05/74

SUPREME COURT OF VICTORIA

WALDRON (Registrar of Companies) v BIRD

Gillard J

1, 4 February 1974 — [1974] VicRp 61; [1974] VR 497

COMPANIES – DIRECTOR AND SECRETARY OF COMPANY ACTED AS RECEIVER WHEN NOT QUALIFIED TO ACT – CHARGE LAID – 'NO CASE' SUBMISSION UPHELD – CHARGE DISMISSED – "MORTGAGEE OF THE PROPERTY OF THE COMPANY" INTERPRETED BY MAGISTRATE AS A MORTGAGEE OF THE REAL PROPERTY OF COMPANY – FEATURES NECESSARY TO CONSTITUTE A MORTGAGE – WHETHER MAGISTRATE IN ERROR – JUDICIAL NOTICE – WHETHER JUDICIAL NOTICE CAN BE TAKEN OF THE INFORMANT'S SIGNATURE ON THE INFORMATION – PRESUMPTION OF DUE AUTHORITY – PRESUMPTION OF CONTINUANCE – STATUTORY INTERPRETATION – MEANING OF THE WORD "THE" – WHETHER PAYMENT MADE WAS IN PART SATISFACTION OF THE MONEY DUE: *COMPANIES ACT* 1961, SS7(4); 105(1); 187(1); *EVIDENCE ACT* 1958, SS79, 80, 81.

HELD: Order absolute. Dismissal set aside. Remitted for further hearing in accordance with law.

1. In relation to the point which was successful before the Magistrate, it was putting a narrow meaning on the words "a mortgagee of the property of the company" that the property mortgaged must have been real property of the company.

2. The features necessary to constitute a mortgage are threefold: first, there must be a promise by the alleged mortgagor to repay money to the alleged mortgagee or to perform some other obligation; secondly, as security for repayment of such moneys or performance of such obligation, the alleged mortgagor must transfer or assign his estate and interest in property, real or personal, to the mortgagee absolutely; thirdly, to distinguish between an absolute transfer of title and a mortgage, the transfer or assignment must, in order to constitute a mortgage, be subject to a proviso that if and when the alleged mortgagor makes repayment or performs the obligation imposed upon him, the alleged mortgagee will retransfer or reassign the property to the alleged mortgagor.

3. Looking at the document put in evidence in this case it clearly established that the three features necessary to constitute a mortgage were to be found in the document and, accordingly, it must be held that at the material time MGMA Pty Ltd was a mortgagee of property of the Roto Furniture Co Pty Ltd.

4. In the end it came back to whether MGMA Pty Ltd was a mortgagee of the property of the Roto Furniture Pty Ltd. Grammatically, the answer had to be "Yes". By introducing the demonstrative adjective "the", it did not necessarily follow that the whole of the property had to be mortgaged. Indeed, to reach such a conclusion the word "whole" must be inserted between the word "the" and property". There was no justification for making such an implication.

5. Section 81 of the *Evidence Act* 1958 saves any difficulties in the way of the prosecution. Once the Court took judicial notice of the signature, one must look at the document, and on its face it purported to be an information brought by the Registrar of Companies and, according to s81, was a valid and subsisting document. In the absence of evidence that Mr Waldron was not the Registrar of Companies, any supposed objection based upon the informant's lack of qualification disappeared.

6. Quite apart from the *Evidence Act*, at common law the presumption of due authority might well be established in the intrinsic evidence in the document. However, it was unnecessary to come to a concluded view on such last-mentioned matter, because s81 was sufficient to prove and establish a valid and subsisting information by the Registrar of Companies.
***Holland v Jones* [1917] HCA 26; (1917) 23 CLR 149; 23 ALR 165, applied.**

7. *Obiter:* Having regard to the evidence in the account that was filed and having regard to the cheque paid to MGMA Pty Ltd by the defendant on behalf of Roto Furniture Pty Ltd in May 1972, there was little doubt that the proper inference to draw was that that payment was made in part satisfaction of the money due for money secured to MGMA Pty Ltd. In the absence of any evidence of satisfaction, the proper inference should be drawn that the debenture and the collateral security of the mortgage of the chattels had not been satisfied.

GILLARD J: This is the return of an order nisi to review a decision of the Magistrates' Court at Melbourne given on 31 July 1973, when an information brought by Brian Joseph Waldron against Alex Neville Bird was dismissed.

The information on its face purports to be brought by Brian Joseph Waldron, Registrar of Companies, as informant against Alex Neville Bird, 289 Flinders Lane Melbourne, as defendant. The body of the information set out:

> "The information of the above-named informant of Melbourne in the State of Victoria who states that the said defendant, that between on or about [sic] 25 August 1971 and on or about 26 February 1973 at Melbourne in the said State, the defendant acted as receiver of the property of a company namely Roto Furniture Pty Ltd and pursuant to the provisions of s187(1) of the *Companies Act* 1961 was not qualified to act as such and accordingly was guilty of an offence against the said Act pursuant to s379 thereof.
>
> "Particulars of lack of qualification:
> "The defendant was at the material time as a director and secretary an officer of MGMA Pty Ltd being a corporation which was the mortgagee of the property of the said Roto Furniture Pty Ltd".

There then appears at the conclusion of that information a signature of "BJ Waldron, Informant".

In the proceedings before the magistrate a number of points were taken by the defendant at the close of the case for the prosecution. The magistrate determined that the information should be dismissed on a limited interpretation that he gave to s187 of the *Companies Act*. That section provides:

> "The following shall not be qualified to be appointed and shall not act as a receiver of the property of a company:—
>
> (a) A corporation;
>
> (b) An undischarged bankrupt;
>
> (c) A mortgagee of any property of the company an auditor of the company or an officer of the company or of any corporation which is a mortgagee of the property of the company;
>
> (d) Any person who is not a registered liquidator."

The point was taken in the court below that "a mortgagee of the property of the company" should be interpreted to mean a mortgagee of the real property of the company. The stipendiary magistrate upheld this interpretation of par. (c), and as I say dismissed the information. An order nisi was obtained from Master Brett on 12 September 1973 to review that decision on the following grounds:—

> 1. The stipendiary magistrate was wrong in holding that the defendant was not an officer of a corporation which was a mortgagee of the property of Roto Furniture Pty Ltd within the meaning of s187(1)(c) of the *Companies Act* 1961.
>
> 2. The stipendiary magistrate was wrong in holding that s187 of the *Companies Act* 1961 in making use of the word "mortgagee" must be read in accordance with the general law and not expanded to include within its scope other securities and charges over personal property or chattels or property other than real property.

In order to understand the problem posed for the magistrate some short account should be given of the relevant facts. In the court below, counsel for the defendant was quite co-operative with counsel for the prosecution and in consequence there was some little difficulty raised in the proceedings before me of what was actually proved or admitted. However, I think the following four points have been established.

First, it was proved that the defendant was a director of MGMA Pty Ltd from 2 November 1967 to 22 May 1973, and was the secretary of that company from 28 February 1966 to 30 April 1973.

Secondly, it was admitted by the defendant that he issued cheques on behalf of Roto Furniture Pty Ltd; receiver and manager appointed, one on 17 March 1972 and two cheques on 23 May 1972. The signature on those cheques it was admitted was that of the defendant and he purported to sign "for and on behalf of Roto Furniture Pty Ltd, receiver and manager appointed".

The third matter that was established was that Roto Furniture Pty Ltd on 18 June 1971 gave a mortgage over chattels set out in the schedule to the instrument to secure a sum of $3500 lent by MGMA Pty Ltd to Roto Furniture. It would appear that this sum was lent on a debenture or debentures given by Roto Furniture Pty Ltd to MGMA Pty Ltd. This is all set out in recitals to the mortgage document. The document itself makes it clear that it is a collateral security to the debentures, which apparently were given on the same date as the mortgage. The mortgage itself does not set out the date upon which the loan was to be repaid: that is to say, it is not explicitly stated that the loan was to be paid on such and such a date, but it did obligate the grantor to carry out the terms and conditions of the debentures and any breach of those terms should constitute a default under the instrument.

In terms, "Roto Furniture Pty Ltd assigned and transferred unto MGMA Pty Ltd all and singular the chattels and all the right title interest property claim and demand whatsoever in and to the same every or any of them together with full power and authority to MGMA Pty Ltd as attorney of Roto Furniture Pty Ltd to use the name of that company in or concerning any claim demand or proceedings which may be necessary expedient for recovering or obtaining possession of chattels or of any of them or for otherwise carrying the mortgage into full effect". It is stated that "MGMA Pty Ltd is to have and to hold such chattels for its own absolute use and benefit subject only to the proviso for redemption as set out in the document".

On its face it is described as being a "mortgage by way of assignment of chattels" and in my view, that is a proper description of the instrument. Even though it has to be registered under the *Companies Act* as a charge, it does not mean that because it is registered as a charge, therefore it loses its character as a mortgage. In my view, the characterization on the face of the document is an accurate one.

The fourth matter that was admitted was that at all material times Mr Bird, the defendant, had been appointed and acted as the receiver of Roto Furniture Pty Ltd. In opening, counsel for the prosecution stated that he had been appointed on 25 August 1971 and had filed a notice on 19 March 1973 saying that he had ceased to act on 26 February 1973. These facts were never actually proved mainly, in my view, due to the fact that there had been apparently some agreement between counsel as to Mr Bird acting as receiver at the material times with consequence that no specific dates appeared in the evidence or in the admissions. In this court I asked counsel whether those dates were accurate but it appeared that no demand was made of him in the court below to admit those dates. It is, however, sufficient I think for the purpose of this prosecution that the admission was made that at the material time Mr Bird was acting as a receiver.

In my view the ground upon which the magistrate decided this information cannot be upheld. Before me, Mr Buckner who appeared for Mr Bird, the defendant, in the court below, sought to uphold the decision on three other points, viz: First, on the proper interpretation of the sub-section it was necessary for the prosecution to establish that MGMA was the mortgagee of the whole of the property of Roto Furniture Pty Ltd. Secondly, it was submitted that there was no evidence that the information was brought by a qualified informant under the provisions of s381(1) of the *Companies Act* 1961.

Thirdly, it was submitted that there was no proof that at the time when the acts relied upon by the prosecution were committed the mortgage given in June 1971 was still in existence. I now intend to deal with these three points and the further submission which found success with the magistrate, namely, that on its proper interpretation s187(1)(c) referred to a mortgagee of real property only and did not comprehend a mortgage of chattels or a charge or a conditional bill of sale.

Dealing first with the point which was successful in the court below, it seems to me that it is putting a narrow meaning on the words "a mortgagee of the property of the company" that the property mortgaged must be real property of the company. As McTiernan J pointed out in

Minister of State for the Army v Dalziel [1944] HCA 4; (1943) 68 CLR 261, at p295; [1944] ALR 89, referring to the word "property" in s51(xxi) of the *Constitution*, his Honour said: "The word 'property' in s51(xxxi) is a general term. It means any tangible or intangible thing which the law protects under the name of property." In that case, Sir John Latham had pointed out certain difficulties arising from the word "property", but he does not really dissent from the statement of McTiernan J "property" connotes not only real estate but any chose in action or chattel interest. The only limitation that one can find is that there are some intangible things which the law will not protect and, accordingly, they can not be characterized as property rights.

In this case it is unnecessary to delve into those fields of discussion. Clearly, on the face of the document, it is an assignment, absolute in terms, of the chattels set out in the schedule to the document. Furthermore, it appears that that assignment is made as security for repayment of a loan of $3500 made by MGMA Pty Ltd to Roto Furniture Pty Ltd. It also appears clear that in terms that absolute assignment is subject to the provision for redemption.

In *Santley v Wilde* [1899] 2 Ch 474, at p474 Sir Nathaniel Lindley MR, said this:

> "A mortgage is a conveyance of land or an assignment of chattels as security for the payment for a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and that security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law."

Although the actual decision of *Santley v Wilde* was subsequently overruled in the House of Lords that description by Lord Lindley of what constitutes a mortgage has never been dissented from. The features necessary to constitute a mortgage are threefold: first, there must be a promise by the alleged mortgagor to repay money to the alleged mortgagee or to perform some other obligation; secondly, as security for repayment of such moneys or performance of such obligation, the alleged mortgagor must transfer or assign his estate and interest in property, real or personal, to the mortgagee absolutely; thirdly, to distinguish between an absolute transfer of title and a mortgage, the transfer or assignment must, in order to constitute a mortgage, be subject to a proviso that if and when the alleged mortgagor makes repayment or performs the obligation imposed upon him, the alleged mortgagee will retransfer or reassign the property to the alleged mortgagor.

From very early times, Courts of Equity have sought to protect the mortgagor's interest which in the Courts of Chancery in the course of time became known as the equity of redemption. In effect, the document or the instrument transferred the legal estate from the mortgagor to the mortgagee, but the beneficial interest was protected in a court of Equity and the Security given remained only with the mortgagee subject to such beneficial interest, or, as it is put, subject to the equity of redemption.

In argument before me, it was suggested that there was a distinction to be drawn between a mortgage and a bill of sale. Historically, bills of sale became quite common during the last century in England, and became the vehicles of fraud. In order to overcome this reprehensible conduct by a number of people, legislation was introduced whereby bills of sale were required to be registered in order to give them validity. With the passage of the years there have been various amendments as to what constitutes a bill of sale. I have little doubt that a mortgage of chattels such as here would constitute a conditional bill of sale which would require registration under the *Instruments Act* if it were not for the provisions of the *Companies Act* which relieve a company from registering the document under the *Instruments Act*, but requiring it to be registered under the Companies Act: see, for example, *Re Standard Manufacturing Co* [1891] 1 Ch 627; [1891-4] All ER Rep 1242.

In my view, it tends to confuse the proper interpretation of s187(1)(c) to introduce the distinctions that can be drawn between the three instruments referred to above, namely a mortgage, a charge and a bill of sale. In each case that comes before the Court, in order for the instrument to constitute a mortgage, it must demonstrate the three features I have ventured to set out above. There is nothing in s187(1)(c) which requires that the mortgage should be of real estate only. I repeat, and again refer to the fact that it is "the property of the company" which is mentioned in s187(1)(c).

A mortgagee therefore referred to in s187(1)(c) in my opinion means at least the assignee

or transferee of any property, real or personal, given by way of security on an assurance whereby there is provision for redemption of such property on repayment of the moneys lent. There is no valid reason why the expression should be limited to "mortgagee of the real estate" only.

Looking at the document put in evidence in this case it is clearly established that the three features necessary to constitute a mortgage were to be found in the document and, accordingly, it must be held that at the material time MGMA Pty Ltd was a mortgagee of property of the Roto Furniture Co Pty Ltd. I have deliberately left out the demonstrative adjective or definite article "the" before the word "property" in that statement because that brings me to the second point that was argued before me and which had been overruled in the court below.

It was urged that since in the first part of s187(1)(c) reference is made to a "mortgagee of any property of the company", it is implied that when one comes to the concluding words of the paragraph, "a mortgagee of the property of the company", a distinction is intended to be drawn. It was said that a mortgagee of "the" property of the company must mean a mortgagee of the whole of the property of the company. The use of the word "the" in English writing is frequently equivocal. The demonstrative adjective quite frequently acquires a difference of meaning in actual speech by emphasis upon the word used. I, however, have come to the conclusion that the statement in Wallace and Young on *Company Law* at p568 where they, in effect, state that the word "the" means "any" is correct. The authors insert after the word "the", "scilicet" which of course means "namely" and then insert the word "any" as being the proper interpretation of "the".

However, it was pointed out to me that under the English legislation in s366 and s367 similar disqualifications appear as provided in s187. In s376(a) of the *Companies Act* 1945 in the United Kingdom it is provided as follows:

> "It is hereby declared that except where the context otherwise requires any reference in this Act to Receiver or Manager of the property of a company or to Receiver thereof includes a reference to a Receiver or Manager as the Case may be—to Receiver, of part only of that property and Receiver only of the income arising from the property or from part thereof."

It was therefore urged that although our section in 1961 was copied from the English legislation, we did not introduce a necessary part of the English legislation which made it clear that "the property" could connote a part of the whole property.

Overnight I have had an opportunity of looking at our legislation and I discover that it is in practically the same terms in the 1958 Act in s81 and that section in turn was a copy of s4(2) of the 1931 Act No. 4005. So it becomes quite apparent that our legislation was developed quite independently of the English legislation and in the end, I find that I can get no comfort or assistance from considering the English legislation.

In the end it comes back to whether MGMA Pty Ltd was a mortgagee of the property of the Roto Furniture Pty Ltd. In my view, only one answer can be given to that question. Grammatically, the answer must be "Yes". By introducing the demonstrative adjective "the", it does not necessarily follow that the whole of the property had to be mortgaged. Indeed, to reach such a conclusion the word "whole" must be inserted between the word "the" and property". I can find no justification for making such an implication and, accordingly, I agree with the view expressed by the authors Wallace and Young.

The third matter that was argued before me, and I now intend to deal with it, is that there was no proof that the information was brought by the Registrar under the provisions of s381(1) of the *Companies Act* 1961. That sub-section provides:

> "Except where provision is otherwise made in this Act proceedings for any offence against this Act may be taken by the Registrar or with the written consent of the Minister by any person."

The first matter to draw attention to is how proceedings for an offence are taken. Under s18 of the *Justices Act* 1958 proceedings in the magistrates' court are commenced by an informant appearing before a justice of the peace with a signed information. Strictly, the magistrate before whom the information is laid should read it to see that it is in proper form and he then issues his summons requiring the attendance of the defendant to answer the information. Indeed, the justice

issuing might require the informant to lay the information with an oath. The only prerequisite other than taking that oath, which of course is in the discretion of the justice, is that the informant must sign the information.

In this case, as I pointed out right at the beginning of this judgment, the information appears to be in proper form signed by the informant, but it was strongly urged that there was no proof that the person signing the document was in fact the Registrar of Companies, albeit he is so described in the document itself. My attention was drawn to a number of cases and, in particular, to the concluding words of s79 of the *Evidence Act* 1958. In effect, it was said the Court may take judicial notice of the signature of the Registrar of Companies if and when it was proved who was the Registrar of Companies. There is no provision, as in s79, that judicial notice must be taken of the fact that Mr Waldron holds the office of Registrar of Companies. I agree that is the state of the statutory provisions.

On the other hand, however, there is provision in the *Companies Act* in s7(4) as follows:

> "All courts judges and persons acting judicially shall take judicial notice of the seal and signature of the Registrar and of any Deputy or Assistant Registrar."

It was strongly submitted on behalf of Mr Bird that that sub-section could not apply to these proceedings. First, it was said, as I have already noted, that there is no proof that Mr Waldron was the Registrar of Companies and therefore there could be no proof that it was the signature of the Registrar of which judicial notice was to be taken.

Secondly, it was submitted that courts and persons acting judicially are only bound to take judicial notice when both the seal and signature of the Registrar appears in a document. If this view is correct, then of course this prosecution must fail.

It seems to me that since judicial notice is to be taken of the seal and signature those are two distinct and different acts, and there is no requirement in the section that a court should only take judicial notice when the two appear together. It was submitted that it would be quite improper to read the conjunction "and" disjunctively. In my view, it is not reading the word "and" disjunctively to say that judicial notice shall be taken of each of the two acts. There is no requirement, in my opinion, that the two must exist together before you take judicial notice of the signature. This seems to be in line with the view that McInerney J, took in the case of *Reddy v Ross* [1973] VicRp 46; [1973] VR 462 at p465. Whilst I am a little dubious as to the correctness of the view that a court is required to take judicial notice of the identity of the person who at the relevant time holds the office concerned, nevertheless his Honour's view as to Judicial notice of the seal and signature of the Chief Commissioner accords with my own view on the proper interpretation of that expression. I agree with Mr Buckner that this statement of his Honour might be regarded as *obiter dictum*, but having regard to his great experience in this rubric of the law, I am content to follow McInerney J's *dictum*.

Once that conclusion is reached, then I think the remainder of Mr Buckner's submission, interesting and ingenious though it was, can carry little weight, because, in my view, once judicial notice may be taken of the signature of the Registrar, then s80 and s81 of the *Evidence Act* remove any of the difficulties the prosecution might be faced with.

A good deal of attention has been paid by Mr Buckner as to the doctrine of judicial notice, and over the week-end he has obviously taken advantage of the suggestion I made on Friday of looking at the cases in the High Court. Not only has he done that, but he has also looked at cases in the Full Court of Queensland and cases in the United Kingdom. But as I say, I am of opinion that most of the learning that he gave me is of little value as against the provisions of s80 and s81 of the *Evidence Act*.

By s80 it is provided:

> "Where by or under any Act it is provided in effect that all courts or all courts of justice shall or may take judicial notice of any seal, stamp or signature or any other matter or thing, then all courts and persons acting judicially shall or may take judicial and official notice of such seal, stamp, signature or other matter or thing."

This is a somewhat extraordinary piece of legislation. Already there is apparently some statutory provision for taking judicial notice of certain things and certain acts. Why was it necessary therefore to reintroduce this into the *Evidence Act*? The answer to that question appears from the succeeding section, which provides (leaving out immaterial portions):—

> "Where under this or any other part of this Act, (including cases falling under the last preceding section) any court or person acting judicially has taken judicial or official notice of any signature attached or appended on or to any document if according to the law in Victoria such signature might properly have been attached or appended on or to such document, such court or person shall in the absence of any evidence, matter or thing suggesting the contrary presume that such signature was properly attached at the time and place purporting to be the time and place at which it was so attached and that there was jurisdiction or authority to sign such document at such time and place and that such document is what on its construction it purports to be and is a valid and subsisting document."

It seems to me that that section saves any difficulties in the way of the prosecution. Once the Court takes judicial notice of the signature, one must look at the document, and on its face purports to be an information brought by the Registrar of Companies and, according to s81, is a valid and subsisting document. In the absence of evidence that Mr Waldron was not the Registrar of Companies, it seems to me that any supposed objection based upon the informant's lack of qualification disappears.

Quite apart from the *Evidence Act*, however, having looked at *Holland v Jones* [1917] HCA 26; (1917) 23 CLR 149; 23 ALR 165, and the cases cited there, it seems to me that even at common law the presumption of due authority might well be established in the intrinsic evidence in the document: see *Howell v Wilkins* [1828] EngR 410; 108 ER 916; (1828) 7 B & C 783, cited by Isaacs J in *Holland v Jones*. It is unnecessary to come to a concluded view on such last-mentioned matter, because, in my opinion, s81 is sufficient to prove and establish a valid and subsisting information by the Registrar of Companies.

The fourth matter that was argued before me was that there was insufficient evidence of the existence of the mortgage at the time that the acts relied upon by the prosecution occurred, that is to say, by the issue of the three cheques in March and May 1972. I was inclined to leave this to the magistrate to determine if I thought the case should be sent back, but I have considered the matter over the week-end and I have analysed the evidence, and, in my view, there is sufficient evidence to establish the facts challenged.

The registration of the charge under the *Companies Act* shows that the mortgage by way of assignment was given on 18 June 1971 to secure repayment of $3500 lent by MGMA Pty Ltd to Roto Furniture Pty Ltd. There is no entry of satisfaction of the mortgage apparently by the company under s105(1). It will be seen that there is no requirement to register a satisfaction, but it is significant that there was no cross-examination of the prosecution witness touching this question, and this in itself leads one to be very suspicious of the defence saying that the mortgage was no longer in existence at the time of the alleged acts proved by the prosecution.

In the circumstances of this case, accordingly, I think one could more readily invoke the presumption of continuance: see *R v Sharp* (1863) 2 SCR (NSW) 150 and *Pepper v Tuomy* (1926) 32 ALR 300; 48 ALT 53.

I respectfully adopt the views expressed by Walsh JA, in *Donoghue v St Luke's Hospital Pty Ltd* [1969] 2 NSWR 647, where he said at p657:

> "In the circumstances of this case, I think it is unnecessary to refer to the cases concerning the presumption of continuance, or concerning the circumstances which may operate retrospectively. In my opinion, these are really no more than a recognition that there was a situation in which, by a process of reasoning and inference, a fact may be found to exist at a particular time, without direct proof of its existence then, because of its proved existence at another point of time either earlier or later." (Compare *Purex Corporation and Co v Vanguard Trading Co* [1965] HCA 10; 112 CLR 532; (1965) 38 ALJR 436.)

Having regard to the evidence in the account that was filed and having regard to the cheque paid to MGMA Pty Ltd by the defendant on behalf of Roto Furniture Pty Ltd in May 1972,

I would have little doubt that the proper inference to draw was that that payment was made in part satisfaction of the money due for money secured to MGMA Pty Ltd. The *dictum* of Walsh J, accordingly, is apposite to the present case. In the absence of any evidence of satisfaction, it seems to me the proper inference should be drawn that the debenture and the collateral security of the mortgage of the chattels had not been satisfied. Accordingly, having those views, nothing that I have heard this morning should prevent my expressing them.

Accordingly, on the two grounds set out in the order nisi, the order nisi must be made absolute with costs, and order below quashed. Since the proceedings failed at the conclusion of the prosecution on an application that there was no case to be answered, obviously it must be sent back to the magistrate to continue with the hearing of the information.

The defendant, of course, will have to pay the costs of the order to review which, having regard to the statutory limit contained in the *Justices Act*, are fixed at $200. I will grant the defendant an indemnity certificate under the *Appeal Costs Fund Act*. Order nisi made absolute with costs. Information remitted for further hearing.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: Frederick Owen and Associates.
