[HIGH COURT OF AUSTRALIA.]

BAYNE AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

BLAKE AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 8, 9, 10.

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

Abuse of process of Court—Insolvency proceedings taken to stifle litigation—Reasonable and probable cause for proceedings—Special damage.

Assuming that the taking of proceedings in insolvency for the purpose of stifling litigation between the parties amounts to an abuse of the process of the Court in respect of which an action will lie (as to which *quære*), a necessary ingredient of the cause of action is that damage has thereby resulted.

Held, therefore, that the action must fail where the litigation attempted to be stifled was in respect of a claim which was afterwards determined to be untenable.

Held, also, that so far as the action is one for fraudulently, falsely and maliciously, and without reasonable or probable cause, putting in motion the process of the Court of Insolvency, it must fail if at the time the proceedings were taken there was a good petitioning creditor's debt and an available act of insolvency.

Per O'Connor J.—The evidence was such that the finding of the Judge that the intention of the defendants was not to stifle litigation should not be disturbed.

Judgment of the Supreme Court (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

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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 summary 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 17th September 1906 the appeal to the High Court from the judgment of *Holroyd* J. was allowed: *Bayne* v. *Blake* (1); but on appeal to the Privy Council that judgment was on 4th June 1908 restored (2). 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, and on 9th September 1907, by order of the High Court, the order absolute for the sequestration of the estate of L. E. Bayne was discharged: *Bayne* v. *Baillieu* (3).

Mary Bayne instituted an action in the Supreme Court against A. P. Blake, W. Riggall and A. S. Baillieu, by a writ dated 2nd July 1907, claiming damages in respect of the institution and prosecution of the insolvency proceedings against her.

Summary judgment for the three defendants having been obtained in the Supreme Court, on 22nd June 1908 the High Court annulled the judgment so far as A. P. Blake and W. Riggall were concerned: *Bayne* v. *Riggall* (4).

The writ was then amended by adding L. E. Bayne as a plaintiff, and by the statement of claim the plaintiffs alleged that the defendants—

"(*a*) Fraudulently falsely and maliciously and without reasonable and probable cause presented a petition and obtained orders *nisi* and absolute for the sequestration of the plaintiffs' estates.

"(*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 the above-named plaintiffs were plaintiffs and the

(1) 4 C.L.R., 1.
(2) 6 C.L.R., 179; (1908) A.C., 371.
(3) 5 C.L.R., 64.
(4) 6 C.L.R., 382.

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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 plaintiffs' estates amongst their creditors but to prevent the plaintiffs in the said action continuing their said appeal in the High Court taking and continuing the said insolvency proceedings against both the said plaintiffs.

"(*d*) Fraudulently falsely and maliciously knowingly and recklessly after a stay of proceedings under the judgment against them for the said costs causing the defendant A. S. Baillieu the assignee of the estate of the plaintiff L. E. Bayne to apply for and obtain warrants for the arrest of the said plaintiffs."

The plaintiffs then alleged that by reason of the premises they had suffered "great loss mental worry anxiety ill-health suspense and damage to fair fame and credit," and they claimed £20,000.

By their defence the defendants objected that the statement of claim disclosed no cause of action, inasmuch as it was not alleged that the plaintiffs, or either of them, at any time material were traders; nor was it alleged that they sustained any special damage by reason of the matters complained of. The defendants also counterclaimed for £1,838 16s. 11d. for amounts due under certain judgments, and for costs under certain proceedings.

The action was heard before *Hood* J.

At the close of the plaintiffs' case, and on the assumption that the statement of claim disclosed a good cause of action, the learned Judge found that the defendants did not institute the insolvency proceedings against the plaintiffs for the purpose of preventing the plaintiffs from continuing their appeal to the High Court from the judgment of *Holroyd* J., and he therefore gave judgment for the defendants upon the claim, and upon the counterclaim.

From this judgment the plaintiffs now appealed to the High Court.

Duffy K.C. and *Winnecke*, for the appellants. The proceedings

in insolvency were instituted and continued either wholly or mainly for the purpose of stopping the appellants' appeal. Although the respondents may have started the proceedings with a proper object, those to whom they entrusted the carrying them on did so with an improper object, and the respondents are liable for what their agents did. The findings of fact of the learned Judge are not supported by the evidence. In an action of this kind it is not necessary to prove personal damage. Improperly using the process of the Court imputes damage. By their action the respondents put the appellants in a similar position to that of a plaintiff in an action for malicious prosecution, and that imputes damage. Insolvency proceedings being of a *quasi* criminal nature, proof of special damage is not necessary. There was technical evidence of damage in that the appellants were unable by reason of the insolvency proceedings to obtain money in order that they might be properly represented before the Privy Council. [They referred to *Bayne* v. *Riggall* (1); *Bayne* v. *Baillieu* (2); *Williams on Bankruptcy*, 8th ed., p. 49).]

Macarthur, for the respondents. The Judge has found every fact necessary to entitle the respondents to judgment, and these findings should not be interfered with. The mere fact that a creditor believes that his debtor has no assets is not a reason for not making the debtor insolvent. *In re Leonard*; *Ex parte Leonard* (3). If the proceedings were properly instituted, the onus was upon the appellants to prove that the proceedings were improperly continued, and they did not discharge that onus. If there were two objects, one proper and the other improper, there would be no cause of action unless the improper object was the main object. There never was any wrong here, because there was reasonable and probable cause, in view of the decision of the Privy Council.

[O'CONNOR J. referred to *Bayne* v. *Riggall* (4).

GRIFFITH C.J. referred to *Pollock on Torts*, 6th. ed. p. 307.]

Winnecke in reply. If a debtor has no assets the Court may in

(1) 6 C.L.R., 382.
(2) 5 C.L.R., 64.
(3) (1896) 1 Q.B., 473.
(4) 6 C.L.R., 382, at p. 397.

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its discretion refuse to make him insolvent: *In re Betts*; *Ex parte Betts* (1). The appellants' cause of action was infringed when the proceedings were taken and continued, and their cause of action arose then, and at that time the proceedings were improper.

Cur. ad. vult.

Sept. 10.

GRIFFITH C.J. This is an action brought by the appellants against the respondents, claiming damages for improperly putting in motion the process of the Court of Insolvency—I use advisedly a neutral expression. It was framed in part in accordance with what is said to be a well known cause of action, namely, fraudulently, falsely and maliciously and without reasonable and probable cause presenting a petition and obtaining orders *nisi* and absolute for the sequestration of the appellants' estates. It was also put as an action founded upon an abuse of the process of Court to the prejudice of the appellants.

The material facts may be very shortly stated. The respondents had obtained judgments in a suit brought against them by the appellants. The appellants gave notice of appeal to the High Court on 21st December 1905. On 20th December 1905 the respondents had taken out debtors' summonses against the appellants but had not served them. On 23rd December the respondents commenced an action in the Supreme Court to recover the amount of their taxed costs in the original action—a proceeding which I understand is peculiar to Victoria, and is not found elsewhere. On 26th January 1906 the respondents obtained judgment in that action, and in February they issued execution upon that judgment. On 6th February the respondents obtained orders *nisi* for the sequestration of the estates of the appellants which on 22nd February were made absolute. On 8th March the appellants' appeal to the High Court was perfected.

The complaint made by the appellants is that these proceedings taken under these circumstances were not a *bonâ fide* exercise of the rights of creditors against their debtors, but were an attempt to interfere with the rights of the appellants in seeking such redress as they were entitled to from the High

(1) (1897) 1 Q.B., 50.

Court. The object of the proceedings, it was said, was to stop the appeal or hamper the appellants in the conduct of their case and in obtaining the redress to which they claimed they were entitled. The decision of the Supreme Court was reversed by this Court. From that the respondents appealed to the Privy Council, and the decision of this Court was reversed by that tribunal.

As far as the result of the action taken by the respondents is concerned there can be little doubt that, whether they desired it or not, they certainly succeeded in hampering the appellants in the conduct of their defence to the respondents' appeal, with the result that the appellants only had £20 to defend their cause in London, so that the case was practically heard *ex parte* there, and there is reason to suppose that the members of the Board were under some strange misapprehension on questions of fact.

So far as the action is one for falsely and maliciously and without reasonable and probable cause obtaining adjudications of insolvency, I think it is a complete answer to say that it now appears that when the petitions were presented there were good petitioning creditors' debts and acts of insolvency. The debts have now been established by the decision of the highest Court in the realm, and so far as the action is based upon instituting insolvency proceedings against persons who had not committed an act of insolvency, the respondents had reasonable and probable cause for instituting these proceedings, and the action fails.

The action must then be supported, if at all, as an action for damages for an abuse of a process of Court. Although some of the authorities say that such an action will lie, there is no instance of an action of that sort having ever been brought, and what are the principles applicable to such an action seems to me to be a matter of great obscurity. The learned Judge from whom the appeal is brought found as a matter of fact that the respondents were not actuated in taking the insolvency proceedings by a desire to prevent the appeal going on, but by a desire to recover any property the appellants might have in satisfaction of their claim for costs. As I understand that finding, it is that the respondents had not that object in view in any way—that it was quite absent from their minds. If that is the meaning of the

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finding, I have very great difficulty in accepting that conclusion on the evidence before us. It appears to me, on the evidence, as I understand it, that that was at any rate one of the objects respondents had in taking the proceedings in the Court of Insolvency. But whether that would be sufficient to establish the cause of action of abuse of process of Court seems to me to be a very difficult point. The case of *King* v. *Henderson* (1) was relied upon in the argument of a previous appeal in this case (*Bayne* v. *Riggall* (2)), and this passage (3) from the judgment of the Privy Council was read by me:—"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, 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."

I have very great difficulty in knowing what is exactly the meaning of "fraud" and "fraudulently" as used in that passage. Fraud, of course, imports a state of mind. I have very great difficulty in seeing how far a particular state of mind is involved in proceedings which are an abuse of the process of the Court. For instance, in *Egbert* v. *Short* (4), there was an application to stay proceedings or dismiss the action on the ground, as stated by *Warrington* J. (5), "that to allow it to proceed would be so oppressive and vexatious to the defendant as to amount to such an injustice to him that it ought not to be permitted." Now the ground for staying proceedings in insolvency that they ought

(1) (1898) A.C., 720.
(2) 6 C.L.R., 382, at p. 394.
(3) (1898) A.C., 720, at p. 731.
(4) (1907) 2 Ch., 205.
(5) (1907) 2 Ch., 205, at p. 211.

not to have been taken in the present case seems to me to be exactly within the words: "To allow it to proceed would be so oppressive and vexatious to the defendant as to amount to such an injustice to him that it ought not to be permitted." In accord with that is an expression used by *Bowen* L.J. in *Ex parte Heyworth*; *In re Rhodes* (1): "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." If that view is accepted, the finding of the Judge would be quite immaterial, because I agree that to allow the insolvency proceedings to go on would be so oppressive to the appellants as to amount to such an injustice to them that it ought not to be permitted. It was practically in that view that this Court set aside one of the adjudications. I say, if that is so, the finding is immaterial; but I only point out the difficulty, I form no conclusion on the matter.

But there is one thing quite clear, namely, that, assuming this was an abuse of process of Court and that it is actionable, actual damage is an ingredient of the action, just as it is in an action for fraud. Fraud without damage is not a cause of action. Therefore, the appellants in order to succeed must show that they have sustained some damage owing to the improper conduct of the respondents, and the connection between the conduct and the damages must be such that the Court can take notice of it. Now the damage the appellants have sustained, assuming either of the causes of action to lie, undoubtedly is that they were seriously hampered in the defence of their case, and so much so that they practically became *inopes consilii*. But it has been determined by the highest Court of Appeal that the appellants never had a cause of action, so that they have only been hampered in putting forward an untenable claim. In my opinion the Court cannot take notice of that as damage to sustain their present cause of action. That the appellants never had a cause of action has been decided in litigation between the same parties, and even if it appeared in the clearest way that the judgment was mistaken,

(1) 14 Q.B.D., 49, at p. 52.

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or was given upon mistaken evidence, or that fresh evidence had been discovered—no matter what the circumstances were—so long as that stands as the final judgment between the parties their claim is untenable, and I do not think that being hampered in such an action can be regarded as giving rise to a cause of action.

For that reason I think the appellants fail. As to the other points, I reserve my judgment until the question arises for decision, which I think will be never.

BARTON J. I do not think it necessary to decide any point in this case except one, namely, that, although oppressive or vexatious proceedings will be set aside, it does not necessarily follow that the taking of these proceedings gives rise to a cause of action. The Court will not allow its process to be abused by oppressive or vexatious proceedings: but, unless that abuse involves or effects a fraud on the party against whom the proceedings have been directed, his successful exercise of the right to invoke the intervention of the Court to set them aside does not give him any right of action, and there is no actionable fraud without proof of special damage.

That the plaintiffs' appeal was crippled by the conduct of the defendants in procuring the adjudication in insolvency, and that the insolvency proceedings were instituted with the object of bringing about that result, may be true. I do not so decide. But, merely for the purposes of the argument, let me assume both propositions to be correct. Even so, the crippling of the plaintiffs' appeal is not actionable unless they thereby lost some substantial right. That no such right was lost is apparent from the fact that the Privy Council set aside the judgment of this Court in favour of the plaintiffs. That judgment of the Privy Council is conclusive to this Court, and therefore it is conclusively established that there never was a cause for that action. The plaintiffs' claim in this action must therefore be untenable simply because no cause, according to any legal intendment, ever existed for their former action. That appears to be conclusive against the claim, whatever opinion one may otherwise have in its favour. It seems to me, therefore, that this appeal should be dismissed.

O'CONNOR J. When this case came before the Court in March of last year the only question to be determined was whether the Judge of first instance had rightly dealt with the matter under the summary procedure provided for by the Victorian Rules.

The case presented itself at that time in two aspects, first whether on the facts stated there was sufficient indication of a cause of action to prevent the claim being treated as frivolous or vexatious, and, secondly, whether there was sufficient evidence that the facts relied on could be established. The question whether there was a cause of action involved very difficult considerations which were dealt with by the Court at that time, and it came to the conclusion, without determining whether there was a cause of action or not, that at all events the facts were such as to render it illegal for the Judge to determine in a summary way whether there was a cause of action and whether the facts existed which were necessary to substantiate the claim. In pursuance of that view the Court set aside the summary judgment which had been entered for the respondents. The case then came on for trial in the ordinary way before *Hood* J. The appellants were in the unfortunate position of being obliged to call one of the respondents and some of the respondents' witnesses in support of their claim, and we now have before us all the evidence which could possibly be brought before the Court on the trial of the issues between the parties. The Judge had to determine, first, whether there was a cause of action, and, secondly, whether the facts alleged in support of the cause of action were proved. His Honor took the course of assuming that there was a cause of action and proceeded then to deal with the facts. It was contended by Mr. *Duffy* on behalf of the appellants that his Honor had in some way mistaken what the cause of action was and had not dealt with the facts upon the issues which really arose for determination. But I have not been able to see that it is open to that criticism. It appears to me, looking at the judgment as a whole, that the Judge dealt fairly with every aspect of the case put forward by the appellants, and, dealing with the case in that manner, and applying his mind to every element of the assumed cause of

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action, he came to the conclusion that the appellants had not in fact established their claim. The duty of this Court in dealing with decisions on questions of fact is laid down in *Dearman* v. *Dearman* (1) in these terms:—"Now, it is well settled that upon an appeal from a Judge of first instance who has had the advantage of hearing the witnesses, especially in a case where there is conflict of evidence, the Court of Appeal cannot reverse his decision on questions of fact unless it sees that the decision is manifestly wrong." I have considered the decision of the learned Judge very carefully in connection with all the facts with which he deals, and I am certainly unable to say the decision is manifestly wrong. The Judge on this occasion had before him evidence which was not before the Judge who decided the case originally, and which was not before this Court on the application of March last. That is the evidence of Mr. Riggall, which if believed—and it is supported by other parts of the evidence—is conclusive that, so far as he was concerned, in putting the law in motion there was no intention to use the process of the Court of Insolvency in any other way than to discover assets of the appellants for the purpose of having his debt paid. It appears to me that there was evidence before the learned Judge from which he might conclude that the statement of Mr. Riggall was corroborated by the circumstances. That being so, it is impossible for me on the question of fact to determine that the decision was manifestly wrong.

It would be unnecessary to go further than express this opinion, because that disposes of the matter. There is no doubt that the other question, whether the action will lie, involves very difficult questions. Some of the difficulties have been referred to by my brother the Chief Justice, and, with regard to that aspect of the case, I will only say that I agree that an action of the kind, whatever other elements may be necessary for its maintenance, clearly will not lie unless actual damage is shown as resulting from the wrongful conduct complained of. It is in this case clear that no damage has resulted from the wrongful act complained of which the law can appreciate. As to the other elements of the cause of action, the injury relied on was the setting in motion

(1) 7 C.L.R., 549, at p. 553.

the process of the Court of Insolvency for a purpose to which it could not be legitimately applied. It appears to me that, as far as the cases indicate anything upon the subject, it is a necessary part of the cause of action that the purpose with which the proceedings are taken should amount to an abuse of the process of the Court. It may be that a person who is exercising his rights quite legitimately and with the intention of using the process of Court for ends to which it may be legitimately applied, is yet doing something which in the interests of justice the Court itself will think it necessary to restrain. Such was the case when in one of the cases between these parties this Court set aside the insolvency proceedings. But it does not follow that, because the Court in the exercise of its discretion will prevent the use of process of Court in circumstances which it considers unjust, that a person who is only exercising his rights and using the Court for a proper purpose is liable to the other party if damage results. It is not, however, necessary to express an opinion as to what are the elements of that cause of action. That question may some day come up for decision. But it is not necessary to decide it at present.

Assuming that there was a cause of action, I am of opinion that the decision of the learned Judge below cannot be interfered with. On that ground I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *W. Hordern.*

Solicitors, for the respondents, *Blake & Riggall*

B. L.