

[COURT OF APPEAL.]

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* YEOMAN CREDIT LTD. v. LATTER.

1961
Mar. 22, 23,
24.Holroyd
Pearce,
Harman and
Davies L.JJ.

Guarantee—Indemnity or guarantee—Hire-purchase agreement—Indemnity against loss—Infant's contract—Car—Default by infant—Adult's undertaking to reimburse finance company.
Practice—Preliminary point—Indecisive of substantial issue—Whether procedure appropriate.

A finance company let a car on hire-purchase to an infant. An adult signed a form headed "Hire-purchase indemnity and undertaking" in which the adult by clause 1 undertook to indemnify the finance company against any loss resulting or arising out of the hire-purchase agreement. The adult did not obtain full rights of subrogation under the undertaking but only those which the finance company chose to allow. By clause 2 the adult agreed to pay the finance company such amount as would make up the sums paid by the hirer to the total amount of hire payable under the agreement and the price of the option together with any expenses incurred by the finance company in enforcing the agreement. Clause 3 provided that if the car had come into the company's possession, they should either give the adult credit for any amount which they realised on sale or transfer the car to the adult after payment in full by him.

The infant defaulted. The finance company repossessed the car and sold it. They then claimed against the adult the amount due under the undertaking. On a preliminary point as to whether the document was a guarantee which, since it guaranteed a void contract, was itself void:—

Held, (Davies L.J. *dubitante*) that on its true construction, the undertaking was in truth a contract of indemnity and not a contract of guarantee, and, accordingly, the indemnity undertaking was prima facie enforceable (post, pp. 834-835, 836).

Per Harman L.J. It is only when a preliminary point will decide the substantial question at issue between the parties that a matter of law can usefully be raised as a preliminary point (post, p. 835).

APPEAL from Judge Gage sitting at Southend County Court.

The plaintiffs, Yeoman Credit Ltd., a finance company, by a hire-purchase agreement dated January 14, 1959, let a car on hire-purchase to the first defendant, Terry Brian Robert Latter, who was at that date an infant. As the hirer was under 21, an adult was required to sign a special form of indemnity, and the second defendant, Clifford Owen, signed a form headed "Hire-purchase indemnity and undertaking."

The first defendant paid the initial payment of £55 10s. on the hire-purchase price of the car which was £668 18s. He paid no instalments and in May, 1959, the plaintiffs repossessed the car and sold it for £430. In September, 1959, the plaintiffs claimed £182 8s. from the second defendant the amount due under the indemnity. The second defendant failed to pay and the plaintiffs commenced proceedings. The county court judge

tried as a preliminary issue the questions, first, whether the hire-purchase agreement between the plaintiffs and the first defendant was void under the Infants Relief Act, 1874, and secondly, if so, whether the second defendant could be held liable to the plaintiffs under his agreement to indemnify them for any loss arising out of or resulting from that void agreement with the first defendant. On the first question the judge held that the hire-purchase agreement was not a contract for necessities and was, therefore, void under section 1 of the Infants Relief Act, 1874. On the second question the judge held that the undertaking by the second defendant was a guarantee and therefore, following *Coutts & Co. v. Browne-Lecky*,¹ as the principal agreement was void, the guarantee was also void. The judge therefore decided the preliminary point in favour of the second defendant and gave judgment in his favour.

The plaintiffs appealed.

The relevant facts are more fully stated in the judgment of Holroyd Pearce L.J.

Neil Lawson Q.C. and *John Lloyd-Eley* for the plaintiffs.

E. H. Laughton-Scott for the second defendant.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Macgregor v. Dover and Deal Railway Co.*²; *Eldridge and Morris v. Taylor*³; *Temperance Loan Fund Ltd. v. Rose*⁴; *Harris v. Huntbach*⁵; *Valentini v. Canali*⁶; *Birkmyr v. Darnell*⁷; *Gordon v. Martin*⁸; *Guild & Co. v. Conrad*⁹; *Harburg India Rubber Comb Co. v. Martin*¹⁰; *Chambers v. Manchester and Milford Railway Co.*¹¹; *Nottingham Permanent Benefit Building Society v. Thurstan*¹²; *Reg. v. Wilson*¹³; *Read v. Anderson*.¹⁴

HOLROYD PEARCE L.J. This is the plaintiffs' appeal from a judgment of Judge Gage at Southend County Court dismissing, on a preliminary point of law, the plaintiffs' claim for £182 8s. against the second defendant

The plaintiffs are a finance company. By a hire-purchase agreement dated January 14, 1959, they let a car on hire-purchase to the first defendant who was then, as all the parties were aware, an infant. Printed at the end of the hire-purchase agreement is a form of guarantee securing the performance of all

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¹ [1947] K.B. 104; 62 T.L.R. 421; [1946] 2 All E.R. 207. ⁸ (1731) Fitzg. 302.
² (1852) 18 Q.B.(n.s.) 618. ⁹ [1894] 2 Q.B. 885; 10 T.L.R. 549, C.A.
³ [1931] 2 K.B. 416; 47 T.L.R. 516. ¹⁰ [1902] 1 K.B. 778; 18 T.L.R. 428, C.A.
⁴ [1932] 2 K.B. 522, C.A. ¹¹ (1864) 5 B. & S. 588.
⁵ (1757) 1 Burr. 373. ¹² [1903] A.C. 6; 19 T.L.R. 54, H.L.
⁶ (1889) 24 Q.B.D. 166; 6 T.L.R. 75, D.C. ¹³ (1879) 5 Q.B.D. 28, C.C.R.
⁷ (1704) 1 Salk. 27. ¹⁴ (1884) 13 Q.B.D. 779, C.A.

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the terms by the hirer, and upon his default accepting liability as if the guarantor had been the hirer. At the foot of the form are printed the words: "Note. If the hirer is under 21 an adult " must sign a special form of indemnity." Since the hirer was in this case under 21, the second defendant signed a more lengthy and complicated form headed: "Hire-purchase indemnity and " undertaking."

The hire-purchase price of the car was £668 18s. The initial payment of £55 10s. was paid. Forty-eight monthly instalments of £12 15s. 2d. were payable, but the hirer never paid any of them. In May, 1959, the plaintiffs repossessed the car and sold it for £430. In June, 1959, the hirer went on military service to Hongkong. In September, 1959, the plaintiffs demanded from the second defendant £182 8s., being the amount due under the indemnity. They then started these proceedings against him, claiming that sum. They also sued the hirer as first defendant, since by then he had reached his majority. But they never served him. The sum for which the first defendant would be liable under the terms of the hire-purchase agreement in the events that had happened was £278 19s., a sum which differs not only in amount, but also in its method of calculation from the liability of the second defendant under his indemnity. It is admitted that the hire-purchase agreement was not a contract for necessaries.

Before the Infants Relief Act, 1874, the contract would have been voidable, and the contract of indemnity would admittedly have been enforceable. But section 1 of that Act provides: "All " contracts, whether by specialty or by a simple contract, hence- " forth entered into by infants for the repayment of money lent " or to be lent, or for goods supplied or to be supplied (other than " contracts for necessaries), and all accounts stated with infants, " shall be absolutely void: Provided always, that this enactment " shall not invalidate any contract into which an infant may, by " any existing or future statute, or by the rules of common law or " equity, enter, except such as now by law are voidable." The hire-purchase agreement was, therefore, void under the Act.

In the county court it was argued by the second defendant as a preliminary point that the indemnity, though so called, was really a guarantee, and that since it guaranteed a void contract it was itself void on the reasoning and authority of Oliver J., who held in *Coutts & Co. v. Browne-Lecky*¹ that since a guarantee is by definition an obligation to answer for the debt, default or miscarriage of another, there cannot, in respect of a void contract, be any debt, default or miscarriage to answer for.

There are, therefore, two questions raised by this appeal. First, is the document in question a guarantee although styled an indemnity? And, if it is a guarantee, is it void? In its widest sense a contract of indemnity includes a contract of guarantee. But in the more precise sense used in various cases dealing with

¹ [1947] K.B. 104; 62 T.L.R. 421; [1946] 2 All E.R. 207.

section 4 of the Statute of Frauds, 1677 (and used in the arguments in this case), a contract of indemnity differs from a guarantee. An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promisee.

Mr. Laughton-Scott, for the second defendant, in an able argument, admits that if the so-called indemnity in this case is in truth a contract of indemnity, he cannot, on the authorities, claim that it was void. If, however, it is in essence a guarantee, then the judge was right in regarding himself as bound by *Coutts v. Browne-Lecky*,² and this court should hold likewise unless it takes the view (for which Mr. Lawson contends) that that case was wrongly decided. Mr. Lawson argues that it is out of accord with other authorities, and that we should accept the view taken in certain cases that the guarantor of a void contract may yet be liable, a view which is in accord with that taken by the civil law.

The document in question is headed and described as " Hire-purchase indemnity and undertaking." It is clear from the wording of the document and the surrounding circumstances that it was intended to be something more than a mere guarantee. This tells in favour of its being in truth an indemnity. However, I agree with Mr. Laughton-Scott that we must have regard to its essential nature in order to decide whether or not it is really no more than a guarantee. Its ultimate object, of course, was to ensure that the plaintiffs received back with profit the money that they had laid out in the transaction; but that ultimate object is shared by guarantee and indemnity alike. It is the method by which that object is attained which decides the class to which the document belongs.

Its material words are as follows: " I undertake and agree as follows: (1) To indemnify you against any loss resulting from or arising out of the agreement and to pay to you the amount of such loss on demand and whether or not at the time of demand you shall have exercised all or any of your remedies in respect of the hirer or the chattels but so that upon payment in full by me of my liabilities hereunder I shall obtain such of your rights as you may at your discretion assign to me." Thus, under paragraph 1 the second defendant does not obtain the full rights of subrogation to which a guarantor is by law entitled, but only such rights of subrogation as the plaintiffs may choose to allow. The second defendant does, however, under clause 3 (as will be seen) get valuable rights of a nature different from subrogation. Clause 2 reads: " The amount of your loss for the purpose of this indemnity whether or not the agreement shall have been terminated by any party thereto shall be the total amount which the hirer would have had to pay under the agreement to entitle him to exercise the option of purchasing the chattels

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² [1947] K.B. 104.

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“ plus all expenses you may incur in the exercise or enforcement of your rights under the agreement . . . less the amount actually paid to you under the agreement by the hirer.” By that clause the second defendant is assuring to the plaintiffs such amount as will make up the sums paid by the hirer to the total amount of hire payable under the agreement, and the price of the option together with any expenses incurred by the plaintiffs in enforcing the agreement. Clause 3 provides that if the car has come into the plaintiffs’ possession, they shall either give the second defendant credit for any amount which the plaintiffs realise on the sale of it, or shall, after payment in full by the second defendant of the full sum due, transfer the car to the second defendant so that he can sell it and keep the proceeds.

One may sum up the effect of the document in question as this: It protects the plaintiffs against any loss they may suffer since it assures to them the full sum of the hire-purchase price, plus any costs incurred by them in enforcing the hire-purchase agreement. Thus the rights of the second defendant (if called upon to pay) are different from the rights of subrogation under a guarantee, rights which would, in such a case as this, be useless. Moreover, whereas the plaintiffs’ rights against the hirer and the second defendant would, under a normal guarantee, be identical, the document in question gives to the plaintiffs wholly different rights from those which they have against the hirer under the hire-purchase agreement. In some circumstances the plaintiffs’ rights against the hirer may be higher than those against the second defendant, and in some circumstances lower.

If, as happened in the present case, the plaintiffs seize the car on default and sell it for a good price, the hirer’s liability will be greater than that of the second defendant. Against the hirer the plaintiffs can claim under clause 7 of the hire-purchase agreement such sum as will make up the sums already paid by the hirer to half the purchase-price as agreed compensation for depreciation; but they need not give any credit for the value or proceeds of the car which they have seized. Against the second defendant, however, they can claim the total hire-purchase price plus expenses of enforcement, but they must give credit for the whole proceeds of the car. Hence the substantial difference between the respective sums claimed in this action against the first and second defendants. This difference is caused solely by the difference between the plaintiffs’ rights under the indemnity and the hire-purchase agreement.

If, however, the hirer had determined the agreement himself when he had paid sums amounting to half the hire-purchase price, and if the car had failed to fetch as much as half the hire-purchase price, falling short of it by, say, £100 (which it might have done) then the hirer would have had to pay nothing under the hire-purchase agreement, while the second defendant would have had to pay £100. Moreover, in the latter instance

the hirer would have been guilty of no debt, default or miscarriage, yet the second defendant would have to pay £100 under the indemnity. Mr. Laughton-Scott argues that the mere fact that in occasional circumstances such a result may be produced does not destroy the essential nature of the agreement in question, which is to answer for the debt, default or miscarriage of another. Nevertheless, it raises a strong suspicion that that may not really be its essential nature.

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Further, the agreement does not provide that the second defendant shall make good the particular defaults of the hirer. If the hirer fails to pay the instalments, no recourse can be had to the second defendant for those instalments. None of the actual obligations of the hirer can, if he defaults, be enforced against the second defendant. Only if the totality of the transaction produces either a loss, or a profit less than that which the total hire-purchase price would have yielded can the second defendant be asked to pay. And, if he is asked to pay, the fact that the hirer has made no default is no defence. For it is irrelevant to the calculations on which the second defendant's liability is based. And that liability may well arise from a lawful return of the car by the hirer coupled with a fall in the price of secondhand cars. The agreement is in truth (as clause 1 states) an indemnity against "any loss resulting from or arising out of "the agreement," and not a surety against loss resulting from particular breaches of the agreement.

All these considerations point strongly towards the agreement being what it claims to be, namely, an indemnity. The surrounding circumstances (so far as one can gather them in the absence of the evidence) also support that claim. The parties were, it would seem, all aware of the legal difficulty created by the hirer's infancy. Hence the necessity for this special form of indemnity. That circumstance, as well as the wording of the document, makes it improbable that the transaction was intended as a guarantee of particular obligations if, as appears, they were known not to be binding against the infant. These assumptions, however, may thereafter be shown by the evidence to be incorrect.

In the leading case of *Lakeman v. Mountstephen*³ the plaintiff, a contractor, was failing to do certain sewage work because he was not sure that the Board of Health would pay for it; and the defendant, who wanted the work to be done, said: "Mountstephen, go and do the work, and I will see you paid." The House held that these words did not constitute a promise to pay the debt of another, and that they were rightly left to the jury as evidence of a primary obligation on the defendant. Lord Selborne said⁴: "There can be no suretyship unless there be a "principal debtor, who of course may be constituted in the course "of the transaction by matters ex post facto, and need not be so "at the time, but until there is a principal debtor there can be no "suretyship. Nor can a man guarantee anybody else's debt

³ (1874) L.R. 7 H.L. 17, H.L.⁴ *Ibid.* 24, 25.

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“ unless there is a debt of some other person to be guaranteed
 “ The tendency, therefore, of any view of this contract which
 “ would place it in the position of a guarantee for a future
 “ liability to be undertaken by the local board, would be abso-
 “ lutely to defeat the whole purpose of the communication, which
 “ was to remove a difficulty then pressing upon the mind of the
 “ contractor, as to whether or not he had sufficient authority from
 “ anyone to go on with the work; and the answer was given in
 “ terms de praesenti for the express purpose of inducing him at
 “ once to go on.” In the present case the agreement is more
 consistent with a primary obligation on the second defendant to
 secure the plaintiffs against loss if the transaction should turn out
 unremunerative rather than a secondary obligation to make good
 the particular defaults of the hirer.

In *Wauthier v. Wilson*⁵ a father and infant son signed a joint
 and several promissory note, the father joining as guarantor.
 Pickford J. had held that the debt against the infant was void,
 but that, nevertheless, a guarantor of it remained liable on the
 authority of a decision of Kay J. in *Yorkshire Railway Wagon Co.*
v. Maclure.⁶ The Court of Appeal⁷ (without expressly dis-
 agreeing with the trial judge) preferred to take a different view.
 Farwell L.J. said⁸: “. . . if Mr. Newbolt’s contention that this
 “ was a case of a guarantee were to prevail it would follow that
 “ these three parties deliberately sat down to enter into an
 “ arrangement under which money was to be advanced on a
 “ promissory note on which no one was liable at all, there being
 “ no one liable as principal and therefore no one liable as
 “ surety.” And later Farwell L.J. said⁹: “ That seemed to him
 “ [the Lord Justice] to be the plain meaning of the transaction,
 “ on the assumption that the plaintiff knew that the son was
 “ under age; and it followed that, in his [his Lordship’s] opinion,
 “ the father acted as principal and incurred liability as principal.”

I would take a somewhat similar view of the transaction in
 the present case in the absence of any evidence to the contrary.
 The second defendant was in effect saying to the plaintiffs: “ Go
 “ on with the transaction, and I will see you make your profit and
 “ suffer no loss.” No doubt it was hoped that the hirer would
 fulfil his obligations, although not legally bound by them. But
 the second defendant was not purporting to guarantee or make
 good any particular obligation of the hirer. Under the terms of
 his agreement he had no liability to do so. His liability was to
 see that the plaintiffs made their intended profit even though the
 hirer lawfully, without any default, terminated the hiring. He
 was underwriting the profitable success of the transaction, he was
 not insuring against contractual breaches of it by the hirer.

For those reasons, the agreement was not a contract of guaran-
 tee, but a contract of indemnity. It is, therefore, unnecessary

⁵ (1912) 28 T.L.R. 239, C.A.⁸ Ibid.⁶ (1881) 19 Ch.D. 478.⁹ Ibid.⁷ 28 T.L.R. 239.

to decide whether the decision in *Coutts & Co. v. Browne-Lecky*¹⁰ was rightly decided. That matter has been well argued on both sides, and is clearly not free from difficulty, but I need express no view upon it.

In my judgment the second defendant's preliminary point of law fails, and the case must go back to be heard on the facts.

HARMAN L.J. I cannot help feeling that in this case the joint and well-meant persuasions of counsel led the county court judge up the garden path to this preliminary point of law. He was unwilling, as he said, to decide it, and in my judgment rightly so, for it is only when a preliminary point of law will decide the substantial question at issue between the parties either way it be decided that such an expedient can ever be really useful. The way in which the county court judge decided the point, of course, put an end to the suit; but this court taking a different view, the case will no resume its meandering course when by now it might well have finished if the straight road had been taken in the first place.

However that may be, I cannot but admire the courage with which the judge faced the real difficulties of the present situation. He preferred to let himself decide the question whether this contract was one of guarantee or indemnity. It seems to me a most barren controversy. It dates back, of course, to the Statute of Frauds, and has raised many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public. Nevertheless, this difficulty persists, and the decided cases on the subject are hardly to be reconciled.

Where all concerned know that the first promisor is an infant, so that as against him the promise cannot be enforced, the court should incline to construe the document signed by the adult (the second promisor) as an indemnity, for that must have been the intention of the promisee and the second promisor. Both know that the first promise has no legal validity; it may be that both hope that the first promisor will honour his engagement, but with the knowledge that he cannot be obliged to do so it must have been their intention that the promise of the adult promisor should have an independent validity. Otherwise the whole transaction is a sham. This is what led the Court of Appeal in *Wauthier v. Wilson*¹¹ to decide as it did. That case is inadequately reported, and we do not know the form of document involved. Pickford J.¹² at first instance treated the position of the father as that of guarantor, and was, therefore, troubled with the difficulties involved in the division of opinion apparent from the cases—*Swan v. Blair*¹³ on the one side, and Kay J. in *Maclures'* case¹⁴ and Lawrence J.'s decision in *Garrard*

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¹⁰ [1947] K.B. 104.¹¹ 28 T.L.R. 239.¹² 27 T.L.R. 582.¹³ (1835) 3 Cl. & F. 610, 635.¹⁴ 19 Ch.D. 478.

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v. *James*.¹⁵ on the other. But the Court of Appeal cut the knot by holding that the father's promise was an independent contract enforceable without regard to the invalidity of that of the infant. If Oliver J. had felt free to take a like course in *Coutts & Co. v. Browne-Lecky*¹⁶ he would not have been troubled with the same doubts as afflicted Pickford J.

Starting from this premise I approach the document between the plaintiffs and the second defendant in the present case, and I find that upon its true construction this is clearly a document of indemnity. It so styles itself. It was clearly meant so to be by the plaintiffs as the note at the foot of the hire-purchase form shows. Had it been otherwise, the ordinary guarantee included in the hire-purchase form itself would have been used. Apart from that, the object of the document appears on its face to be to protect the plaintiffs against loss—to see them harmless—rather than to make good the infant's liability; this might (indeed would in this case) have resulted in a profit to the plaintiffs as appears from the writ itself where a much larger sum is claimed against the infant than against the second defendant. My Lord has shown clearly that in other circumstances the second defendant's liability might have been heavier than the infant's and not have arisen out of his default. For if the latter, without making any default, had (as the hire-purchase contract expressly allowed him to do) put an end to the hiring by returning the car after paying half its price, he would have gone scot-free, while the second defendant would still be under liability for the balance of the hire-purchase price. This alone shows that the second defendant's contract was not one of guarantee for the infant, but of indemnity to the plaintiffs. Again, the second defendant lacked one of the essential rights of a guarantor, namely, that of subrogation given him by law against the principal debtor. Everyone, of course, was aware that the second defendant could not enforce any such right against the infant, whose promise was void.

Taking this view, as I do, of the second defendant's promise, I find it unnecessary to enter on the vexed question whether Oliver J.'s decision (which applies only to a guarantee properly so called) was right.

I would allow the appeal.

DAVIES L.J. All through this case I have found myself in considerable doubt as to the true meaning of the contract with which we are concerned, and, despite the powerful reasons that have been given in the opinions expressed by my Lords, I find myself still in that unhappy position. But as the case involves no question of general law but concerns merely the transaction recorded in this particular document, I think that probably the less I say about it the better. I content myself, therefore, by

¹⁵ [1925] 1 Ch. 616.

¹⁶ [1947] K.B. 104.

saying that I am still extremely concerned as to whether the real meaning of this document is not that it sets up machinery to secure to the finance company in any event the receipt of the full amount of the money due under the hire-purchase agreement (if any) plus any expenses incurred—whether or not the contract is terminated by the finance company under clause 4 of the agreement in the event therein provided, or whether or not it is terminated by the hirer at his option under clause 5; but that throughout the primary liability under the whole transaction taken together falls on the hirer. But my Lords have formed a firm view about it.

I will only add that I am wholly unconvinced in this case by the argument that was mentioned by Farwell L.J. in *Wauthier v. Wilson*¹⁷ and is one of the arguments that have found favour with my Lords, namely, that all the parties to the transaction knew that the hirer here was an infant. For it is manifest on the facts of this case that, despite that fact, the finance company, both by correspondence and by the writ in this action, were pursuing the infant in order to try to recover moneys due under the agreement. That argument, therefore, does not prevail with me.

Appeal allowed.

Action remitted to the Southend County Court for trial with intimation that this court is of opinion that the agreement dated January 14, 1959, between plaintiffs and second defendant is a contract of indemnity.

Costs of appeal and proceedings in court below to be in the discretion of the county court judge.

Solicitors: *Paisner & Co.; Drysdale, Lamb & Jackson.*

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¹⁷ 28 T.L.R. 239.

[QUEEN'S BENCH DIVISION.]

* REGINA v. LIVERPOOL LICENSING JUSTICES.

Ex parte TYNAN.

Licensing—Club—Supper hour extension—Supply of intoxicating liquor with meals—Bar and restaurant with bar—Restaurant bar sales ancillary to refreshment—Total receipts from sale of intoxicating liquor in excess of receipts for meals—Whether supply of intoxicating liquor ancillary to supply of refreshment—“Ancillary”—Licensing Act, 1953 (1 & 2 Eliz. 2, c. 46), s. 104 (1) (a).

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