

Not Roll Coles Myer Finance Ltd v FCT 98 ALR 411	Not Roll Coles Myer Finance Ltd v FCT 21 ATR 1185	Appl Coles Myer Finance Ltd v FCT (1993) 25 ATR 95	Roll Coles Myer Finance Ltd v FCT (1993) 112 ALR 322	Cons Coles Myer Finance Ltd v FCT (1993) 67 ALJR 463	Appl Coles Myer Finance Ltd v Federal Commissioner of Taxation (1993) 176 CLR 640
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[HIGH COURT OF AUSTRALIA.]

DAVID APPELLANT ;

RESPONDENT,

AND

MALOUF AND ANOTHER RESPONDENTS.

PETITIONERS,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Insolvency Act 1890 (Vict.) (No. 1102), sec. 37—Insolvency Act 1897 (Vict.) (No. 1513), sec. 106 (2)—Sequestration—Petitioning creditor's debt—Current promissory note.

H. C. OF A.
1908.

Sec. 37 of the *Insolvency Act 1890* (Vict.), as amended by sec. 106 (2) of the *Insolvency Act 1897* (Vict.), provides, in reference to a petition for the sequestration of a debtor's estate, that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity, payable either immediately or at some certain future time."

MELBOURNE,
June 11, 12.

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

Held, that a debt in respect of a current promissory note made by the debtor and of which the creditor was the holder at the date of the petition was a good petitioning creditor's debt.

Judgment of Supreme Court affirmed.

APPEAL from the Supreme Court of Victoria.

Charles Malouf and Mary Malouf petitioned for the sequestration of the estate of Joseph David.

The order *nisi* thereon, dated 3rd April 1908, was as follows, so far as is material:—

"Upon reading the petition alleging and setting forth that Joseph David is now justly and truly indebted to the petitioners in the sum of £151 12s. 7d.

H. C. OF A.
1908.
—
DAVID
v.
MALOUF.
—

on six promissory notes signed by the said Joseph David in favour of the petitioners and of which promissory notes the petitioners are the holders that the whole of such sum is owing to the petitioners that such promissory notes are all dated 1st April 1907 and are as follows:—One for £26 12s. 10d. due 4th April 1908 one for £26 7s. 3d. due 4th July 1908 one for £26 7s. 7d. due 4th October 1908 one for £25 15s. 11d. due 4th January 1909 one for £25 10s. 4d. due 4th April 1909 one for £21 4s. 8d. due 4th July 1909 and that the said debt is a liquidated sum due at law to the petitioners payable at the times aforesaid and is wholly unsecured and that the said Joseph David has committed an act of insolvency within six months before the presentation of the said petition namely on 23rd March 1908 and that the act of insolvency committed by him was that the said Joseph David made an assignment of his property to a trustee for the benefit of his creditors generally and praying that the estate of the said Joseph David might be sequestrated for the benefit of his creditors I do by this order under my hand place the estate of the said Joseph David under sequestration until this order shall be made absolute or discharged. . . .”

On the return of the order *nisi*, Hood J. made it absolute, holding that he was bound by the finding of *àBeckett* J., who made the order *nisi*, that the debt set forth in the order *nisi* was a good petitioning creditor's debt.

From the decision of Hood J. the respondent now appealed.

Alh Ket (with him *Lowe*), for the appellant. A promissory note not yet due cannot be made the foundation of a petition for sequestration. Under the *Insolvency Act* 1890, sec. 37, it was necessary that the petitioning creditor's debt should be a debt presently due and payable. But that section is amended by sec. 106 (2) of the *Insolvency Act* 1897, so that the debt must be “a liquidated sum due at law or in equity, payable either immediately or at some certain future time.” When a man takes a promissory note for his debt, the original debt is suspended and is not due until the due date of the promissory note. The effect of sec. 106 (2) of the *Insolvency Act* 1897 is that the original

debt may be a good petitioning creditor's debt notwithstanding such suspension, but the section has not the effect of making the debt on a promissory note which is not yet due a good petitioning creditor's debt. It is quite consistent with the facts here that the promissory notes were given for a debt of £20 with a money lender's rate of interest.

[BARTON J.—The interest might be apportioned: *In re Barr; Ex parte Wolfe* (1).]

In *In re Raatz; Ex parte Raatz* (2) it was held that where a bill of exchange was given for the price of goods, and the bill of exchange was still current, there was a good petitioning creditor's debt, but it was the original debt for the price of the goods.

[O'CONNOR J.—Could not the Judge have amended the order *nisi*?

ISAACS J.—There is ample power under sec. 10 (2) of the *Insolvency Act* 1897.]

There has never been any application to amend. A promissory note cannot be said to be "due" until it is payable. It is only evidence of a debt which is not due and payable until the last of the days of grace.

[ISAACS J.—A debt "due" *primâ facie* includes all sums certain which any person is legally liable to pay whether those sums have become actually payable or not: *Ex parte Kemp; In re Fastnedge* (3).]

In sec. 37 of the *Insolvency Act* 1890 "due" means "presently payable." In *Pyne v. Kinna* (4) it was held that a promissory note not yet due was not a debt which could be attached to answer a judgment debt.

[HIGGINS J.—*Tapp v. Jones* (5) is to the contrary.

GRIFFITH C.J.—In *Brett v. Levett* (6) a bill of exchange was held to constitute a good petitioning creditor's debt.]

In that case the bill of exchange was due at the time of the petition. See also *Sarrat v. Austin* (7).

[GRIFFITH C.J. referred to *In re Douthat* (8).]

H. C. OF A.
1908.

DAVID
v.
MALOUF.

(1) (1896) 1 Q.B., 616.

(2) (1897) 2 Q.B., 80.

(3) L.R. 9 Ch., 383, at p. 387.

(4) 11 I.R.C.L., 40.

(5) L.R. 10 Q.B., 591.

(6) 1 Rose, 102.

(7) 2 Rose, 112.

(8) 4 B. & A., 67.

H. C. OF A.

1908.

DAVID

v.

MALOUF.

There there was an antecedent debt for which the bill of exchange was given, and that was a good petitioning creditor's debt.

[Counsel also referred to *Encyclopædia of the Laws of England* (2nd ed.), vol. II., p. 4; 7 Geo. I. c. 31, secs. 1, 3; 5 Geo. II. c. 30, s. 22; 6 Geo. IV. c. 16, sec. 50.]

Goldsmith K.C. and *Agg*, for the respondents were not heard.

GRIFFITH C.J. The petitioning creditors' debt in this case is described as "the sum of £151 12s. 7d. on six promissory notes signed by the said Joseph David in favour of the petitioners and of which promissory notes the petitioners are the holders." The dates of the promissory notes are then given, showing that none of them had fallen due at the date of the petition. The objection is taken that that is not a good petitioning creditor's debt. Whether it is or is not depends entirely upon the Insolvency Acts. Sec. 37 of the *Insolvency Act* 1890 provides that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity;" and it was held in Victoria in *In re Taylor; Ex parte Young Bros.* (1), following the decision of *Sir James Bacon* C.J. in *Ex parte Sturt & Co.; In re Percy* (2), that those words did not include the case of a debt in respect of which credit, which was unexpired at the time of the presentation of the petition, had been given. That case, which was not a case of a promissory note, but of credit given for goods sold, was decided in 1871, shortly after the English *Bankruptcy Act* 1869 was passed. That view does not appear to have been disputed, although much might possibly have been said against it.

The English *Bankruptcy Act* 1883, by sec. 6, substituted a new definition of a petitioning creditor's debt, viz., "a liquidated sum payable either immediately or at some certain future time," leaving out the word "due." Under that provision there have been many petitions in England founded upon debts not payable until a future time. It is suggested that in all of them, even if a promissory note or a bill of exchange had been

(1) 17 V.L.R., 121; 12 A.L.T., 158.

(2) L.R. 13 Eq., 309.

given, the petition was founded on the original debt. That may be so. Sec. 37 of the Victorian Act of 1890 was amended by the Act of 1897, which added after the words "in equity" the words "payable either immediately or at some certain future time." The question for our determination is whether under the definition now given in the Victorian Acts the holder of a current promissory note of sufficient amount can present a petition. That depends upon whether it is such a debt as can be described as "a liquidated sum due at law or in equity, payable either immediately or at some certain future time."

H. C. OF A.
1908.

DAVID
v.
MALOUF

Griffith C.J.

It was not disputed that in this case, if there was an original debt in respect of which the promissory notes were given, and that fact had been set out, the petition would be good. If it were only a question of fact the matter could probably be cured by amendment. The other point is of considerable importance, because, if the objection is good, an indorsee could not become a petitioning creditor for the sequestration of the estate of the maker of a current promissory note.

It seems to me that the relation between the maker and the holder of a promissory note is that of debtor and creditor—certainly for the purposes of the Insolvency Acts. There can be no doubt that, if a man in insolvent circumstances deliberately preferred one person in that position to another, it might be a fraudulent preference. Again, if he made a preferential payment with a view to defeat or delay such persons, they would be creditors who would be defeated or delayed. Again, if it became necessary to inquire whether a debtor was able to pay his debts as they became due out of his own moneys, certainly his obligations on promissory notes falling due on subsequent dates would be regarded as debts which he might be unable to pay out of his own moneys. So that, unless the words of the Acts compel us to hold the contrary, we are bound to decide that the holder of a current promissory note is a creditor of the maker and has a good petitioning creditor's debt.

Under sec. 37 of the Act of 1890 before its amendment the word "due" was capable of meaning "presently payable"; it was also capable of meaning "owing"; and a third meaning was that the debt was a sum due either at law or in equity, regarded as

H. C. OF A. a debt, without reference to the time of payment. *Sir James*
1908. *Bacon* C.J. took the view that it meant "presently payable."

DAVID
v.
MALOUF.
Griffith C.J.

Assuming that that was the meaning of the word "due" in sec. 37 of the Act of 1890, when sec. 106 of the Act of 1897 added other words the context became different, and the meaning of the word "due" may, therefore, have become different. If we substitute in the phrase as amended the words "presently payable" for the word "due," and add the other words "payable either immediately or at some certain future time," we get "a liquidated sum presently payable at law or in equity, payable either immediately or at some certain future time." But that clearly would not be giving effect to the intention of the legislature. It seems then that, whatever the word "due" meant in its original context, it can no longer have reference to the time of payment, but must now refer to the nature of the obligation.

Another argument was that, although that view might apply to an obligation arising under a covenant or goods sold on credit, it does not apply to negotiable instruments, because the words "due" and "payable" are used as synonymous terms in the *Instruments Act* of 1890. That is, no doubt, the meaning of the word "due," as used in that Act. But it does not follow that in an other Act, in an entirely different context, the word "due" has the same meaning, nor that, if it once had that meaning in the Act of 1890, it can any longer have it after the Act of 1897. I think, therefore, that the petition is good on its face without amendment.

BARTON J. I am of the same opinion.

O'CONNOR J. I concur.

ISAACS J. I concur.

HIGGINS J. I concur.

Appeal dismissed with costs.

Solicitor, for the appellant, *R. L. Cross.*

Solicitor, for the respondents, *W. H. L. Roberts.*

B. L.