sufficient to constitute an 'injury by accident'. There had been nothing in the nature of a ruptured artery, as there was in *Hetherington v. Amalgamated Collieries of W.A. Ltd.*[9] Here there was merely a valve commencing to leak slightly. And secondly, the respondent had not discharged the onus on him to establish that the leakage or the murmur had commenced at a time when he was present at his place of employment. The court could well have decided the case on these grounds alone, without venturing into a controversial treatment of the phrase 'in the course of his employment'. However, it did not, and the *ratio decidendi* of the case stands as the reading of a causal requirement into the phrase 'in the course of his employment'. One must wonder whether it heralds a new judicial, or perhaps even legislative, trend in this important field.

J. S. COX

KING v. SMAIL[1]

Transfer of Land—Gift—Bankruptcy Agreement—Prior Equities—Transfer of Land Act 1954, sections 42, 43

K and his wife, the applicant, were the proprietors as joint tenants of certain property under the Transfer of Land Act 1954. On 24 July 1956, K purported to transfer to his wife, by way of gift, his half-interest in the land. Then, on 17 August, he and his business partner executed a deed of arrangement under the Bankruptcy Act 1924-1955 (Cth.), in favour of one S, the respondent to the application, as trustee for their creditors. The property so assigned included 'all other property of which the debtor . . . is possessed or to which he . . . is entitled legally or equitably in possession . . .'. A search on behalf of S disclosed that the land in question was registered in the joint names of the husband and wife. However, on 28 September the transfer to Mrs K was lodged for registration, and it was not until two weeks later that the respondent lodged a caveat claiming an equitable estate in fee simple. The caveat was therefore ineffective to prevent registration of the transfer to Mrs K, but was later amended to apply to the land standing in the Register Book in her name alone. The instant proceedings arose by way of an application by Mrs K under section 90 (3) of the Transfer of Land Act 1954 seeking an order that the caveat be removed. It was held that a volunteer who becomes registered as proprietor under the Transfer of Land Act 1954 takes subject to prior equities, and the application was therefore refused.

The issue to be decided was whether the respondent had acquired an estate or interest in the land which took priority over the wife's registered title. Two subsidiary questions then arose—did the respondent acquire any beneficial interest or estate under the deed of arrangement and, if so, did that estate prevail against the registered title subsequently acquired by the applicant?

To answer the first of these questions, His Honour had to decide

[9] (1939) 62 C.L.R. 317. [1] [1958] Argus L.R. 677. Supreme Court of Victoria; Adam J.

whether K was, at the time of the execution of the deed of arrangement, competent to confer any interest in the land. Although the property was not referred to by name in the deed, it was held that the words 'all other property of which the debtor is possessed or to which he is entitled legally or equitably' were capable of including this property. K, of course, had already executed an instrument of transfer to his wife, but an instrument of transfer under the Transfer of Land Act 1954 does not operate to convey land by its own force, and requires registration to be effective. It might have been said that the reasoning of Dixon J. in *Brunker v. Perpetual Trustee Co. (Ltd)*[2] was applicable here. In that case it was suggested that, once an executed transfer had been delivered to the transferee by the registered proprietor, the transferee *might* immediately acquire some interest in the land in question, namely a right to become registered as proprietor. However, in the present case Mrs K did not prove that the transfer had been handed to her prior to the execution of the deed of arrangement. Thus Adam J. would not be tempted into considering any argument based on *Brunker's* case.[3] The conclusion was that, despite the earlier instrument, K was, at the time of the deed of arrangement, still the legal owner of a moiety of the land, and so competent to confer an interest in it. The respondent therefore acquired the beneficial estate in K's half-share.

It would appear then that, in disputes such as the present one between a transferee and the holder of an equity over the land, a right of the kind suggested in *Brunker's*[4] case makes the date of delivery of the transfer extremely relevant.

A more important and difficult issue was raised by the second question —did the registration of the transfer to the applicant exclude the prior equity obtained by the respondent? There is no doubt that had the applicant given value for the transfer, she would have acquired a title free from equities affecting the transferor. But should a volunteer receive the protection of the Act in similar circumstances? It was argued for the applicant that section 42, which draws no distinction between persons becoming registered proprietors for value and mere volunteers, is the key section of the Act; and that it should be read in isolation, effect being given to it regardless of other provisions. His Honour was unable to accept this contention, considering that:

> The Act is to be read as a whole and sections which in themselves would give conclusive validity to registered title in the circumstances therein expressed, should be read subject to qualifications required of necessity or by implication to give effect to the scheme of legislation, manifested from reading the legislation as a whole.[5]

But the real basis for the argument that only purchasers for value were intended to receive the benefit of section 42 was found in section 43 of the Act, which provides: 'Except in the case of fraud, no person contracting or dealing with . . . the registered proprietor of any land . . . shall be affected by notice actual or constructive of any trust or unregistered

[2] (1937) 57 C.L.R. 555; [1937] Argus L.R. 349.
[3] *Supra*, n. 2. [4] *Supra*, n. 2. [5] [1958] Argus L.R. 677, 680.

interest, any rule of law or equity to the contrary notwithstanding.' In three cases[6] dealing with forgeries the section corresponding to section 43 was treated as providing guidance to the meaning of the general language used in the section corresponding to section 42, and it was held that someone who gives value for a forged certificate of title is not 'dealing with the registered proprietor' within section 43, and therefore does not receive the complete protection afforded by section 42. And so, if volunteers do not come within the protection given by section 43, by parity of reasoning they should be held outside the indefeasibility provisions of section 42.

Section 43 gives to persons dealing with the registered proprietor protection from the consequences of notice. If A *sells* to B land under the general law which is subject to a prior equity, B will acquire a clear title provided that he has no notice of such equity, because he has given value. But if A *gives* such land to B, the latter must take subject to any equity, whether he has notice or not. To give a volunteer immunity from the consequences of notice is therefore clearly superfluous, and could hardly have been contemplated by the draftsmen of section 43. The argument is put by Adam J. in the following passage:

> Are these mere volunteers then within the protection of section 43? In my opinion—clearly no. The protection given by section 43 to a registered proprietor, *i.e.* a legal owner of land, against the consequences of notice actual or constructive of trusts or equities affecting the transferor has point where the legal owner is a purchaser for value. A purchaser for value has by virtue of this section the immunity from prior equities of a *bona fide* purchaser of the legal estate without notice under the general law. On the other hand, to confer on a mere volunteer immunity from the consequences of notice would be illusory, for as already stated the volunteer was, on well-settled rules of equity, subject to equities which affected his predecessor in title whether with or without notice of such equities.
>
> Had it been intended by section 43 to relieve a mere volunteer from equities which affected his transferor, the section would have been differently worded as, for example, by providing that persons dealing, *etc.*, with registered proprietors would not be affected by any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding.[7]

Authority on this question is scanty, and the few cases relevant are unsatisfactory, *Crow v. Campbell*[8] being the only one directly in point. In this case Molesworth J. reluctantly felt bound by the earlier decision of *Chomley v. Firebrace*[9] to hold that volunteers were not given the protection of the section which is now section 43. Of these cases, Adam J. said:

> As reasoned authority for the general proposition that the Transfer of Land Act 1954 does not confer on a volunteer under a registered transfer a title free from prior equities, these decisions, although binding on me, appear to leave much to be desired.[10]

[6] *Gibbs v. Messer* [1891] A.C. 248; *Clements v. Ellis* (1934) 51 C.L.R. 217; *Davies v. Ryan* [1951] V.L.R. 283; [1951] Argus L.R. 623.

[7] [1958] Argus L.R. 677, 682.

[8] (1884) 10 V.L.R. (Eq.) 186.

[9] (1879) 5 V.L.R. (Eq.) 57. Also *Raleigh v. Glover* (1866) 3 W.W. & a'B. (Eq.) 163.

[10] [1958] Argus L.R. 677, 683.

Support for the decision in this case appears widespread among textbook writers,[11] a notable exception being Mr Fox in his textbook on the Transfer of Land Act 1954.[12] But it is submitted that Mr Fox's objections are more than sufficiently answered by the judgment in this case. It does not seem harsh that someone who takes by way of gift should take subject to prior equities. The volunteer will still become the registered proprietor, and anyone who deals with him, giving valuable consideration, will gain indefeasible title, freed from unregistered equities. This gap in the legislation, if gap it be, was surely the intention of the draftsmen of the system.

S. P. CHARLES

NEWTON v. COMMISSIONER OF TAXATION[1]

Income Tax—Arrangements to avoid tax—Companies liable to Division 7 tax unless sufficient distribution

Three private companies with interlocking boards of directors, L., M., and N. Motors, were engaged in the sale of motor vehicles. All had extremely large profits available for distribution, but it was intended that much of these would be reinvested. The problem confronting the directors was how to carry out this distribution and reinvestment whilst attracting the least possible taxation liability, which would have been fifteen shillings in the pound of taxable income. Thus an involved course was decided upon designed to alter the character of the profits concerned, so that they should not fall within the taxable income of the companies or the shareholders. Since, apart from some minor variations not producing any different consequences, this course was identical for each company, it will be necessary to state the position with regard to one only, L. Motors Pty Ltd.

In December 1949 the appellants (or persons for whom they were representatives) held 237,321 ordinary shares in the company. This constituted the entire share capital except for a comparatively small block of preference shares immaterial for the purposes of this note. Available for distribution were profits of approximately £460,000. In order to accomplish their ends, it would have been possible for the shareholders to have effected a conversion of the company into a public one and thereby to have avoided Division 7 tax, but this did not find favour. Accordingly the existing shares were divided into two classes. One third of each shareholder's holding became A ordinary shares to which special dividend rights were attached. The remainder became B ordinary shares and the unissued shares became B preference shares. Next the articles of associa-

[11] Hogg, *Australian Torrens System* (1905) 832-833; Hogg, *Registration of Title* (1920) 106-109; Wiseman, *The Transfer of Land* (2nd ed. 1931) 316; Baalman, *Commentary on the Torrens System in New South Wales* (1951) 149-150; Kerr, *The Principles of the Australian Lands Titles (Torrens) System* (1927) 195.

[12] *Transfer of Land Act 1954* (1957) 43.

[1] [1958] 3 W.L.R. 195; [1958] Argus L.R. 833. Judicial Committee of the Privy Council; Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow, and Lord Denning. The opinion of the Board was delivered by Lord Denning.