[HIGH COURT OF AUSTRALIA.]

GEORGE FRANK DOBSON . . . APPELLANT;
RESPONDENT,

AND

BEATH SCHIESS & CO. . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 16, 17, 18.

Griffith C.J. Barton and O'Connor JJ.

Insolvency Act 1890 (*Vict.*) (*No.* 1102), *secs.* 37, 106, 109—*Insolvency Act* 1897 (*Vict.*) (*No.* 1513), *secs.* 79, 81, 82, 83, 106—*Compulsory sequestration—Act of Insolvency—Assignment for benefit of "creditors generally"—Right of creditors by assenting to become parties to deed—Trust for scheduled creditors and all others of creditors who satisfy trustee that they are creditors—Power to exclude—Deed of arrangement.*

By a deed, to which the parties were a debtor, of the first part, a trustee, of the second part, and the creditors of the debtor whose names and seals appeared in a schedule to the deed, or who otherwise should assent to the deed, of the third part, the debtor assigned to the trustee all his property upon trust, after payment of charges and expenses, to apply the residue in payment of the debts owing to the creditors of the debtor whose names appeared in the schedule and to all others (if any) of the creditors of the debtor who should, by reasonable efforts in that behalf satisfy the trustee that they were entitled at the date of the deed to be included as creditors, without any priority or preference and in due course of administration. The deed also contained a proviso that the trustee should not be precluded from inquiring into, and insisting on such proof as he should deem reasonable of, the debts owing to creditors whose names appeared in the schedule, and should not be bound to pay any dividend on any amount inserted in the schedule beyond what should by reasonable efforts in that behalf be shown to have been owing at the date of the deed. Further it contained a clause whereby in consideration of the premises the parties of the third part released the debtor from any claims in respect of their debts, provided that the release should be inoperative if the deed should not be registered in accordance with law, or if the deed should be set aside.

Held that the deed was a conveyance or assignment for the benefit of "creditors generally" within the meaning of sec. 106 of the *Insolvency Act*

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1897, and was therefore an act of insolvency within sec. 37 (1.) of the *Insolvency Act* 1890, and also that it was a deed of arrangement within the meaning of Part VI. of the *Insolvency Act* 1897.

Judgment of Full Court (1905) V.L.R., 51; 26 A.L.T., 103, affirmed.

In re Wiedeman, 5 V.L.R. (I.P. & M.), 32, considered.

APPEAL from the Supreme Court of Victoria.

On the 5th September, 1904, Beath, Schiess & Co. obtained an order *nisi* for the sequestration of the estate of George Frank Dobson, the act of insolvency alleged being "That the said George Frank Dobson did, on the 7th day of July, 1904, make a conveyance or assignment of his property for the benefit of his creditors generally." The conveyance or assignment in question was by an indenture expressed to be made between George Frank Dobson, the debtor, of the first part, Edward Graham, the trustee, of the second part, and "the several persons, companies and partnership firms being creditors of the debtor whose names and seals are set and affixed in the schedule hereto or who shall otherwise assent to these presents and who are hereinafter called the creditors of the third part." By the indenture the debtor purported to grant, release, convey, and assign and transfer unto the trustee all the property of the debtor. It was declared that the trustee should stand possessed of all moneys to arise upon sale and conversion of the property upon trust, after payment of charges and expenses, "to apply the residue of the same moneys in or towards payment of the debts and sums of money owing by the debtor to the persons and parties whose names appear as his creditors respectively in the schedule hereto and to all others (if any) of the creditors of the debtor who shall by reasonable efforts in that behalf satisfy the trustees or trustee that he or they was or were entitled at the date of these presents to be included as a creditor or creditors respectively without any priority or preference whatsoever, and in due course of administration." There was also a proviso in these words: "Provided always that the trustees or trustee shall not be precluded by anything in the schedule hereto contained from inquiring into and insisting upon such proof as he or they shall deem reasonable in support of any debt alleged in such schedule to be due to any person or persons therein named as a creditor or creditors, and that the said trustees or trustee

shall not be bound or required to pay any dividend on any amount inserted in the said schedule in excess of the amount which shall by reasonable evidence in that behalf be shown to have been due or owing at the day of the date hereof." The indenture concluded as follows: "And this indenture lastly witnesseth that in consideration of the premises the said several persons and corporations parties hereto of the third part do and each of them doth so far as relates to the debt or demand due to themselves or himself respectively (and subject to the proviso hereinbefore contained) hereby release and discharge and for ever quit claim unto the said debtor his heirs executors and administrators of and from all and all manner of actions suits claims and demands whatsoever either at law or in equity which they respectively now have or at any time may hereafter have against the said debtor his executors or administrators for or by reason or on account of the several debts or sums of money due owing or accruing due and owing to them respectively by the said debtor as aforesaid. Provided always that the release hereinbefore contained shall be inoperative and have no validity either at law or in equity if these presents be not registered in accordance with law or if these presents be at any time set aside."

On the return of the order *nisi* an objection was taken (*inter alia*) that the deed was not for the benefit of creditors generally, having regard to the terms of the direction given to the trustee as to payment of creditors who should satisfy the trustee that they were such.

a'Beckett J. stated a case for the opinion of the Full Court, by which he asked whether, having regard to the objection above stated, the indenture was a conveyance or assignment for the benefit of creditors generally, within the meaning of the Insolvency Acts?

The Full Court (*a'Beckett* and *Hood* JJ., *Madden* C.J. dissenting), having answered this question in the affirmative (1), *a'Beckett* J. made the order absolute.

From this decision the debtor appealed to the Full Court, and his appeal having been dismissed, he now appealed from the decision of the Full Court to the High Court.

(1) (1905) V. L.R., 51; 26 A.L.T., 103.

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Joseph for the appellant. This assignment is not for the benefit of creditors generally within the meaning of sec. 37 (1.) of the *Insolvency Act* 1890. The trustee is put in the position of an arbitrator and he may, acting reasonably, exclude some of the creditors. *Molesworth* J. in *In re Wiedeman* (1) held that a deed in almost identical terms was not for the benefit of creditors generally. A Statute creating an act of insolvency will be interpreted as strictly as a Statute creating a misdemeanour: *Ex parte Chinery* (2). *In re Wiedeman* (1) had been preceded by three decisions of the same judge, viz., *Port* v. *London Chartered Bank* (3), in which it was held that a deed for the benefit of all creditors who should sign it within a certain time, was not for the benefit of creditors generally, *In re Derham* (4), and *In re Haslam* (5), in both of which it was held that a deed for the benefit of scheduled creditors was not for the benefit of creditors generally. *In re Wiedeman* (1) was approved and followed in *In re Thomas and Cowie* (6) and in *Beeston* v. *Donaldson* (7). In this state of the law the *Insolvency Act* 1897 was passed, and no alteration was made as to this particular matter. In secs. 82 and 106 the term "creditors generally" is defined, but not in such a way as to affect the decision in *In re Wiedeman* (1). That being so, the Legislature must be taken to have recognized and adopted that decision as being law. The Court should not interfere to alter the interpretation which for many years has been put on mercantile documents in common use. *Pandorf* v. *Hamilton* (8), and cases collected in *Mews' Digest*, Vol. V., col. 331. A creditor would have no remedy against the trustee unless he could prove that the trustee had acted unreasonably or dishonestly.

He also referred to *In re M'Donald* (9).

Isaacs K.C. (with him *Woolf*), for the respondent. The decision in *Port* v. *London Chartered Bank* (3) is contrary to that in *Hadley & Son* v. *Beedom* (10) where it was held that an assign-

(1) 5 V.L.R. (I.P. & M.), 32.
(2) 12 Q.B.D., 342, at p. 346.
(3) 1 V.R. (L.), 162.
(4) 1 V.L.R. (I.P. & M.), 2.
(5) 3 V.L.R. (I.P. & M.), 10.
(6) 9 V.L.R. (I.P. & M.), 2; 5 A.L.T., 95.
(7) 18 V.L.R., 208; 13 A.L.T., 286.
(8) 17 Q.B.D., 670, at p. 674.
(9) 5 A.J.R., 45.
(10) (1895) 1 Q.B., 646.

ment for the benefit of creditors who should sign the deed within one month, was for the benefit of all the creditors. If any creditor or class of creditors is excluded by the deed itself, then it is not for the benefit of creditors generally. The last mentioned case follows *Ashford* v. *Tuite* (1). The deed must be looked at the instant it is made to see whether it is for the benefit of creditors generally. The enumeration of the parties of the third part in the deed shows that every creditor can come in and be a party to the deed if in fact he is a creditor. That was the case in *In re Batten* (2), where it was held that the assignment was for the benefit of creditors generally. The power given to the trustee is not arbitrary but is given for the benefit of all the creditors. There is no power to exclude creditors; all the creditors by assenting may become parties to the deed, and when they assent both they and the scheduled creditors are in the same position. This is a deed of arrangement within Part VI. of the *Insolvency Act* 1897. If it is not, the trustee has under this deed the same duties to perform in dealing with payments and proofs of debts as a trustee under a deed within that Act, that is, the duties he would have under an insolvency. See secs. 79 and 83 of the *Insolvency Act* 1897: *In re Comyns and Williams* (3). In the cases of *In re Derham* (4) and *In re Haslam* (5) the trust was for scheduled creditors only. In *In re Ritchie* (6) there was a discretion in the trustee to prefer some creditors; which was held not to be for the benefit of creditors generally. Sec. 106 of the Act of 1897 provides that, notwithstanding a power to prefer, the deed is nevertheless for the benefit of creditors generally. That Act was intended to sweep away all the cases of which *In re Wiedeman* (7) is the basis, and make all these deeds subject to the *Insolvency Acts*.

[GRIFFITH C.J.—The question is, is there a power of exclusion of any of the creditors in this deed? *In re Wiedeman* (7) is an authority that words very similar to those in this deed gave a power of exclusion. If the Act of 1897 applies to this deed there

(1) 7 Ir. C.L.R., 91.
(2) 22 Q.B.D., 685.
(3) 27 V.L.R., 274, at p. 284; 23 A.L.T., 61.
(4) 1 V.L.R. (I.P. & M.), 2.
(5) 3 V.L.R. (I.P. & M.), 10.
(6) 8 V.L.R. (I.P. & M.), 1; 3 A.L.T., 88.
(7) 5 V.L.R. (I.P. & M.), 32.

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is no power of exclusion. See sec. 79. He referred to *Coles* v. *Turner* (1).]

If this deed is not an act of insolvency it has the effect of putting the smaller creditors at the mercy of one or more larger ones. [He referred to *Re Thoneman* (2); *Re Vagg* (3); *Davey* v. *Danby* (4); *Beeston* v. *Donaldson* (5); *In re Wood* (6); *Bergin* v. *Dixon* (7); *Seidel* v. *Kohn* (8); *Maskelyne & Cooke* v. *Smith* (9); *Hadley & Son* v. *Beedom* (10)]. As to the question whether the Court should now disturb the decision in *In re Wiedeman* (11), it cannot be said that all deeds of assignment are in this form, or that they are documents which pass from hand to hand. They cannot after six months be relied on as acts of insolvency.

The *Insolvency Act* 1897 shows that drastic alteration of the law was intended. The current of authority is not all one way, for the Courts have in the later cases on the subject thrown doubt on *In re Wiedeman*. There is no rigid rule laid down that a deed for the benefit of creditors generally must be for the equal benefit of all creditors.

They also referred to *In re Roper's Trusts* (12).

Joseph in reply. To see whether a deed is for the benefit of the creditors generally one must look at the disposing part of it, and not to that which says who are the parties to it. Here the trustee only holds for the benefit of those of the creditors who can satisfy him that they are creditors.

He also referred to *Vaizey on Settlements*, p. 1414; *Tempest* v. *Lord Camoys* (13).

Cur. adv. vult.

8th March.

GRIFFITH C.J. This is an appeal from an order of the Supreme Court affirming an order of *a'Beckett* J., adjudging the appellant to be insolvent upon the petition of the respondent. The alleged act of insolvency was that the appellant on 7th July, 1904,

(1) 35 L.J., C.P., 169.
(2) 12 V.L.R., 691; 7 A.L.T., 147.
(3) 13 V.L.R., 172; 8 A.L.T., 105.
(4) 13 V.L.R., 957; 9 A.L.T., 163.
(5) 18 V.L.R., 208, at p. 213; 13 A.L.T., 286.
(6) L.R., 7 Ch., 302.
(7) 20 V.L.R., 140; 15 A.L.T., 229.
(8) 20 V.L.R., 145; 15 A.L.T., 276.
(9) (1902) 2 K.B., 158.
(10) (1895) 1 Q.B., 646, at p. 651.
(11) 5 V.L.R. (I.P. & M.), 32.
(12) 11 Ch. D., 272.
(13) 21 Ch. D., 571.

made "a conveyance or assignment of his property to a trustee for the benefit of his creditors generally." The point raised on the appeal is that the deed of assignment in question was not a deed of assignment for the benefit of "creditors generally." The meaning of that term is defined by the *Insolvency Act* 1897 in two places. In sec. 82, which occurs in that part of the Act which relates to deeds of arrangement, it is said that the term "creditors generally" includes "all creditors who may assent or take the benefit of a deed of arrangement." In sec. 106 it is provided that, in the section of the Principal Act which defines what are acts of insolvency, the term "'creditors generally' shall include all creditors who may assent to the conveyance or assignment" notwithstanding certain conditions mentioned. The question then is whether this deed falls within that definition or not. The appellant relied on a course of authorities in the Courts of Victoria which, he says, should be considered as binding authorities. I propose first to deal with the matter on principle, and then to see how far, if at all, those authorities interfere with the conclusion to which we should otherwise come.

In construing a deed the first step is to ascertain the intention of the parties, then as far as possible to give effect to that intention. This deed is made between the appellant of the first part, the trustee of the second part, and "the several persons companies and partnership firms being creditors of the debtor whose names and seals are set and affixed in the schedule hereto or who shall otherwise assent to these presents," parties of the third part. Every creditor therefore who assents is a party to the deed. Later on in the declaration of the trusts upon which the trustee is to hold the residue of the estate after satisfying certain charges and expenses, occur these words: "To apply the residue of the same moneys in or towards payment of the debts and sums of money owing by the debtor to the persons and parties whose names appear as his creditors respectively in the schedule hereto and to all others (if any) of the creditors of the debtor who shall by reasonable effort in that behalf satisfy the trustees or trustee that he or they was or were entitled at the date of these presents to be included as a creditor or creditors respectively without any priority or preference whatsoever and in due course of administration."

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Those are the words upon which the appellant relies. It is contended that under them the trustee has absolute power to exclude from the benefit of the deed any person who alleges that he is a creditor, but who fails to satisfy the trustee that he is one. There is a proviso in the same trust in these words: "Provided always that the trustees or trustee shall not be precluded by anything in the schedule hereto contained from inquiring into and insisting upon such proof as he or they shall deem reasonable in support of any debt alleged in such schedule to be due to any person or persons therein named as a creditor or creditors, and that the said trustees or trustee shall not be bound or required to pay any dividend on any amount inserted in the said schedule in excess of the amount which shall by reasonable evidence be shown to have been due or owing at the day of the date hereof." So that creditors who are named in the schedule are liable to be called upon to prove their debts just as fully as creditors not named in the schedule, but becoming parties to the deed by assenting to it. The only other part of the deed to which it is necessary to refer is the final clause, which contains the release by the parties of the third part (who include all creditors who assent to the deed), and continues: "Provided always that the release hereinbefore contained shall be inoperative and have no validity either at law or in equity if these presents be not registered in accordance with law or if these presents be at any time set aside." It is obvious from the concluding clause that it was intended that the deed should be registered under the *Insolvency Act* 1897. The deed therefore was on the face of it intended to be a deed to which all creditors who think fit to assent—who may "assent to or take the benefit of" it, in the words of the Statute—would be parties.

As I have said, the contention is that the trustee has nevertheless absolute power to exclude any creditor from the benefit of the deed. If that be the true construction, no doubt the deed is not for the benefit of creditors generally. The question is, is that the proper construction of the deed? All the creditors are parties, therefore *primâ facie* every creditor is entitled to have the provisions of the deed carried out. Is then a trustee of a deed, under which the property is applicable to creditors who sign the

deed and to creditors who do not sign but who assent to it, to be regarded as having the powers of an arbitrator? In the case of *Coles* v. *Turner* (1) in the Exchequer Chamber, a deed was considered in which there was a provision that the trustee might require any creditor to verify the nature and amount of his debt with full particulars, by statutory declaration "or otherwise as the trustee may think fit." The Court of Common Pleas held that that provision had the effect of enabling the trustee to exclude any creditor from the benefit of the fund. But it was held in the Exchequer Chamber that it had not the effect of enabling the trustee to deprive a creditor who failed to produce proof of his debt to the satisfaction of the trustee of all benefit under the deed. In the judgment of the Court delivered by *Blackburn* J., he said:—"The trustee cannot be bound to give the dividends to everyone who claims, though others assert that his claim is fictitious, nor can he be bound to reject every claim which is objected to, though it is said that the objection is unfounded. His duty, as trustee, requires him in some way or other to ascertain what he thinks to be the fact, and to act on his opinion, which will cast the onus upon the party dissatisfied with his decision of appealing to a Court of Equity, or, in the case of a deed within their jurisdiction, to the Court of Bankruptcy, to set aside that decision. Bearing this in mind, it will be found that the provision in this deed, perhaps, requires no more from the creditor than would be thus required if the deed were silent. At all events it requires nothing unreasonably beyond what would be thus required. It does not make the trustee arbitrator, finally to decide whether there is any debt, or what is the amount of that debt; nor does it impose any penalty on those creditors who fail to produce what the trustee thinks sufficient proof of the debt." In the argument of that case, another case was cited which was heard by Lord *Westbury* L.C.: *Ex parte Spyer* (2). There a deed of assignment contained a provision that the trustee might require "the amount of any debt or debts of any or either creditor of the several creditors parties hereto to be verified by solemn declaration, or in such other manner as to the said trustees shall seem expedient; and in

(1) 35 L.J.C.P., 169.

(2) 32 L.J. Bky., 62.

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the event of any such creditor or creditors refusing or failing so to verify his or their debt or debts, or declining to execute these presents, then such creditor or creditors so refusing or failing or declining as aforesaid, shall lose all benefit, dividends and advantage to be derived from or otherwise claimed under these presents." On that clause being relied on to invalidate the deed, "the Lord Chancellor pointed out that this clause was nonsense; it enabled the trustee to require the amount of debt of any of the creditors *parties thereto* to be verified, and in the event of *such* creditor or creditors refusing to execute, such creditor or creditors so refusing, &c., should lose all benefit." That was Lord *Westbury's* opinion of the clause. Taking the whole of this deed into consideration, the best that can be said for the appellant is that it is open to two constructions, one that the trustee may at his option, acting as an arbitrator, reject those of the creditors who do not satisfy him that they are creditors; the other that he exercises that power subject to the control of the proper legal tribunal, which in the absence of legislation would be a Court of Equity. Having regard to those principles and the obvious intention of the parties to this deed, it seems to me that the proper construction is that the deed does not enable the trustee to exclude any of the creditors. Therefore it is an assignment for the benefit of creditors generally, and is within the definition of the Statute.

I will now refer to the cases relied on in opposition to that view. The first is *In re Wiedeman* (1), decided by *Molesworth* J. in 1879, which is said to have been since followed in a number of other cases. The deed in *In re Wiedeman* was somewhat similar to this, but its exact terms are not stated, and it does not appear whether all assenting creditors were formally made parties to it or not. In that case two matters were decided, one a matter of principle, the other the construction of the particular deed. The matter of principle was stated by the majority of the Court in the decision now under appeal to be that a deed which enables the trustee to exclude some of the creditors from the benefit of the deed is not a deed for the benefit of creditors generally. That proposition is irresistible, and has never been doubted. As to

(1) 5 V.L.R. (I.P. & M.), 32.

the other matter decided, the construction of the particular deed, we do not know exactly what the deed was. We have the advantage of seeing exactly what the deed now under consideration is, and we have the opinion of the Court of Exchequer Chamber and of Lord *Westbury* L.C. as to the interpretation of a similar provision in a similar deed. It is, therefore, not necessary to overrule the case of *In re Wiedeman* (1) because the principle of law there enunciated is clearly a sound one, and the construction of a particular deed cannot be binding on another Court in the construction of another deed not in identical terms. I think therefore the appeal should be dismissed.

BARTON J. I concur.

O'CONNOR J. I also am of opinion that the decision of the Court should be upheld. There is no different rule of interpretation to be applied to this deed than to any other deed. That is to say, the intention of the parties as expressed in the deed must be ascertained from the deed itself, and that intention is to be gathered, not from any one portion of the deed, but from a consideration of the deed as a whole. Now if we look at the deed as a whole, we find in the first place that the parties to it are the assignor, the trustee, and the parties of the third part. The latter are particularized as "the persons, companies, and partnership firms mentioned in the schedule, and all other creditors who assent to the deed." So that every creditor who chooses to assent to the deed is a party to it. It also appears that the release to be given by the deed is a release by all the creditors including those who assent. Further it is provided that the deed is to have no validity until registered in accordance with law. Taking these provisions altogether, it appears evident that this is a deed between the debtor, the trustee, and all creditors who choose to come in and assent to it, which is intended to be registered under the provisions of the *Insolvency Acts* as a deed of assignment.

Now in order to find out the powers of the trustee under the deed we must have regard to the *Insolvency Acts*, because, although it

(1) 5 V.L.R. (I.P. & M.), 32.

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is true that the deed will not operate as an act of insolvency unless it is for the benefit of all the creditors, still in order to ascertain whether it is a deed assigning property for the benefit of creditors generally, we must see what the powers of the trustee are. Under sec. 83 of the *Insolvency Act* 1897, the trustee of a deed of this kind is an officer of the Court, so that everything he does in the administration of his trust must be done under the guidance of the Court, and he is responsible to the Court for everything he does. Under sec. 79 the provisions of the *Insolvency Acts* as to the payment of certain claims as preferential, as to the proof of debts, as to the respective rights of secured and unsecured creditors, and as to the examination of the debtor or any other person are to apply to every deed of arrangement. So that this trustee is not at all in the position in which a trustee was before the passing of that Act. By the fact of his becoming a trustee under the deed, he becomes an officer of the Court, and the estate is to be distributed in accordance with the provisions of the *Insolvency Acts*. We find, for instance, that sections regulating the proof of debts, and as to the appeal from that proof, are amongst those to be applied in the administration of the estate by the trustee. In other words the whole of Part V., Division 3 of the *Insolvency Act* 1890 as to proof of debts becomes incorporated as part of the duties and obligations to be performed by the trustee under the deed of assignment. Under sec. 106 of that Act, proof is to be by affidavit containing a complete statement of account between the creditor and the insolvent, and if that proof is rejected, there is an appeal under sec. 109 to the Court, and "the Court may at any time admit, reject, expunge or reduce a proof of debt on the application of any creditor or of the trustee or of the insolvent." Now it appears to me that we must read this deed in the light of those provisions, because it is apparent that, as the deed is to be worked under the *Insolvency Acts*—as it has to be registered under them—it is intended by it to put the trustee in such a position that he will be endowed with the powers and burdened with the obligations which a trustee has under those Acts. A consideration of these matters throws a great deal of light upon the portion of the deed on which most of the argument has turned, that is to say, the discretion which the trustee has in the

rejection of proofs of debt, or the rejection of creditors, and in what way, if at all, that discretion shall be controlled. In other words it is apparent on the face of the deed that it was intended to clothe the trustee, not with an uncontrolled power to admit or reject creditors, but with a power subject to the control of the Court under the provisions of the *Insolvency Acts*.

Before I refer to the words of the deed giving these powers, I think it may be useful to consider what would be the position of the trustee if the words of the deed I have referred to were left out altogether. That is, supposing the trustee were directed simply to pay over the portion of the property left after making certain payments referred to, to all creditors who should have assented to the deed. In carrying out that duty the trustee could not pay everybody who made a claim, he must make an investigation in every case, and it would be his duty, in order to ascertain whether a claimant was a creditor, to make precisely the same investigation as under this deed. I do not think it could be contended that, if the provision of the deed was simply that the trustee was to distribute the property of the assignor amongst the creditors according to the amounts due to them, this deed did not assign the property for the benefit of the creditors generally. What difference is there between such a deed and the one now under consideration as to the duty put upon the trustee? The words of the deed are that the trustee's duty is "to apply the residue of the same moneys in or towards payment of the debts and sums of money owing by the debtor to the persons and parties whose names appear as his creditors respectively in the schedule hereto and to all others (if any) of the creditors of the debtor who shall by reasonable efforts in that behalf satisfy the trustees or trustee that he or they was or were entitled at the date of these presents to be included as a creditor or creditors respectively without any priority or preference whatsoever and in due course of administration." Now what proof is required? What discretion has the trustee under that clause? I take it that, as the provisions of Division III. of Part V. of the *Insolvency Act* 1890 are embodied, it would be a reasonable compliance with this clause on the part of the creditor to make the same proof of debt before the trustee as is required to be made before

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the Court of Insolvency. And what is the power of the trustee in accepting or rejecting a proof of debt? No absolute or arbitrary power, but a discretion to be exercised under the control of the Court. That is a discretion which certainly would give to every creditor precisely the same rights as he would have if the estate were being administered after sequestration in the ordinary way under the Act. Having therefore regard to the provisions of the deed and of the Act, it appears to me impossible to say that the trustee is put in the position of being able to arbitrarily reject any creditor. That being so, I think the deed is one which on the face of it, and in accordance with its intention, is an assignment for the benefit of all the creditors of the insolvent.

I could hardly imagine that any doubt could be raised on the matter, if it had not been for the decision of *In re Wiedeman* (1). I wish to add nothing to what the learned Chief Justice has said in reference to that case, except this, that in considering *In re Wiedeman* we must have regard to the condition of the law at the time it was decided. In 1879 a deed of assignment was not administered under the Court as it is under the Act of 1897. There was no doubt a remedy against the trustee, as against any other trustee, in a Court of Equity. But the trustee was not an officer of the Court, and there were not the same remedies against him as under the Act of 1897. I think that alone is sufficient to enable us to say that the decision in *In re Wiedeman*, having regard to the provisions of the deed as set out in the report, and having regard to the law at that time, was right But this deed, which must be read in accordance with the law as it exists now, puts the trustee in quite a different position, and therefore the considerations in *In re Wiedeman* cannot be applied to this deed. For these reasons I think the decision of the Full Court was right.

Appeal dismissed with costs.

Solicitor for appellant, *W. Brocket*, Melbourne.

Solicitor for respondent, *W. R. Rylah*, Melbourne.

B. L.

(1) 5 V.L.R. (I. P. & M.), 32.