[HIGH COURT OF AUSTRALIA.]

MARY BAYNE . . . . . APPELLANT;
PLAINTIFF,

AND

ARTHUR SYDNEY BAILLIEU . . . RESPONDENT.
DEFENDANT,

MARY BAYNE . . . . . APPELLANT;
PLAINTIFF,

AND

WILLIAM RIGGALL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 25, 26; *May* 26, 27, 28; *June* 22.

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

Practice — Summary judgment for defendant — Action frivolous or vexatious — Important question of law involved — Rules of Supreme Court of Victoria 1906, *Order XIV.* (A) *— Insolvency proceedings taken to stifle litigation — Abuse of process of Court — Damages — Cause of action.*

A. having been made insolvent in Victoria on the petition of R. in respect of the costs of an action by A. and B. against R., the assignee in insolvency of A., acting at the request of R. and on his indemnity, applied to the Court of Insolvency for a warrant for the apprehension of B. on the ground of her neglect to attend on summons as a witness on certain proceedings in the insolvency. The warrant was ordered to issue, but no more was done upon it. The insolvency of A. was subsequently annulled, but the order for the issue of the warrant was left standing. In an action by B. against the assignee and R. for damages in respect of the order for the warrant, any actual damage being negatived,

Held, that summary judgment for the assignee under Order XIV. (A) of the *Rules of the Supreme Court of Victoria* 1906, was properly given, even assuming that the order for the warrant was obtained not *bonâ fide* for the purpose of discovering assets of A., but for the indirect purpose of hampering an appeal to the High Court in the original action by A. and B. against R.

An action which, being brought upon sufficient materials, seeks to raise and put in train for decision an important and difficult question of law, is not frivolous or vexatious or an abuse of the process of the Court, so as to justify the Court in giving summary judgment for the defendant under Order XIV. (A) of the *Rules of the Supreme Court of Victoria* 1906, or in staying the action.

Quære, whether proceedings in insolvency taken to stifle litigation between the parties amount to an abuse of the process of the Court in respect of which an action will lie.

Quære, further, whether such an action, if it will lie at all, will lie in Victoria by a non-trader without proof of actual damage.

Decision of Supreme Court in *Baillieu's Case*, affirmed.

Decision of Supreme Court in *Riggall's Case*, reversed.

APPEALS from the Supreme Court of Victoria.

On 13th April 1904 Lila Elizabeth Bayne and Mary Bayne commenced an action in the Supreme Court against Arthur Palmer Blake and William Riggall upon an administration bond which had been assigned to them. On 6th December 1905 judgment was given in that action by *Holroyd* J. for the defendants with costs. The defendants taxed their costs and on 19th December 1905 obtained an *allocatur*, the amount being £628 14s. 4d.

On 20th December 1905 the defendants issued a debtor's summons against each of the plaintiffs in respect of the amount of the taxed costs, that against L. E. Bayne being served on 4th January 1906, that against Mary Bayne on 15th January 1906.

On 21st December 1905 the plaintiffs gave notice of appeal to the High Court from the judgment of *Holroyd* J.

On 23rd December 1905 A. P. Blake and W. Riggall issued a writ against L. E. Bayne and Mary Bayne for the amount of the taxed costs, and on 12th January 1906 issued a summons for final judgment against L. E. Bayne, and on 19th January 1906, issued a summons for final judgment against Mary Bayne. Both summonses were heard on 25th January 1906, and an order for

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judgment was then made against both L. E. Bayne and Mary Bayne. Judgments were entered accordingly on 26th January 1906.

On 6th February 1906 orders *nisi* for the sequestration of the estates of L. E. Bayne and Mary Bayne were made by *Hood* J., in the case of L. E. Bayne on the grounds of failure to satisfy the judgment and failure to comply with the debtor's summons, and in the case of Mary Bayne on the ground of failure to comply with the debtor's summons.

These orders *nisi* were returnable on 22nd February 1906, when they were made absolute, and Arthur Sydney Baillieu was appointed assignee of the estate of L. E. Bayne.

On 8th March 1906 the appeal to the High Court from the judgment of *Holroyd* J. was duly instituted.

On 25th April 1906, on the application of A. S. Baillieu, a summons was issued by the Court of Insolvency at Melbourne under sec. 135 of the *Insolvency Act* 1890 requiring the attendance of Mary Bayne, to be examined in respect of the estate of L. E. Bayne, and that summons was duly served on Mary Bayne. On May 21st 1906, the return day of the summons, Mary Bayne did not appear, and on the application of A. S. Baillieu a warrant was ordered by the Court of Insolvency to be issued and was directed to lie in the Court for three days, but the warrant was never issued.

On September 17th 1906 the appeal to the High Court from the judgment of *Holroyd* J. was allowed (*Bayne* v. *Blake* (1)). On 30th May 1907 *Hodges* J. set aside and annulled the order *nisi* and order absolute for the sequestration of the estate of Mary Bayne and all proceedings thereunder. Mary Bayne thereupon instituted an action in the Supreme Court against A. P. Blake, W. Riggall and A. S. Baillieu by a writ dated 2nd July 1907 on which the following claims were indorsed:—

"1. For damages against the defendants A. P. Blake and W. Riggall for:—

"(*a*) Fraudulently falsely and maliciously and without reasonable and probable cause presenting a petition and obtaining orders *nisi* and absolute for the sequestration of her estate.

(1) 4 C.L.R., 1.

"(*b*) Fraudulently falsely and maliciously and by suppression of the truth that there was and a false suggestion that there was not an appeal to the High Court in an action of *Bayne and another* v. *Blake and another* in which she and her sister L. E. Bayne were plaintiffs and the said defendants were defendants causing the plaintiff to be made insolvent for the costs of the said action.

"(*c*) Fraudulently falsely and maliciously and not for the fair distribution of the present plaintiff's estate among her creditors but to prevent the plaintiffs in the said action continuing their said appeal to the High Court taking and continuing the said insolvency proceedings against both the said plaintiffs.

"(*d*) Fraudulently falsely maliciously knowingly and recklessly after a stay of proceedings under the judgment against them for the said costs causing the defendant A. S. Baillieu to apply for and obtain warrants for the arrest of herself and her said sister.

"and 2. For damages against the said A. P. Blake W. Riggall and A. S. Baillieu for fraudulently falsely and maliciously and without reasonable and probable cause and in contempt of the High Court causing a warrant to be applied for and obtained for the apprehension and commitment of the present plaintiff to the Melbourne gaol.

"And the plaintiff claims £20,000."

Summonses were taken out in that action by W. Riggall and by A. S. Baillieu for summary judgment on the ground that the action was frivolous and vexatious. These summonses were heard by *Madden* C.J., who ordered that judgment should be entered for each of these defendants with costs.

From each of those judgments Mary Bayne now appealed to the High Court.

Duffy K.C. and *Agg*, for the appellant. Quite apart from an action for malicious prosecution, if a party uses the process of the Court for a fraudulent purpose, or for the purpose of inflicting a legal injury with an indirect object, that gives rise to a right

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of action. There can be no reasonable and probable cause for an improper use of the process of the Court. The taking of proceedings in insolvency, not with the object of obtaining a distribution of the debtor's assets, but with the object of stopping a party from appealing, is an abuse of the process of the Court, and proof of these facts would be ample evidence of malice and of want of reasonable and probable cause: *In re Davies*; *Ex parte King* (1); *Ex parte Griffin*; *In re Adams* (2); *Ex parte Harper*; *In re Pooley* (3); *Ex parte Gallimore* (4); *Grainger* v. *Hill* (5); *King* v. *Henderson* (6); *Ex parte Bourne* (7); *Heywood* v. *Collinge* (8); *In re Smart and Walker*; *Ex parte Hill* (9); *In re Bayne* (10); *Williams on Bankruptcy*, 8th ed., p. 49. Motive is immaterial, but, if it is followed by a course of conduct, it is important as showing the intention of that course of conduct. An action founded on facts such as are alleged here is not frivolous and vexatious.

[O'CONNOR J. referred to *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Co.* (11).]

Order XIV. (A), r. 1 of the *Rules of the Supreme Court* 1906, was not intended to usurp the function of a jury, or to be a substitute for a trial: *Jacobs* v. *Booth's Distillery Co.* (12).

[GRIFFITH C.J. referred to *Wallingford* v. *Mutual Society* (13).]

In order to justify a summary judgment under that rule it should be shown that the action is obviously unsustainable. This rule is only intended to carry out the inherent jurisdiction of the Court; if it goes further it is *ultra vires*: see *Davey* v. *Bentinck* (14). In the case of Baillieu, it is open on the facts for a jury to say that he was doing whatever Blake and Riggall told him to do, and was not acting *bonâ fide*.

Weigall K.C. and *McArthur*, for the respondent Riggall. Under Order XIV. (A) it is intended to allow a Judge to deal with the

(1) 3 Ch. D., 461.
(2) 12 Ch. D., 480.
(3) 20 Ch. D., 685.
(4) 2 Rose, 424.
(5) 4 Bing. N.C., 212; 5 Scott, 561.
(6) (1898) A.C., 720; 18 N.S.W. L.R., 1.
(7) 2 G. & J., 137.
(8) 9 A. & E., 268; 1 P. & D., 202.
(9) 20 V.L.R., 97.
(10) 25 A.L.T., 176.
(11) (1892) 3 Ch., 274.
(12) 85 L.T., 262.
(13) 5 App. Cas., 685.
(14) (1893) 1 Q.B., 185.

law and the facts, and, if he thinks they are such that the plaintiff has no case, to stop the action. See *Lawrance* v. *Lord Norreys* (1).

[GRIFFITH C.J.—The defendant must show that under no possibility could there be a good cause of action consistently with the pleadings and the facts: *Goodson* v. *Grierson* (2).]

On the evidence given and suggested as possible the appellant had no reasonable possibility of success. Heretofore there have been two kinds of causes of action totally distinct from one another, one for maliciously and improperly making a person insolvent, which is analogous to an action for malicious prosecution, and the other for an abuse of the civil process of a Court, that is to say, making an improper use of the process of the Court: *Clerk and Lindsell on Torts*, 4th ed., pp. 668, 663. It has been attempted here to mix up those two causes of action. In *Grainger* v. *Hill* (3) the action was for improperly using a process of the Court which had been properly obtained, and so was the case of *Heywood* v. *Collinge* (4). The elements of an action for maliciously making a person insolvent are absence of reasonable and probable cause, malice and damage. If that be so the appellant must fail, for there is no evidence of want of reasonable and probable cause or of damage. If the case is put as an abuse of the process of the Court then there is no proof of damage. The answer is that the appeal was not stopped. All the facts were presented to the Judge when the order for sequestration was made, and there was no concealment. The fact that the object was to stop the appeal is immaterial: *In re Morissey*; *Ex parte Perkins* (5). Whether the Court should make absolute an order *nisi* for sequestration is a different question from whether it is actionable to make a man insolvent with the object of stopping further litigation by him. The fact that a man has no assets is not a ground for not making him insolvent: *In re Leonard*; *Ex parte Leonard* (6). See also *Ex parte Painter*; *In re Painter* (7). In *King* v. *Henderson* (8) it was distinctly held that mere motive, however reprehensible, is not sufficient to

(1) 39 Ch. D., 213; 15 App. Cas., 210.
(2) (1908) 1 K.B., 761.
(3) 4 Bing. N.C., 212.
(4) 9 A. & E., 268.
(5) 24 V.L.R., 776; 20 A.L.T., 223.
(6) (1896) 1 Q.B., 473.
(7) (1895) 1 Q.B., 85.
(8) (1898) A.C., 720.

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constitute an abuse of process or a fraud upon the Court. If all the facts are put before the Court and the Court is asked to make an order upon them, and if the Court does make the order, there is no abuse of process. In *In re Bayne* (1) the Court was deceived in that it was not informed of a very material fact, viz., that a proposed appeal by the debtor in an action against her by the petitioner had been stopped by the petitioner until the debtor should give security for the costs of the appeal, and that in the meanwhile the petitioner, who had got a judgment for his costs of that action, took the insolvency proceedings in respect of that judgment for costs. In *Ex parte Bourne* (2) it was admitted that, if a commission in bankruptcy were taken out with the motive of stopping an action, but with the intent that it should operate as a commission, the Court would not interfere to supersede the commission. The presenting a petition in insolvency is not evidence of damage in the case of a non-trader: *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (3): *Wyatt* v. *Palmer* (4).

[O'CONNOR J.—*Heywood* v. *Collinge* (5) seems to support the view that special damage should be proved.]

[Counsel also referred to *Ex parte Wilbran* (6); *In re Leonard*; *Ex parte Leonard* (7); *In re Hecquard*; *Ex parte Hecquard* (8); *In re Jubb*; *Ex parte Burman* (9); *Williams* v. *Smith* (10); *Daniels* v. *Fielding* (11); *In re Sims*; *Ex parte Demamiel* (12).]

Mann, for the respondent Baillieu. The cause of action against this respondent involves a charge of misfeasance in a public office. As to the position of an assignee, see *Insolvency Act* 1890, sec. 52; *Insolvency Act* 1897, sec. 30. It was therefore important for this respondent to get rid of the action at the earliest possible opportunity. Whether there was or was not reasonable and probable cause, the obtaining of the order complained of gave no cause of action. An application for a warrant under sec. 135 of the *Insolvency Act* 1890 imports no damage either to the person, or to the property, or to the reputation, and

(1) 25 A.L.T., 176.
(2) 2 G. & J., 137, at p. 150.
(3) 11 Q.B.D., 674.
(4) (1899) 2 Q.B., 106.
(5) 9 A. & E., 268.
(6) 5 Madd., 1.
(7) (1896) 1 Q.B., 473.
(8) 24 Q.B.D., 71.
(9) (1897) 1 Q.B., 641.
(10) 14 C.B.N.S., 596.
(11) 16 M. & W., 200.
(12) 21 V.L.R., 630; 17 A.L.T., 230.

special damage must be proved. An action will not lie for a malicious prosecution of a civil process without proof of actionable damage, such as arrest: *Bullen & Leake's Precedents of Pleadings*, 3rd ed., p. 351; *Encyclopædia of Laws of England*, vol. VIII., p. 89; *George* v. *Radford* (1); *Berry* v. *Adamson* (2). The application for a warrant was a civil proceeding or in the nature of a civil proceeding: *In re Armstrong*; *Ex parte Lindsay* (3). As both the adjudication of insolvency of L. E. Bayne and the order complained of were standing, there was no absence of reasonable and probable cause. None of the evidence given is inconsistent with reasonable and probable cause. The plaintiff on an application of this kind must indicate the nature of the evidence he proposes to call: *Birch* v. *Birch* (4). Where the plaintiff practically alleges that a judgment has been obtained by fraud, the Court on such an application puts upon the plaintiff the burden of showing a *primâ facie* case.

Duffy K.C., in reply. It is an abuse of the process of the Court if the main object of taking insolvency proceedings is to stop an appeal: *Ex parte Phipps* (5). If the process has been used for the purpose of injury and the effect of using that process has been to defeat the rights of the appellant, legal or equitable, an action will lie: *King* v. *Henderson* (6). In that case the debt in respect of which the bankruptcy proceedings were taken was admitted; here the validity of the debt depended on the correctness of the judgment the appeal from which was attempted to be stopped. An abuse of the process of the Court connotes that the formal materials for the exercise of jurisdiction are present, so that the fact that the Judge was informed of everything at the time the order was made absolute is immaterial. Although the appeal was not stopped, the appellant was hampered in prosecuting it. There being a doubtful question of law the action should not have been stayed. See *Mittens* v. *Foreman* (7).

[GRIFFITH C.J. referred to *Hubbuck & Sons Ltd.* v. *Wilkinson, Heywood & Clark Ltd.* (8); *Ex parte Bowes* (9).]

(1) Moo. & M., 244; 3 C. & P., 464.
(2) 6 B. & C., 528.
(3) (1892) 1 Q.B., 327.
(4) (1902) P., 130, at p. 136.
(5) 3 M. D. & D., 505, at p. 521.
(6) (1898) A.C., 720, at p. 731.
(7) 58 L.J.Q.B., 40.
(8) (1899) 1 Q.B., 86, at p. 91.
(9) 4 Ves., 168.

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As to Baillieu, if he acted under the direction of the other defendants and asked for the warrant in order to harass and annoy the appellant, and to injure her reputation, the action lies against him. His acts were a part of a course of conduct on the part of all the defendants to hamper the appeal.

[He also referred to *Ex parte Browne* (1)].

Cur. adv. vult.

June 22.

The following judgments were read :—

GRIFFITH C.J. These two appeals, which were argued together, and which were brought from two orders of *Madden* C.J. made in the same action, raise entirely distinct questions. No point was made of improper joinder of the alleged causes of action against the two respondents, although it is hard to see how they could properly be joined in one action.

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I will deal first with Baillieu's case. The cause of action set out in the writ, so far as regards him, is that the two respondents and the third defendant Blake fraudulently, falsely and maliciously, and without reasonable and probable cause, and in contempt of the High Court caused a warrant to be applied for and obtained for the apprehension and commitment of the plaintiff to the Melbourne goal.

The relevant facts are that Lila E. Bayne had been adjudged insolvent on the petition of the defendants Blake and Riggall, the debt being in respect of costs due under a judgment for these defendants in an action brought against them by the appellant and the insolvent. The respondent was appointed assignee of her estate. At the request of his co-defendants, who had been the petitioning creditors, he obtained a summons from the Insolvency Court for the attendance of the appellant as a witness. She did not attend in pursuance of the summons, whereupon an application was made by the respondent for a warrant for her apprehension. The Court ordered the warrant to issue, but to lie in the office for three days. Nothing more was done upon it. Neither the warrant nor the order has been set aside. At the

(1) 1 Rose, 151.

time when the order was applied for an appeal had been duly instituted in the High Court from the judgment on which the petitioning creditor's debt was founded, but no stay of proceedings had been granted in the insolvency. The appellant alleges and the respondent denies that he was aware of this fact. He was, however, acting at the instance and on an indemnity from the other defendants, who were, of course, aware of it, and I will assume that he also knew. I will also assume that it could be proved, as suggested, that the order for the warrant was not obtained for any *bonâ fide* purpose of discovering assets in the estate of the insolvent Lila Bayne, but for the indirect purpose of hampering her in the appeal to this Court.

What then is the cause of action? It cannot be supported as an action for trespass to the person, for nothing was done under the warrant. Nor can it be supported as an action for maliciously and without reasonable and probable cause procuring the issue of process, for the warrant had not been set aside when this action was brought, and so long as it stood it must be taken to have been properly issued. But it is suggested that the action is in substance an action for damages for a conspiracy to oppress the appellant. Such an action, if it lies at all, could not be maintained without proof of actual damage, and in this case actual damage is negatived.

For these reasons I am of opinion that the action against Baillieu is one in which the plaintiff could not possibly succeed, and that the order of the learned Chief Justice was properly made.

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The case of the respondent Riggall presents much more difficulty. The judgment in the action brought by the appellant and Lila Bayne against the defendants Blake and Riggall was signed on 6th December 1905. The *allocatur* for costs was given on 19th December, and on the following day the successful parties took out a debtor's summons against the appellant. On the 20th notice of appeal to the High Court from the judgment was given. On 15th January 1906 the debtor's summons was served on the appellant. On 6th February Blake and Riggall presented a petition for sequestration of her estate, and on the same day

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obtained *ex parte* an order *nisi*, which under the law of Victoria has the effect of a provisional sequestration. The order *nisi* was returnable before *Hood* J., who, being fully informed of the facts above stated, made an order absolute for sequestration. The appellant complains that the respondent and Blake presented the petition maliciously and without reasonable and probable cause. It is alleged, and it must be taken upon the materials before us, that there is evidence available from which a jury might find that the petition was presented mainly, if not altogether, for the purpose of preventing the prosecution of the appeal, and not at all for the purpose of making any property available for the payment of the judgment debt, since the appellant had nothing in the world outside her claim asserted in the action which had failed.

The respondent says that as there was a debt and an act of insolvency, there would not be an absence of reasonable and probable cause. The appellant replies that the presentation of the petition, or at any rate the procuring of the provisional sequestration by the order *nisi*, was under the circumstances an abuse of the process of the Court, and that in the case of an abuse of process there can be no reasonable and probable cause, whatever other facts may exist. The respondent rejoins that the motive for doing a lawful act is not material, and that, if the act done is not unlawful and is warranted by the facts, the Court cannot make any further inquiry. That the exercise of a legal right to institute proceedings in a Court of justice may, under some circumstances, be regarded as an abuse of the process of the Court, is shown by the very recent case of *In re Norton's Settlement*; *Norton* v. *Norton* (1). The respondent further contended that the alleged purpose was not effectuated, since, notwithstanding the sequestration, the appeal to the High Court proceeded and was allowed, so that no damage followed to the appellant.

It may be a question whether the sequestration could have been set up as bar to the appeal. (Compare the two cases of *Edwards* v. *Edwards* (2) and *Crossley* v. *Anti-Vibration Incandescent Lighting Co. Ltd.* (3). But, whether it could or not,

(1) (1908) 1 Ch., 471. (2) (1906) W.N., 42. (3) (1906) W.N., 76.

there is no doubt that in modern, as in ancient, times to reduce your adversary to the position of being *inops consilii* may be of great advantage to a wealthy litigant who does not disdain to have recourse to such methods of warfare. The advantage derived from competent advocacy before a Court of justice in a case of difficulty is no less now than in the days of the Roman Empire, and a litigant who can command the services of competent advocates, while his opponent cannot, has *primâ facie* a great initial advantage and, if the proceedings are protracted, may secure a victory not otherwise attainable. I think, therefore, that the circumstance that the appeal to the High Court in fact proceeded is not relevant to the question whether the procuring of the sequestration order was under the circumstances an abuse of the process of the Court. The success or failure of the project cannot determine the question whether it is an abuse.

Several cases were referred to by Mr. *Duffy* in support of his contention.

In *Ex parte Bowes* (1), decided by Lord *Loughborough* L.C. in 1798, a commission of bankruptcy was superseded on the grounds that it was founded on the debt of a creditor who must of necessity under the commission gain the whole direction of the debtor's estate, and that the debt was disputed by the debtor in litigation pending both at law and in Chancery. Lord *Loughborough* L.C. said (2):—"The commission therefore is evidently not taken out for the benefit of the creditors in general but, as a proceeding in the dispute between these two persons." In *Ex parte Browne* (3) Lord *Eldon* superseded a commission in bankruptcy on the ground that it had been taken out for the purpose of working a dissolution of a partnership and in collusion with a partner who desired the dissolution. In *Ex parte Bourne* (4) Lord *Eldon* referred with approval to *Bowes' Case* (1), and said that if a commission were taken out, as it was in that case, to prevent a suit in equity, and not for the general benefit of the creditors, he would hold, as Lord *Loughborough* L.C. had held, that such a commission was an abuse of the seal, and as such could not stand. In *Ex parte Phipps* (5) Vice-Chancellor *Knight Bruce*, then Chief Judge in

(1) 4 Ves., 168.
(2) 4 Ves. 168, at p. 177.
(3) 1 Rose, 151.
(4) 2 Gl. & J., 137, at p. 142.
(5) 3 M.D. & D., 505, at p. 522.

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Bankruptcy, superseded a commission procured by a creditor in collusion with one member of a firm with the main object of procuring a dissolution of the partnership. He thought that under such circumstances the fiat was issued "under a false colour for a concealed object, in fraud and abuse of the bankruptcy laws." The same reasoning appears to me to apply—if not indeed *à fortiori*—to proceedings in bankruptcy taken to prevent or hamper the legitimate prosecution of an appeal by the debtor from a judgment obtained against him by the petitioning creditor, and *à fortissimo* if that appeal is in respect of the very debt on which the petition is founded. *Ex parte Hepworth*; *In re Rhodes* (1) was a case exactly of this kind. In that case the Registrar adjourned the hearing of the petition pending the appeal, as he was expressly authorized to do by the *Bankruptcy Act* (sec. 7, sub-sec. 4). Even without statutory authority he would have had discretion to do so. The petitioning creditor appealed to the Court of Appeal against the order of adjournment. The appeal was dismissed. *Bowen* L.J. said that it would be impossible for the Court to interfere with the exercise of the Registrar's discretion unless they were satisfied that he could not have been right, and added (2):—"If it could be shown that the appeal from the judgment must be a frivolous one, we might reverse his decision. But, so long as he might reasonably have come to the conclusion that there was a reasonable ground of appeal, it would be a monstrous thing that a receiving order should be made while the appeal is pending."

The cases of *In re Davies*; *Ex parte King* (3), and *Ex parte Griffin*; *In re Adams* (4), were also referred to, in which *James* L.J. said that it was quite shocking that proceedings in bankruptcy should be used as a means of extorting money from a debtor.

Reliance was placed on both sides on the case of *King* v. *Henderson* (5), in which Lord *Watson*, delivering the opinion of the Judicial Committee, said:—"Their Lordships do not dispute the soundness of the proposition that a plaintiff or petitioner who

(1) 14 Q.B.D., 49.
(2) 14 Q.B.D., 49, at p. 52.
(3) 3 Ch. D., 461.
(4) 12 Ch. D., 480, at p. 482.
(5) (1898) A.C., 720, at p. 731.

institutes and insists in a process before the Bankruptcy or any other Court, in circumstances which make it an abuse of the remedy sought or a fraud upon the Court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or as fraud upon the Court. In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shown that, in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable."

The proposition with which this passage opens, and the soundness of which is admitted, is relied upon by the appellant as establishing her case, since, if the proceedings complained of were an abuse of the process of the Court, the respondents could not be said to have acted with reasonable and probable cause.

The respondents relied on the latter portion of the passage as establishing that a mere motive is not sufficient to amount to what is generally known as an abuse of process or as fraud on the Court. If these words are to be taken as meaning that the presentation of a petition as a mere step in litigation between the judgment creditor and the debtor, and for the sole purpose of defeating the debtor in the litigation, cannot, even if the litigation is as to the debt itself, be an abuse of the process of the Court, they are inconsistent with the long array of authorities to which I have referred, and from which their Lordships apparently did not intend to express their dissent. They then proceeded to examine the facts of the case before them. It was contended for the appellant (who was plaintiff in an action of the same nature as the present) that the Judge should have directed the jury that the presentation of a petition for an ulterior private purpose other than the equal distribution of the debtor's assets is a fraud on the Court. Their Lordships thought that such a direction would have been improper. The alleged motive was to force the plaintiff out of a partnership with which the defendant had dealings. This their Lordships said was "simply a by-motive," which

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would not taint the procedure without proof of positive fraud, which was absent. There was no evidence of collusion between the creditor and the debtor's partner, so that the petition was not, as in *Bowes' Case* (1), and *Hepworth's Case* (2), a step in the litigation between the judgment creditor and his debtor. They distinguished the case of *Ex parte Gallimore* (3), as one in which the commission of bankruptcy had been obtained for a fraudulent purpose, and quoted the language of *Sir John Leach* in *Ex parte Wilbran* (4), (which was also a partnership case without collusion):—"It is not enough that there be a by-motive, unless there be fraud." They then referred without dissent to the case of *In re Davies* (5), in which the proceedings were used as a means of extorting money from a debtor, and to *Ex parte Griffin* (6).

The respondent asks us to hold that this case should be regarded as overruling the cases in which it was held that proceedings in bankruptcy, taken for the purpose of stifling litigation between the two parties, amount to an abuse of the process of the Court. I find it very difficult to come to such a conclusion. But I do not think that we are called upon in this case to decide that question. In *Hubbuck and Sons Ltd.* v. *Wilkinson, Heywood and Clark Ltd.* (7), which was an application to strike out a statement of claim on the ground that it did not disclose any reasonable cause of action, it was contended for the defendants that a decision of the Court of Appeal on which the action was based was in effect overruled by a later decision of the House of Lords. The Court of Appeal said that if it were necessary to come to that conclusion they would be of opinion that the question raised was too difficult and important to justify the Court in summarily striking out the claim. The same principle applies to the present case, so far as it turns on a question of law. An action which, being brought upon sufficient materials, seeks to raise and put in train for decision an important and difficult question of law cannot be regarded either as frivolous and vexatious, or as an abuse of the process of the Court. So far as the

(1) 4 Ves., 168.
(2) 14 Q.B.D., 49.
(3) 2 Rose, 424.
(4) 5 Madd., 1.
(5) 3 Ch. D., 461.
(6) 12 Ch. D., 480.
(7) (1899) 1 Q.B., 86.

case turns on questions of fact, the true rule is laid down in the very recent case of *Goodson* v. *Grierson* (1), where the Lords Justices reversed an order to dismiss an action as frivolous and vexatious on the ground (*per Fletcher Moulton* L.J.) that, as the action had not reached the stage at which the Court would assume that it knew all the facts, it was impossible to say that the plaintiff must necessarily fail to prove an important element of his case. *Buckley* L.J. said (2) :—"It appears to me that the plaintiff might prove facts which might lead to his succeeding in the action, and until the Court knows all the facts it is impossible to say that the action can be stopped."

I have already said that in the present case there is evidence apparently available which, if believed, would entitle the plaintiff to succeed, unless the doctrine that proceedings in bankruptcy, although founded on an existing debt and an undisputed act of bankruptcy, may under some circumstances be an abuse of the process of the Court is no longer law.

It may be that the mere presentation of the petition could be justified by facts showing that it was important to establish an early date for the commencement of the insolvency, for in Victoria the title of the assignee does not relate back to any date before the order for sequestration. No such facts appear, and if they did they would not justify asking for and obtaining *ex parte* an immediate order for sequestration, which had the effect of depriving the appellant of any power of disposition over any property which she might have. The fact that the learned Judge who made the order did not think that the pendency of the appeal was a sufficient reason for refusing it, is, of course, not material, now that the order itself is out of the way.

Another point taken by the respondent was that there was no possible evidence of actual damage, without which, it was contended, the action would not lie, and referred to the case of *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (3). The Victorian insolvency law makes no distinction between traders and non-traders. In my opinion, the question whether such an action will lie in Victoria by a non-trader without proof of actual damage is

(1) (1908) 1 K.B., 761. (2) (1908) 1 K.B., 761, at p. 766.
(3) 11 Q.B.D., 674.

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an important, if not a difficult, question of law which ought not to be determined on such an application as that now before us.

For these reasons I think that the appeal in this case should be allowed.

BARTON J.

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This case is too plain for argument. I am clearly of opinion that the conclusion of His Honour the Chief Justice of Victoria was right, and that the appeal fails.

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I am of opinion that this appeal must be allowed. It is clear that the power of thus summarily dealing with an action should be reserved for exercise as to actions that are hopeless. Now, if there is anything that is made plain by the argument it is that the question whether, upon the law as applied to the facts constituting the plaintiff's case, there is a cause of action against Mr. Riggall, is a question of much difficulty. In fact it has warranted the extended argument which took place, and if the action comes to trial it will warrant further investigation. This is not the stage for determining that question. It is sufficient that it is highly arguable, as we have seen. That being so, it was not a case for summary judgment, as it cannot be said to be an abuse of the process of the Court.

O'CONNOR J. This is an appeal from an order made by the Chief Justice of Victoria entering judgment for the defendants severally on the ground that the action was frivolous and vexatious, and that in the case of each of the defendants there was a good defence on the merits. Order XIV. (A), under which the learned Chief Justice acted, is substantially in the same terms as the English rule on the same subject, and is little more than a formal expression of the inherent power to deal with its own process which the Superior Courts have always exercised. The principle on which the power should be exercised is well settled, and the latest statement of it is in the judgment of the Court of

Appeal in *Goodson* v. *Grierson* (1), where *Fletcher Moulton* L.J., says that in order to support an application of the kind the defendant must show that "under no possibility could there be a good cause of action consistently with the pleadings and the facts in the case." At the time the order was made in this case the stage of pleadings had not been reached: the cause of action was merely outlined by endorsement on the writ. The evidence before the Judge was given both orally and by affidavit. Where under this procedure the Judge acts in pursuance of a power to dismiss an action before it is tried, he is bound to assume, in regard to disputed facts, that the plaintiff will be able to establish at the trial the case as put forward by him unless there is something in the evidence to show that that is impossible. It must therefore, I think, be taken that there was evidence before him upon which a jury might reasonably find that the defendants were the plaintiff's only creditors, that their debt was the judgment for costs in the action under appeal, that, as they well knew, there were no assets in the plaintiff's estate, and that the proceedings in insolvency were taken, not with a view of obtaining payment of the judgment debt, but with the view of hindering and obstructing the plaintiff in the effective exercise of her right of appeal by causing her financial embarrassment.

The question for our determination may therefore be fairly stated to be this. Applying the rule referred to by *Fletcher Moulton* L.J. to the facts relied on by the plaintiff in this action, were the orders directing judgment to be entered for the defendants respectively rightly made? Here at once a distinction must be drawn between the case against Mr. Baillieu and that against the other defendant.

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On the material before us I can see no possibility of the plaintiff proving a state of facts on which a jury could reasonably find that there was a cause of action established as against the defendant Baillieu. He was the duly appointed officer of the Court for the purposes of the adjudication. He obtained the order for the warrant in the ordinary discharge of his duty; it

(1) (1908) 1 K.B., 761, at p. 764.

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was never put into execution; and when the proceedings for summary judgment were initiated, both the order and the warrant were still subsisting. Finally, there was no evidence whatever that Baillieu was acting in any fraudulent way, or with any ulterior purpose, or otherwise than in the honest discharge of his duty. Even on the assumption that he was aware that there were no assets in the estate, that the appeal was pending, and that the order for sequestration might cause the plaintiff such financial embarrassment as would prevent her from effectively carrying on the appeal, the plaintiff's action against Baillieu was hopeless, and it was obviously a proper exercise of discretion on the Judge's part to put an end to it summarily. As regards the order in the case of that defendant, therefore, the appeal must fail.

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But the action against the other defendant stands on quite a different footing. Mr. *Duffy* put his case in two ways; first, that in obtaining the order for adjudication under the circumstances the process of the Insolvency Court had been used for the collateral object of oppressing the appellant and embarrassing her in her appeal (a use to which that process could not legitimately be applied); that, as damage necessarily followed, she had a good cause of action against the defendants; that it was unnecessary in such an action to prove determination of the proceedings in the plaintiff's favour or absence of reasonable and probable cause. *Grainger* v. *Hill* (1) and *Heywood* v. *Collinge* (2) were cited to illustrate the principles on which such an action is founded. In the former case *Tindal* C.J. in delivering judgment says (3): — "The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendant's proceeding, is the same: that this is an action for abusing the process of the law, by applying it to extort property from the

(1) 4 Bing. N.C., 212.
(2) 9 A & E., 268.
(3) 4 Bing. N.C., 212, at p. 221.

plaintiff, and not an action for malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved."

The principles there laid down are not, in my opinion, applicable to the state of facts which the plaintiff puts forward in this case. The substantial complaint here is, not that the defendants fraudulently and oppressively used process lawfully and regularly obtained for a purpose not warranted by the process, but rather that they set the law in motion to obtain the process under circumstances which amounted to an abuse of the remedy sought and a fraud upon the Court, and therefore without either reasonable or probable cause. It is, therefore, essential to the plaintiff's case to show that the proceedings in insolvency were taken by the defendants without reasonable and probable cause. She seeks to establish that position by proving that the proceedings were, under the circumstances, an abuse of the process of the Insolvency Court, and, therefore, necessarily without reasonable and probable cause.

The defendants, on the other hand, contend that, as there existed the elements necessary for invoking the jurisdiction of the Court (a judgment debt due to the petitioning creditor, and an act of bankruptcy committed in reference to it) the defendants were entitled to have the estate adjudicated insolvent with all the consequences which directly or indirectly flowed from the adjudication, whatever may have been their motives in instituting the proceedings.

The general principles of law applicable to such cases have been laid down by the Privy Council in *King* v. *Henderson* (1) in the following passage from the judgment of Lord *Watson*, in delivering the judgment of the Judicial Committee:—" Their Lordships do not dispute the soundness of the proposition that a plaintiff or petitioner who institutes and insists in a process before the Bankruptcy or any other Court, in circumstances which make it an abuse of the remedy sought or a fraud upon the Court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language,

(1) (1898) A.C., 720, at p. 731.

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it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or as fraud upon the Court. In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shown that, in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable."

Both parties take this, as of course they must, as an authoritative statement of the law. The whole contest is as to whether the last paragraph of the passage cited does or does not apply to the facts upon which the plaintiff relies; in other words, whether or not "in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the" defendants obtaining it fraudulently to defeat the rights of the plaintiff legal or equitable.

All the English cases relied on by the appellant's counsel were under consideration in that case and several of them were referred to in the judgment as instances of what amounted to abuse of process or a fraud upon the Court. It must be taken, therefore, that they still correctly expound the law to be applied in similar circumstances. The case which comes nearest to this is *Ex parte Bourne* (1). In that case, heard on appeal from the Vice-Chancellor, Lord Chancellor *Eldon* set aside a commission in bankruptcy which he found was taken out for the purpose of putting an end to an action by the bankrupt against the petitioning creditor, and not for the purpose of its operating as a commission for the benefit of the creditors. In *Ex parte Harcourt* (2) a commission legally valid in all other respects, but which had been taken out against good faith, and with the view to enforce compliance with an arrangement then pending between the parties, was set aside by Lord *Eldon* L.C. on the same principle as being an abuse of the process of the Court. In *Ex parte Gallimore* (3), referred to in the judgment of the Court in *King* v. *Henderson* (4), the same learned Judge set aside a commission,

(1) 2 Gl. & J., 137.
(2) 2 Rose, 203.
(3) 2 Rose, 424, at p. 429.
(4) (1898) A.C., 720, at p. 731.

although all the necessary requirements for its validity were present, because it had been taken out for an indirect and improper object, described by Lord *Eldon* L.C. in these terms:—"It is said, that the object of Mr. *Wedgwood* the petitioning creditor, in making this man a bankrupt, is not to obtain his debt in common with the other creditors, by a distribution of the effects, but that he has taken out the commission in order to possess himself of the property of which he is the landlord, and with no other view than to dispossess his tenant of an extensive colliery, rendered valuable by the exertions of a few antecedent years." He then set aside the commission as an abuse of the process of the Court, holding that the furtherance of such a design could not be the fair and legitimate object of a commission of bankruptcy, and that, if it were taken out with that view, it would be fraudulently taken out. In these cases all the grounds necessary for a valid commission existed, but the real object sought to be effected in each case was, not the distribution of the bankrupt's assets amongst his creditors or the attainment of any end which was a legitimate consequence of the adjudication, but to unfairly and oppressively force the bankrupt to give up some legal right or advantage.

The respondents boldly took up the position that, so long as there were in existence facts which would entitle them to obtain an adjudication, they had a legal right to obtain it, no matter what were their motives or their object in exercising the right. *In re Morissey*; *Ex parte Perkins* (1), was a type of the class of cases upon which they relied: *King* v. *Henderson* (2) was cited in argument before *Holroyd* J. who decided that case, and in a few words of his clear and concise judgment he brings out the test to be applied in the determination of all that class of cases. He says (3):—"I think that if the object of an act is legal, and there is no wrongful intention in it, but the intention is to do something also legal, founded upon that act—it is perfectly immaterial what the ulterior motive of the party may be—what it may be that prompts him to do the legal act." That is the principle on which *Ex parte Wilbran* (4) (approved in

(1) 24 V.L.R., 776; 20 A.L.T., 223.
(2) (1898) A.C., 720.
(3) 24 V.L.R., 776, at p. 778.
(4) 5 Madd., 1.

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King v. *Henderson* (1) stands, and the distinction between that case and a case like the present is well stated by Lord *Watson*, in his judgment in the latter case, as follows (2):—"The very intelligible principle which was recognized in *Ex parte Wilbran* (3), does not appear to their Lordships to have been departed from in any of the subsequent decisions which were brought under their notice by the industry of the appellant's counsel. Motive cannot in itself constitute fraud, although it may incite the person who entertains it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result; and it is not the motive, but the course of procedure which leads to that result, which the law regards as constituting fraud."

The application of that principle to the facts relied on by the plaintiff in this case is clear. The process of the Insolvency Court was used by the defendants, as she contends, not for the purpose of obtaining payment of their debt by distribution of the appellant's estate, but for the purpose of placing her in such a condition of financial embarrassment as would make it difficult, if not impossible, for her to find the money essential for the effective prosecution of her case before the Court of Appeal. Assuming that the facts relied on by the plaintiff are established, the institution of insolvency proceedings would be under the circumstances, in my opinion, an abuse of the process of the Court.

It was contended by the respondents that on the hearing of the order *nisi* nothing was concealed, that all the evidence now put forward in support of the plaintiff's claim was before the Court, and that the order of adjudication was the act of the Court done in the full light of all the facts, and that, therefore, the respondents are not liable for the consequences of the adjudication. That is no answer to the plaintiff's claim. The cause of action arose on the presentation of the petition. The order *nisi* placing the estate provisionally under sequestration followed almost as a matter of course the presentation of the petition. And the damage and injury of the plaintiff followed, therefore, immediately from the presentation of the petition. It is not suggested that the petition informed the Court of the real

(1) (1898) A.C., 720.

(2) (1898) A.C., 720, at p. 732.

(3) 5 Madd., 1.

object of the proceedings, or stated any facts from which the Court might infer it. A similar defence was raised in the *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (1) and was disposed of by Lord *Esher*, then Mr. Justice *Brett* M.R. in the following words:—"The proposition is that an action cannot be maintained because the petitioning creditor merely asks the Court to act judicially, and because it was to be assumed that the Court would decide rightly. If that proposition were well founded, it would be an answer to an action for malicious prosecution on a criminal charge, because even in that case the prosecutor merely asks the tribunal to decide upon the guilt of the person whom he charges. If a man is summoned before a justice of the peace falsely and maliciously and without reasonable and probable cause, he will be put to expense in defending himself, and his fair fame may suffer from the accusation: nevertheless, the prosecutor only asks the justice to adjudicate upon the charge. Therefore it is not a good answer to an action for maliciously procuring an adjudication in bankruptcy to say, that the alleged creditor has only asked for a judicial decision. It seems to me that an action can be maintained for maliciously procuring an adjudication under the *Bankruptcy Act* 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can show that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer a pecuniary loss."

For these reasons I am of opinion that on the facts relied on by the appellant there was evidence upon which a jury or a Judge determining questions of fact might reasonably come to the conclusion that the proceedings in insolvency instituted by the defendants against the plaintiff were an abuse of the process of the Insolvency Court and were, therefore, without reasonable or probable cause. We are not called upon in this appeal to determine whether those facts have or have not been established. There was material before the learned Chief Justice on which he ought to have come to the conclusion that the plaintiff might succeed in establishing them. Under these circumstances it was, in my opinion, an improper exercise of his discretion under Order

(1) 11 Q.B.D., 674, at p. 684.

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XIV. (A) to summarily put an end to the action as against the defendant Riggall, and thus deprive the plaintiff of her right to have her case tried.

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Appeal dismissed with costs.

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Appeal allowed. Summons dismissed with costs. Respondent to pay costs of appeal.

Solicitor, for the appellant, *J. L. Clarke.*

Solicitors, for the respondents, *Rigby & Fielding*; *Blake & Riggall.*

B. L.

[HIGH COURT OF AUSTRALIA.]

DOODEWARD . . . . . APPELLANT;
PLAINTIFF,

AND

SPENCE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 21, 22; *July* 31.

Griffith C.J., Barton and Higgins JJ.

Action of detinue—Right to possession of corpse—Monstrous birth—Preservation as curiosity.

A dead human body may under some circumstances become the subject of property.

A corpse may possess such peculiar attributes as to justify its preservation on scientific or other grounds, and, if a person has by the lawful exercise of