[HIGH COURT OF AUSTRALIA.]

HOWDEN . . . . . APPELLANT;

AND

COCK AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 18, 19, 20; *June* 8, 18.

Griffith C.J., Isaacs, Higgins, Gavan Duffy and Rich JJ.

Insolvency—Deed of assignment for benefit of creditors—Effect—Jurisdiction of Court of Insolvency—Assignment by creditor of debt—Exercise of rights under deed—Voting—Purchase of debt by debtor—Validity—Insolvency Act 1890 (*Vict.*) (*No.* 1102), *sec.* 5—*Insolvency Act* 1897 (*Vict.*) (*No.* 1513), *secs.* 5, 74, 83.

Sec. 5 of the *Insolvency Act* 1897 (Vict.) provides that "(1) Subject to the provisions of this Act the Court" (of Insolvency) "shall have full power to decide all questions of priorities and all other questions whatsoever whether of law or fact which may arise in any case of insolvency coming within the cognizance of the Court or which the Court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." Sec. 83, so far as material, provides with regard to deeds of arrangement, which under sec. 74 include assignments for the benefit of creditors, that "so far as the nature of the case will admit the trustee creditors and debtor respectively shall have the same functions powers rights duties obligations and liabilities and the Court" (of Insolvency) "shall have the same powers authority and jurisdiction as in the case of insolvency."

Held, by *Griffith* C.J., and *Isaacs*, *Gavan Duffy* and *Rich* JJ., that under sec. 83 and sec. 5 of the *Insolvency Act* 1897 the Court of Insolvency has in relation to deeds of assignment for the benefit of creditors power to decide all such questions of law or fact as a Court of equity charged with the administration of an estate could decide, including questions as to the validity of assignments by creditors of their debts and as to the effect of those assignments, if valid, upon the voting power to be exercised by creditors in pursuance of such deeds.

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Semble, per Higgins J., that if the debtor were doing anything unfair to prevent the realization of his assigned property, the Court of Insolvency could check or punish him.

A debtor, who had a life interest in certain property, entered into a deed of assignment for the benefit of his creditors which was registered pursuant to the *Insolvency Act* 1897. The property assigned included the life interest, as to which it was provided that it should not be sold or disposed of by the trustee "except with the consent and by the direction of a three-fourths majority in number and value of the creditors and with the consent of the debtor or failing the consent of the debtor then under and subject to the approval of the Court." The "creditors" were defined by the deed as being the signatories to the schedule of creditors and all other creditors who should assent to the deed. Several of the creditors, sufficient in number to render it impossible without some of them to obtain a three-fourths majority in number of all the creditors, assigned to the debtor's mother, who was herself a creditor, their debts and proofs of debt and all their interests and rights therein. The assignments were procured by the debtor with the object of benefiting himself and of hindering as far as possible the sale of his life interest, and his mother intended to use any power which she might obtain by reason of them in furtherance of that object.

Held, by *Griffith* C.J. and *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that under the deed the right of creditors to receive dividends, into which their rights in respect of their debts were converted, was assignable to any person, including the debtor himself; that on the evidence the debtor's mother was the beneficial owner of the interests which the assignors had under the deed; that the assignments to her were lawful and not in derogation of the deed; and, therefore, that the trustee of the deed was not entitled to have the assigned debts expunged or to an order restraining the debtor's mother from using the proofs of debt and assignments thereof or from voting thereon, or from obstructing by means of such proofs of debt or assignments thereof the realization of the estate by the trustee.

Per Higgins J.—The Court of Insolvency has no power to expunge debts rightly admitted.

Per Higgins J.—Even if the debtor were to be taken as the true owner of the claims assigned, the acts done by him as such owner were not in any way in derogation of his grant under the deed or in breach of any covenant or undertaking.

Per Isaacs J.—(1) The clause as to a three-fourths majority in number and value of the creditors implied that a person claiming to vote thereunder in his own right continued to be the creditor both at law and in equity; (2) in case of assignment either to the debtor or his mother, the right to dividends attributable to the debt passed to the assignee, and the assigning creditor lost the right to vote on his own behalf; (3) if the assignments, though nominally to the mother, were really—as in fact they were—to the debtor,

he did not thereby become his own creditor, and could not as equitable creditor of himself direct the assigning creditor how to vote; (4) if all the assignments were really to the mother, she could unite in one sum the several debts assigned, for the purpose of value; but could not, for the purpose of number, multiply her individuality so as to vote separately through her nominees the assigning creditors, in respect of each debt assigned; (5) in the circumstances the assignment even if to the mother was in collusion with the debtor for the purpose of assisting him to defeat the rights of other creditors, and therefore if otherwise entitled she ought not to be permitted to vote separately for each debt through her nominees; (6) a creditor binding himself to another person for a money consideration to vote under such a clause as directed, is acting illegally by taking a bribe, and ought not to be permitted to vote according to such direction.

Decision of the Supreme Court of Victoria: *In re Cock*; *Howden* v. *Cock*, (1914) V.L.R., 395; 36 A.L.T., 29, affirmed, but on a different ground.

APPEAL from the Supreme Court of Victoria.

On 20th February 1909 Charles Matthew Germain Cock executed a deed of assignment of his property to a trustee, John McAllister Howden, for the benefit of his creditors, "the several persons firms and companies whose names and seals and the amounts of whose debts are subscribed affixed and entered in the schedule of creditors hereto and all other the creditors of the debtor who shall in writing or otherwise signify their assent to these presents (hereinafter called the creditors)."

The deed contained the following provisions (*inter alia*):—

"14. The debtor shall if and when required by the trustee be bound to render his services in winding up the estate and in administering the trust property and trust fund."

"19. The creditors do and each of them doth hereby release and discharge the debtor from all debts due or owing from the debtor to them or any of them and from all actions suits claims demands or other proceedings by the creditors or any of them in respect of the said debts."

"21. The trustee may at any time and shall forthwith if requested in writing by not less than one-sixth of the creditors in number and value to do so call a meeting of creditors . . . and any resolution passed thereat by a majority in number and value of the creditors voting at such meeting shall be valid and binding on the trustee . . . and the minutes

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of the business transacted at such meeting . . . shall be *primâ facie* evidence for all intents and purposes whatsoever of the business transacted at such meeting . . . and the minutes so signed shall be binding on the parties hereto."

"26. Notwithstanding anything hereinbefore contained the life estate or interest to which the debtor is entitled under the will of Lucy Smith deceased and which is included in the personal estate hereby assigned or intended so to be and the rights conferred by the said will upon the debtor shall not be sold or disposed of by the trustee except with the consent and by the direction of a three-fourths majority in number and value of the creditors and with the consent of the debtor or failing the consent of the debtor then under and subject to the approval of the Court."

The deed was duly registered on 10th June 1909. Early in 1912 twenty-one of the creditors in writing assigned their debts to Mrs. Emily Cock, mother of the debtor, who was herself a creditor and a party to the deed. By each assignment the assignor assigned and transferred to Mrs. Cock the debt owing to him by the debtor and his proof of debt lodged with the trustee under the deed, and the benefit of such proof and any dividend or dividends which might thereafter be declared in respect of such debt or proof or to which the assignor might at any time thereafter become entitled to receive in respect of such debt or by virtue of such proof. The assignor then authorized Mrs. Cock to receive all such dividends, and declared that her receipt should be an absolute and sufficient discharge to the trustee, and the assignor authorized Mrs. Cock to exercise in the assignor's or Mrs. Cock's name all rights which the assignor could or might thereafter be able to exercise under the deed, and to execute and give all consents and all directions whether by vote or by deed which the assignor might be able to give or exercise under the deed. Each of the assignors also executed a proxy in favour of Mrs. Cock.

On 3rd November 1913 a motion was made to the Court of Insolvency at Melbourne on behalf of Howden which, as amended at the hearing by direction of His Honor Judge *Moule*, asked (*inter alia*) for an order that the proofs of debt of the creditors

who had assigned to Mrs. Cock should be expunged, and that C. M. G. Cock, Mrs. Cock and their or her trustees or nominees should be restrained from using such proofs of debt and assignments thereof, and from voting thereon, and from hindering, preventing or obstructing, by means of such proofs of debt and assignments thereof, the realization of the assigned estate of C. M. G. Cock. On the hearing of the motion, evidence was taken which it was said on behalf of Howden established that C. M. G. Cock was the beneficial owner of the assigned debts.

The learned Judge held that the Court of Insolvency had no jurisdiction to grant any of the relief asked, and he dismissed the summons.

On appeal by Howden to the Supreme Court, the Full Court dismissed the appeal, taking the same view as to the jurisdiction of the Court of Insolvency: *In re Cock*; *Howden* v. *Cock* (1).

From that decision Howden now, by special leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Starke (with him *Mann* and *Owen Dixon*), for the appellant.

Mitchell K.C. and *S. R. Lewis*, for the respondent Mrs. Cock.

Cohen, for the respondent C. M. G. Cock.

During argument reference was made to *Ellis* v. *Silber* (2); *In re Hawke*; *Ex parte Scott* (3); *Ex parte Harper*; *In re Pooley* (4); *Trego* v. *Hunt* (5); *Lyttelton Times Co. Ltd.* v. *Warners Ltd.* (6); *Stirling* v. *Maitland* (7); *Hamlyn & Co.* v. *Wood & Co.* (8); *Douglas* v. *Baynes* (9); *Ex parte Stallard*; *In re Freeland* (10); *Morley* v. *White*; *In re White* (11); *Ex parte Gordon*; *In re Dixon* (12); *Re Iliff* (13); *Re Hills*; *Ex parte Lang* (14); *Bateson* v. *Gosling* (15); *Commercial Bank of Tas-*

(1) (1914) V.L.R., 395; 36 A.L.T., 29.
(2) L.R. 8 Ch., 83, at p. 85.
(3) 16 Q.B.D., 503.
(4) 20 Ch. D., 685, at p. 691.
(5) (1896) A.C., 7.
(6) (1907) A.C., 476.
(7) 5 B. & S., 840, at p. 852.
(8) (1891) 2 Q.B., 488.
(9) (1908) A.C., 477.
(10) 2 Mont. D. & De G., 469.
(11) L.R. 8 Ch., 214.
(12) L.R. 8 Ch., 555.
(13) 51 W.R., 80.
(14) 107 L.T., 95.
(15) L.R. 7 C.P., 9.

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mania v. *Jones* (1); *Perry* v. *National Provincial Bank of England* (2); *Duck* v. *Mayeu* (3); *Rowlatt on Principal and Surety*, p. 253; *In re McHenry*; *McDermott* v. *Boyd* (4); *Green* v. *Wynn* (5); *Ex parte Stagg*; *In re Burton* (6); *Jack* v. *Smail* (7); *Re Baines*; *Ex parte Board of Trade* (8); *In re Bedingfeld and Herring's Contract* (9); *Theobald on Wills*, 7th ed., p. 440; *Mayhew* v. *Boyes* (10); *Ex parte Barrow*; *In re Andrews* (11); *Ex parte Milner*; *In re Milner* (12); *In re E.A.B.* (13).

Cur. adv. vult.

June 18. The judgment of GRIFFITH C.J. and GAVAN DUFFY and RICH JJ. was read by

GRIFFITH C.J. Part VI of the *Insolvency Act* 1897 (No. 1513) deals with deeds of arrangement, which term includes assignments of property by a debtor for the benefit of his creditors. Such deeds are inoperative unless registered within the prescribed time (sec. 75). Sec. 83 provides that so far as the nature of the case will admit, the trustee, creditors and debtor respectively shall have the same functions, powers, rights, duties, obligations and liabilities, and the Court (*i.e.*, the Court of Insolvency) shall have the same powers authority and jurisdiction as in the case of insolvency. Creditors are required to prove their debts as in an insolvency. Sec. 5 of the Act is as follows:—"(1) Subject to the provisions of this Act the Court shall have full power to decide all questions of priorities and all other questions whatsoever whether of law or fact which may arise in any case of insolvency coming within the cognizance of the Court or which the Court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

By a deed, dated 20th February 1909, and made between the respondent C. M. G. Cock (described as the debtor) of the first

(1) (1893) A.C., 313.
(2) (1910) 1 Ch., 464.
(3) (1892) 2 Q.B., 511, at p. 514.
(4) (1894) 3 Ch., 365.
(5) L.R. 4 Ch., 204.
(6) 2 Mont. D. & De G., 186.
(7) 2 C.L.R., 684.
(8) 86 L.T., 691.
(9) (1893) 2 Ch. 332.
(10) 103 L.T., 1.
(11) 18 Ch. D., 464.
(12) 15 Q.B.D., 605.
(13) (1902) 1 K.B., 457, at p. 464.

part, the appellant of the second part, and "the several persons firms and companies whose names and seals and the amount of whose debts are subscribed affixed and entered in the schedule of creditors hereto and all other the creditors of the debtor who shall in writing or otherwise signify their assent to these presents (hereinafter called the creditors)" of the third part, the debtor Cock assigned to the appellant as trustee all his real and personal estate upon trusts for realization and distribution of the net proceeds amongst the creditors by way of dividend as in insolvency, and to pay the surplus (if any) to the debtor. The debtor's property comprised a life interest in an estate of great value to which he was entitled under the will of one Lucy Smith. The deed did not include after acquired property. By clause 19 of the deed the creditors released the debtor from all debts owing by him to them or any of them, and all claims in respect of the debts, with a reservation of rights against securities (clause 20). Clause 26 was in these terms:—"26. Notwithstanding anything hereinbefore contained the life estate or interest to which the debtor is entitled under the will of Lucy Smith deceased and which is included in the personal estate hereby assigned or intended so to be and the rights conferred by the said will upon the debtor shall not be sold or disposed of by the trustee except with the consent and by the direction of a three-fourths majority in number and value of the creditors and with the consent of the debtor or failing the consent of the debtor then under and subject to the approval of the Court."

The deed was executed by eighty-three creditors, including the debtor's mother, the respondent Emily Cock, who was a creditor for nearly £1000, but the number has since been reduced to eighty-one by payment of preferential claims in full.

The effect of this deed was that upon its execution and registration the defendant became a free man so far as regards his debts owing to the creditors who executed it. On the other hand, the rights of the creditors in respect of their debts were converted into a right to receive dividends out of the proceeds of the property until satisfaction of the debts. This right to dividends was in the nature of property, which was assignable, in the mode

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appropriate to the assignment of such property, to any person qualified to acquire it. We entertain no doubt that the debtor himself was such a person.

By instruments executed in the year 1912 twenty-one of the creditors who had proved under the deed assigned to the respondent Mrs. Cock their debts and proofs of debt and the benefit of such proofs and any dividends that might be acquired thereunder, and authorized her to receive such dividends, and declared her receipts to be an absolute and sufficient discharge to the trustee. They also authorized her to exercise in her own name all rights which they might be able to exercise under the deed, and to execute and give all consents and all directions, whether by vote or by deed, which they might be able to give or exercise under it. They also executed proxies in her favour. All the assigned debts were of small amount.

The appellant applied to the Court of Insolvency on notice to the respondents, who include the twenty-one creditors who had executed the assignments, for an order that the proofs of those creditors should be expunged and that Mrs. Cock should be directed to deliver one proof to the trustee in lieu of them, or alternatively that the proofs might be expunged *simpliciter*. At the hearing of the motion the notice was amended by asking alternatively that the respondents C. M. G. Cock and Mrs. Cock or their trustees or nominees might be restrained from using the proofs and assignments and from voting thereon and from preventing or obstructing by means thereof the realization of the estate, or such other order as the Court might think fit to make, on the ground that the assignments and the use thereof by the "said persons" were in derogation of the deed and a fraud thereon.

The case made in support of the motion was that the assignments of the proofs to Mrs. Cock were arranged by the debtor for his own benefit, and that his mother was a trustee of the assigned debts and proofs for him. It appeared from the evidence that the assignments were in fact negotiated by him with his mother's concurrence, that the consideration paid for the assignment was in the first instance paid out of money borrowed by him, but that the money was almost immediately afterwards

repaid by his mother. Under these circumstances it is, in our opinion, impossible to say that she is in any sense a trustee for him of the rights assigned to her by the twenty-one creditors, or that he could claim as against her to receive the dividends under their proofs. There is no doubt, however, and it is not disputed, that the assignments were obtained with a view to benefiting her son, and hindering as far as possible the sale of the life interest already mentioned without his consent, and that any power which she might obtain by the acquisition was intended to be used in furtherance of what she regarded as his interests.

The learned Judge of the Insolvency Court was of opinion that no ground had been shown for expunging the proofs, and did not see his way to make any other order on the motion. The Supreme Court unanimously dismissed an appeal from this decision.

The case was presented to this Court in various ways. The claim to expunge the proofs was not abandoned, but it was urged that the jurisdiction of the Court of Insolvency conferred by sec. 83 of the Act in respect of deeds of assignment is coextensive with that conferred by sec. 5 in the case of insolvency, which includes power to decide all questions whether of law or fact which may arise in the case, and that, as applied to the case of deeds of assignment, it extends to deciding any question that it becomes necessary to decide for making a complete distribution of the estate, that is to say, all such questions as a Court charged with the administration of an estate, as was the Supreme Court in what used to be called its equity jurisdiction, could decide. In our opinion this contention is sound.

It was further urged that in this view the Court of Insolvency had jurisdiction to decide whether the assignments in question in this case are valid, and, if valid, what is their effect upon the voting power to be exercised by creditors under clause 26. We agree that the Court has power to decide both questions in a fitting case, that is, under such circumstances as those under which a Court of equity would exercise it.

With regard to the validity of the assignments we are of opinion, as we have already intimated, that Mrs. Cock is the beneficial owner of the interests which the assignors had under

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the deed. We express no opinion on the question whether it would make any difference if the respondent Cock were the beneficial owner. Interesting questions were raised on the assumption that he was such beneficial owner, but in the view we take of the facts, these questions become immaterial. We will, however, briefly deal with them.

The appellant first contended that a purchase by the debtor of the interest of a creditor in the dividends payable in respect of his proof would operate as an extinction of the debt. In our opinion such a purchase cannot be distinguished in principle from a purchase of a similar interest made by an insolvent after obtaining his discharge. Such a purchase would clearly operate as a transfer to him of the right to receive the dividends.

It was further contended that the effect of clause 26 was to create an implied obligation on the part as well of the debtor as of each creditor not to do any act by which the qualified power of control given to a majority of three-fourths in number and value of the creditors would be affected. So far as the debtor is concerned the argument is plausible, but it is not necessary to consider it. So far as regards the creditors it involves the assumption that the deed created a mutual obligation between the creditors themselves, as in the case of a deed of composition under which the debtor is not discharged until the composition is paid. In our opinion there is no analogy between the cases. Under this deed each creditor is free to dispose of his own interest in the trust property to any person and for any consideration he thinks proper.

It is quite a mistake to suppose that Mrs. Cock's sympathy for her son is relevant in any aspect of the case. The motive by which a creditor is induced to exercise his right to concur or refuse to concur in a sale of the life interest is a matter with which the Court has no concern, unless he is under some legal or equitable obligation to exercise it in the interests of some other person than himself.

The only question, in our opinion, that could arise for decision upon the facts is whether the twenty-one creditors who have assigned their interests to Mrs. Cock have by the assignments ceased to be creditors who should be counted in calculating the

stipulated majority of three-fourths in number whose consent is necessary before a sale of the life interest. It is to be observed that clause 26 requires positive action by a majority of creditors desiring the sale, and that objectors to it need only abstain from joining in the direction. The majority required is a majority of the creditors, not of creditors present at a meeting. There can, we think, be no doubt that after the assignments the twenty-one creditors could not, without the approval of their assignee, give directions for a sale. It is not suggested that they desire to do so. The only question, therefore, is whether they can any longer be counted as creditors for the purpose of clause 26. We have great difficulty in seeing any reason for thinking that they cannot. If, however, at some future time it should appear that a majority of three-fourths in value of all the creditors, being also a majority of three-fourths in number of all the creditors except the twenty-one, desired a sale, and that Cock refused his consent, it would, we think, be within the jurisdiction of the Court of Insolvency to entertain an application for a declaration that the requisite consent and direction of creditors had been given, and for its approval of the sale notwithstanding Cock's refusal. We express no opinion as to what the decision of the Court should be on such an application. No such case has, however, arisen, and it may never arise. At present, therefore, such a declaration would be upon a purely hypothetical case, and not necessary for the purpose of the distribution of the estate. We do not think that such a declaration would be, even if it could be, made under similar circumstances by the Supreme Court in a suit for administration, and in our opinion it could not be made by the Court of Insolvency upon the present motion.

ISAACS J. read the following judgment:—The relief claimed by the appellant was refused to him by both the Courts below, not on the merits, but because both those Courts considered the Insolvency Court was not a competent forum to grant it.

In the argument before us, the respondents have contended not only that the Insolvency Court lacks the necessary remedial jurisdiction, but that what is complained of may be done with impunity so far as any legal intervention whatever is concerned.

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The latter view is by far the most serious; and, as will be indicated later, the learned Judge of the Insolvency Court by the amendments he made in the proceedings has carefully guarded against this case going off on any side issue—too often the reproach of the Law,—and so the real rights of the parties have to be determined. Now, if it indeed be the truth that law and morality are such strangers to each other, as to allow what has happened in this case to pass as permissible, then the sooner the Victorian Legislature, and perhaps that of each State, directs its attention to the protection of the commercial community the better. If it be the law that debtors who have been allowed by their creditors to escape the difficulties and inconveniencies of insolvency, and to get relieved from their debts, by executing a deed of assignment, can, without reprehension or check from the law, deliberately undermine and destroy their creditors' position in the way this debtor has confessedly done, it comes as a complete surprise to me, and, I venture to say, to most business men, who have hitherto placed dependence on such friendly arrangements. Whichever of the possible views of the facts be taken, the law, as I have hitherto understood it, stamps what is complained of in this case as illegal, immoral and a gross breach of faith; and this I shall endeavour to demonstrate. In the Courts below, three out of the four judges who dealt with the matter found their only difficulty in a supposed lack of power in the Court of Insolvency to provide a remedy.

In view of the course the arguments have taken, it seems to me the clearest way to deal with them is to consider in order the three branches involved—namely, the rights of the parties, the alleged wrong, and the appropriate remedy.

1. *The Right.*—The matter in its main circumstances stands very simply.

Charles Cock was indebted to eighty-six creditors, including his mother, Mrs. Cock, and Howden the appellant. The total amount of his liabilities was £8,900, or a few pounds over. He was possessed of considerable assets, the most valuable apparently being a life interest under a will. On 20th February 1909 he made a deed of arrangement with all his creditors, assigning thereby all his property to Howden as trustee, and,

subject to certain express provisions, empowering him to dispose of all the property, and, after paying expenses and preferential claims, to pay dividends to the creditors, any surplus remaining to be paid over to the debtor. Two special provisions were made for controlling the trustee. One is clause 21, the chief point in which is that he is to be bound by any resolution passed at a meeting by a majority in number and value of the creditors voting. The other is clause 26, on which this case mainly turns. It limits the power of sale or disposal of the life estate which the trustee would otherwise have, by requiring him to get two consents—namely, (1) the consent and direction of a three-fourths majority in *number and value* of the creditors, and (2) the consent of the debtor or the approval of the Court. Provided he gets those two consents, the property may be made available for the payment of the debtor's liabilities ; otherwise it never can.

What are the rights of the creditors under such clauses as 21 and 26 ? I couple them together, because, although the later clause by its very words brings prominently into view the contrast between creditors as a class on the one hand and the debtor on the other, the same contrast is inherent in the earlier clause, and in every similar clause common to all deeds of assignment. The point I am now considering is of the most general import, and does not in its essence depend on the special wording of clause 26. That clause, like all contracts, is subject to one universal canon of construction. It is stated by *Bowen* L.J. in *The Moorcock* (1) in these words:—"The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side." The following words seem specially appropriate here :— "In business transactions, such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men ; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each part promise in law as much,

(1) 14 P.D., 64, at p. 68.

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at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." Now, the judgment of *Bowen* L.J. states—more concretely, more vividly, perhaps, than any previous judicial utterance—the guiding principle, that men's agreements must be faithfully kept according to their essential meaning, otherwise they become, if not the idle breath of mere oral bargains, then mere "scraps of paper." The rule so laid down in *The Moorcock* (1) has since been repeatedly affirmed, as, for instance, by Lord *Alverstone* C.J. in *Devonald* v. *Rosser & Sons* (2) and Lord *Sumner* (then *Hamilton* J.) in *Easton* v. *Hitchcock* (3).

Then, what is the "business efficacy" of such a provision as the first condition in clause 26*n*, namely, the consent of a certain proportion in *number* of the creditors? I emphasize this, because, as it appears to me, the important part is the word "number." The contrary opinion appears to me to overlook the real force of that word, and the real complaint made in this case. The business efficacy of that provision is, to my mind, this: that the creditors each and all agree to come into the scheme on the basis that the actual creditors ascertained or ascertainable comprise a number that cannot be exceeded, and have a certain number of debts that cannot be multiplied owing to them, aggregating a certain totality; that preferential creditors may be paid off, and so disappear both as to number and amount, and the balance of the creditors, and the balance of the amounts owing to them as they exist at any given moment, constitute the total operative number and value, and then that the requisite majority of three-fourths is a majority of three-fourths of the creditors as existing at that moment. But it is of the essence of the matter that the interests of the "creditors" and the interests of the "debtor" are regarded as adverse. The creditors, each and all, consent, not that each is to act in the interests of the others (which, with great deference, is the slip in the reasoning of *à Beckett* J.), but that each will be bound by the free act and discretion of each other, provided—and here comes in the necessary business efficacy—each one so acting really retains the character and interests of a creditor, and acts honestly.

(1) 14 P.D., 64.
(2) (1906) 2 K.B., 728, at p. 738.
(3) (1912) 1 K.B., 535, at p. 538.

Honesty is at the bottom of every compact; and when a power is, by mutual consent, given to the parties as creditors, it is a root essential that unless they are creditors the power cannot be exercised. It would otherwise be a fraud upon the power.

Now, this mutual arrangement is as between the creditors and debtor collectively and individually; it is each person bargaining with each. The debtor gives up his property, and each creditor gives up his debt and takes his chance—an equal chance as between himself and his fellow creditors—of being paid out of the property so given up. But if a creditor ceases to be a creditor he parts with his qualification; he parts with the one fact which constitutes him a member of the class, he parts with the one interest which induces his fellow creditors to consent to be bound by his decision. So long as he has that interest, he is naturally swayed by it to some extent, and in the direction that makes it his interest to act in concert with them; he may, nevertheless, choose to subordinate his material interest — not theirs, as *à Beckett* J. considered—to altruistic considerations or to friendly sentiment, or even to a desire to be unfriendly or inimical to his fellow creditors. That is a chance that every one takes. But no one runs the risk of dishonesty, of one of his fellow creditors selling his freedom of action, or of the entire absence of the one circumstance that generally, having regard to the ordinary promptings of human nature, impels a man to seek his own advantage.

In ordinary insolvency proceedings, where there is no contractual nexus between the creditors, it is entirely different, except where the law supplies the nexus. This distinction is emphasized by *Best* C.J. in *Britten* v. *Hughes* (1), and is on the face of the matter.

Therefore, the core of the matter is that each creditor has the right as against every other creditor and against the debtor that he is not to be controlled by any person claiming to act in the character of a creditor unless he really is a creditor; and, as a universal principle, the right to insist that there shall be no fraud.

(2) *The Wrong.*—It is a rule of law applicable to all dealings

(1) 5 Bing., 460, at p. 465.

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that no man, having for valuable consideration granted property or undertaken an obligation, shall frustrate his grant or his promise. He is not allowed, after getting the consideration, to undermine the other man's position, which he himself has agreed to create. Now, that is precisely what Cock has done, what he has admitted he set out to do, and what he boasted he had succeeded in doing. Certain creditors have parted with their debts, having bargained for their disposal with the debtor himself, and nominally to his mother, Mrs. Cock, but really to himself, though that, as I shall show, is immaterial.

Having the misfortune to be unable to agree with my learned colleagues on the merits and the nature of a transaction which interests the whole mercantile community—although on this branch I have the satisfaction of being in accord with the learned Judge of the Court of Insolvency and two learned Judges of the Supreme Court—I am constrained to state explicitly what considerations lead me to think that, if the scheme planned and carried out in this case can be tolerated, the law does not recognize a fraud.

On 3rd April 1912, over three years having elapsed from the date of the assignment and the creditors still being unpaid, a meeting of creditors was to be held, and was in fact held on that date, to consider the disposal of the life estate. The debtor was determined to prevent the interest from being disposed of, and in his own words in one place he "wanted to block Howden from selling the life interest," and in another place he says "it was for the purpose of defeating this clause."

Of the eighty-six creditors scheduled, three were preferential and had been paid off. Of the remaining eighty-three, a three-fourths majority was, in consequence of the fraction, sixty-three. If, therefore, the votes of twenty, or, for abundant caution, twenty-one, of the creditors could be controlled by the debtor, he could defy the rest of his creditors and let them go unpaid as to 17s. 6d. in the £, notwithstanding they had released him from liability to actions. They were fixed in numbers; by which I mean a creditor for, say, £50, could not be allowed to split up his debt, and assign, say, £1 to each of forty-nine persons, and take proxies from each, and so exercise fifty votes in respect of the

£50. And so, knowing the maximum number was definitely fixed, the debtor selected about twenty-one small debts, amounting in all to about £40, an infinitesimal amount as against the total of nearly £7,000 that he then owed after payment of 2s. 6d. dividend. If he secured these twenty-one representing £40 he could prevent the creditors having a three-fourths majority in number, and hold the remaining sixty-three, holding debts for over £7,000, at bay.

He went to a financier named Butler to borrow £50, having first arranged with the small creditors what they would take. Butler's account is this—and the learned Judge who heard both him and Cock give their respective reasons believed Butler—that Cock came to him and borrowed £50, that he borrowed it for himself and not for Mrs. Cock, and gave his own promissory note for the amount. But as Butler was fully acquainted with Cock's position, he refused to make the advance unless Mrs. Cock, who was a creditor, guaranteed repayment, which she did by giving an order on Howden to pay over her dividend. The promissory note was taken up on 20th May 1913 by Goldberg. Cock's own account of what he did with the creditors is thus stated in his own words:—"I have about eighty creditors under my deed, and I got about twenty-one to give assignments. This, with my mother, is sufficient to block the sale of the life interest. I paid all the creditors under £1 who gave assignments in full. I gave all those above £1 whatever they asked. It came to about 10s. in the £." He says he had tried to get some one to buy up the debts for him and failed. He then fell upon the expedient of doing it in his mother's name. She was at the time a feeble lady of seventy-four, with a weak heart and no business experience. When he mentioned the subject to her, she did not want to buy any debts, she had no money for it, she did not provide any—beyond guaranteeing his borrowing in the way stated, no doubt signing what she was asked to sign. He told her, as he says:—"I was going to block or try to block the resolution." Her answer shows how much she knew of the matter. Referring to Howden, she said, "Oh my! the poor old gentleman will be disgusted if you are going to stop the meeting." Can anything be plainer than that she was clay in her son's hands. He got her

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to sign proxies, and some time afterwards she wanted to know what were the blue papers she had signed. He had to tell her they were proxy forms.

He admits several times in his evidence that he did all this for the express purpose of blocking the resolutions.

The resolutions were in fact defeated. It is said that even without these proxies the requisite majority was not obtained. That is immaterial. The result of a meeting with persons present who had no right there, exerting influence on others, vitiates the whole. But the question at present is whether what was done was wrong, and whether the creditors have a right to prevent it in future, or does the law permit it ?

That Cock knew it was wrong is clear. He sought the advice and assistance of many solicitors in turn. Dixon is the trustee's solicitor. But he also acted for Cock and Mrs. Cock. Cock asked him for a form of assignment. Dixon told him what he was doing was wrong, but reluctantly wrote out a form, and said "You can have that for what it is worth." That was not acting for the trustee. The trustee himself knew nothing about it till afterwards.

The creditors have been paid throughout all these years 2s. 6d. in the £, and, as the trustee swears, if this conduct is persisted in, the creditors cannot be paid. Otherwise they may, because, as he says, Cock's life interest is in an estate worth £90,000, the income of which is subject to certain other interests which may fall in.

Now, the first observation I have to make is this, that his Honor Judge *Moule*, the able and experienced Judge of the Court, sat and heard the case in the Court of Insolvency, and had the best opportunity of gauging the truth, because he heard all the witnesses and could judge of their credibility. His Honor states in the following definite and unsparing words the conclusions of fact he arrived at. His Honor said, first, that the debtor to prevent the operation of clause 26 in a way he considered detrimental to his own interests "conceived the idea of buying up, or getting his mother on his behalf to buy up, a number of the smaller creditors, so as to get control of the voting power of the creditors under the clause, and so to block any sale

of this valuable asset. And, as a fact," says his Honor, "the sale was so blocked." Later he says:—"I have no hesitation in finding that the debtor's mother allowed her name to be used for the purpose of this scheme, that she was a mere dummy, and that the debtor himself arranged the whole thing, that he himself borrowed the money for the purpose and arranged, and carried through, the whole transaction on his own initiative, his mother standing by and allowing her name to be used. So far as the mother is concerned, I do not think she has any real interest in the transaction, but that, anxious to help her son, she allowed her name to be used, and signed all necessary documents so as to enable her son to carry out his scheme for his own ultimate gain."

His Honor, though finding, as he said, all material facts in favour of the trustee, thought the Insolvency Court had no power to expunge the debts, though it might have power to substitute Mrs. Cock's name for the names of the assignors if she applied. He says this: "If I could have discovered some power under the Statutes to block the fulfilment of this scheme, cunningly devised as it is by the debtor, I should have acted without hesitation"; and added: "I am dismissing this motion, not on what I consider the merits of the case, but solely because I am of opinion that I have no power to grant the relief asked for."

If even I felt any doubt as to the proper conclusions to be drawn from the evidence, I should, on the well-known principle stated and enforced in *Dearman* v. *Dearman* (1), find the greatest difficulty in reversing those so carefully and lucidly stated by the learned Judge. If the finding of the primary Court can be departed from in the present case, it seems to me the principle enunciated in *Dearman's Case* is a shadow. But so far from leading to any other conclusion, the evidence points unmistakably, in my opinion, to the accuracy of the view taken by Judge *Moule*, and I can find no words to better express it. In the Supreme Court none of the learned Judges questioned the finding of the fact. *à Beckett* J. was not prepared to say one way or the other whether equity would have regarded the debtor's conduct

(1) 7 C.L.R., 549.

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as improper. He assumed for the purpose of the appeal that it would, and held that nevertheless the proceeding in the Insolvency Court was not well founded mainly because sec. 83 of the Act of 1897 did not extend full insolvency powers to deeds of arrangement. *Hodges* J., while concurring in the view that the Insolvency Court had no jurisdiction to grant any possible relief, expressed in strong language a very decided view that a Court of equity could and would have granted it. *Hood* J. agreed with what *Hodges* J. said as to the merits, and concurred in dismissing the appeal only on the ground that the debts were not paid off. I desire to say that I entirely endorse what *Hodges* J. so forcibly said, and *Hood* J. concurred in, as to the merits. To my mind those observations state the only position compatible with law and good faith; and, unless that position be maintained, all deeds of arrangement can be made a snare to well-meaning creditors, and a means of embarrassing and defrauding them. These learned Judges, like Judge *Moule*, had no doubt as to the iniquity of the proceeding; their only difficulty was whether the arm of the Insolvency Court was long enough to reach it.

A distinction was sought to be made on the ground that Mrs. Cock was the real purchaser of the debts, and that Cock was not. To accept such a suggestion is too great a strain on my credulity, and not a single creditor has come forward to say he really believed he was selling to her. The trustee tried to get Mrs. Cock's evidence, but she was ill, and gave none. The assumption is that this lady, feeble and inexperienced, oblivious of what she had signed, refusing to sign a bill, letting her son borrow the money in his own name, and merely guaranteeing him to the extent of dividends, wholly misunderstanding the proposed action at the meeting, was deliberately becoming the real purchaser in order to exercise as a matter of free will a power of veto for his benefit.

Suppose that were so, how does it affect the matter in the slightest degree? She knew his object; he told her the scheme to block the resolution, and on this assumption she lent herself to it. In other words, she consented to a plan whereby the twenty-one creditors were to be bought out, and were to cease to be creditors,

and she was to be permitted to prove for those debts by being substituted if she chose. But that would not have allowed her to multiply her identity twenty-one times, and she would count only as one person, for she was to have the sole right to their debts. But she becomes a party to a scheme by which these former owners of the debts were to pose as creditors by giving proxies who were to vote ostensibly for them, as if they still continued to be creditors, but really for her. On the assumption that Mrs. Cock is the person really interested, and the real creditor in respect of those debts, these persons have no interest whatever in the debts, they have lost so far as their own right is concerned the substantial qualification which was at the root of their being recognized as creditors by their fellow creditors. That is why proofs are required by clause 8 of the deed. The others only accepted them as creditors subject to that security. As the Court of Insolvency is a Court of equity as well as of law, the assigning creditors may still vote in the right of their assignee, but only to the extent that the assignee could vote. He cannot multiply himself indirectly if he cannot do so directly.

Assuming the creditors here could substitute others by assignment, it is clear as I have said—at least, it is clear to me—that they could not subdivide their debts, otherwise they would be subdividing their own voting power. If, however, the ordinary power of assignment is taken to be the test of what can be done under this deed, then I do not know why creditors could not be multiplied indefinitely. Mrs. Cock might have split up her own debt into shillings and saved her son's borrowing Butler's £50. And every other creditor could do the same. But if subdivision of voting power by subdivision of debts is not permitted, then aggregation of individual voting power by aggregation into one hand of the powers of creditors who by the assumption are bound in law to do as they are told is not permissible under the deed.

It is of the essence of the provision as to majority that there shall be legal independence of voting power, because the creditors are to have the opportunity of securing the separate assent of separate minds.

Therefore, if it be the fact that Mrs. Cock is to be regarded as the purchaser, that affects only the right of property in dividends,

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which is utterly immaterial to the present case. No suggestion is made that the other creditors are to profit by the wrong that is done to them by confiscating dividends—all they ask through the trustee is that they shall not suffer. And the way they are made to suffer is that they are paralyzed as to the provision with regard to "number" in clause 26, not with regard to *value*, and in effect the debtor's scheme has deprived them of the property altogether.

We then come to the position of the assigning creditors. Whichever way the matter is regarded they have lost their rights of voting. They have not forfeited either for themselves or Cock or Mrs. Cock any right of property. Whatever right of dividend attaches to their debt remains for the person whom it concerns, but their right of voting for controlling their co-contractors has gone. Suppose, in the first place, it was a sale to Cock himself. It was argued that they had a right to act as they pleased, to consent at the solicitation of Cock and avowedly for his benefit. I agree, so long as they remain free they may act as they think best, because, as *à Beckett* J. says, they are not bound to act in the interests of fellow creditors. To act adversely to their fellows might be considered unexpected, but not illegal. But the one essential is that they must remain free. They must not bind themselves by contract to do it. That is taking a bribe.

Lord *Lindley*, in his book on *Companies* (6th ed., at p. 428), says:—"It is conceived that an agreement to vote in a particular way, in consideration of some personal benefit, is illegal; for a vote ought to be an impartial and honest exercise of judgment." The case he cites (*cf. Elliott* v. *Richardson* (1)) strongly supports the opinion. See, particularly, *per Montague Smith* J. Lord *Lindley*, when Master of the Rolls, judicially said as much in *Allen* v. *Gold Reefs of West Africa Ltd.* (2). And whatever a man may do with his own property as property, it is a different matter when a creditor binds himself for a money consideration to act so as to control the members of the class to which he belongs. See Lord *Buckley's* book on *Companies*, (9th ed.), at p. 612. Perhaps the most decisive answer to the suggestion that

(1) L.R. 5 C.P., 744.

(2) (1900) 1 Ch., 656, at p. 671.

the taking of valuable consideration by a creditor makes no difference is the case of *Hall* v. *Dyson* (1). There a creditor for a money consideration withdrew his opposition to the insolvent's discharge. Lord *Campbell* C.J. said (2):—"There is no doubt that the plaintiff might have withdrawn his opposition, if he chose; but he had no right to agree to do so in consideration of receiving money. . . . The creditor is, as it were, bought off; and he was under a moral obligation to continue his opposition, inasmuch as, by giving notice of it, he had led the other creditors to believe that he really intended to oppose." So here by entering into the compact of arrangement the assigning creditors were under a moral obligation to act in each instance freely and upon fair consideration of the whole circumstances. That was, to use the words of *Patteson* and *Coleridge* JJ. in *Hall* v. *Dyson*, a duty of imperfect obligation, but to bind oneself to vote, whatever the circumstances, as another may dictate is illegal and a fraud on others who are to be controlled by the vote. In other words, it is illegal to bind oneself for valuable consideration to act contrary to one's moral obligations towards others.

So in *Ex parte Baum* (3) *James* L.J. applies the same rule to the purchase of a creditor's vote. So *per Holker* L.J. in *Ex parte Harper* (4). So, too, *per Vaughan Williams* L.J. in *In re E.A.B.* (5). The utmost good faith is required of the parties to such deeds as this, both in making the contract and in carrying out its provisions. If, outside the deed altogether and independently of it, after it has been made, the debtor chooses voluntarily to make one of the creditors a present or improve his position, he may do so (*Tuck* v. *Tooke* (6)). But the new act must not trench upon the rights of the creditors under the deed, or affect the duty under the deed, of the one preferred, towards the rest. To pay him to act in a prescribed way at the will of the person paying him is clearly an interference with his duty under the deed, because the binding nature of the bargain leaves him no free will.

That being so, it matters not whether they so pledged themselves to Mrs. Cock, or to Charles Cock, they are disqualified, and

(1) 17 Q.B., 785.
(2) 17 Q.B., 785, at p. 791.
(3) 7 Ch. D., 719, at p. 721.
(4) 20 Ch. D., 685, at p. 695.
(5) (1902) 1 K.B., 457, at p. 464.
(6) 2 B. & C., 437.

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the resolution is vitiated (*Ex parte Baum* (1)), and they continue disqualified while, however, still retaining their rights otherwise.

This is all on the supposition that they and not Mrs. Cock are to be considered the creditors, because *at law* they so remain. If, however, they are to be regarded as automata, bound in equity to obey the behests of the assignee and move as commanded, and the assignee is to be regarded as the real creditor (see *Ex parte Battier* (2)), then the matter stands thus: Mrs. Cock has no right to gather up as one creditor into her own hands the voting of twenty-two—including her original debt. The creditors have never stipulated that any one creditor, however large his debt, is to do that. "One creditor one vote" is the keynote of the deed. It would be strange, indeed, if Mrs. Cock could by this means, in addition to her own debt, which is in blank as to amount in the deed—a fact which may account for the full number purchased—should be able with £40 worth of debts to have twenty-one votes while, for instance, John Watson & Co. with a debt of £1,353 11s. 6d. should have but one without power of increasing it.

To permit such an incongruous result is to destroy entirely what *Bowen* L.J. calls the "business efficacy" of the deed.

If Cock himself be, as I feel sure he is, the real person behind the purchase, the evil is more glaring but not more real.

Quacunque viâ what has been done is, in my opinion, a gross and fraudulent violation of clause 26.

3. *The Remedy.*—Three out of four of the learned Judges in the two Courts below were anxious to give a remedy if they thought the Court of Insolvency could have given it. Sec. 83 was thought to be restricted. But it is, in my opinion, comprehensive enough to embrace *mutatis mutandis* every power with regard to deeds of arrangement which the Court has in strict insolvency.

By sec. 5 of the Act of 1890 the Court of Insolvency is a Court of law and equity, that is, of course, for the purposes of insolvency matters. By sec. 5 of the Act of 1897 it is provided that "subject to the provisions of this Act the Court shall have power to decide all questions of priorities and all other questions

(1) 7 Ch. D., 719. (2) 1 Buck, 426.

whatsoever whether of law or fact which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." That, by the second sub-section, is restricted to claims arising in the insolvency, unless by consent or limited in value to £500.

As for the order applied for, the notice of motion originally asked:—(1) To expunge the proofs of the several creditors, and direct Mrs. Cock to bring in one for all she claimed. This would at once have tested her claim—by making her pledge her oath to the purchase—which up to the present she has not done. (2) For such other order as the Court might see fit to make. As a Court of equity the cases of *Hiern* v. *Mill* (1) and *Cockerell* v. *Dickens* (2) apply.

But as the case was argued substantially on the point of expunging, an application was then and there made and granted to add a further specific claim for relief in the nature of a restraining order or injunction, plainly within the powers of the Court. (See sec. 5 of the Act of 1890 and *In re Murphy* (3)).

This was embodied in the formal order of the Court of 1st October 1913, and in the argument in the Full Court of Victoria the request for consolidation was plainly understood to include any injunction against exercising more than one vote, because learned counsel for Mrs. Cock argued "Even if there were jurisdiction, there is not sufficient shown to found an injunction" (4), and *Hodges* J. *in arguendo* says (5):—"You need not wait till danger becomes injury. That is a fundamental principle of equity." And see the reply of appellant's counsel. In this Court it was fully argued.

Now, if this were a case of insolvency, and the Court deemed it expedient or necessary for the purpose of doing complete justice to expunge these creditors' proofs, leaving Mrs. Cock if need be, but not forcing her, to increase her own proof by adding debts which she is asserted by others—not herself—to have bought, what is to prevent that being done here?

(1) 13 Ves., 114, at p. 120.
(2) 1 Mont. D. & DeG., 45.
(3) 8 V.L.R. (I.), 15.
(4) (1914) V.L.R., 395, at p. 398.
(5) (1914) V.L.R., 395, at p. 399.

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And similarly as to an order that these quondam creditors' votes shall not be reckoned in future. Such orders would not deprive Cock or his mother of a single sixpence. Mrs. Cock, if she chose to do what is right and come forward as the true creditor—supposing she really is so,—could have her proof admitted. But then she could vote only as one person. On the other hand, if Cock is the real purchaser he could not be a creditor but will still have his surplus after the debts are paid. The whole trouble is in the underhand plot to control the number. Now, the position is this, that the illegal and immoral voting has taken place—the wrong has been perpetrated—and the trustee, as officer of the Court (sec. 83 of the Act of 1897) and as representing the general body of creditors, has a right to prevent the further illegal and immoral attempt to control him in the exercise of his powers and duties under the deed.

Why this is refused I am unable to see. What I do see is, that creditors in future will do well to hesitate before they become parties to a deed of arrangement.

In my opinion this appeal should be allowed with costs.

HIGGINS J. read the following judgment:—I am of opinion that this appeal should be dismissed on the merits. I concur with the learned Judges of the Supreme Court and of the Court of Insolvency in their view that the debts cannot be expunged; for the debts were due and rightly admitted, and the assignee of the creditors who assigned is entitled to receive the dividends payable to them from the estate. Even if Mr. C. M. G. Cock is to be treated as the assignee, the fact that he was the debtor does not disqualify him from taking the benefit of the assignment. The debts which he owed have been released (clause 19 of deed of arrangement); what he gets under the assignment is a claim under the deed of arrangement against the trustees of the deed for the shares of the assigning creditors in the proceeds of the estate assigned; and there is no ground for saying that the assignments make him a creditor of himself.

Under the alternative relief claimed in the notice of motion, however, I am inclined to think that if the debtor were doing anything unfair to prevent the realization of his property, the

arm of the Court of Insolvency is long enough to check and to punish him. If his estate had been sequestrated, it would be his duty to "aid in the realization of his property and the distribution of the proceeds amongst his creditors." It would also be his duty to "do all such acts and things as may be reasonably required by the trustee or may be prescribed by rules of Court or be directed by the Court by any special order or orders made in reference to any particular insolvency, or made on the occasion of any special application by the trustee or any creditor" (*Insolvency Act* 1890, sec. 128). Secs. 5 and 6 of the *Insolvency Act* 1890 and sec. 5 of the *Insolvency Act* 1897 give very wide powers to the Court in cases of insolvency; and sec. 83 of the *Insolvency Act* 1897 seems to apply these powers to the case of a deed of arrangement. But, according to my view, it is unnecessary to decide this question. For, whatever might be done by the Court in an appropriate case, I hold a clear opinion that the trustee has brought forward no valid ground of complaint against either Cock or Mrs. Cock in this matter. I think that *à Beckett* J. was well justified in his doubt as to any Court of equity finding any ground for interference or prohibition. I can find nothing done on the part of Cock in the way of derogation from his grant, and I can find no breach of any implied covenant or undertaking. It is not any derogation from the grant made by the deed for the grantor to buy up all the proofs, or any of the proofs, under the deed. The debtor assigned all his estate to a trustee for his creditors; but as to his life interest it was stipulated (clause 26) that it should "not be sold or disposed of by the trustee except with the consent and by the direction of the three-fourths majority in number and value of the creditors and with the consent of the debtor, or failing the consent of the debtor then under and subject to the approval of the Court." This provision, inserted in favour of the debtor, does not prevent the trustee from receiving all Cock's income under the life interest as it accrues, or from applying it for the benefit of the creditors; but it prevented the sale of the life interest unless two things concurred—(1) the direction of the three-fourths majority in number and value of *the creditors*, and (2) the consent of the debtor or of the Court. Now, "*the creditors*" are

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defined in the statement of the third parties to the deed, as "the several persons firms and companies whose names and seals and the amounts of whose debts are subscribed affixed and entered in the schedule of creditors hereto and all other the creditors of the debtor who shall in writing or otherwise signify their assent to these presents (hereinafter called the creditors)." So the direction to sell the life interest must come from three-fourths in number and value of the creditors who are parties to the deed. It is said that under the deed two preferential creditors who have been paid off are not to be reckoned in finding a three-fourths' majority of the creditors; but whether that view is right or is wrong the result is substantially the same. Each creditor who became a party had a property in his interest under the deed, including his right to join, or to refuse to join, in a direction to sell; and the ordinary incident of property, assignability, was attached to his interest. Each creditor who became a party took the risk of other creditors not acting as he would think it would be their interest as creditors to act—whether their conduct be attributable to friendship towards the debtor, or to the direction of any assignees of the proofs. Moreover, except as provided by the deed, the debtor retained all his rights as a free man. He could buy if he had the money. The deed does not contain any assignment of after-acquired property; if the debtor became entitled to a legacy after executing the deed, he was free to apply the money to buying any interest of any creditor; and he could hold it as his own to do with it what he chose. The trustee could not touch it, or interfere with him in respect thereof. Cock might, indeed, have bought up all the interests of all the creditors; and why should he not in that case put an absolute veto on the sale of his life interest? Any larger creditor who wanted a sale could have bought up the interests of the smaller creditors with the view of securing a three-fourths' majority in number and value in favour of a sale of the life interest; and they could not, in that case, be regarded as derogating from the deed, or as preventing it from being carried into effect. By taking the assignments they would be accepting and giving effect to the provisions of the deed. Cock had as much right as any one to buy any of the proofs of debt; and he is at liberty to use those

proofs in what he conceives to be his own interest, and whatever be his motive. As a shareholder's right to vote is a right of property, and can be used adversely to the interests of the company, so with Cock and the proofs which he purchased (*North West Transportation Co.* v. *Beatty* (1), and other cases). The cases in which the Court has a discretionary power either to allow or to disallow a scheme of arrangement or of composition when carried by a majority of votes of creditors have no application. According to this deed the majority of "the creditors," whatever their motives, must be obtained for a sale before the Court can be called upon to interfere with the debtor's veto.

Some confusion of thought has arisen from the fact that Cock, the purchaser of these interests, was also, under the deed of arrangement, the debtor and the grantor of the estate. It is quite true that as debtor and grantor he would not be justified in obstructing the creditors in exercising their free option under clause 26; but, since the deed, he has become a purchaser of certain of the creditors' interests; and, as such purchaser, he has the absolute right to vote and act, or to get them to vote and act, as he may choose. He does not use the votes or powers of the creditors as debtor and grantor, but under a new right as purchaser. A man who sells a field is a trespasser if he walk on it; but he gets full right to walk through it if he buy adjoining land with an easement of way over the field. The fact that Cock has an adverse interest, or that he uses his interest adversely, to such of the larger creditors as want a sale (he never objected to a mortgage of the life interest), does not justify the trustee in ignoring his vote or his refusal to vote (*Ex parte Stallard* (2)). The assigning creditors are still included in the class of those called "the creditors" throughout the deed; and they can vote and act as Cock directs them, in pursuance of their bargain (*Ex parte Stagg* (3)); at all events, unless the assignee get himself substituted as creditor (*In re Frost* (4)).

My opinion is, therefore, that even if Mr. C. M. G. Cock is to be treated as the equitable owner of these purchased interests

(1) 12 App. Cas., 589.
(2) 2 Mont. D. & De G., 469.
(3) 2 Mont. D. & De G., 186.
(4) (1899) 2 Q.B., 50.

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the trustee has no valid claim against him. Mr. *Mann* admits that if the mother, Mrs. Cock, was the owner, the trustee has no valid claim against her. The actual assignment is made to the mother, Emily Cock; and if it is open for us to draw our own conclusions from the evidence in the face of the expressions used by the learned Judge of the Court of Insolvency, who saw the witnesses, I should have no hesitation in saying that the assignment represents the truth—that the mother was the purchaser. There is really no evidence to the effect that the mother was to be a trustee for her son of the assignments in her name; and there is not any distinct finding that she was a trustee, in the strict sense, for the son. No doubt, as the learned Judge in Insolvency found, the lady allowed her name to be used for the purpose of her son's "scheme"; no doubt his was the initiative, and he arranged the whole matter; no doubt she had no "real interest in the transaction," in the sense that a man who buys tobacco for troops has no real interest in the smoking transaction. But if the lady and her son had died immediately after the assignment, is there any ground for saying that his executors would be entitled to claim these interests from the executors of the mother? I cannot find any grounds sufficient to negative the express words of the assignment, as showing the true intention of the parties.

The truth is that the deed, in clause 26, was not drawn up with sufficient prevision as to possible results, but all parties were bound by it; and Cock has merely sought to use his legal rights thereunder. It is unfortunate that different minds take different views as to the honesty or dishonesty of the transaction.

Finally, it is but just to say that I can see nothing dishonest, nothing fraudulent, nothing underhand, nothing immoral, in the transaction impeached, either on the part of the assigning creditors or of the assignee; and Mr. Cock's candour as to his acts and his motives makes it clear that he was not conscious of doing anything wrong. He set himself to make use of what he conceived to be his legal powers to prevent the sale of his life interest and the floating of a company in which the trustee should get shares in addition to unnecessary commission; and he

actually got the solicitor who acted for the trustee to draw up the assignments.

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For these reasons I agree with the view that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. W. Dixon.*

Solicitors, for the respondents, *Morgan & Fyffe.*

B. L.

HIGH COURT OF AUSTRALIA.]

McDONALD . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX FOR NEW SOUTH WALES . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *Aug.* 25, 26, 27; *Sept.* 3.

Isaacs, Powers and Rich JJ.

Land Tax—Assessment of unimproved value—Pastoral property—Standard of value—Improvements—Water bore—Proof of presence of water—Value of land—Evidence—Price given on sale—Price offered—Land Tax Assessment Act 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *sec.* 3.

In ascertaining the improved value of pastoral land for the purpose of the *Land Tax Assessment Act* 1910-1911 the value of land which, situated as the land in question is, would carry one sheep to the acre may properly be taken as the standard of value.

The existence of a water bore which has been constructed by a public Trust on land adjoining a pastoral property, and from which part of the property may be watered, is not an improvement appertaining to the property the value of which may be deducted from the improved value in order to arrive at the unimproved value.