[HIGH COURT OF AUSTRALIA.]

HIPWORTH . . . . . APPELLANT;
DEFENDANT,

AND

MAHAR AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 11-13.

SYDNEY, *Aug.* 1.

Dixon C.J., Webb and Fullagar JJ.

Limitation of Actions—Money secured by assignment of interest as purchaser under contract of sale—Limitation applicable—Acknowledgment of debt "given to the person entitled thereto or his agent"—Property Law Act 1928 (*Vict.*) (*No.* 3754), *s.* 304—*Supreme Court Act* 1928 (*Vict.*) (*No.* 3783), *ss.* 80, 82.

By an instrument under seal dated 16th September, 1929, H. assigned his interest, subject to a proviso for redemption, as purchaser under a contract of sale of land, to M., in consideration of M. guaranteeing H.'s overdraft at a bank. The instrument contained a covenant by H. for repayment of any money paid by M. to the bank under the guarantee. On 15th May, 1944, M. paid to the bank the sum guaranteed and certain interest. In June, 1937, in a proposal for adjustment of debts and an accompanying comparison statement, both of which documents were signed by H. and transmitted to the proper authority under the *Farmers Debts Adjustment Act* 1935 (Vict.) M. was included among the list of creditors and the amount owing to him was set forth as a debt. The *Farmers Debts Adjustment Act* 1935 required that a copy of the proposal for adjustment of debts be forwarded by the proper authority to each creditor. On 15th October 1950 M. brought an action against H. for the recovery of the sum paid under the guarantee.

Held (1) that the proper limitation applicable was that contained in s. 304 of the *Property Law Act* 1928 (Vict.) and not that contained in s. 82 of the *Supreme Court Act* 1928 (Vict.); but (2) that the admissions contained in the proposal for adjustment of debts and the comparison statement amounted to an acknowledgment of the debt given to the creditor for the purposes of s. 304 of the *Property Law Act* 1928.

Judgment of the Supreme Court of Victoria (*Smith* J.) affirmed.

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APPEAL from the Supreme Court of Victoria.

Peter Herbert Mahar and Sydney George Mahar, the executors of the will of John Mahar, late of Kerang, Victoria, who died on 31st August 1935, commenced an action as plaintiffs on 5th October 1950 in the Supreme Court of Victoria against John Alexander Hipworth, as defendant. The plaintiffs alleged that by an instrument under seal dated 16th September 1929 made between John Mahar and the defendant, John Alexander Hipworth, John Mahar agreed to guarantee the defendant's overdraft with the English Scottish and Australian Bank Ltd. at Kerang, Victoria, to the extent of nine hundred pounds, and the defendant covenanted that, in the event of John Mahar being called upon by the said bank to pay the said sum of nine hundred pounds, he would repay to John Mahar the money so paid, together with interest thereon at the rate of 7 per cent per annum, and, by way of security for the due repayment of the said money, he assigned, subject to a proviso for redemption, to John Mahar, his interest as purchaser in a contract for the sale of certain land. It was further alleged that John Mahar gave the guarantee to the bank on 19th March 1930, and had, when called upon to do so by the bank, on 15th May 1933 paid to it the sum of £1,017 representing the said sum of £900 and certain interest owed to the bank by the defendant. The plaintiffs claimed from the defendant the sum of £1,684 8s. 10d. representing the said sum of £900, together with interest thereon at the rate of 7 per cent per annum less a statutory deduction of 22½ per cent per annum, and less the sum of £45 11s. 8d. which the plaintiffs alleged that the defendant had paid to them on account, on 27th June 1936. The defendant by his defence to the statement of claim pleaded accord and satisfaction and, alternatively, that the debt was statute-barred by reason of s. 82 of the *Supreme Court Act* 1928. The plaintiffs, by their amended reply to the defence pleaded that in or about the month of October 1936 and in or about the month of June 1937 the defendant had made an acknowledgment, in writing signed by him, that the debt sued for, or alternatively £817 8s. 0d. thereof, remained unpaid and due to the plaintiffs by the defendant.

The action was tried by *Smith* J. who held that neither the defence of accord and satisfaction nor the allegation of part payment had been established on the evidence. The trial judge, however, held that the debt was not barred by s. 82 of the *Supreme Court Act* 1928 (Vict.), because there had been a sufficient acknowledgment of it, as to £817, in a comparison statement signed by the defendant on 17th June 1937 and transmitted by him to the Farmers'

Debts Adjustment Board which was the proper authority under the *Farmers Debts Adjustment Act* 1935 (Vict.). Accordingly judgment was entered on 15th February 1952 for the plaintiff for the sum of £817 with interest from 17th June 1937 to 5th October 1950 at 7 per cent less 22½ per cent, and with costs.

From this judgment the defendant appealed to the High Court of Australia.

E. R. Reynolds Q.C. and *B. J. Dunn*, for the appellant.

Gregory Gowans Q.C. and *K. A. Aickin*, for the respondents.

The argument sufficiently appears in the judgment hereunder.

Cur. adv. vult.

Aug. 1.

THE COURT delivered the following written judgment:—

This is an appeal from a judgment of the Supreme Court of Victoria in an action brought by the respondents against the appellant. The action was tried by *Smith* J., who gave judgment for the respondents for £817 with interest from 17th June 1937. It is necessary to state the facts only in outline.

The respondents are the executors of the late John Mahar, who died on 31st August 1935. Their action was brought on a covenant contained in an instrument under seal executed by the appellant and John Mahar on 16th September 1929. This instrument recited (*inter alia*) that John Mahar had agreed to guarantee the account of the appellant with a bank at Kerang to the extent of £900. The appellant covenanted to repay to John Mahar any amounts which the latter might be called upon to pay to the bank in pursuance of the guarantee, and, by way of security for such repayment, assigned to John Mahar, subject to a proviso for redemption, his interest as purchaser in a contract for the sale of certain land. The guarantee was given by John Mahar to the bank on 19th March 1930. Some three years later the bank called upon John Mahar for payment under the guarantee, and on 15th May 1933 John Mahar paid to the bank a sum of £1,017, which apparently comprised the sum of £900 and certain interest owing by the appellant to the bank. The respondents' writ claimed from the appellant a sum of £900 with interest, less a sum of about £46 paid on account. The writ was issued on 5th October 1950.

The appellant, by his defence, pleaded (1) accord and satisfaction, and (2) that the claim was statute-barred. It is not

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necessary to state the terms of the former plea. The learned trial judge held that the evidence fell short of establishing the plea. We think that his Honour was clearly right, and that the contrary view is not seriously arguable. The terms of the second plea, however, have assumed some importance. It is contained in par. 6 of the defence, which says:—"He will rely upon the provisions of s. 82 of the *Supreme Court Act* 1928". The respondents, by their amended reply, alleged acknowledgments in writing of the debt, to the extent of £817, made in or about October 1936 and in or about June 1937.

Section 82 of the *Supreme Court Act* 1928 (Vict.) provides, so far as material, that actions of covenant or debt upon any bond or other specialty shall be commenced within fifteen years after the cause of such action. Section 82, however, occurs in Div. 7 of Pt. VII of the Act, and s. 80 provides that nothing in Div. 7 shall apply to any action the time for commencing which is limited by the provisions of Pt. IX of the *Property Law Act* 1928 (Vict.) or by any special enactment specially limiting the time for commencing any action. The present case is a case of an action of debt upon a specialty, and it seems clear that it is within s. 82 of the *Supreme Court Act* unless that section is excluded by the combined operation of s. 80 and some special enactment. *Smith* J. suggested to counsel at the trial that the case was really governed by another enactment, though he did not specify any other enactment. Counsel for the appellant maintained that s. 82 was the relevant enactment, and counsel for the respondents, to use his Honour's own words, "expressly stated that he did not challenge in any way the contention that that section is the relevant section". His Honour then expressly dealt with the case on the basis, thus mutually assumed by counsel, that s. 82 contained the relevant provision.

It cannot be doubted that the view which *Smith* J. had in mind was that the deed containing the covenant was a mortgage, and that the law really applicable was therefore to be found in s. 304 of the *Property Law Act* 1928, which occurs in Pt. IX of that Act, and, if applicable, is made exclusively applicable by s. 80 of the *Supreme Court Act*. Section 304 of the *Property Law Act* provides, so far as material, that no action shall be brought to recover any sum of money secured by any mortgage or otherwise charged upon or payable out of any land at law or in equity but within fifteen years next after a present right to receive the same has accrued.

The actual period of limitation is seen to be the same whether the provision applicable is to be found in s. 82 of the *Supreme Court*

Act or in s. 304 of the *Property Law Act*. In each case the period is fifteen years. By reason of a difficulty of construction of the deed, to which we do not think it necessary to refer, the exact time or times at which a cause or causes of action accrued under it to John Mahar may be open to question, but on any construction more than fifteen years had elapsed between the accrual of the right and the commencement of the action. The possible importance of determining which statute is applicable arises from the difference between the provisions made by the two statutes with respect to acknowledgments. If it is to the *Supreme Court Act* that we must look, the relevant provision is to be found in s. 88 (4), under which (so far as material) time begins to run anew from the date of "any acknowledgment . . . *made* . . . by some writing signed by the party chargeable or his agent duly authorized". If it is to the *Property Law Act* that we must look, the relevant provision is to be found in s. 304 itself. Under that section time begins to run anew from the date of an "acknowledgment . . . *given* in writing signed by the person by whom" the money "is payable or his agent *to the person entitled thereto or his agent*".

Smith J. held that an acknowledgment in writing had been made by the appellant in June 1937, so that the defence founded on s. 82 of the *Supreme Court Act* failed. Some argument against this view was presented to this Court, but we find it sufficient to say that, in our opinion, his Honour's view was clearly right. The appellant then sought to advance the contention that the relevant limitation of actions was that prescribed by s. 304 of the *Property Law Act*, and that, although an acknowledgment in writing had been "made", no acknowledgment in writing had been "given to the creditor".

Strong reasons may be, and were, put forward against allowing the appellant to raise any such contention at this stage. To permit him to do so would involve amendments of the pleadings and an amendment of the notice of appeal, and this after the attention of the appellant's counsel had been expressly directed by the learned judge to the possibility that he had chosen the wrong statute of limitation. Counsel for the respondents observed moreover, that he might have been able to adduce further evidence which would clearly establish an acknowledgment which would have been good for the purposes of s. 304 as well as for the purposes of s. 82. And, while we think it highly unlikely that any acknowledgment, other than and different from that relied upon, could have been and was not proved, it is clearly possible that the circumstances attending the acknowledgment actually proved might have

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been elaborated, and that, if the further evidence were accepted, it might have become quite clear that the action was not barred by s. 304. In all these circumstances it is plain that it would not be proper to set aside the judgment and remit the action to the Supreme Court except on stringent conditions, which would certainly include a condition that the appellant should pay all costs incurred in the Supreme Court after delivery of defence.

We are of opinion that s. 304 of the *Property Law Act*, and not s. 82 of the *Supreme Court Act*, is the relevant provision, and we have considered whether we ought not to set aside the judgment and remit the action on terms, but we are of opinion that we ought not to adopt a course which will involve substantial expense and delay unless we are satisfied that, on the evidence as it stands, no acknowledgment sufficient for the purposes of s. 304 is established. And we have come to the conclusion that the acknowledgment actually proved is sufficient for the purposes of s. 304 as well as for the purposes of s. 82.

There are three documents on which the respondents relied as acknowledgments. All are documents which the appellant signed in connection with an application which he made in 1936 for an "adjustment" of his debts under the *Farmers Debts Adjustment Act* 1935 (Vict.). The first was the application itself, which is dated 10th October 1936. This contains a "statement of liabilities", in which the appellant included "Estate John Mahar, Kerang. Guarantee—£934 14.0.". This entry, however, is inserted under the printed heading, "Contingent Liabilities, Guarantees, etc.", and *Smith* J. rightly held that this document could not be regarded as containing such an unequivocal admission as would amount to an acknowledgment of a presently subsisting debt. The second and third documents were a "Proposal for Adjustment of Debts", which was signed by the appellant on 21st June 1937, and an accompanying "Comparison Statement", also signed by the appellant on 21st June 1937, the purpose of which is to compare debts as disclosed by the farmer with amounts claimed by creditors. The former document includes among the creditors "Estate J. Mahar deceased, Kerang, Amount paid under guarantee, £934.14.0." The latter document refers to the debt in question as owing to "Estate J. Mahar deceased, Kerang, Amount paid to E.S. & A. Bank under guarantee, £817.8.0., Interest £116.16.0.". Then follow, shown in separate columns, the words and figures "Amount shown in application, £934.14.0.—Amount claimed by creditor, £934.14.0—Amount agreed to by farmer and creditor, £934.14.0.". It should be mentioned that on 12th October 1936 the respondents

had put in a proof of debt in accordance with the Act, showing £817 8s. 0d. as owing for principal and £116 16s. 0d. for interest. (The trifling error in addition is of no importance.) All the documents mentioned were forwarded to the proper authority under the *Farmers Debts Adjustment Act*. That Act, by s. 19, requires a copy of the proposal for adjustment to be furnished by the proper authority to each creditor, and also requires a meeting of the farmer and his creditors to be called. Such a meeting was called and held, and one of the respondents attended the meeting. In the end no adjustment of the appellant's debts was made.

Smith J. said:—"My view is that, assuming s. 82 to apply, there is here a sufficient written acknowledgment in the comparison statement so far as £817 of the principal money is concerned". It would seem clear that, for the purposes of s. 82, there was also a sufficient written acknowledgment in the proposal for adjustment, though, in view of the proof of debt and the comparison statement, doubtless it ought not to be taken as an admission that more than £817 8s. 0d. was owing for principal. We have already expressed our agreement with the view of *Smith* J. that there was in this case an acknowledgment "made by the debtor". The question is whether the acknowledgment evidenced by either document or by both read together was an acknowledgment "given to the creditor or his agent". It is to be observed that the question turns wholly on the interpretation of the statute (s. 304 of the *Property Law Act*) and not on the common law doctrine of "acknowledgment". It is not necessary in this case, as it still is in Victoria in cases of simple contract debts, to find a promise to pay implied in the admission of liability: see *Moodie* v. *Bannister* (1).

There appears to be no clearly decisive authority on the question in England or Australia or New Zealand. In Ireland a broad view of what fulfils the requirements of the statute seems to have been taken. In *Millington* v. *Thompson* (2) Lord Chancellor *Blackburne* held that an acknowledgment in a will must be regarded as given to the creditor, and this case was recently followed by the Supreme Court in *Howard* v. *Hennessy* (3). It seems difficult to reconcile this view with the English cases of *In re Beavan*; *Davies, Banks & Co.* v. *Beavan* (4) and *Lloyd* v. *Coote* (5), in which it was held that an executor's affidavit for probate, which included in the list of the testator's debts a statute-barred debt, was not an acknowledgment given to the creditor. In England a recital in a deed

(1) (1859) 4 Drew. 432 [62 E.R. 166].
(2) (1852) 3 Ir. Ch. R. 236.
(3) (1947) I.R. 336.
(4) (1912) 1 Ch. 196.
(5) (1915) 1 K.B. 242

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(*Batchelor* v. *Middleton* (1)) and a record in the books of a building society (*Wilson* v. *Walton* (2)) have been held not to be acknowledgments given to the creditor. We come perhaps a little nearer to the present case in *Goode* v. *Job* (3). In that case an admission made in an answer in a Chancery suit was held in a later action at law between the same parties to be an acknowledgment given by the defendant to the plaintiff. Lord *Campbell* C.J. said :— " It is given in answer to the bill filed by the plaintiff. It is, in effect, as if he had written, ' I acknowledge that I hold under you ' " (4). But the only English case directly in point appears to be *Eicke* v. *Nokes* (5). This was a case of a simple contract debt : it was, therefore, necessary that a promise to pay should be implied, and, as Lord *Herschell* pointed out in *Stamford, Spalding and Boston Banking Co.* v. *Smith* (6), such a promise could not be implied unless the acknowledgment were made " to " the creditor or his agent. The acknowledgment relied upon was an entry in a bankrupt's examination in which a sum of £594 was inserted as owing to the plaintiff. The bankruptcy had been annulled. *Tindal* C.J. held the entry a sufficient acknowledgment. It is to be noted that this case was after *Tanner* v. *Smart* (7), in which Lord *Tenterden*, delivering the judgment of the King's Bench, had said that, though an acknowledgment " showed to demonstration " that the debt had never been paid and was still subsisting, yet unless it amounted to a promise, it had no effect. *Tanner* v. *Smart* (7) was cited to *Tindal* C.J. by counsel for the defendant in *Eicke* v. *Nokes* (5). His Lordship said that the entry was " an admission of a debt, in the first instance, *to be paid* under the bankrupt laws, . . . and, if not in that way, then according to the ordinary course of law " (8). (As to the effect now to be given to the actual decision in *Tanner* v. *Smart* (7) see *Spencer* v. *Hemmerde* (9).)

In *Barrett* v. *Birmingham* (10) Sir *Michael O'Loghlen* M.R., citing *Eicke* v. *Nokes* (5), held that the admission of a debt by an insolvent in his schedule signed by him was a sufficient acknowledgment for the purposes of 3 and 4 Will. 4, c. 27, s. 40, which corresponds to s. 304 of the *Property Law Act* 1928 (Vict.). The learned Master of the Rolls expressed strong disagreement with an opinion expressed in *Hill* v. *Stawell* (11) that what was required

(1) (1848) 6 Hare. 75 [67 E.R. 1088].
(2) (1903) 22 T.L.R. 408.
(3) (1858) 1 El. & El. 6 [120 E.R. 810].
(4) (1858) 1 El. & El., at p. 10 [120 E.R., at p. 811].
(5) (1834) 1 M. & Rob. 359 [174 E.R. 123].
(6) (1892) 1 Q.B. 765, at p. 768.
(7) (1827) 6 B. & C. 603 [108 E.R. 573].
(8) (1834) 1 M. & Rob., at p. 361 [174 E.R., at p. 123].
(9) (1922) 2 A.C. 507.
(10) (1842) 4 Ir. Eq. R. 537.
(11) (1840) 2 Ir. L.R. 302.

was something in the nature of a " private voucher ". The actual decision in *Hill* v. *Stawell* (1) seems clearly distinguishable from *Barrett* v. *Birmingham* (2) and not open to criticism, but the observations of Sir *Michael O'Loghlen* on the vague notion of a " private voucher " seem justified.

In *Morrogh* v. *Power* (3) the Court did not find it necessary to consider whether an admission in an insolvent's schedule was sufficient as an acknowledgment under 3 & 4 Will. IV, c. 27, s. 40, but the report (4) contains an interesting note by the reporter, in which he expresses his own view that such an admission may fairly be regarded as an acknowledgment to the creditors named in the schedule, while mentioning the arguments which may be advanced against this view. As supporting his own view he refers to the earlier cases of *McCarthy* v. *O'Brien* (5) and *Neligan* v. *Gun* (6). Later cases to the same effect are *Dugdale* v. *Vize* (7) and *Hanan* v. *Power* (8) : see also the short judgment of *Foster* B. in *Tristram* v. *Harte* (9).

The reasoning in the cases so far cited is not perhaps as clear as one could wish, but in 1846 they received the high authority of the approval of Sir *Edward Sugden*, as he then was, in *Blair* v. *Nugent* (10). The Lord Chancellor said :—" The next question is whether it is an acknowledgment ' to the person entitled thereto or his agent '. The cases show that the Court has not, in that respect, restricted itself within narrow limits. If it be made in a schedule, affidavit or answer, it is sufficient, although it may be said that in these cases it is made to the Court and not to the party. The decisions are, I think, right. They proceed upon a liberal, but yet a just and fair, construction of the statute " (11). The case before his Lordship was not a case of an admission in an insolvent's schedule, but of an admission in an answer to a bill in a former suit. But among the cases cited to his Lordship were *Barrett* v. *Birmingham* (2) and *Tristram* v. *Harte* (12). Again in *Re West* (13) the inclusion by an insolvent debtor in his schedule of a statute-barred debt was held a sufficient acknowledgment for the purposes of the statute of William IV. On the point in question, *Ormsby* J. contented himself with saying :—" Sir Michael O'Loghlen, in the well-known case of *Barrett* v. *Birmingham* (2), held that the admission of a debt by an insolvent debtor in his schedule was a

(1) (1840) 2 Ir. L.R. 302.
(2) (1842) 4 Ir. Eq. R. 537.
(3) (1842) 5 Ir. L.R. 494.
(4) (1842) 5 Ir. L.R., at p. 500.
(5) (1839) 2 Ir. L.R. 67.
(6) (1841) 3 Ir. L.R. 354.
(7) (1843) 5 Ir. L.R. 568.
(8) (1845) 8 Ir. L.R. 505.
(9) (1841) Long & T. 186, at p. 191.
(10) (1846) 3 Jo. & Lat. 658.
(11) (1846) 3 Jo. & Lat., at p. 677.
(12) (1841) Long. & T. 186.
(13) (1879) L.R. 3 Ir. 77.

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sufficient acknowledgment in writing to save it from being barred by the Statute of Limitation" (1). The provision in question in that case was s. 42 of 3 & 4 Will. IV. c. 27 (Imp.), which corresponds to s. 305 of the *Property Law Act* 1928 (Vict.), and which requires an acknowledgment "given to" a creditor.

There is thus seen, we think, to be a substantial body of authority in favour of the view that an admission by a bankrupt in his statement of his affairs that a debt is owing to a particular creditor must, if there is no sequestration or the bankruptcy is annulled, be regarded as a sufficient acknowledgment "given to" the creditor concerned, and available as such in subsequent proceedings in which the debtor claims that his debt is barred by a statute which makes time run anew from the date of an acknowledgment given by him to the creditor. The admission has, of course, no effect in a bankruptcy itself, for statute-barred debts are not provable, and statutes of limitation cease to run on sequestration: see *Lightwood, Time Limit on Actions*, p. 154. But in other proceedings not barred by a bankruptcy the better view is that the admission is an effective acknowledgment "given to" the creditor. The reasons stated in the authorities are not very clear, but the reasons are not far to seek. The admission is not made directly to the creditor, but it is made with the intention that it shall be communicated to the creditor and for the purpose of enabling a compromise of rights as between all creditors. Having that intention and that purpose, it is fairly and properly regarded as a statement made to each and every creditor: "I admit to you that I owe you so much, and I inform you that I owe so much to so many other creditors". This view represents, as Sir *Edward Sugden* said, "a just and fair construction of the statute". No distinction can be drawn between an admission made in abortive insolvency or bankruptcy proceedings and an admission made in abortive proceedings under the *Farmers Debts Adjustment Act*. The official who receives the "Proposal for Adjustment" is directed by s. 19 of the Act to communicate it to all the creditors. Admissions contained in the proposal must be regarded as made with the intention that they shall be communicated to the creditors concerned. It seems correct, and in accord with authority, to regard them as acknowledgments given to the creditors. The case is different from that of a will or of an executor's affidavit for probate. Neither a will nor an executor's affidavit is made for the purpose, or with the intention, of its being communicated to creditors.

(1) (1879) L.R. 3 Ir., at p. 82.

For the above reasons we are of opinion that, even if the appellant had relied upon s. 304 of the *Property Law Act* 1928, he would not have been entitled to succeed in the action.

We have said that, in our opinion, that section, and not s. 82 of the *Supreme Court Act* 1928, is the section appropriate to the case. We may add that it was suggested that, while it is well settled that s. 304 applies to equitable mortgages of legal interests, it does not apply to mortgages of equitable interests in land such as that of a purchaser of land under an executory contract of sale. But the cases of *Bowyer* v. *Woodman*; *Ex parte Clarke* (1); *Kirkland* v. *Peatfield* (2) and *Re Fox*; *Brooks* v. *Marston* (3) show that s. 304 applies to cases where the mortgage is of an equitable interest in land, and there seems to be no reason for distinguishing between different classes of equitable interests. It was also suggested that before action brought the legal estate in the land had passed into the hands of a purchaser for value without notice of the deed of 1929, and that therefore at the material time the debt was not secured by a mortgage or charged upon land. But (whether or not the conclusion would follow) the evidence did not establish that the legal estate had passed into the hands of such a purchaser.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Roy Schilling*.

Solicitors for the respondents, *Phillips, Fox & Masel*, agents for *J. Malcolm McKee*, Kerang.

R. D. B.

(1) (1867) L.R. 3 Eq. 313.
(2) (1903) 1 K.B. 756.
(3) (1913) 2 Ch. 75.