(2) That the operation of the Act should be to extinguish absolutely some of the rights of action which previously existed; and

(3) That if such a right of action became extinguished not merely by reason of the operation of the Act but because of some omission, mistake or misfeasance of the Registrar, the assurance fund should be liable and liable only in that event.

That seems to be at variance with section 165 as that section seems to confer a right of action upon a person deprived of land by adverse registration whether or not the registration occurred by reason of the error of the Registrar. That leaves the law in some doubt, as the subsequent change in the section does not appear to have affected its interpretation on that point.

There is another problem of interpretation with section 165. Do the words "and who by the provisions of this Act is barred from bringing an action for the recovery of land or encumbrance or interest therein" relate back to those persons claiming to have sustained loss or damage through an omission, mistake or misfeasance of the Registrar, *i.e.*, must a person claiming to have suffered loss from an error of the Registrar show that he would have had a common law action which has been barred by the Act? Grammatically the section could be read either way, and the comma immediately before those words might suggest that they relate back to both classes. On the other hand the words "barred from bringing an action for the recovery of the land or encumbrance or interest therein" do not seem appropriate in relation to a person claiming against the Registrar for an error in an abstract or something of that kind. Mr. Justice Beck thought that the words did relate back to both classes of complainants, but the reason which he assigned related to the words which have since been removed from the section. The passage from Mr. Justice Haddad's judgment, *supra,* says the same thing but it was not necessary to his judgment and he may not have directed his mind to the point. The interpretation should be clarified.

In any event, *Barty* v. *Kerr and the Registrar* does provide some useful guidance as to the interpretation of section 165 and as to the basis of liability of the assurance fund.

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IRREGULARITY OR NULLITY—RULES 558 AND 559—FAILURE OF SERVICE OF PROCESS: *FONTAINE* v. *SERBEN*

At the May, 1976 sittings of the Alberta Appellate Division in Edmonton, the defendant's appeal from the decision of Haddad D.C.J., as he than was, in *Fontaine* v. *Serben* [1974] 5 W.W.R. 428 was dismissed without written reasons. The appellant argued that as he had not been served with the Small Claims Summons issued against him in the action, the default judgment which was entered against him was therefore a nullity and, being a nullity, the judgment ought to be set aside *ex debito justitiae.*

Judge Haddad expressly declined to follow the principle (*Craig* v.

Kanssen [1943] K.B. 256, followed in Saskatchewan in *Hagemeister* v. *Walters* [1925] 2 W.W.R. 682 and in British Columbia in *Stokes Exploration Management Ltd.* v. *The Advanced Geophysics* [1972] 1 W.W.R. 192 and 197; see also *Appleby et al.* v. *Turner et al.* (1900) 19 P.R. 145, *Minneapolis Threshing Machine* v. *Clessen* [1950] 2 W.W.R. 574; *Wilson et al.* v. *Haftner et al.* [1925] 1 W.W.R. 867, that if the defendant is not served with the originating process in the action, a default judgment subsequently entered will be set aside *ex debito justitiae* without any regard to the promptness with which the defendant moves to have the judgment set aside, or any acquiescence on the part of the defendant.

In the present case, the plaintiff had commenced proceedings against the defendant by way of Small Claims Summons. Service was attempted by double registered mail pursuant to Rule 22. The double registered card came back signed by the defendant's son, although the double registered card had been altered by the plaintiff ostensibly to permit only the defendant himself to sign for the letter. The first two letters of the defendant's first name appeared on the double registered card, but had apparently been crossed off and the card signed in the name of and by his son. Default judgment was entered on the strength of an Affidavit of Service by Double Registered Mail. Subsequent to the entry of judgment, the defendant was advised of the judgment in May of 1970.

The defendant's truck was seized and he later received a notice of cancellation of Sheriff's sale and a new notice of sale. The truck was sold in March of 1971. On March 2, 1972, the defendant moved to have the default judgment set aside even though he had in the meantime paid the full amount of the claim against him.

Judge Haddad held that in Alberta failure of process of service is merely an irregularity and, pursuant to Rule 559, because the defendant had not moved promptly to open up the default judgment, he refused to grant such relief.

On appeal, the Appelate Division refused to open up the judgment because of the defendant's delay in bringing the action and also because of his acquiescence in the judgment by paying the claim.

The case is of interest to the Bar as it would appear to be following a trend to treat defects in litigation as irregularities and not as nullities wherever possible. A further distinction should be made between "nullity" and a defect which has occurred which gives the opposite party the right to have a defective step aside *ex debito justitiae*. It is, in the writer's view, doubtful whether a judgment of the court (including a default judgment) can be considered a "nullity". (See *In Re Pritchard* [1963] 2 W.L.R. 685 and Stevenson D.C.J.'s recent decision in *Rizzie* v. *Lilley* [1976] 2 W.W.R. 97.).

While Judge Haddad's decision is expressed in broad terms as to failure of service not rendering subsequent proceedings a "nullity", it is conceivable that the case might be distinguishable on the facts. The case deals with the Small Claims procedure in the Rules wherein there is express power for a judge to deem otherwise defective service good and valid (Rule 662(2)). As well, under Rule 22(1) it can be argued that the procedure followed in attempting to serve the defendant substantially complied with that Rule. There is English authority (*Cooper* v. *Scott-Farnell* [1969] 1 W.L.R. 120) where there was substantial compliance with a similar Rule although service had not actually been effected. The

defect was treated as an irregularity and not a nullity, weakening the effect of *Craig* v. *Kanssen.*

The present case does not depart from the general principle that service of process goes to the root of litigation but it does impose an onus on the defendant to act promptly in setting aside a defective step.

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