full Court reversing that ruling cannot be sustained.

HIGGINS J. In my opinion, this appeal should be allowed. The case turns on the meaning of the words "*the* interest in the property insured" in clause 9 of the conditions endorsed on the policy, and on the meaning of the word "owner" on the face of the policy, and in the answer in the proposal to the question "State the *nature* of proponent's interest in the property to be insured—if owner or otherwise." The nature of the interest stated was "owner."

Under clause 9 "the insurance ceases to attach as regards the property affected unless the insured before the occurrence of any loss or damage obtains the sanction of the Company signified by endorsement on the policy . . . (d) *if the interest in the property insured pass from the insured* otherwise than by will or operation of law." The insured has, since the policy, given a bill of sale—a conditional bill of sale, containing a proviso that if he pay the interest yearly and the principal on demand the indenture should become void and the mortgagee would reassign. The insured remained in possession, carrying on his business as confectioner: can he still be called the *owner* of the goods?

I should have no difficulty but for the fact that in New South Wales the *Judicature Act* has not been adopted, and the distinction between equity and common law must be maintained in this common law action on the policy. The legal title to the cash register, scales and other non-consumable goods has been vested in the mortgagee, and the goods are not to be reassigned until the principal has been repaid with interest. Has "the interest" in the property insured passed from the insured?

In my opinion, *the* interest in the property insured means here the *whole* interest of the insured as owner, not part of the interest. Unless the *whole* interest has passed the benefit of the insurance has not ceased. We are not entitled to treat "the interest" of the insured as if it were some of the interest. Exceptions, it is said prove the rule; and it is to be observed that the exceptions, "otherwise than by will or operation of law," refer to cases where usually the whole interest

(involuntarily) passes, as on death, bankruptcy, &c. The learned Chief Justice of New South Wales has said (1): "There are many reasons why an insurer should wish to know what interest the person seeking insurance has in the property, and, if an insurer requires that this interest shall be disclosed when the contract is entered into, there is nothing unreasonable or improbable in supposing that he might also wish to be informed of any change in the nature of that interest." I respectfully concur; but I cannot find that it was part of the bargain to disclose *any* change—that is, *every* change, no matter how trifling—in the nature of the interest.

These conditions, framed by the Company, must be read, if there be a doubt, strictly against the Company (*In re Bradley and Essex and Suffolk Accident Indemnity Society* (2)); indeed, many people would refuse to take out a policy with a company conditioned to cease if a petty temporary loan were raised on the property insured.

In my opinion the insured is still "owner," in the ordinary sense, although under the New South Wales law the legal title has passed from him, and although we must, we are told, close our eyes to the fact that in equity he would be regarded as the equitable owner subject to a security. There are authorities which, in my opinion, justify us in applying to the word its ordinary meaning. "Who is the owner of this station?" Answer, "X"—although X may have given a mortgage over his lands and a lien over his wool. In the case of *Hughes* v. *Sutherland* (3), under the Act against crimping, the Court treated S. as owner, because he had possession and control of the ship under P., who, having contracted to purchase all the sixty-four shares, had transferred one of the shares to S. S. had a real interest which justified him in employing seamen and apprentices, and, like a charterer, must be regarded as an owner for the purposes of the Act. "Owner" there means one who is substantially the owner, having the control and management of the ship (per *Manisty* J. (4)). Yet the Act which had to be construed was an Act of 1854, before the *Judicature Act* 1873; and an amending Act had to be passed in 1862, allowing equities to be enforced (in

(1) (1905) 25 S.R. (N.S.W.), at p. 188.
(2) (1912) 1 K.B. 415, at p. 422.
(3) (1881) 7 Q.B.D. 160.
(4) (1881) 7 Q.B.D., at p. 164.

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the Chancery Court) against "*owners* and mortgagees" of ships. This liberal view of the word "owner" was also adopted by *Hodges* J. in *Condogianis* v. *Guardian Assurance Co.* (1). After all, there is no reference in the policy or conditions to the legal title; and the popular use of the word happens to correspond with the use in equity.

Starke J.

STARKE J. I agree that this appeal must be allowed. It has long been settled in insurance law that an insured who gives security, whether by way of bill of sale or otherwise, over the subject matter insured, retains an insurable interest in the full value of that property (*Alston* v. *Campbell* (2); *Ward* v. *Beck* (3); *Hibbert* v. *Carter* (4)). The question is whether the conditions and stipulations in clause No. 9 (d) in the policy in this case have made a contrary provision. It cannot, I think, be approached without some reference to the history of legal opinion upon fire insurance. Fire policies, it has been said, "are not in their nature assignable, for they are only contracts to make good the loss which the contracting party himself shall sustain, nor can the interest in them be transferred from one person to another without the consent of the office" (*Park on Insurance*, 8th ed., p. 978, and note Form VII. in App. C1, 1034; *Lynch* v. *Dalzell* (5); *Sadlers' Company* v. *Badcock* (6); *Bank of New South Wales* v. *North British and Mercantile Insurance Co.* (7)). In many cases, the assent of the company may, as pointed out by *Shaw* C.J. in *Fogg* v. *Middlesex Mutual Life Insurance Co.* (8), create "a new and original contract, embracing all the elements of a contract of insurance between the assignee and the insurers." On the other hand, high authorities have suggested that there is no apparent reason why a fire policy should not be assignable with the subject matter, as readily as a marine policy has always been (*Porter on Insurance*, 6th ed., p. 302; *Rayner* v. *Preston* (9); *Bank of New South Wales* v. *North British and Mercantile Insurance Co.*). But most policies of fire insurance do in fact contain

(1) (1919) V.L.R. 1.
(2) (1779) 4 Bro. Parl. Cas. 476.
(3) (1863) 13 C.B. (N.S.) 668.
(4) (1787) 1 T.R. 745.
(5) (1730) 4 Bro. Parl. Cas. 431.
(6) (1743) 2 Atk. 554.
(7) (1882) 3 N.S.W.L.R. 60.
(8) (1852) 10 Cush. (Mass.) 337, at p. 345.
(9) (1881) 18 Ch. D. 1.

stipulations requiring, in some form, the consent of the office before any assignment of the policy is allowed or can operate. A somewhat similar form to that contained in the policy in the present case is noted in *Bunyon on Fire Insurance*, 6th ed., p. 348, and in *Porter on Insurance*, 6th ed., p. 191.

All this satisfies me that clause 9 (d) merely embodies the usual insurance practice, and does not operate to terminate or avoid the policy so long as the assured retains an insurable interest in the subject matter insured: *the* interest in the property insured has not, in that case, passed from him. And it is clear enough that the assured in the present case retains an insurable interest in the property insured, and, indeed, in the full value of that property.

Appeal allowed. Judgment of Supreme Court discharged. Verdict for defendant set aside and verdict of jury for plaintiff restored. Respondent to pay the costs of appeal to the Supreme Court and of this appeal.

Solicitors for the appellant, *McGuinn & McGuinn*, Dubbo, by *L. G. B. Cadden.*

Solicitors for the respondent, *A. J. McLachlan, Westgarth & Co.*

B. L.