THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 1, Ontario.

CASE AND COMMENT

JUDGMENTS IN REM.—The Court of Appeal for British Columbia have held in *Warehouse Security Finance Co. Ltd.*, v. *Oscar Niemi Ltd.*,[1] that a default judgment declaring that a claimant has a woodsman's lien is a judgment in rem and is binding on those who are neither parties to the action nor privies. The consequences of this ruling seem rather far-reaching, especially in view of the reasoning on which it is based.

On an earlier appeal in demurrer proceedings in the same case, the same Court, differently constituted, had held that a woodsman, who has done work within the governing statute for the owner of logs, and who has taken due measures to preserve his lien, has a lien on the logs regardless of whose hands they may come into.[2]

That decision, though probably sound, seemed to go quite far enough, since it could impose real hardship on purchasers of logs who had bought without notice and without adequate means of knowing of liens. But at least one member of the Court, without dissent from the others, had expressed the view that the lien-claimant had to establish his right to the lien as against those in possession who, if they were neither parties nor privies to the action to enforce it, were not bound by a judgment declaring the lien.

The Court's second decision however took a different view, and appears to involve, if logically carried out, that even one

[1] [1944] 3 W.W.R. 567.
[2] 57 B.C.R. 346.

who was the true owner of logs at all material times may find his logs liened by a judgment rendered against anyone at all, even against one who never had a scintilla of interest in the logs, that is he may be bound by a judgment given in an action to which he was no party and to which no one through whom he claims was party, an action that he never heard of.

The Court reached this peculiar conclusion by holding that the judgment was a judgment in rem. Robertson J.A. laid down the principle that any judgment is of this type which directs sale or other disposition of specific property. He relied on a number of admiralty cases, which it is submitted held no more than that a judgment directing sale in an action in rem is a judgment in rem. (Obviously, every judgment in an action in rem, e.g. one for recovery of costs against a party, is not a judgment in rem.) It seems quite impossible however to justify saying that every judgment for sale of property is a judgment in rem, a judgment that binds the world. Sale is often ordered in foreclosure actions; but it does not seem arguable that if a mortgagee obtains an order for sale, this is a judgment in rem, or that it would bind a puisne encumbrancer whom he had overlooked making a party. It seems obvious that such an order merely decides that the mortgagee is entitled to sell as against parties before the Court; and it appears to have no resemblance to a judgment in rem.

Equally it would seem that when a woodsman gets a judgment declaring he has a lien on logs, the judgment decides no more than that he has a lien as against the parties before the Court. To hold that the judgment gives him a lien against the world is to invite him to ignore interested parties who might successfully oppose him and to proceed only against those who have no title and no interest in opposing him.

The Court in the *Warehouse* case seems to have overlooked the essential point that the peculiar practice in admiralty makes all who are interested parties to an action in rem. In England the defendant to an admiralty action in rem is not the ship but the "owners", without identification; all owning any interest are equally served when the writ is nailed to the mast, and all are entitled to defend.

Another consideration that the Court overlooked in comparing the judgment for a lien with a judgment in admiralty was that the judgment for the lien was a default judgment, and a judgment in rem cannot be obtained by default; the plaintiff must prove his case. If the world is to be bound, it can only be bound by proof that the judgment has a foundation in fact.

The *Warehouse* decision is open to the criticism that not only does it leave the real owner of logs open to being deprived of his rights without being heard but he can equally be deprived without there being any proof at any stage of the facts set up.

O'Halloran J.A. also thought a judgment for a lien a judgment in rem, but said that even if he did not, he would hold it good against the world because the statute enacted that:

> . . . the lien shall remain and be in force against the logs or timber in whosesoever possession the same shall be found.

There seems however to be an obvious answer to this reasoning. The lien no doubt is good against anyone when duly proved against him; but there is nothing in the language quoted to suggest that a claim of lien need not be proved against all against whom it will affect, or that one man must admit the claim as soon as any other is precluded from disputing it.

A mortgage is equally good against all into whose hands the mortgaged property may come but that does not relieve the mortgagee from proving as against every interested party that he has got a mortgage.

A. B. C.

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CRIMINAL LAW — RESPONSIBILITY OF CORPORATIONS FOR OFFENCES INVOLVING MENS REA. — Two recent English cases, *Director of Public Prosecutions* v. *Kent & Sussex, Contractors, Ltd.*,[1] and *Rex* v. *I. C. R. Haulage, Ltd.*,[2] provide a measure of the progress of the law in connection with the criminal liability of corporations for offences involving *mens rea*. Except as to offences, such as bigamy, of which a corporation case in no circumstances be guilty, and treason or murder, in respect of which it cannot suffer the punishment provided, a corporation may be found guilty of offences committed by its human agents on a basis which seems to be approaching that upon which it may be held vicariously liable in torts for the acts of its servants.

This is not to say, however, that its criminal responsibility is automatic. To quote the judgment in *Rex* v. *I. C. R. Haulage, Ltd.*, "whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and in cases where the presiding judge so rules whether the

[1] [1944] 1 All E.R. 119, [1944] 1 K.B. 146.
[2] [1944] 1 All E.R. 691.

jury are satisfied that it has been so proved, must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case." Generally speaking then, corporate responsibility for crime is a question of proof of facts adduced in the course of a trial, and the day when an indictment charging a corporation with an offence involving a mental element may be quashed without more is apparently gone.

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WILLS—ABSOLUTE GIFT OR LIFE INTEREST—EFFECTUATION OF GIFT OVER—*Re Hornell*[1] would not be worth mentioning if it simply illustrated the rule that a testator who makes an absolute gift cannot effectively limit a gift over of the same subject matter.[2] But the disposition in that case admitted of an alternative construction that would have given effect to the whole will. The will, drawn by a clergyman upon the testator's instructions, disposed of all the latter's property in favour of his wife "to have and to hold after she pays all legal claims against my estate"; it then continued: "On the death of my wife, what remains of my estate is to go to my daughter". It was held, although not without a dissent on appeal,[3] that the gift over to the daughter failed. The holding was based on a reading of the words "what remains of my estate" as referable to the situation as at the wife's death. But it would seem that a reading of these words in the light of the antecedent clause could reasonably make them equivalent to "what remains of my estate after all legal claims against it have been paid." On this basis, the wife's gift would take effect as a life interest with a good remainder to the daughter.

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WAR—LEASEHOLD REGULATIONS — STRICT CONSTRUCTION AS TO FORMS FOR EVICTION NOTICES.—In *Trager* v. *Talbot*,[1] the Ontario Court of Appeal construed the wartime provisions respecting leaseholds as admitting of no equity even in the use of forms. It held that a landlord who used the wrong form of eviction notice could not regain possession of his premises thereunder, even though the tenant was not misled. This conclusion rested on the wartime policy expressed in a section of the relevant

[1] [1944] D.L.R. 572, [1944] O.W.N. 664; affirmed on appeal, [1945] O.W.N. 17.
[2] *Re Walker* (1925), 56 D.L.R. 517.
[3] Laidlaw J.A.
[1] [1944] 4 D.L.R. 650.

regulations which declare that no tenant may be dispossessed except in certain specified situations. Strict conformity with excepting terms is generally a prerequisite at any time, so that the severe view taken in this case in respect of a form prescribed by wartime legislation is not utterly without justification, especially in the absence of any curative clause stipulating that defects of form shall not defeat substance.

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COMMORIENTES—DEATH IN COMMON DISASTER—STATUTORY PRESUMPTION OF SURVIVORSHIP.—*Re Grosvenor, Peacey* v. *Grosvenor*[1] and *Re Mercer, Tanner* v. *Mercer*,[2] decisions on the English commorientes statute, s. 184 of the law of Property Act, 1925, are relevant in the interpretation of the Ontario Commorientes Act, 1940,[3] which, with some modifications, is an enactment of a "uniformity" statute[4] based on the English provision. Both the English and the Ontario Acts raise a presumption of survivorship of the younger or youngest person where two or more persons die in circumstances "rendering it uncertain which of them survived the other or others." This statutory presumption was created to help resolve difficulties in connection with the devolution of property dependent on the survivorship of a particular person as against another or others who died with him in a common disaster. It was not a basis for a judgment at common law to show merely that the deaths were consecutive, and certainly not if the court was convinced that the deaths were simultaneous; it was necessary to show that the particular person upon whose survivorship the claim depended had in fact survived.[5]

The statutory provision referred to above does not affect the situation where it is proved as a fact that as between two persons who die in a common disaster one survived or did not survive the other. It does clearly apply where proof is made that the deaths occurred consecutively but no evidence is available or forthcoming as to which of the two persons in fact died first or survived the other. Does the statute cover the case where the only conclusion on the evidence is that the deaths were simultaneous? The English Court of Appeal in the *Grosvenor* case answered in the negative, and this conclusion of law bound the

[1] [1944] 1 All E.R. 81.
[2] [1944] 1 All E.R. 759.
[3] 1940 (Ont.) c.4.
[4] See Commorientes (Report of the Ontario Commissioners on Uniformity of Legislation), (1938), 16 Can. Bar Rev. 43, at p. 50.
[5] See Note, (1936), 14 Can. Bar Rev. 503.

single Judge who decided the *Mercer* case, although different results were reached because of a distinction on the facts of the respective cases.

The majority of the Court in the *Grosvenor* case rejected the contention (based on statements in previous cases)[6] that simultaneous death was a legal impossibility. In this connection Lord Greene M.R., stated:

> It was argued. . . . that the possibility of simultaneous death is not recognized by the law upon the ground that, as time is infinitely divisible, it must always be certain that one of two persosn in fact died before the other, although it may, and in most cases of what would popularly be described as simultaneous death it will necessarily be impossible to prove which in fact died first. The statement that time is infinitely divisible was said to be a scientific fact. I should prefer to call it a metaphysical conception. No doubt when a bevy of angels is performing saltatory exercises on the point of a needle it is always possible to find room for one more. But propositions of this character appear to me to be ill-suited for adoption by the law of this country which proceeds on principles of practical common sense.

The practical common sense of the matter will become apparent only as the courts resist any inclination to find simultaneity in the death of two or more persons. Lord Greene admitted that "it is true that simultaneous deaths can only occur in special circumstances". Whether there is simultaneity is a question of evidence sufficient to warrant such a conclusion, in the same way as the questions of consecutive deaths and uncertainty as to which death occurred first are also dependent on evidence sufficient to warrant such conclusions. Distinctions on the facts will thus determine the applicability of the commorientes legislation. In the *Grosvenor* case, the majority of the Court was satisfied that the evidence warranted a conclusion of simultaneity where a number os persons in a small air raid shelter were killed by a direct hit of an enemy bomb. In the *Mercer* case, the conclusion was otherwise, where a husband and wife were killed as the result of the explosion of bombs in the vicinity of their flat which was damaged by fire due to incendiary bombs which were also dropped in the neighborhood, especially when no evidence was adduced as to the room or rooms in which the deceased were when they met their deaths.

[6] *Cf. Re Lindop, Lee-Barber* v. *Reynolds*, [1942] 2 All E.R. 46.