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NEW SOUTH WALES COUNTRY PRESS CO-OPERATIVE CO. LTD. v. STEWART.

O'Connor J.

sufficient legal evidence before his case could go to the jury. Stripped of the many immaterial considerations upon which it was attempted to found the proof of Dunn's authority, the only fact upon which it really can be put is his employment by Shakespeare in the special duty of obtaining possession of some of the respondent's contracts from certain of the respondent's customers. No attempt was made to prove express authority conferred on Dunn to make statements with reference to the subject matter of the alleged slanders, and for the reasons I have given I have come to the conclusion that it would be impossible for a jury legally to draw the inference that it was within the scope of Dunn's special employment to make those statements. It follows that, in my opinion, the plaintiff ought to have been nonsuited, and that the Supreme Court not having so held this appeal must be allowed.

Appeal allowed.

Solicitor, for the appellants, *R. Sullivan.*
Solicitors, for the respondent, *McCoy* v. *McCoy.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

LORIMER AND OTHERS . . . . . APPELLANTS;

AND

SMAIL AND ANOTHER . . . . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *Sept.* 20, 25.

Insolvency—Settlement by woman who afterwards becomes insolvent—Registration of settlement—Insolvency Act 1897 (*Vict.*) (*No.* 1513), *sec.* 100.

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

Sec. 100 of the *Insolvency Act* 1897 (Vict.) provides that "Every settlement of property on or for the wife or children or both wife and children of the

settlor made after the commencement of this Act not being a settlement before or in consideration of marriage or a settlement made on or for the wife or children or both wife and children of the settlor of property which has accrued to the settlor after marriage in right of his wife shall in case of the insolvency of the settlor at any time thereafter be absolutely void and of no effect against the assignee or trustee in insolvency unless such settlement be in writing and " registered in the mode prescribed.

Held, that the section does not apply to settlements made by women.

Decision of the Supreme Court of Victoria: *In re Lorimer*, (1911) V.L.R., 168; 32 A.L.T., 172, reversed.

APPEAL from the Supreme Court of Victoria.

On 18th January 1907 Isabella Susanna Farckens, then a widow, executed a settlement, whereby, in consideration of the natural love and affection she bore to her three children, she transferred to herself and her children a certain piece of land to be held for the use and benefit of herself for life, and on her decease to her children, naming them, and their heirs and transferees in fee simple as tenants in common. A transfer was accordingly executed on 11th February and a certificate of title was issued in the joint names of the settlor and her children. This settlement was not registered under the provisions of sec. 100 of the *Insolvency Act* 1897. Mrs. Farckens subsequently re-married and became Isabella Susanna Lorimer, and in July 1910 she voluntarily sequestrated her estate.

The trustees of her estate moved in the Court of Insolvency for a declaration that the transfer of 11th February 1907 was void and of no effect against them and that the property comprised therein formed part of the insolvent estate, and for an order that the transferees of the property should execute such transfers and other assurances as might be necessary to vest the property in the trustees.

The ground of the motion was that the transfer was a settlement of property on the children of the settlor requiring registration under sec. 100 of the *Insolvency Act* 1897.

The Judge of the Court of Insolvency held that sec. 100 did not apply to settlements by women, and he dismissed the motion with costs. On appeal to the Supreme Court this decision was reversed: *In re Lorimer* (1).

(1) (1911) V.L.R., 168; 32 A.L.T., 172.

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An appeal to the High Court was now brought on behalf of Mrs. Lorimer and her children.

Arthur, for the appellants. Sec. 100 of the *Insolvency Act* 1897 does not apply to settlements by a woman. It does not provide for a settlement by a wife on her husband or on her husband and children. The evil the legislature was aiming at was the ordinary one of a settlement by a man, and they had not in mind settlements by a woman. The collocation of words is the same as is used in sec. 72 of the *Insolvency Act* 1890 to denote a settlement by a man.

Mann, for the respondents. Married women are by sec. 119 of the *Insolvency Act* 1897 subject to the insolvency law. Sec. 100 refers to three classes of settlements—a settlement on a wife, a settlement on children, and a settlement on both wife and children. Two of these are applicable to settlements by men only, and the third, a settlement on children, is applicable to settlements by either men or women. If there were no exception, there would be no reason for limiting the meaning of that class which was applicable to settlements by either men or women. Of the two exceptions, with regard to marriage settlements words are used to describe them generally, and they are consistent with the section covering settlements made by men or women. The second exception is applicable only to settlements by men, but that is only because of the particular subject matter dealt with. The fact that this second exception is only applicable to settlements by men is no reason for limiting settlements on children to settlements by men, nor is the fact that the section makes no provision for settlements by wives on their husbands or on their husbands and children. The policy of the legislature is to apply the provisions of the insolvency law equally to males and females, and the Court should give such a meaning to sec. 100 as will help that policy. The grammatical construction should be followed in a case of doubt. [He also referred to sec. 72 of the *Insolvency Act* 1890 and secs. 103, 104 of the *Insolvency Act* 1897.]

Arthur, in reply. The marriage settlements referred to in sec. 100 can only be such marriage settlements as are included in the

three classes previously referred to, and therefore cannot include marriage settlements by a wife on her husband or on her husband and children, so that no assistance can be drawn from that exception. The section must be read as a whole and cannot be divided up into different parts and then interpreted as if each part had no reference to the others: *Craies on the Interpretation of Statutes*, pp. 98, 174, 198; *Mersey Docks and Harbour Board* v. *Henderson Bros.* (1); *Nolan* v. *Clifford* (2).

[GRIFFITH C.J. referred to *Rein* v. *Lane* (3): *Doe* v. *Bartle* (4).]

Cur. adv. vult.

Sept. 25.

GRIFFITH C.J. The question for determination in this case depends entirely upon the construction of sec. 100 of the *Insolvency Act* 1897, which provides that:—"Every settlement of property on or for the wife or children or both wife and children of the settlor made after the commencement of this Act not being a settlement made before or in consideration of marriage or a settlement made on or for the wife or children or both wife and children of the settlor of property which has accrued to the settlor after marriage in right of his wife shall in case of the insolvency of the settlor at any time thereafter be absolutely void and of no effect against the assignee or trustee in insolvency unless such settlement be in writing" and registered in the mode prescribed by the section.

The general question of voluntary settlements was dealt with by sec. 72 of the *Insolvency Act* 1890. The appellants in this case contend that sec. 100 of the Act of 1897, which I have read, has no application to a settlement made by a mother upon her children. The settlor in this case was a widow when she made the settlement, and the settlement was for the benefit of herself and her children. The respondents contend that, grammatically, sec. 100 is capable of including settlements by a mother upon her children, whether she is a widow or married, and should be so construed. The Judge of the Court of Insolvency accepted the contention of the appellants, but the learned Judges of the

(1) 13 App. Cas., 595.
(2) 1 C.L.R., 429.
(3) L.R. 2 Q.B., 144.
(4) 5 B. & A., 492.

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Supreme Court were of the contrary opinion. It is a matter upon which opinions may well differ, and we must express our own. There is very little to be said about it. The respondents say that the question is purely one of grammar. They say that when a number of words are connected together in a sentence as subjects or objects by the word "or," you can reject all the words up to and including the final "or," and say the sentence is grammatically complete. So you can. But I do not think it follows that the meaning so arrived at is the true meaning of the enactment. You must have regard to the omitted words, to the context, to the collocation, and to the purpose as relating to the subject matter—as was pointed out by *Blackburn* J. in *Rein* v. *Lane* (1)—to see whether this merely mechanical operation will give effect to the whole intention of the legislature. Having regard to the context and to the collocation of the words, I find that the word "children" is used throughout in conjunction with the word "wife." I think it is right to have some regard to the *primâ facie* probability of one construction as compared with the other, where words are really ambiguous, although the argument is a very dangerous one. It is quite clear that a settlement by a wife on her husband and children would not be void as far as regards the husband, but it is said it would be void as regards the children. It seems *primâ facie* highly improbable that the legislature would forbid a mother to make gifts to her children, and, still more improbable, that in an Insolvency Act it would forbid gifts by a woman to her children, and allow gifts by her to her husband, and yet that must be the effect of the respondents' contention. On the whole I have come to the conclusion, though not without the doubt which is necessarily involved in differing from the opinion of the learned Judges of the Supreme Court—and it is a mere matter of opinion—that the intention of the legislature was to use the word "settlor" in the sense of a husband and not to include in it a wife. I think, therefore, that the judgment of the Judge of the Court of Insolvency was right and should be restored.

BARTON J. read the following judgment:—No doubt we are bound to look further than the mere literal meaning of

(1) L.R. 2 Q.B., 144.

the words used and to consider the whole enactment, which is the context. But the literal or grammatical meaning is also the plain meaning unless, to use the words of *Jessel* M.R. in *Bentley* v. *Rotherham and Kimberworth Local Board of Health* (1), it is controlled by a "context even more plain, or at least as plain."

Whether the writing to be interpreted be a Statute or any other document, the rule is the same. It is clearly laid down by *Sir John Leach* V.C., in *Hume* v. *Rundell* (2):—"In the construction of all instruments it is the duty of the Court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together. But a Court is not authorized to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every Court is bound by it, unless it be plainly controlled by other parts of the instrument."

First, then, what is the literal or grammatical meaning of the words used?

That is to be ascertained, not by cutting them into segments, and sorting out a segment which will bear the desired meaning, but by taking the disputed phrase or passage as a whole. If the words "Every settlement of property on or for the . . . . children of the settlor," were the only words used to describe the settlement or the settlor, Mr. *Mann's* contention would be amply justified. But we must take these words in their relation to the rest of the passage, and consider the relation to the word "children" of the words "wife or" which precede it, and the words "or both wife and children" which follow it; and the relation of the word "settlor" to all these expressions.

The settlor is a person who may make a settlement on "the wife or children or both the wife and children" of the settlor. The alternative to a settlement on either wife or children separately is a settlement on both wife and children together. What

(1) 4 Ch. D., 588, at p. 592.

(2) 2 Sim. & St., 174, at p. 177.

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sort of person then is the settlor who can adopt the alternative? Can it be other than a man? He may be a man who has a wife but no children, or who has children but no longer a wife, or who has both wife and children; and he may in any of these cases make a settlement which will, if not registered as prescribed, be voidable at the instance of the assignee or trustee. But whichever person or class of persons be the object or objects of the settlement, the person who makes it cannot be a woman. Mr. *Mann's* construction is not only arrived at by ignoring the relations *inter se* of the component parts of the passage, but would have the effect of placing under the ban of the section a provision made by a woman for her children, while leaving untouched a settlement made by a wife upon her husband; and it is, to say the least of it, improbable that the legislature intended to make so strange a discrimination. Further, the process employed is condemned by Lord *Halsbury* L.C., in *Mersey Docks and Harbour Board* v. *Henderson Bros.* (1) where he says:—"It certainly is not a satisfactory mode of arriving at the meaning of a compound phrase to sever it into its several parts and to construe it by the separate meaning of each of such parts when severed." The phrase there in question was "trading inwards": but the principle applies equally to a passage like that in question where the parts are inter-dependent, as I think they are.

Are there, then, in other parts of the enactment expressions which manifest that the legislative author of it "could not have had the intention which the literal force of the particular expression would impute to it?" I have looked in vain for any such controlling context. Certainly it does not exist in the section we are to construe. Indeed, the exception of post-nuptial settlements made in pursuance of a wife's equity to a settlement is couched in terms which include a repetition of the phrase which it is sought to construe in favour of the trustees, and to that extent the grammatical construction of it is, perhaps, helped. Then sec. 72 of the Act of 1890 was referred to. Though that section probably covers (*inter alia*) settlements made by women, its terms do not assist the trustees. Indeed, a very close

(1) 13 App. Cas., 595, at p, 599.

critic might say that the later portion of it, beginning with the words "any contract or covenant," uses the words "his wife or children" in a manner which tends possibly to indicate that the person referred to in the previous part of the section as the settlor is a man. But I am not adopting that kind of criticism. It is enough to say that there is not in sec. 72 of the Act of 1890, when read in connection with sec. 100 of the Act of 1897, any context controlling the construction which the Judge in Insolvency has placed on the latter.

Speaking for myself, I find nothing at all capricious in the intention which I think is expressed in the section. It is not unreasonable that Parliament should have deliberately abstained from applying such a drastic provision as this to a settlement by which a solvent woman provides for her children. They may have considered it quite sufficient that they had already subjected an arrangement ordinarily laudable to the perils of the 72nd sec. of the Act of 1890—perils superadded to the risks it ran from the mother's ability to defeat it.

This particular settlement has not been attacked under sec. 72, although Mrs. Lorimer became insolvent three and a half years after its execution. It seems probable, therefore, that the trustees found that the beneficiaries could prove that Mrs. Lorimer (then Mrs. Farckens) was at the time she made it able to pay all her debts without the aid of the property settled. If this was really the fact, I am glad that we find the meaning of sec. 100 to be such that the attack under that section is also fruitless.

I think that the construction adopted by the learned Judge in Insolvency is the grammatical and natural meaning of the words, that there is no controlling context, and that his order was right and should be restored.

O'CONNOR J. The meaning which the Supreme Court put upon the words of sec. 100 of the *Insolvency Act* 1897 is no doubt clear enough if one reads the section in the way in which the learned Chief Justice of the Supreme Court read it. He arrived at his conclusion by leaving out the words of the section which create the difficulty. The first few words of the section are those which have to be considered, and they read in this way:

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"Every settlement of property on or for the wife or children or both wife and children of the settlor." Now it appears to me impossible to give full effect to every word of that portion of the section without inquiring into what is meant by "settlor." The words are not "Every settlement of property on or for the wife or children or both wife and children," but "Every settlement of property on or for the wife or children or both wife and children *of the settlor*." It is quite clear that read in that way the settlement which is the subject matter of the section must be a settlement made by a male settlor and can be nothing else. To attempt to construe the section by leaving out the word "settlor" seems to me to construe it without taking the whole of the words in dispute into consideration.

There is a further reason, it seems to me, in favour of taking that which really gives a meaning to the whole sentence into consideration, and it is this: As the learned Judges of the Supreme Court read the section, it amounts to an enactment that a settlement by a wife on her children must be registered under penalty of becoming void, but that a settlement by a wife on her husband need not be registered. Considering that this is an Insolvency Act and is especially directed to the prevention of frauds on creditors, it seems highly improbable that the legislature should have dealt in that way with settlements on children, and should have left out the very kind of settlements which were more likely to be used to the prejudice of creditors.

I therefore agree that the correct interpretation of the section is that arrived at by the Judge of the Court of Insolvency.

Appeal allowed. Judgment appealed from discharged. Appeal from the Court of Insolvency dismissed with costs, and judgment of the Judge of the Court of Insolvency restored. Respondents to pay the costs of the appeal.

Solicitor, for the appellants, *C. J. MacFarlane* for *T. Robinson*, Ballarat.

Solicitors, for the respondents, *Phillips, Fox & Overend.*

B. L.