[HIGH COURT OF AUSTRALIA.]

FERRIS . . . . . APPELLANT;
DEFENDANT,

AND

MARTIN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *June* 22, 23, 27.

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

Arrest—Ca. sa.—Judgment against defendant in action for defamation—Defendant made bankrupt on petition of plaintiff—Election of remedy against goods of debtor—Joinder of other causes of action with one for defamation—Consolidation of Statutes—Bankruptcy Act (*N.S.W.*), (*No.* 25 *of* 1898), *sec.* 10 (3)*—*Defamation Act* (*N.S.W.*), (*No.* 22 *of* 1901), *sec.* 24†.

Sec. 24, sub-sec. (1) of the *Defamation Act* (N.S.W.) 1901, which provides (*inter alia*) that "no law now or hereafter in force for the relief of insolvent debtors . . . shall be construed to extend to affect or discharge from his liability any defendant indebted" for any damages in an action for publishing defamatory words, refers to Statute law only. The common law doctrine, that a judgment creditor may be concluded by his election as to the method of execution to which he will have recourse for the satisfaction of his judgment, is not affected by that section.

The respondent, who had obtained a verdict against the appellant in an action for defamation and breach of contract and, had signed judgment for the

*Sec. 10, sub-sec. (3) of the *Bankruptcy Act* (N.S.W.), No. 25 of 1898, is as follows:—

"(3) After a sequestration order has been made, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence or take any fresh step in any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

†Sec. 24, sub-sec. (1) of the *Defamation Act* (N.S.W.), No. 22 of 1901, is as follows:—

"(1) No law now or hereafter in force for the relief of insolvent debtors, or for the abolition of imprisonment for debt, shall be construed to extend to affect or discharge from his liability any defendant indebted for any penalty, damages, or costs adjudged against him in any proceeding, either civil or criminal, for the printing or publishing of any blasphemous, seditious, or defamatory words or libel."

H. C. OF A. 1905.

FERRIS v. MARTIN.

amount of the damages and costs, presented a petition in bankruptcy for the sequestration of the appellant's estate, and, an order having been made for sequestration, proved as a creditor for the full amount of the judgment. She then procured the arrest of the appellant on a writ of *capias ad satisfaciendum* for the amount of the damages recovered on the count for defamation.

Held, that the proceedings in bankruptcy were in the nature of an execution against the goods of the judgment debtor, and that the respondent had thereby irrevocably determined her election as to the form of remedy for the satisfaction of the judgment debt, and was therefore debarred from afterwards, while the bankruptcy was still pending, having recourse to execution against the body of the debtor.

Ex parte Wilson, 1 Atk., 152; and *Miller* v. *Parnell*, 6 Taunt., 370, followed.

Nicholls v. *Rosenfeld*, 7 N.S.W. L.R., 322, distinguished.

Per Griffith C.J.—Sec. 10, sub-sec. (3) of the *Bankruptcy Act* 1898, which provides that no creditor to whom a bankrupt is indebted in respect of a debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt unless with the leave of the Bankruptcy Court, is not necessarily inconsistent with sec. 14 of 11 Vict. No. 13, but may be read as not extending to the case of a defendant indebted for damages in an action for defamation, and therefore is not necessarily repealed by the re-enactment of the latter section in sec. 24 of the *Defamation Act* 1901.

Quære, whether sec. 44 (3) of the *Bankruptcy Act*, which deals specifically with the case of bankruptcy of defendants in actions for defamation, is not necessarily a limitation or qualification of the general provisions of sec. 14 of 11 Vict. No. 13, and therefore impliedly repealed by sec. 24 of the *Defamation Act* 1901.

Per O'Connor J.—After the release of the bankrupt defendant's estate, if the judgment debt in respect of the damages for defamation has not been wholly satisfied, the liability of the defendant for the balance continues by virtue of sec. 24 of the *Defamation Act* 1901, and the judgment creditor has the same choice of methods of execution as before the bankruptcy.

Decision of the Full Court of New South Wales (1905) 5 S.R. (N.S.W.), 287; 22 N.S.W. W.N., 90, reversed, and decision of *A. H. Simpson* J. 22 N.S.W. W.N., 52, restored, but on a different ground.

APPEAL from a decision of the Supreme Court of New South Wales: *Martin* v. *Ferris*, (1905) 5 S.R. (N.S.W.), 287; 22 N.S.W. W.N., 90.

The respondent in September, 1904, brought an action against the appellant for slander and wrongful dismissal, and obtained a verdict on both counts, £500 on the first, and £30 on the second. The costs were taxed and judgment signed by the respondent for the amount of verdict and costs. In November of the same year

H. C. OF A. 1905. FERRIS v. MARTIN.

the respondent issued a bankruptcy notice calling on the appellant to pay the amount of the judgment. The notice was not complied with, and the respondent thereupon filed a petition in bankruptcy against the appellant, alleging as the act of bankruptcy non-compliance with the notice referred to. A sequestration order was made against the appellant, and the respondent proved as a creditor in the bankruptcy for the full amount of the judgment with interest. In April, 1905, the respondent sued out a writ of *capias ad satisfaciendum* in respect of the judgment on the slander count for £500, and the appellant was arrested under the writ.

On April 10th, 1905, the appellant took out a summons to set aside the writ of *capias* on the grounds:—That the leave of the Judge in Bankruptcy had not been obtained before the issuing of the writ as required by sec. 10, sub-sec. (3) of the *Bankruptcy Act* (N.S.W.) (No. 25 of 1898); and that, by taking the proceedings to have the estate of the appellant sequestrated in bankruptcy, and by proving in the estate for her judgment debt, the respondent had elected to rank with the other creditors and to satisfy her judgment debt in that manner, and could not lawfully thereafter sue out a writ of *capias ad satisfaciendum* nor arrest the appellant under such writ. The summons was dealt with by *A. H. Simpson* J., sitting in Chambers, who held that the writ had been irregularly issued, inasmuch as the leave of the Judge in Bankruptcy had not been obtained, and ordered that it be set aside and the appellant discharged from custody: *Martin* v. *Ferris* (1).

From this decision the respondent appealed to the Full Court to have the order of *A. H. Simpson* J., set aside, on the ground that His Honor was in error in holding that the leave of the Judge in Bankruptcy was necessary, and in setting aside the writ on that ground. The Full Court granted the application and set aside the order appealed from. They were of opinion that sec. 24 of the *Defamation Act* (N.S.W.), (No. 22 of 1901), was inconsistent with the provisions of sec. 10 of the *Bankruptcy Act* 1898, and operated as a repeal of them to the extent of the inconsistency, and that therefore the proceedings in bankruptcy did not debar the respondent from exercising her remedy against the

(1) (1905) 5 S.R. (N.S.W.), 287; 22 N.S.W. W.N., 52.

H. C. OF A. 1905. FERRIS v. MARTIN.

person of the judgment debtor: *Martin* v. *Ferris* (1).

From this decision the present appeal was brought.

Armstrong, for the appellant. Sec. 24 of the *Defamation Act*, 1901, should not be construed as a total repeal of sec. 10 (3) of the *Bankruptcy Act*, 1898, if any other construction is possible. If it is a repeal it is only by implication, and therefore the Court should endeavour, if possible, to read the two Acts in such a way as to give effect to both. The Bankruptcy Acts were passed in 1887, 1896 and 1898, after the date of the original *Defamation Act* (11 Vict., No. 13), and were intended, *inter alia*, to make special provision for the case of all defendants indebted for damages, who became bankrupt. The words "now or hereafter in force," in the Act 11 Vict., No. 13, s. 14, could not affect the validity of special provisions in the later *Bankruptcy Acts*. The Bankruptcy Acts left the *Defamation Act* in force, subject to limitations. Sec. 44 (3) of the Act of 1898, dealing specifically with the case of defendants indebted for damages in actions of libel and slander, shows that it was the intention of the legislature that that Act should be read as a qualification or limitation of the Act 11 Vict., No. 13. The two Acts then could be read together without inconsistency, one being a proviso to the other. The fact of the *Defamation Act* being consolidated after the Bankruptcy Acts should not afford a presumption that the legislature intended to alter the law. The words "shall be construed to extend to affect or discharge from his liability" are capable of a construction consistent with sec. 10 (3) of the *Bankruptcy Act*. The latter section does not purport to discharge from liability. It merely places the bankrupt defendant under the control of the Judge in Bankruptcy. Sec. 24 of the *Defamation Act* 1901 cannot be intended to take such a defendant altogether out of the operation of the Bankruptcy Acts, which would be the consequence of a literal construction of the word "affect." As a limited construction must be adopted, that construction is the proper one which leaves the section of the *Bankruptcy Act* 1898 some force; though a different conclusion might possibly have been arrived at, if the *Defamation Act* 1901 had been a new enactment, and not a

(1) (1905) 5 S.R. (N.S.W.), 287; 22 N.S.W. W.N., 90.

mere re-enactment of older provisions, made presumably with the intention of leaving unaltered the law as it stood at the date of the consolidation. Such a construction is to be found by reading the *Defamation Act* 1901, sec. 24, as a provision that, notwithstanding bankruptcy, the liability of the defendant remains unaffected, but during the bankruptcy, the terms of the *Bankruptcy Act* 1898 are to apply, and the judgment creditor must do nothing in execution of his judgment except under the direction and with the leave of the Judge in Bankruptcy. The Court may take cognizance of the fact that the *Defamation Act* 1901 is a consolidation, and therefore not to be presumed to alter the law, especially in its general provisions: *Williams* v. *Pritchard* (1).

Apart from the question of repeal, the words "law for the relief of insolvent debtors" do not include a law which enables a petitioning creditor to make his debtor bankrupt.

The action in the present case was not within the meaning of the words a "proceeding, either civil or criminal . . . for the publishing . . . of . . . defamatory words or libel." The declaration contained a count for breach of contract in addition to that for slander. Though the verdict distinguished between the counts, one judgment was signed for the whole amount, and the respondent proved for the judgment and costs in the bankruptcy. The arrest was for the £500 damages for slander only, but the foundation was wanting, that they should have been recovered in an action for slander or libel. A person exercising a common law remedy against the person must strictly follow the course appropriate to the remedy when the right was given, and it has always been held that in such cases the writ must agree with the judgment: *Chitty's Archbold*, 12th ed., p. 606; *Smith* v. *Knapp* (2); *Amer. Encyc. of Prac. and Pldg.*, vol. VIII., p. 645.

[*Pickburn*, for the respondent.—This point was not taken in the grounds of appeal.]

I ask leave to take the ground now. It was not argued before the Full Court because that Court had decided in *Nicholls* v.

(1) 4 T.R., 2.

(2) 30 N.Y.R., 581.

H. C. OF A. 1905.

FERRIS v. MARTIN.

Rosenfeld (1) that the objection that the writ did not agree with the judgment was not a valid one. Where there are two counts the judgment is one and indivisible. They cannot be separated for the purpose of arresting upon one.

The right to arrest is based upon common law, the Courts having allowed a writ of *ca. sa.* in every case in which the creditor would have been entitled to a *ca. re.*

Assuming this to have been an action for defamatory words within the meaning of sec. 24 of the *Defamation Act* 1901, the respondent had two methods of execution open to her, one against the person of the debtor, the other against his goods. It has always been held in England that the two remedies cannot be pursued concurrently. If the creditor elects to proceed against the goods, she may, by withdrawing the execution, have recourse to execution against the person, but, if she elects to proceed in bankruptcy, and the debtor is made a bankrupt, she has determined her election irrevocably, because the status of the debtor is changed by the bankruptcy, and the interests of other creditors are affected. The remedies are inconsistent, and the creditor must make an election between them: *Ex parte Wilson* (2); *Ex parte Ward* (3); *Ex parte Lewes* (4); *Cohen* v. *Cunningham* (5); *Watson* v. *Humphery* (6); and cases cited in *Chitty's Archbold*, 12th ed., vol. I., p. 708; and *Chitty's Equity Index*, 2nd ed. under Bankruptcy—Proof; *Ex parte Cator* (7); *Ex parte Warder* (8). So long as the creditor has one execution in force against the debtor's property, he cannot have another against the person.

[GRIFFITH C.J. referred to *Miller* v. *Parnell* (9); *Dicas* v. *Warne* (10); and *Andrews* v. *Saunderson* (11).]

Miller v. *Parnell* (9) was approved in *In re A Debtor; Ex parte Smith* (12). In several cases the Supreme Court of New South Wales has expressed its opinion that the rule as to election does not apply here, on the ground that in England the decisions depend upon English Statutes. In that the Supreme Court has

(1) 7 N.S.W. L.R., 322.
(2) 1 Atk., 152.
(3) 1 Atk., 153.
(4) 1 Atk., 154.
(5) 8 T.R., 123.
(6) 24 L.J., Ex., 190.
(7) 3 Bro. C.C., 216.
(8) 3 Bro. C.C., 191.
(9) 6 Taunt., 370.
(10) 10 Bing., 341; 2 Dowl. P.R., 762.
(11) 26 L.J., Ex., 208; 1 H. & N., 725, 728.
(12) (1902) 2 K.B., 260.

been in error. 49 Geo. III., c. 121, s. 13, was the earliest of those which provided that a creditor must be bound by his election; and it merely declared the law which had been in existence for many years before. The rule as to election is one of common law, and is of very early date; there were many cases decided before the date of any Act dealing with election, all supporting the rule. They were not cited to the Supreme Court. In *Ex parte Gee* (1); *Webb* v. *Humphrey* (2); and *Webb* v. *Wilton* (3), the question of election was not expressly raised, but the Court's decisions must have proceeded upon the assumption that the rule was not in force. In *In re G. R. Dibbs* (4), the question was raised, and the Court decided against the contention that by taking the body of the debtor under *ca. sa.* the creditor had determined his election. The same point arose in *Nicholls* v. *Rosenfeld* (5), and the Court again decided that the rule as to election did not apply. But the judgment creditor in that case was not the petitioning creditor in the bankruptcy; he merely proved his debt against the estate. The case may be distinguishable on that ground. There is nothing in the *Defamation Act* 1901 to do away with the general rules of common law as to election of remedy, and, therefore, that case should, if necessary, be overruled.

The *Defamation Act* (11 Vict. No. 10) gave no new remedy to the creditor, it merely suspended the effect of the relieving laws in certain cases.

[GRIFFITH C.J. referred to *Cobbold* v. *Chilver* (6).]

[He referred also to *Wilson* v. *McIntosh* (7).]

Pickburn for the respondent. The point as to the form of the judgment, and the discrepancy between the writ and the judgment was not raised before the Courts below. The appellant has by his action practically abandoned the point, and should not be allowed to raise it in a Court of Appeal.

[GRIFFITH C.J.—The appellant is not limited to the grounds

(1) 6 S.C.R. (N.S.W.), 355.
(2) 6 S.C.R. (N.S.W.), 361.
(3) 6 S.C.R. (N.S.W.), 374.
(4) 2 N.S.W. L.R., 10.
(5) 7 N.S.W. L.R., 322.
(6) 4 Man. & G., 62.
(7) (1894) A.C., 129.

H. C. OF A. 1905.

FERRIS v. MARTIN.

argued in the Full Court, as long as the respondent is not prejudiced.]

The respondent is prejudiced because this is a mere irregularity. If the writ had been set aside on this ground the Judge would have imposed terms upon the appellant.

[GRIFFITH C.J.—This is not a mere irregularity, but a defect in substance. If the point is a good one, the *ca. sa.* could not have been issued in any circumstances. The point appears on the face of the proceedings. (He referred to *Macleod* v. *Attorney-General for New South Wales* (1).)]

If there is a defect in the judgment roll an amendment should be allowed.

By the *Common Law Procedure Act* 1899, sec. 49, a plaintiff may join several counts and have judgment on them all. The writ is not issued for the whole judgment commingled, but only for the £500, which is one independent judgment. There is power to do this under sec. 131 of the *Common Law Procedure Act*. The appellant is not in any way prejudiced, if the respondent is willing to abandon her judgment on the other count and the costs. The respondent followed the case of *Nicholls* v. *Rosenfeld* (2), which covered this very point, and, if that case is now over-ruled, no costs should be allowed the appellant, or, if costs are allowed, the respondent should be allowed to set them off against her verdict.

[GRIFFITH C.J.—If the Supreme Court of New South Wales holds that it is the practice of the Court to issue execution in that way we cannot say that they are wrong.]

As to the effect of the *Defamation Act* upon the *Bankruptcy Acts*, the Supreme Court held in 1886 that, as the law then stood, a defendant indebted for damages in an action for defamation was still liable to imprisonment. The legislature having afterwards re-enacted in identical terms the earlier Statutes, it must be taken that the Supreme Court rightly interpreted them, and that the intention of the legislature was that the law should remain as interpreted: *Saunders* v. *Borthistle* (3); *Nolan* v. *Clifford* (4). The old *Insolvency Act* 5 Vict. No. 17, by secs. 30 and 32, in effect provided that if a man, who was in gaol under a writ of *capias*

(1) (1891) A.C., 455.
(2) 7 N.S.W. L.R., 322.
(3) 1 C.L.R., 379, at p. 390.
(4) 1 C.L.R., 429.

in respect of a tort to which the laws for the abolition of imprisonment for debt did not apply, sequestrated his estate, he was entitled to his discharge from custody. If he so escaped, no further proceedings could be taken under the writ. Then the *Defamation Act* (11 Vict. No. 13) by sec. 14, altered the law by providing, *inter alia*, that defendants indebted for damages in an action for defamation should not have the benefit of the *Insolvency Act* amongst others. It was so decided by the Supreme Court in the cases cited. Sec. 4 of 37 Vict. No. 11 allowed such defendants to have the benefit of the Insolvency laws after twelve months in custody. The Bankruptcy Acts, finally consolidated in 1898, possibly restored the law to the condition in which it was before the *Defamation Act* (11 Vict. No. 13), though that has been doubted: (*per Manning* J. in *Re Goode* (1),) and later still, in 1901, the *Defamation Act* 1901 repeated the process and restored to force the law as it existed immediately after the 11 Vict. No. 13. This is the clearest indication of the intention of the legislature. Sec. 24 of the *Defamation Act* 1901 must be taken to have impliedly repealed secs. 10 (3) and 44 (3) of the *Bankruptcy Act* 1898. The words are plain. The words "now or hereafter in force" must mean in or after 1901. They cannot be dated back to 1848 as was contended below. The use of the word "hereafter" may possibly be beyond the power of the enacting body, and may only have effect as preventing any subsequent repeal by implication, but that does not weaken the meaning of "now." Sec. 10 (3) is a law for the relief of insolvent debtors, tending to interfere with the common law right of execution against the debtor's body. Sec. 24 says that such a law "shall not be construed to extend to affect or discharge from" liability. The only possible construction of that is an implied repeal of sec. 10 (3) of the *Bankruptcy Act*, if the latter section is capable of being applied to the case of a defendant in an action for defamation. If the legislature had intended that the *Defamation Act* should not operate as a repeal of the *Bankruptcy Act*, so far as the two were in conflict, it could have been so provided, as in the consolidated *Matrimonial Causes Act* 1899, which Act, by sec. 88, sub-sec. (3), provides that the Act should not

(1) 1 B.C. (N.S.W.), 9.

H. C. OF A. 1905.

FERRIS v. MARTIN.

be taken to repeal or affect the operation of the *Bankruptcy Act* 1898, and should be construed as if passed immediately before it.

The doctrine of election has no application. It is part of the "law for the relief of insolvent debtors," within the meaning of sec. 24 of the *Defamation Act*. "Law" includes the common law.

[O'CONNOR J.—Supposing it is part of the general law, which may have a particular application to the relief of bankrupts, surely that would not bring it within sec. 24.

GRIFFITH C.J.—It is not a law for their relief, though it operates for their benefit. "Law" in this Statute must surely mean Statute law.]

The section is equally applicable to common law. *Nicholls* v. *Rosenfeld* (1) was right on this point. The fact that the judgment creditor was herself the petitioning creditor does not alter the position.

[GRIFFITH C.J. referred to *Cassidy* v. *Steuart* (2)].

Armstrong, in reply, referred to *Re Martin*; *Ex parte The Commissioners of Taxation* (3); *Clarke* v. *Clarke* (4); *Re Goode* (5).

Cur. adv. vult.

June 27.

GRIFFITH C.J. This is an appeal from an order of the Supreme Court of New South Wales, discharging an order made by *A. H. Simpson* J., by which he directed that a writ of *capias ad satisfaciendum*, sued out by the respondent against the appellant, should be set aside, and the appellant discharged from custody. The writ of *ca. sa.* was issued in an action in which the respondent had recovered against the appellant a verdict of £500 damages for slander and £30 for breach of contract. The application to set aside the writ was made on several grounds, of which I propose to notice two only. The first was that the writ was issued and the appellant arrested without the leave of the Supreme Court in its Bankruptcy jurisdiction, and the second that the respondent had procured the sequestration of the appellant's estate in bankruptcy upon her judgment debt.

(1) 7 N.S.W. L.R., 322.
(2) 2 Man. & G., 437.
(3) (1905) 5 S.R. (N.S.W.), 181.
(4) 7 B.C. (N.S.W.), 58; 13 N.S.W. W.N., 188.
(5) 1 B.C. (N.S.W.), 9.

As I understand it, the learned Judge of first instance set aside the writ on the first ground. The Full Court was of opinion that that ground was not tenable, having regard to the Statute law as it now exists, and that the objection with respect to the *Bankruptcy Act* was invalid. I will deal briefly with the question as to the failure to obtain the leave of the Bankruptcy Court before issuing the writ of *capias*. That turns upon Statute law. By the Act 11 Vict., No. 13, usually called the *Defamation Act*, it was provided in sec. 14 that from and after the passing of that Act, "no law which is now or may hereafter be in force" in New South Wales for the relief of insolvent debtors "or for the abolition of imprisonment for debt shall extend or be construed to extend to affect or discharge from his liability any person who shall be indebted for any penalty damages or costs adjudged against him in any proceeding either civil or criminal for the printing or publishing of any . . . defamatory words." Those are the material words of the section. It applied to future as well as to existing law. I think that the word "law" in this section must be read to mean Statute law. It in effect amounted to a limited Interpretation Act, to affect all existing as well as future legislation. The existing Statute to which it was intended to apply was the *Insolvency Act* (5 Vict. No. 17), but in its terms it was applicable to all Statutes "now or hereafter to be in force." Like all Interpretation Acts, however, it must be read subject to the proviso "unless the context otherwise requires." Reading it in that way, no real difficulty can arise, at any rate as to sec. 10 (3) of the *Bankruptcy Act* 1898, upon which the objection with which I am now dealing was founded. That section provides as follows: —[His Honor read the section and continued.] Reading these two sections together the effect will be that sec. 10 of the *Bankruptcy Act* must be read as not extending to the case of a defendant indebted for damages in an action for publishing defamatory words. Thus read, there is no inconsistency between the two Acts. It seems to have been assumed that the *Bankruptcy Act* was in effect a repeal of sec. 14 of the *Defamation Act* (11 Vict. No. 13), but for the reasons I have given I do not think it necessary to come to that conclusion. Later, in 1901, the

H. C. OF A. 1905.

FERRIS v. MARTIN.

Griffith C.J.

Defamation Act (11 Vict. No. 13) was repealed and re-enacted, the provisions contained in sec. 14 being re-enacted in sec. 24 of the *Defamation Act* 1901, in that respect leaving the law as it was before. A greater difficulty would arise under sec. 44 (3) of the *Bankruptcy Act* 1898, which expressly deals with the case of debtors of this kind, and if a question arose under that section, it might be contended with great force that the legislature, having applied its mind to that particular subject, must be taken to have excluded the application of the general provision contained in sec. 14 of the then existing *Defamation Act*. Whether under those circumstances, the *Defamation Act* being re-enacted at a date later than that of the *Bankruptcy Act* 1898, it would be held that the consolidation had or had not effected a change in the law, is a matter which does not arise in this application. It is therefore not necessary to consider it. But there is a serious difficulty, and it would be much more satisfactory if the legislature would solve it. For these reasons I do not feel at all pressed by the contention that the respondent should have obtained the leave of the Bankruptcy Court before suing out the writ of *capias*.

I pass now to the other objection, that the plaintiff was not entitled to issue a writ of *ca. sa.* because she had already made the appellant bankrupt. Now, the respondent is standing upon her common law rights. She claims that the Statute law of New South Wales does not affect the case at all. I assume that there is no other Statute law than that quoted to us which affects it. That is a matter which may some day be argued. For the purposes of this case I assume that the supposed common law right to issue a writ of *capias* is part of the law of New South Wales, except so far as it has been taken away by the Acts for the abolition of imprisonment for debt, which do not extend to cases of defamation. But if the respondent relies upon her common law right she must take that right with all the common law incidents that attach to it. Now those incidents are well known. They are nowhere more clearly stated than in the case of *Miller* v. *Parnell* (1) decided in 1815 by the Court of Common Pleas. In that case the defendant had

(1) 6 Taunt., 370.

been taken in execution under a writ of *capias*, and an application was made for his discharge on the ground that the plaintiff had previously sued out a writ of *fieri facias* which had not yet been returned. The contention was that it was a well-known rule that a plaintiff had the option of execution against the person or against the property of the debtor, but could not have both. If he took the first, execution against the debtor's person, the debtor was discharged as far as his goods were concerned, with certain exceptions to which it is not necessary to refer. If he took out execution against the goods of the debtor, he was not debarred from afterwards levying execution against the person, but he must first have completely got rid of the execution against the goods. I will read the statement of the decision in that case, because it very clearly states the principle and the reason for it (1). "No doubt, a plaintiff having sued out a writ of *fieri facias*, may, if he pleases, omit to execute the *fieri facias*, and take out a writ of *capias ad satisfaciendum*, and execute that before the *fieri facias* is returned or returnable. But there is also no doubt that if the plaintiff does execute his *fieri facias*, he cannot have a writ of *capias ad satisfaciendum* till the *fieri facias* is completely executed and returned. This is a middle case. So far as the defendant is concerned, the goods, to the extent of their value, have been levied; and the question is, whether the plaintiff, after taking them, may change his mind, and sue out a writ of *capias ad satisfaciendum* without returning his former writ. If this might be, it would confer a power that might be much abused. If the *fieri facias* be returned, there is something to bind the plaintiff, and to limit for how much he shall have the body, by showing how much he has already gotten. If a plaintiff might take goods under a *fieri facias*, and hold them a month, or the greater part of the long vacation, and then change his mind, and say, 'I will not sell, but will take the body of the defendant under a *capias ad satisfaciendum*,' it might be the engine of very great oppression. The plaintiff may, by the practice of the Court, sue out both these processes together, if he will, and may use either the one or the other, as he sees advisable, but by using the *fieri facias* first, he makes his election, and after

(1) 6 Taunt., 370, at p. 371.

H. C. OF A. 1905.

FERRIS v. MARTIN.

Griffith C.J.

having so elected, he cannot use the other process, till after the return of the first. We therefore think, that this writ of *capias ad satisfaciendum*, being sued out after the *fieri facias* had issued, and after the sheriff had taken the goods under it, and before its return, cannot be supported." The writ was therefore set aside.

That was no new doctrine. It merely stated the recognized rule governing the plaintiff's right to levy execution against the body of his debtor. The authority of that case was distinctly affirmed by the Court of Appeal in *In re A Debtor*; *Ex parte Smith* (1). That, then, is the law to which the respondent has sought recourse. Now that decision applies in terms only to a writ of *fieri facias*, but long before that, the effect of taking the goods by a petition in bankruptcy by a judgment creditor had come up for consideration before Lord *Hardwicke* L.C. The first case reported on the point was in 1743: *Ex parte Wilson* (2). In that case the judgment creditor had first of all presented a petition, procured a commission, as it was then called, in bankruptcy, against the debtor, and then he took his body in execution. The Lord Chancellor said (2): "This Court will not suffer a petitioning creditor to arrest a bankrupt, and for this reason, because that a commission of bankruptcy is considered both as an action and an execution in the first instance; and after the petitioning creditor has laid hold of all the bankrupt's effects, it would be a great absurdity for the same person to be permitted to arrest him likewise." That is simply applying the principle clearly stated in *Miller* v. *Parnell* (3). Another case was decided in the same year by the same Lord Chancellor: *Ex parte Ward* (4). There the bankrupt was in custody at the suit of the petitioning creditor and the assignees of the estate. The objection was that they could not take him after determining their election by coming under the commission. The assignees insisted that they were not so bound because they had not proved any debt under the commission. The Lord Chancellor said (4): "The petition must be allowed as against the petitioning creditor, for he has determined his election by taking out the commission, ... but," he continued "there is no foundation to grant

(1) (1902) 2 K.B., 260.
(2) 1 Atk., 152.
(3) 6 Taunt., 370.
(4) 1 Atk., 153.

what the petition prays with regard to the assignees; for notwithstanding they are creditors of the bankrupt, yet as they refused to prove their debts under the commission, the barely being assignees . . . will not determine their election; for they can only be considered as creditors at large, since they have not proved any debt." Then three years later, in the case of *Ex parte Lewes* (1), the same Lord Chancellor said: "A petitioning creditor cannot keep the bankrupt in gaol, because he has no election as a common creditor has; for if he was to elect to proceed at law, the commission must of course be superseded, which would affect those creditors who have proved under the commission." That is to say, treating a petition in bankruptcy as in the nature of an execution at common law, the creditor could elect to abandon the execution against the goods and have his execution against the body, but he could not do so in the case of bankruptcy, because other persons were interested, and therefore he was held to have irrevocably determined his election. These principles are illustrated in authorities extending over one hundred and fifty years, and from them it follows that a petitioning creditor, having irrevocably elected to have recourse to the goods of the debtor, cannot afterwards take the debtor's body in execution. The case in the New South Wales Court which was relied upon by the respondent, *Nicholls* v. *Rosenfeld* (2), is not in any way inconsistent with this decision. In that case the plaintiff, the judgment creditor, was not the petitioning creditor, but had proved in the estate. It is not necessary to say whether that would or would not be sufficient to show that he had determined his election. That is not this case. In this case the respondent, by obtaining the order of sequestration has irrevocably elected to have recourse to the debtor's goods, and she cannot now, according to the practice of the common law to which she has resorted, claim to have recourse also to execution against his body.

For these reasons I think the order of *Simpson* J. was right, though not on the same grounds, and that the order of the Full Court discharging it should be set aside, and that of *Simpson* J. restored.

(1) 1 Atk., 154.

(2) 7 N.S.W. L.R., 322.

H. C. OF A. 1905.

FERRIS v. MARTIN.

Barton J.

BARTON J. I concur in the opinion that the order of *Simpson* J. should be restored, and on the ground upon which the Chief Justice has put it, namely, that the doctrine of election applies to this case. After the exhaustive way in which His Honour has gone into the matter, there is no necessity for me to say more than this, that the case of *Miller* v. *Parnell* (1) has been recognized as good law to the present day, and is to my mind a conclusive authority for the position taken up by the appellant.

It has been argued that sec. 24 of the *Defamation Act* affects the case, on the ground that the doctrine of election comes within the meaning of the words "law now or hereafter in force for the relief of insolvent debtors." I cannot accede to that argument. It does not appear to me that the doctrine of election can be classed as a law for the relief of insolvent debtors, because it is a part of the common law of England dependent upon principles applicable to the whole range of the common law, and not simply to the case of insolvent debtors, and therefore it does not seem to me to be a matter intended to be dealt with by sec. 24 of the *Defamation Act*. Holding that opinion, and that being, so far as I can see, the main argument advanced by the respondent on this point, I agree with His Honor the Chief Justice that that doctrine applies to this case; and that therefore there is no necessity for us to consider the question as to the form of the writ, or whether the leave of the Bankruptcy Court should have been obtained before issuing it. But it is as well to mention the difficulty as to the consolidation of the Acts, which has arisen from the fact that the Bankruptcy Acts were consolidated before the Defamation Acts. I cannot help saying that it would be much more satisfactory to the Courts and the public if this matter were cleared up by some legislation declaratory or otherwise, so that in any future proceedings a conclusion, which a large part of the community might think undesirable, might be avoided. It is quite possible,—I cannot say more than that—that owing to the transposition of these two branches of the Statute law which have been consolidated, the Court may come to some conclusion, which, though clearly founded upon legal principles, may not be at all acceptable to laymen, because there are cases in which the inten-

(1) 6 Taunt., 370.

tion of the legislature has to be decided according to principles which bind the Courts in the interpretation of Statute law, while they may be aware that it is very improbable that the intentions to be deduced from the words used were those which the legislature entertained when it adopted the course it did. I throw out these observations because it is well that attention should be called to this state of the law, in order that there may be an opportunity of preventing the rights of parties becoming the sport of legal principle in opposition to the real intention of those who framed the law.

I do not go into the question of the form of the judgment or of the necessity for obtaining the leave of the Bankruptcy Court, because, in my opinion, the doctrine of election solves the whole case. I agree that the appeal should be allowed, and the order of *Simpson* J. restored.

O'Connor J. In the view I take of this case it is only necessary to consider one of the grounds urged by Mr. Armstrong on behalf of the appellant, namely, that the respondent, having made use of her judgment to petition for an order for sequestration in bankruptcy against the appellant, having proved in his estate and been classed as a creditor, cannot, while the bankruptcy is pending, exercise this remedy of *capias ad satisfaciendum*. The *Defamation Act* gives no new remedy. It simply preserves the remedies which existed at the time of the passing of the Act 10 Vict. No. 7, which, speaking generally, abolished imprisonment for debt. The plaintiff's remedies in an action for slander are the same as they were nearly fifty years ago, and the law regulating them is to be found in the old books dealing with the exercise of rights and remedies against property and person commonly exercised in such cases. Now the rule of law as to election is a very old one and arises out of the very nature of the remedies themselves. In *Bacon's Abridgement*, 7th ed., vol. III., p. 393, it is put in this way: "When the plaintiff has judgment, he has it in his election to sue out what kind of execution he pleases; but he cannot regularly take out two different executions on the same judgment nor a second of the same nature, unless upon failure of satisfaction on the first." Then in a note reference is made to

H. C. of A. 1905.

FERRIS v. MARTIN.

O'Connor J.

Miller v. *Parnell*, as reported in 2 Marsh., 78, and the writer continues: "Therefore, if the plaintiff, upon a judgment or recognizance at common law, sues out an *elegit*, he can have no *capias ad satisfaciendum* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels, and a moiety of the land, which being entered upon the record, he is thereby estopped; and though he takes but an acre of land in execution, yet it is held a satisfaction of the debt, be it never so great, because in time it may come out of it." In regard therefore to the remedy of *elegit* or taking the land, it has always been the law that where a plaintiff elects to use that remedy, he cannot be allowed to exercise the other remedy against the person. The same principle of election has also obtained with regard to the use of the other remedy of *fieri facias*. In the case of *Miller* v. *Parnell* (1) to which my learned brother the Chief Justice has referred, it was pointed out that the remedy of taking the debtor's goods in execution must be finally dealt with before the remedy on the writ to take the body can be exercised. From the very nature of the writ of *capias ad satisfaciendum* it is apparent that the Courts in order to guard against abuse of process must exercise some control over those who seek to use it in satisfaction of a judgment. The writ is thus described in another passage in *Bacon's Abridgement*, 7th ed., vol. III., p. 395, note (*a*): "The Statute of James . . . treats this however only as a doubt;" (referring to a decision that if a person taken on a *capias ad satisfaciendum* died in execution, a plaintiff had no further remedy) "for the body is merely a pledge for the debt; it is taken not in satisfaction, but *ad satisfaciendum*. The debtor is presumed solvent, and is therefore coerced of his liberty until he makes payment. His imprisonment is not a punishment, but merely a means of getting at that property which he is supposed to possess, and fraudulently withhold. If he dies in prison without having surrendered his property, it is perfectly content with this proceeding that a new writ should issue attaching immediately upon the property. The judgment of the Court, that he shall pay, is still unexecuted."

(1) 6 Taunt., 370.

Now it has always been the law that when a creditor takes the body of the debtor that is deemed a satisfaction of the debt, and for this reason, that if he voluntarily releases him he shall have no further remedy. Of course if he is released by operation of law, the plaintiff still has a remedy. That was the case in *In re G. R. Dibbs* (1), in which it was held that, notwithstanding that the body of the debtor had been taken and held for the period prescribed by Statute, there was no satisfaction of the debt, because the release was by operation of law, and not by the act of the parties. The doctrine of election has been similarly applied in the case where the creditor has taken goods in execution. His Honor the Chief Justice has referred to *Miller* v. *Parnell* (2), and the cases which follow it. They all proceed upon the principle that, where the remedy of execution against the goods has been exercised, until the writ has been completely returned there cannot be any remedy exercised against the person of the debtor. A plaintiff cannot have two remedies going on at the same time. The same principle was applied in *Cohen* v. *Cunningham* (3), on the ground that the remedy by enforcement of bankruptcy is really in the nature of an execution against the debtor's goods. That is the principle upon which the cases, in 1 Atkyns referred to by the Chief Justice, proceeded. In his judgment in the case *Ex parte Wilson* (4), Lord *Hardwicke* L.C., says, "This Court will not suffer a petitioning creditor to arrest a bankrupt, and for this reason, because that a commission of bankruptcy is considered both as an action and an execution in the first instance."

It would seem therefore to be a well established principle that where a judgment creditor has pursued his remedy against property, whether by *fieri facias* directly levying upon the goods, or by way of a proceeding in bankruptcy, which brings the whole of the property of the debtor into Court for the purpose of satisfying this and other debts, he cannot, until that remedy has been followed out and determined, exercise any other remedy against the person of the debtor. Now those being the common law rights of the respondent and appellant in this respect, does the *Defamation Act* in any way alter them? I will assume for the purpose

(1) 2 N.S.W.L.R., 10.
(2) 6 Taunt., 370.
(3) 8 T.R., 123.
(4) 1 Atk., 152.

H. C. OF A. 1905. FERRIS v. MARTIN. O'Connor J.

of the observations which I am about to make that sec. 24 of the *Defamation Act* 1901 has repealed, so far as may be necessary, the provisions of the *Bankruptcy Act* 1898. It provides: [His Honor then read sec. 24, sub-sec. (1) of the *Defamation Act* 1901.] Now the law which puts the respondent to her election in this case is not a law for the relief of insolvent debtors. It is part of the general common law, which arises from the very nature of these remedies, and it would be stretching the Statute a long way to say that a branch of the common law, because it is applied in relation to a case where a plaintiff seeks a remedy in the Insolvency Court, comes within the words "a law . . . for the relief of insolvent debtors." The matter appears to me to depend entirely on the common law rights of the parties, and the words of sec. 24 do not in any way affect those rights. I agree with their Honors, that under sec. 24 the common law rights of the parties are preserved just as they stand. When the estate of the debtor is released from bankruptcy, the same remedies that existed before will revive. The bankruptcy is merely an interlude. If the respondent has not recovered the whole amount of the judgment, the debtor's liability for the balance remains, and may be enforced, to the extent of the debt remaining unsatisfied when the bankruptcy is at an end, as if the bankruptcy had never taken place. In that way the intention of the legislature, which was to preserve the remedies which a plaintiff had under the *Defamation Act*, apart altogether from the Bankruptcy law, as they existed before, is carried out.

I am of opinion therefore, that the writ of *ca. sa.* was rightly set aside.

Appeal allowed with costs. Order appealed from discharged with costs of appeal to Supreme Court. Order of A. H. Simpson J. restored.

On the application of *Armstrong*, the Court, for special reasons, ordered the amount of security to be paid out to the appellant's solicitor.

Bromfield, for the respondent, asked to be allowed to set-off the

costs of the appeal against the verdict. That cannot be done without an order. *A. H. Simpson* J. refused to make such an order, and if his order is restored that part of it will stand.

He also asked the Court to stay an action which was being brought against the respondent and her solicitor, claiming damages for false imprisonment, &c.

GRIFFITH C.J. This Court cannot stay another action. The appellant is not receiving any favour from the Court. We cannot impose upon him a condition upon which he may enjoy his right.

Bromfield. The Court can make the costs conditional upon the withdrawal of the action.

Armstrong. It is a universal rule that, where the setting aside of a writ is a matter of discretion, the Court will not set it aside except upon reasonable terms, but here there has been no exercise of discretion. The appellant has shown a right, not appealed for a favour.

Privy Council costs cannot be set off, whatever the circumstances may be: *Adams* v. *Young* (5). These costs are on the same footing.

Per curiam. Substantially the same relief can be given in another form.

Order that costs of the motion in the Supreme Court be set off against the respondent's judgment. Execution for costs of the appeal to the High Court not to issue if the respondent executes a release of a corresponding amount of her judgment debt.

Solicitors for appellant, *Levy & Fulton.*

Solicitors for respondent, *Lambton, Milford, & Abbott.*

C. A. W.

(1) 15 N.S.W. W.N., 269.