[HIGH COURT OF AUSTRALIA.]

HALL . . . . . APPELLANT;
PLAINTIFF,

AND

WOOLF . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Nov.* 13, 16, 17.

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

Insolvency—Bankruptcy Act 1883 (46 & 47 *Vict.*) c. 52, *sec.* 118—*Conflict of laws—Insolvent's change of domicil—After acquired property—Subsequent insolvency in another country.*

Although the assignment of a bankrupt's property to the representative of his creditors under the law of a country which has jurisdiction over his person operates as an assignment of the moveables of the bankrupt wherever locally situate, this rule does not extend to after-acquired property situate in another country and which is acquired by the bankrupt when he is not domiciled in the country where the assignment was made. A law, therefore, of the country where the assignment was made, that all property acquired by the bankrupt before he obtains a certificate of discharge shall pass to the trustee under the bankruptcy, has no operation upon such after acquired property.

Sec. 118 of the Imperial Act, 46 & 47 Vict. c. 52, does not create new rights, but only new remedies for enforcing existing rights.

Solomon Horowitz, whose domicil of origin was Poland, was in 1890 a naturalized British subject under the law of Queensland and resident in that Colony. The appellant was appointed trustee under a liquidation by arrangement duly instituted in Queensland in that year under the *Insolvency Act* of that Colony. The debtor afterwards left Queensland, and in 1891, after visiting

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America, came to reside in Western Australia, where he acquired property and again became naturalized. In 1908, without having obtained a discharge in the Queensland liquidation, he became insolvent in Western Australia. The respondent was trustee under that insolvency. The appellant, having obtained from the Supreme Court of Queensland an order pursuant to sec. 118 of the Imperial *Bankruptcy Act* 1883, that aid should be sought of the Western Australian Court to obtain possession of the property belonging to the debtor and situate in Western Australia, asked the Supreme Court of Western Australia for an order that all property in the respondent's hands should be delivered to him. The motion was heard by *Rooth* J., who thought, upon the evidence, that the property in question was in the order and disposition of Horowitz with the consent of the appellant, even assuming him to be true owner. He dismissed the motion with costs, and the Full Court of Western Australia dismissed an appeal from the decision.

A. D. Stone and *Hensman*, for the appellant. While the insolvency proceedings were pending in Queensland Horowitz was not *sui juris*, and it was not open to him to acquire a new domicil so as to oust the Queensland jurisdiction.

[GRIFFITH C.J.—That would be an extraordinary limitation of the right of personal freedom.]

An assignee in insolvency has a right to after-acquired property: *In re Lawson's Trusts* (1) following *In re Davidson's Settlement Trusts* (2); and if Horowitz were still domiciled in Queensland his property acquired in Western Australia would pass to the Queensland trustee, for "the Court of domicil has the right to pronounce a universally valid judgment with regard to the personal property of the bankrupt." (*Fry* L.J. *In re Artola Hermanos*; *Ex parte André Châle* (3)). In *Australian Mutual Provident Society* v. *Gregory* (4), it was claimed that special provisions existing in Natal should be applied by the Tasmanian Courts, and *Barton* J. (5) said:—"Though by the comity of

(1) (1896) 1 Ch., 175.
(2) L.R. 15 Eq., 383.
(3) 24 Q.B.D., 640, at p. 650.
(4) 5 C.L.R., 615.
(5) 5 C.L.R., 615, at p. 633.

nations the law of Tasmania will give effect to that as an assignment of the moveables, applying the maxim so often quoted, it will not also favour the foreign creditors by giving effect to special conditions for their protection, such as are contained in the negative words at the end of sec. 51 of the Natal Statute, to the detriment of Tasmanian claimants under Tasmanian transfers otherwise good. Internationally, the law of that State will recognize the universal effect of the assignment on moveables, but as an assignment only. It gives no more extensive operation to the assignment than could be claimed for it if made in Tasmania." The facts in this case are different, as the law in Queensland is the same as that in Western Australia. [Counsel also referred to the following cases:—*In re Clark*; *Ex parte Beardmore* (1); *Dicey, Conflict of Laws*, 1896 ed., rule 110, p. 446; *Ex parte Sydney* (2); *Westlake, Private International Law*, pp. 163, 164; *Piggott, Foreign Judgments*, 2nd ed., p. 327; *Geddes* v. *Mowat* (3); *Royal Bank of Scotland* v. *Cuthbert* (4); *Selkrig* v. *Davies* (5); *Foote, International Law*, 2nd ed., p. 309; *In re Blithman* (6); *Ex parte McCulloch* (7).]

Northmore, for the respondent. The judgment of the Court can be supported on three grounds:—

(1) The assets which are the subject matter of the appeal could never have become assets in the Queensland insolvency because they were acquired after the debtor had changed his domicil.

(2) *Rooth* J. was justified in coming to the conclusion that the Queensland trustee allowed Horowitz to carry on his trade in Western Australia without intervening, and having knowledge of the fact.

(3) The decision in *Ex parte Clark*; *In re Beardmore* (8), does not apply to cases where the bankruptcies are in different countries, and to apply the Queensland law here would have the effect of working an injustice on the creditors in this State. [He also referred to *Westlake*, 4th ed., sec. 134; *Story*, sec. 324;

(1) (1894) 2 Q.B., 393, at p. 403, *per* Lord *Esher*.
(2) L.R. 10 Ch., 208.
(3) 1 G. & J., 414.
(4) 1 Rose, 462.
(5) 2 Rose, 97.
(6) L.R. 2 Eq., 23.
(7) 14 Ch. D., 716.
(8) (1894) 2 Q.B., 393.

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Lewis on Insolvency, p. 208; *In re Fenton & Sons* (1); *Cohen* v. *Mitchell* (2); *Hunt* v. *Fripp* (3).]

A. D. Stone in reply.

Cur. adv. vult.

November 17.

The judgment of the Court was delivered by :—

GRIFFITH C.J. The appellant, who is the trustee under a liquidation by arrangement duly instituted in Queensland in the year 1890 by one Horowitz under the *Insolvency Act* of that Colony, claims an order requiring the respondent, who is the trustee under a deed of assignment executed by Horowitz in 1908 under the bankruptcy law of Western Australia, to deliver up to him all the property of the debtor in his hands. The debtor's domicil of origin was Poland. Prior to 1890 he had been naturalized in Queensland. He left that Colony in that year and never returned, and has never obtained a certificate of discharge in the liquidation. In 1891, after visiting America, he came to Western Australia, and has since resided in that State, where he has acquired real and personal property, and where one of his daughters has married and settled. In 1902 he became naturalized in Western Australia. Upon these facts it is abundantly clear that if he ever acquired a domicil of choice in Queensland he abandoned it in 1890, and reverted to his domicil of origin, which he still retains unless he has acquired a fresh domicil of choice in Western Australia.

The appellant founds his claim upon the recognized rule of private international law that the assignment of a bankrupt's property to the representatives of his creditors under the law of a country which has jurisdiction over his person operates as an assignment of the moveables of the bankrupt wherever locally situate. It is argued, and we think rightly, that this doctrine applies to the case of a liquidation by arrangement under proceedings conducted in Court, such as those under the law of Queensland which are equivalent in their operation to an adjudication of bankruptcy. It is also argued that, whether the debtor was or was not domiciled in Queensland at the time of the liqui-

(1) 26 V.L.R., 88; 22 A.L.T., 70. (2) 25 Q.B.D., 262.
(3) (1898) 1 Ch., 675.

dation, his voluntary submission to the jurisdiction of the Court was sufficient to bring this rule into operation. Assuming this to be so, it follows that all the moveable property which the debtor then had, wherever locally situated, passed to the trustee in the liquidation. This, however, is not sufficient to establish the appellant's case. He accordingly claims that not only must the original assignment to the trustee be recognized in Western Australia, but also the provision of the Queensland insolvency law which enacts that all property acquired by an insolvent or liquidating debtor before he obtains a certificate of discharge shall pass to the trustee in the insolvency or liquidation. No instance has been cited in which effect has been given to such an extension of the rule, unless the case of *In re Lawson's Trusts* (1) can be so regarded. In that case, however, the point was not raised, and the debtor had continued to reside till his death in the country in which he had become bankrupt.

The foundation of the rule relied upon is the wider rule *mobilia sequuntur personam*, of the application of which it is a familiar instance. If the local law as to after-acquired property ought to be recognized elsewhere, the reason must be that the law of the domicil of the bankrupt operates as a statutory assignment of his moveables, wherever situated, to the assignee in the bankruptcy, the assignment taking effect automatically as soon as they are acquired by the bankrupt. If such a rule were to be accepted by other countries, we are disposed to think that they would accept and apply it subject to a due regard for the rights of their own citizens, and that it might well be held that a rule analogous to that laid down by the Court of Appeal in *Cohen* v. *Mitchell* (2) would be adopted as a qualification of it. But, whatever may be thought of such a case, it is, in our opinion, quite clear that as soon as the debtor ceases to be domiciled in the country of adjudication the law of that country ceases to have any application to his after acquired moveables situated elsewhere. The same rule, *mobilia sequuntur personam*, still applies, but it excludes the operation of that law.

We think, therefore, that, whatever might be the rule as to moveables acquired by the debtor after the commencement of the

(1) (1896) 1 Ch., 175. (2) 25 Q.B.D., 262.

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liquidation, and while he was still domiciled in Queensland, the Queensland trustee cannot assert any title to moveables not locally situated there which were acquired by the debtor after his domicil in that Colony came to an end.

Sec. 118 of the English *Bankruptcy Act* 1883 does not create any new rights, but only creates new remedies for enforcing existing rights. The appellant's application was therefore rightly refused by *Rooth* J. and by the Full Court.

If it had been necessary to call in aid the doctrine of order and disposition, we agree with *Rooth* J. that the evidence brought the case within the rule.

It was suggested that a debtor whose estate has been assigned to representatives of his creditors cannot change his domicil; but this would be an extraordinary limitation of the right of personal freedom, for which no foundation can be found in principle or authority.

It is not suggested that there is or can be any surplus in the hands of the respondent. No question therefore arises as to any case that might be made against the debtor personally.

Appeal dismissed.

Solicitors, for appellant, *Nicholson & Hensman.*

Solicitors, for respondent, *Northmore, Lukin & Hale.*

H. V. J.