if he can sell the goods to another customer, since, but for the default, he could have carried out, and profited on both contracts. That is particularly so in cases where the retail price is fixed but also appears from the *Interoffice Case*[41] to have been established generally as a basis for calculating damages due from a defaulting purchaser or hirer of goods. The greater justice of this rule is also to be seen, apart from the reasons given by the judges in the cases referred to, in that incidental expenses, such as solicitors' costs and advertising fees, which a seller may incur when attempting to re-sell the goods can now be recovered whilst under the old *prima facie* rule the rigidity of the latter prevented them from being brought within its scope. Finally, it may be noted that the apparent ease with which the courts have transferred the new rule from the statute-regulated field of the sale of goods to that of common law hiring appears to indicate that further extensions of the application of this principle are extremely likely.[42]

A. HILLER, Case Editor — Fourth Year Student.

CORPORATE PERSONALITY

CARRUTHERS CLINIC LTD. v. *HERDMAN*

The recent Canadian case, *Carruthers Clinic Ltd.* v. *Herdman*[1] focuses attention again on the circumstances in which the court will look behind the veil of corporate personality[2] and identify the company with its members. The case is of interest in that, firstly, by adhering to the rule in *Saloman* v. *Saloman & Co.*,[3] and, secondly, by lifting the veil, the court reached the same decision.

Carruthers Clinic Ltd. was incorporated to acquire the assets of a medical partnership of two brothers (the Drs. Carruthers), its objects as set down in its Letters Patent being to establish facilities for diagnostical medical activities, to sell, lease, or make available to licensed medical practitioners these facilities and equipment, and to hire and engage the services of licensed medical practitioners to carry out any of the objects of the company. A number of other doctors (including the defendant) became members of the company, each of them entering into an agreement with it which was terminable on giving requisite notice. The agreement recited that the member was desirous of availing himself of the facilities of the clinic for the purposes of carrying on his profession, and that the company was to provide the member-doctor for a period of two years with office space, equipment and technical services in return for which the member was to pay to the company all fees earned and the company was to pay him an annual sum. Except in the case of the two directors, Drs. Carruthers, all agreements contained a covenant by the member-doctor that after termination of the agreement the covenantor would not practise medicine in the City of Sarnia or within 20 miles from there for a period of two years. Subsequently, all the issued shares, except the qualifying shares, were transferred to the Carruthers Foundation, a non-profit company incorporated for charitable purposes. Some time later the defendant terminated his membership of the company and commenced practising medicine within the City of Sarnia in breach of the covenant. The company then applied to the court for an injunction to restrain the breach of covenant, which was refused.

The main issue, therefore, was whether the covenant in restraint of trade was illegal. The court referred to *Nordenfelt* v. *Maxim Nordenfelt Guns Co.*,[4] *Mason* v. *Provident Clothing & Supply Co.*[5] and *Morris* v. *Saxelby*,[6] and said

[41] (1957) 3 W.L.R. 971.

[42] *Cf.* as to stocks and shares Mayne, *Treatise on Damages* (11 ed. 1946) 211-12, by W. G. Earengey.

[1] (1956) 5 D.L.R. (Second Series) 492 (Ontario High Court).

[2] See L.C.B. Gower, *Modern Company Law* (2 ed. 1957) 183.

[3] (1897) A.C. 22.

[4] (1894) A.C. 535.

[5] (1913) A.C. 724.

[6] (1916) 1 A.C. 688.

that to justify a covenant such as this it was essential that the covenantee should have some proprietary interest recognised by law as requiring protection, and that the extent of such an interest and of the protection to which the covenantee was entitled was a question of fact in each case.[6a] The legitimate business of the plaintiff company as authorised by its Letters Patent and recited in the agreement was the supply of office space, whereas the business of the defendant was the practice of medicine. *Prima facie* the covenantee had no apparent interest in restraining the covenantor from carrying on business different from that of the covenantee. It was, however, argued that the income of the covenantee company depended on the fees earned by the member-doctors, and that it therefore had a proprietary interest which should be protected by preventing the covenantor-doctor from using his knowledge of the patients gained whilst associated with the plaintiff to its detriment. The judge held that the covenantee could not acquire such an interest by the device of supplying office space, and that the covenantee was only entitled to protection from "competition flowing from the intimacies and knowledge of the master's business required by the servant from the circumstances of his employment."[7] It followed that, assuming the plaintiff's business was the supply of office space, it was only entitled to protection against the use of such knowledge relating to the letting of office space.[7a] Yet this was not the restraint placed on the defendant. The actual covenant could only be justified by saying that its purpose was to protect the company's members (as distinct from the company) from the competition of the defendant. The court, however, took the view that "the shareholders are not the plaintiff, and they are not parties to the agreement and their interest cannot be protected by a covenant extracted by a company of which they are shareholders."[8]

The argument[9] was then raised for the plaintiff that if the company was practising medicine then it clearly had an interest to protect in restraining the defendant from practising medicine. The judge said that in such circumstances the whole scheme, as evidenced by the Letters Patent and the agreement, was a "cloak" covering the true nature of the plaintiff's business, and it should not be heard to make this claim. Although it was argued that the doctors, not the company, practised medicine, the court inferred from the evidence of the close control and management of the member-doctors by the directors that the Letters Patent and the agreement were a pretence. Whilst an artificial but legal entity cannot "wield a scalpel or treat a disease any more than it can lubricate a car," it can do such acts through its "servants, agents and officers and through corporate acts such as resolution and by-law."[10] and it possesses the capacity of a natural person. It was held, therefore, that the company was practising medicine; the doctors were servants of the plaintiff and subject to its rigid control, and the company fixed and received all fees which were its only income, its sole commodity being the professional services of its member-doctors. The veil was torn aside and the acts of the members identified with those of the company.

[6a] The categories under which this type of restraint has been permitted are mainly: 1. goodwill and 2. master and servant. *Carruthers Case* falls into neither of these.

[7] *Routh* v. *Jones* (1947) 1 All E.R. 179, 181.

[7a] Although not considered by the court, it is perhaps arguable that the company, being a landlord whose authorised business was the leasing of office space to doctors, could have a legitimate interest to protect by restraining the defendant's practice of medicine in the vicinity, for the fewer the doctors in the area, the greater might be the fees received by those doctors occupying the company's premises thus increasing the rental value.

[8] (1956) 5 D.L.R. (Second Series) 492 at 500.

[9] It was also argued that the plaintiff need not practice medicine in order to have an interest to protect, but the court distinguished the cases relied on for this proposition, *Everton* v. *Longmore* (1899) 15 T.L.R. 356 and *Ballachulish State Quarries Co.* v. *Grant* (1903) 5 F. Ct. of Sess. 1105 (Scotland), on the grounds that a real relationship existed between the company and the patients which was not present in *Carruthers Case.*

[10] (1956) 5 D.L.R. (Second Series) at 502.

As both parties were on this view engaged in the same business, the covenant restraining the defendant would be in protection of the plaintiff's interest in its business. The question then became whether this interest of the plaitiff was entitled to legal protection. If the practice of medicine by the company was unlawful, then any agreement made in furtherance of that object would be unlawful and void. The court considered the relevant provisions of the Medical Act,[11] s. 49 of which provides that no person not registered should practise medicine for hire, and that any person who so practised for hire should be guilty of an offence. It held that the effect of the cases[12] relied on by the plaintiff for the proposition that the word "person" referred to a natural person and not a corporation, was limited to prosecutions under the Act, and that a "contract may be illegal although it be not in contravention of the specific directions of the statute provided it be opposed to the general policy and intent thereof."[13] Control of the company was in the hands of the shareholders, who may be all doctors, or as in the present case of unqualified persons, not having the ideals of the medical profession at heart. The practice of medicine by a corporation was, therefore, illegal as being contrary to the policy of the statute, notwithstanding the absence of a specific prohibition in the Act. The agreement between the plaintiff company and the defendant, being connected with the illegal act of practising medicine, was therefore illegal.

Counsel for the plaintiff was in a dilemma. If he argued only from the point of view of the legitimate objects of the company as set out in its Letters Patent, the veil of corporate personality remained undisturbed, but the company would then have no interest to protect in restraining the defendant from the practice of medicine, its authorised business being different from that of the defendant and the covenant was unenforceable. If, however, he invited the court to consider what the company was actually doing, i.e. to look behind the veil, then the business of the company would be disclosed as being opposed to the policy of the Medical Act and therefore the entire agreement, being connected with and in furtherance of this illegal business, would be illegal and void.[14] The court's decision was the same, whether the rule in *Saloman's Case* was applied or not; and the injunction was refused.

NANCY G. SMITH, Case Editor — Fifth Year Student.

RETROSPECTIVE OPERATION OF STATUTORY AMENDMENTS

MAXWELL v. *MURPHY*

The decision of the High Court in *Maxwell* v. *Murphy*[1] is of particular interest to the student of statutory interpretation in that it clarifies the principles to be adopted in determining the retrospective effect to be given to a statute when no clear indication of intention appears from the language of the statute itself.

The facts of the case were relatively simple. Under s. 5 of the Compensation to Relatives Act, 1897-1946 (N.S.W.) it was provided that every action brought under the Act should be commenced within twelve months of the death of the

[11] Medical Act for Upper Canada, 1865, c. 34.

[12] *Giffels & Vallet of Can. Ltd.* v. *The King ex. rel Miller* (1952) 1 D.L.R. 620, *Pharmaceutical Society* v. *London & Provincial Supply Association* (1880) 5 A.C. 857 and *Law Society* v. *United Service Bureau* (1934) 1 K.B. 343.

[13] *Chitty on Contracts* (21 ed.) 520.

[14] Having found that the business of the plaintiff was the same as that of the defendant and therefore grounding in the plaintiff an interest in the restraint imposed on the defendant, the court could have reached the same conclusion on the basis that the plaintiff's interest being the practice of medicine was not a legitimate interest and would not support the covenant in restraint of trade.

[1] (1957) 96 C.L.R. 261.