[HIGH COURT OF AUSTRALIA.]

LILA ELIZABETH BAYNE . . . . APPELLANT;

AND

BLAKE AND ANOTHER . . . . RESPONDENTS.

MARY BAYNE . . . . . APPELLANT;

AND

BLAKE AND ANOTHER . . . . RESPONDENTS.

(No. 2.)

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *Sept.* 30.

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

Insolvency—Sequestration—Petitioning creditor's debt—Judgment debt—Merger—Abuse of process of Court—Debtor having no assets.

In an action brought by a plaintiff against a defendant, the defendant counterclaimed for a judgment debt owing by the plaintiff to him, and obtained judgment on that counterclaim.

Held, that the earlier judgment debt was not merged in the later judgment debt so as to prevent it from being a good petitioning creditor's debt upon which the defendant might have the plaintiff's estate sequestrated.

Quære, *per Griffith* C.J., whether there is a merger of a debt in a judgment for the purposes of a petitioning creditor's debt in insolvency proceedings.

The action was one to recover damages for personal injuries, and judgment had been given for the defendant on the claim, and the plaintiff had given notice of appeal to the High Court from the judgment.

Held, that insolvency proceedings based on the original judgment debt were not an abuse of the process of the Court.

The mere fact that there are no reasons for suspecting that a debtor has any assets is not a ground for refusing to make a debtor insolvent.

Decisions of the Supreme Court of Victoria affirmed.

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CONSOLIDATED APPEAL from judgments of the Supreme Court of Victoria.

Two orders *nisi* were on 16th February 1909 obtained by Arthur Palmer Blake and William Riggall for the sequestration of the estates of Lila Elizabeth Bayne and Mary Bayne. In the case of L. E. Bayne the petition stated that she was indebted to the petitioners in the sum of £605 3s. 9d. being £388 1s. 2d. the amount of a judgment obtained by them against her in the High Court on 19th August 1908, and £216 12s. 7d., the taxed costs of the appeal to the Privy Council in the case of *Blake* v. *Bayne* (1), and that L. E. Bayne had committed an act of insolvency in that she had not paid the amount of a debtors' summons issued against her in respect of that sum. In the case of Mary Bayne the only debt alleged was the sum of £216 12s. 7d. for the taxed costs of the same appeal to the Privy Council, and an act of insolvency similar to that alleged against L. E. Bayne was alleged against her. Objections were lodged in each case which were to the following effect:—That before the order *nisi* was granted an action was heard in which the debtor had sought to recover damages against the petitioning creditors for similar proceedings taken by them and in which they obtained orders *nisi* and absolute which were afterwards annulled; that in that action the sums claimed in the order *nisi* were set up and included in a counterclaim in such action, and that, judgment having been given by *Hood* J. for the petitioners, the debtor had lodged a notice of appeal therefrom to the High Court and intended to prosecute that appeal; that the insolvency proceedings were therefore oppressive and an abuse of the process of the Court; and that the insolvency proceedings were vexatious and malicious, and that the petitioners had no reasonable and probable cause for taking the same.

Both orders *nisi* were made absolute by *à Beckett* J., that

(1) 6 C.L.R., 179.

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against L. E. Bayne on 4th March 1909, and that against Mary Bayne on 18th March, the learned Judge holding that the proceedings were not an abuse of the process of the Court, and that the petitioning creditors' debts had not merged in the judgment.

From these decisions L. E. Bayne and Mary Bayne appealed to the High Court, and the two appeals were by order dated 23rd March 1909 consolidated.

The appellant *Lila Elizabeth Bayne* in person.

Mann, for the respondents. It is said for the appellants that the judgment debts in respect of which the appellants' estates were sequestrated were merged in the judgment debt arising out of the counterclaim, and *In re European Central Railway Co.*; *Ex parte Oriental Financial Corporation* (1) is relied upon in support of that proposition. But an obligation only merges in another obligation of a higher degree and never in an obligation of the same degree: *Preston* v. *Perton* (2); *Manhood* v. *Crick* (3). A debt of record does not merge in another debt of record. The case relied upon by the appellants was one in which an obligation on a bond was held to have merged in a judgment debt. It is very doubtful, also, whether for the purposes of insolvency proceedings a simple contract debt is merged in a judgment debt, because then the judgment is only evidence of the debt which is the principal thing: *Robson on Bankruptcy*, 7th ed., p. 293; *Ex parte Anderson*; *In re Tollemache* (4). As to the objection that the proceedings were an abuse of the process of the Court, there was no relation between the judgment debt and the claim made in the action brought by the appellants. As to the objection sought to be set up that the appellants have no assets and that, therefore, the orders for the sequestration should not have been made, the Court has a discretion: *In re Betts*; *Ex parte Betts* (5), but the mere fact that the debtors have no assets is not a ground for not making them insolvent: *In re Jubb*; *Ex parte Burman and Greenwood* (6).

(1) 4 Ch. D., 33.
(2) 2 Cro. Eliz., 817.
(3) 2 Cro. Eliz., 716.
(4) 14 Q.B.D., 606.
(5) (1897) 1 Q.B., 50.
(6) (1897) 1 Q.B., 641.

GRIFFITH C.J. I think that, although the appellants are not represented by counsel, the matter of their argument has been very fully presented to the Court in the written statement handed in by Miss Bayne, and in the fair manner in which Mr. *Mann* has presented his argument. The respondents presented petitions for adjudication of insolvency against both the appellants. The debts upon which they relied comprised, in one case, amounts ordered to be paid by the appellant to the respondents by this Court and by the Privy Council, and in the other case the amount ordered by the same order of the Privy Council to be paid by the other appellant to the respondents. There is no doubt that that money was due. An objection is taken that the respondents ought not to be allowed to set the debt up as a petitioning creditor's debt because the respondents had in subsequent proceedings counterclaimed for those judgment debts and obtained judgment thereon, and it is said that, under those circumstances, the judgment debt now relied upon was merged in the later judgment. Mr. *Mann* referred to a case decided in the time of Queen Elizabeth in which that exact point was raised and determined. It was held that there was nothing in the objection, and from that time to the present I do not think it has ever been suggested that there was anything in it. It would be a very singular thing if the right of a party to enforce a judgment of this Court in respect of a debt were to be taken away by reason of the creditor having attempted to enforce the same debt in the Courts of Victoria. There is nothing in the objection, and I take leave to share the doubt expressed by Mr. *Mann* as to whether, for the purposes of a petitioning creditor's debt in insolvency proceedings, there is any merger of a debt in a judgment. That disposes of the main objection.

There are two other objections. One is that the proceedings in insolvency so prosecuted were in the nature of an abuse of process of Court. That would be a ground, if proved, for an adjournment of the proceedings and, possibly, for dismissal of the petition, but I agree with the learned Judge in the Court below that there is no foundation for the suggestion in this case. The action pending when the insolvency proceedings were taken was an action for damages for personal injury alleged to have been

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sustained by the appellants by the wrongful act of the respondents. The debt in respect of which the petition was presented is a debt which certainly was due. Whatever the result of the proceedings in the action might be that debt would remain due. Moreover, the cause of action was one which would not pass to the trustee in insolvency, and it has now been determined conclusively that there was no cause of action. Moreover, there was no connection between the claim in that action and the petitioning creditor's debt. The case is as if a man had brought an action against his creditor for defamation and had lost his action. The fact that an appeal in that action was pending might be a ground for the creditor not being allowed to present a petition in insolvency in respect of his debt upon that judgment, but it would not be a ground for not allowing the creditor to present a petition in insolvency in respect of the original debt arising out of an entirely different matter. I am, therefore, unable to see in the present case any ground for suggesting that the proceedings were an abuse of process of Court.

We have been asked now to allow a further ground of appeal to be taken, viz., that there is no reason to think that there are any assets in the estate of either of the appellants. First of all, there is no evidence before us that that is the true state of the facts. But, if it were, that that is a ground for not making an order for sequestration is conclusively negatived by *In re Leonard*; *Ex parte Leonard* (1). As pointed out in that case, when a petition is presented it is impossible to say whether there will prove to be any assets or not. "All the petitioning creditor" said Lord *Esher*, M.R. (2) "then knows or need know is that a debt is owing to him, and that, after taking the necessary steps to procure payment of that debt, he cannot get payment of it; and therefore he asks that the debtor may be made bankrupt.

"The Court cannot at that stage tell whether the proceedings in bankruptcy will have no result. If the debtor is made bankrupt, there will be a public examination of him, and then it may be ascertained whether he has any assets. At the time of the petition and adjudication the Court has not the proper materials for judging whether there are assets or not."

(1) (1896) 1 Q.B., 473.

(2) (1896) 1 Q.B., 473, at p. 475.

So that the objection is really no objection at all. The case of *In re Betts*; *Ex parte Betts* (1), mentioned in the appellants' statement, was a case in which the debtor was already bankrupt, and that was held to be a ground for refusing to make him bankrupt a second time, the only possible result of which would be to give rise to disputes between two sets of assignees under the adjudication, and, as there were no assets, it would be entirely futile. Strictly speaking, perhaps, this point could not be raised, but it may be satisfactory to the appellants to know that every aspect of their case which they desire to present to the Court has been considered. For these reasons the appeal should be dismissed.

BARTON J. I concur.

O'CONNOR J. I concur.

Solicitors, for the respondents, *Blake & Riggall.*

Appeals dismissed with costs.

B. L.

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