HIGH COURT OF AUSTRALIA.

DOWLING . . . . . APPELLANT;

AND

THE COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 10, 11; *Sept.* 16.

Griffith C.J., Isaacs and Powers JJ.

Insolvency—Order for sequestration—Abuse of process—Motive—Res judicata—Existence of petitioning creditor's debt—Decision of Court of Insolvency on application to dismiss debtor's summons—Company—Ultra vires—Purchase of debt—Incidental powers of company—Insolvency Act 1890 (*Vict.*) (*No.* 1102), *secs.* 5, 37*, 38, 39, 45, 47.

Held, by *Isaacs* and *Powers* JJ. (*Griffith* C.J. dissenting), that the mere fact that the only motive of a creditor in seeking to make his debtor insolvent was to ascertain, by examination in the Court of Insolvency, the identity of the persons who had instigated the debtor to publish, or had provided him with the means of publishing, defamatory matter concerning the creditor, did not render the proceedings for sequestration an abuse of the process of the Court, and, therefore, was not a ground for discharging an order *nisi* for such sequestration.

* Sec. 37 of the *Insolvency Act* 1890 provides that "A single creditor or two or more creditors if the debt due to such single creditor or the aggregate amount of debts due to such several creditors from any debtor amount to a sum not less than £50 may present a petition to a Judge of the Supreme Court . . . praying that the estate of the debtor may be sequestrated for the benefit of his creditors, and alleging as the ground for such petition any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression 'acts of insolvency':— . . . (VI.) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due, of an amount of not less than £50, and the debtor has for the space of fourteen days succeeding the service of such summons neglected to pay such sum or to secure or to compound for the same."

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A company being desirous of making D., who owed them a debt of less than £50, insolvent, obtained, with the motive above stated, for valuable consideration an assignment to them of a debt owing by D. to T., thus constituting a debt of sufficient amount to support insolvency proceedings. The company then issued a debtor's summons in respect of the whole debt, and an application by D. to dismiss that summons was dismissed by the Court of Insolvency. The company then presented a petition for the sequestration of D.'s estate based on failure to comply with the debtor's summons, and thereupon an order *nisi* for sequestration was issued. D. gave notice that he would oppose the order *nisi* being made absolute, that he disputed the company's debt and the act of insolvency, and that he relied on the special defence that he was not indebted to the company in a sum of £50 or upwards inasmuch as the assignment by T. to the company was *ultra vires* the company. The Supreme Court, holding that the existence of the debt was *res judicata* by reason of the decision of the Court of Insolvency on the debtor's summons, did not go into the question of the validity of the assignment, and made the order *nisi* absolute. On appeal to the High Court,

Held, by *Isaacs* and *Powers* JJ. (*Griffith* C.J. dissenting on the ground that the proceedings for sequestration were an abuse of the process of the Court), that the decision of the Supreme Court should not be interfered with.

By *Griffith* C.J.—The taking of the assignment was not *ultra vires* the company.

By *Isaacs* J.—The company had a right, under sec. 37 (VI.) of the *Insolvency Act* 1890, to found the petition on D.'s neglect to comply with the requirement of the debtor's summons.

By *Powers* J.—The insolvency proceedings were based upon a lawful debt.

Semble, by *Griffith* C.J. (*contra*, by *Isaacs* J.), the existence of the debt was not *res judicata*.

Decision of the Supreme Court of Victoria (*Hodges* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

The Colonial Mutual Life Assurance Society Ltd., a company registered in Victoria, by petition to the Supreme Court praying for the sequestration of the estate of Arthur Robert Dowling, alleged that Dowling was indebted to them in the sum of £61 8s., being as to £30 5s. 6d. the amount of a judgment of the County Court in their favour in an action by Dowling against them and one Tate, and as to £31 2s. 6d. the amount of a judgment of the County Court in favour of Tate in the same action, which judgment was duly assigned by Tate to them; that the debt was wholly unsecured; and that the act of insolvency committed by

Dowling was that he had neglected to comply with a debtor's summons requiring him to pay the debt of £61 8s. within fourteen days after service of the summons. Upon the petition on 19th October 1914 an order *nisi* for sequestration of the estate of Dowling was issued. By notice dated 22nd October 1914 Dowling gave notice that he intended to oppose the order *nisi* being made absolute, that he disputed the Society's debt and the act of insolvency alleged, and that he would rely upon the following particulars of special defence (*inter alia*):—(1) That he was not indebted to the Society in a sum of £50 or upwards inasmuch as the assignment from Tate to the Society was *ultra vires* the Society; (3) that the proceedings on the part of the Society were not *bonâ fide* to obtain payment of their debts but were malicious and an abuse of the process of the Court. On the return of the order *nisi Hodges* J. held that the question of the existence of the debt of £61 8s. alleged was *res judicata* by reason of the decision of the Court of Insolvency on the debtor's summons, and also that the proceedings for sequestration were neither malicious nor an abuse of the process of the Court, and he made the order *nisi* absolute.

From that decision Dowling now appealed to the High Court.

There was no express power in the articles of association of the Society to buy up debts, but the directors were authorized to invest the moneys of the Society upon certain securities and to manage the business of the Society, which consisted substantially of life assurance, accident and invalidity insurance, and the granting of annuities and endowments.

The other material facts are stated in the judgment of *Griffith* C.J. hereunder.

Shelton, for the appellant. The question of the existence of the creditor's debt is not *res judicata* by reason of the dismissal of the application to dismiss the debtor's summons: *In re M'Donald* (1). On an application under sec. 38 of the *Insolvency Act* 1890 to dismiss a debtor's summons the debtor has to show that he is not indebted, but on a motion in the Supreme Court to make an order *nisi* for sequestration absolute the debtor is by

(1) 5 A.J.R., 42.

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sec. 45 required to state whether he disputes the debt, and under sec. 47 the burden is on the creditor to prove that a debt of the required amount exists. It is doubtful whether the law of estoppel applies to insolvency proceedings. See *Everest and Strode on Estoppel*, 2nd ed., p. 326; *Halsbury's Laws of England*, vol. XIII., p. 322. There is no express power in the articles of association of the Society to use their moneys in buying up debts, and the only power under which the expenditure of those moneys can be justified is an implied power to do what is reasonably incidental to the carrying on of the business of the Society: *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1); *Sinclair* v. *Brougham* (2); *London County Council* v. *Attorney-General* (3); *Attorney-General* v. *Great Eastern Railway Co.* (4); *Palmer's Company Precedents*, 11th ed., vol. I., p. 460. But the buying up of the debt in this case cannot be reasonably incidental to carrying on the Society's business, or even reasonably incidental to the defence of the Society's rights. The insolvency proceedings were an abuse of the process of the Court, for they were not taken for the purpose of getting payment of the debt but to find out who was behind the appellant in publishing the pamphlet: *Wace on Bankruptcy*, pp. 63, 64; *Lewis's Insolvency Law of Victoria*, p. 83; *In re Baker*; *Ex parte Baker* (5); *In re Smart and Walker*; *Ex parte Hill* (6).

Mann, for the respondents. If the Society could prevent the publication of libellous documents, it was a proper and lawful thing for them to do. The purchase of the judgment debt for that purpose was within the incidental power of the Society to defend itself. The purchase of a debt for the purpose of making the debtor insolvent is not unlawful under the *Insolvency Act* 1890, for, under sec. 37, two or more creditors may join their debts together for that purpose. See *In re Baker*; *Ex parte Baker* (7). Even if the acquisition of Tate's judgment debt was *ultra vires*, the property in it is in the Society: *Great Eastern Railway Co.* v. *Turner* (8), and it constitutes a good petitioning creditor's debt.

(1) L.R. 7 H.L., 653.
(2) (1914) A.C., 398.
(3) (1902) A.C., 165.
(4) 5 App. Cas., 473.
(5) 58 L.T., 233.
(6) 20 V.L.R., 97.
(7) 5 Morr., 5.
(8) L.R. 8 Ch., 149.

The proceedings were not an abuse of process. The fact that there is an ulterior motive in taking insolvency proceedings is of no importance unless an attempt is made to unjustly deprive the debtor of some right: *In re Morissey*; *Ex parte Perkins* (1); *King* v. *Henderson* (2). The test of abuse of process is whether the Court is being moved not for a purpose authorized by the *Insolvency Act*, but for some other purpose. Here the purpose is to make the appellant insolvent, and, when that has been done, to examine him as authorized by the Act. [Counsel also referred to *Ex parte Griffin*; *In re Adams* (3); *In re Davies*; *Ex parte King* (4); *Ex parte Gallimore* (5); *Bayne* v. *Riggall* (6); *Bayne* v. *Blake* (7); *Ex parte Wilbran*; *In re Wilbran* (8).]

[ISAACS J. referred to *In re Shaw*; *Ex parte Gill* (9); *In re Sunderland* (10); *Ex parte Painter*; *In re Painter* (11).]

The making of the order absolute is under sec. 39 a matter of discretion, and it is not shown that the Judge acted on a wrong principle.

Shelton, in reply, referred to *In re Sims*; *Ex parte Demamiel* (12).

Cur. adv. vult.

The following judgments were read:—

Sept. 16.

GRIFFITH C.J. The appellant brought an action in the County Court against the respondents and one W. R. Tate, claiming against Tate the return of 5,000 pamphlets or £70 their value, and damages for their detention, and, alternatively, damages for conversion of the pamphlets and for breach of copyright, and claiming against the respondents a return of the pamphlets. It was alleged in argument, and taken to be the fact, that Tate had obtained possession of the pamphlets, which contained matter highly defamatory of the respondents, and disposed of the pamphlets to them. When the case came on for trial the respondents took the objection of misjoinder of parties. The objection

(1) 24 V.L.R., 776; 20 A.L.T., 223.
(2) (1898) A.C., 720.
(3) 12 Ch. D., 480.
(4) 3 Ch. D., 461.
(5) 2 Rose, 424.
(6) 6 C.L.R., 382.
(7) 9 C.L.R., 347.
(8) 5 Madd., 1.
(9) 83 L.T., 754.
(10) (1911) 2 K.B., 658.
(11) (1895) 1 Q.B., 85, at p. 91.
(12) 21 V.L.R., 630, at p. 633; 17 A.L.T., 230.

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was allowed, and they were struck out of the action with costs, which were taxed at £30 5s. 6d., for which amount judgment was entered on 26th June 1914. The action was then heard against Tate, and judgment was given for him with costs, which were taxed at £31 2s. 6d., judgment being entered on the same day.

The minutes of a meeting of the managing committee of the defendants held on 27th June record a resolution in the following terms:—"Letter from Messrs. Moule, Hamilton & Kiddle *re* Dowling. Agreed to make Dowling insolvent if we can to ascertain who is behind him." By an instrument under seal dated 7th August 1914, reciting the judgment for £31 2s. 6d. obtained by Tate against Dowling, and that the respondents had agreed to pay him that sum upon having an assignment of the judgment debt, Tate as beneficial owner assigned to the respondents all the benefit and advantage of the judgment, together with the judgment debt. Notice of the assignment was given on 11th August to Dowling, who replied declining to recognize their claim under the assignment. On 13th August an execution issued on the respondents' judgment was returned *nulla bona*.

On 18th August the respondents took out a debtor's summons against the appellant, founded on an alleged debt of £61 8s., being the aggregate amount of the two judgments. An application made to the Judge of the Court of Insolvency to dismiss the summons was dismissed. On 19th October the respondents presented a petition for sequestration of the appellant's estate, the alleged act of insolvency being failure to comply with the debtor's summons, and an order *nisi* for sequestration was made on the same day. The appellant disputed the petitioning creditor's debt and the act of insolvency alleged, and also gave notice that he would rely upon the following grounds of special defence:—(1) That the assignment from Tate to the respondent Society was *ultra vires* of the Society; (3) that the proceedings on the part of the petitioning creditors were not *bonâ fide* to obtain payment of creditors' debts, but were malicious and an abuse of the process of the Court. *Hodges* J. was of opinion that the question of the petitioning creditors' debt was concluded by the order dismissing the application to dismiss the debtor's summons, which he regarded as a judgment *inter partes*, and did

not therefore consider the question of the validity of the assignment. As at present advised, I am unable to agree with this view, having regard to the express provisions of sec. 45 of the *Insolvency Act* 1890, which requires the person against whom an order *nisi* for sequestration is granted, if he intends to oppose its being made absolute, to give notice in writing of his intention, which notice must state whether he disputes the act of insolvency or the petitioning creditor's debt, or both. It is not necessary, however, to decide the point, as the objection taken to the validity of the assignment is not in my opinion sustainable.

The question remains to be determined whether the proceedings for sequestration were an abuse of the process of the Court. The meaning of that phrase was discussed in this Court in the case of *Bayne* v. *Riggall* (1), in which the English decisions were reviewed, but the point was left open. For the respondents it is contended that if the petitioning creditor has a debt of the requisite amount, and the debtor has committed an act of insolvency, the petitioning creditor is entitled to an order for sequestration *ex debito justitiæ*, and that the case of *King* v. *Henderson* (2) is an authority for this proposition, "unless in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable." It is contended that these conditions did not exist in the present case. I confess that I do not understand what the learned Lord meant by the word "unsuitable." On the other hand, there are decisions of high authority in which it has been laid down that the Court ought in some cases to refuse to exercise its power on the ground that its interposition is sought for some collateral object extraneous to the purpose of the insolvency law. A leading case is *Ex parte Griffin*; *In re Adams* (3). In that case, which was a decision of the Court of Appeal, the petitioning creditor had procured an assignment to his clerk, one Culley, of a judgment debt due by the debtor to a Mrs. Edenborough. Culley, having at Griffin's instance unsuccessfully attempted to make the debtor bankrupt,

(1) 6 C.L.R., 382.

(2) (1898) A.C., 720, at p. 731.

(3) 12 Ch. D., 480.

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assigned the debt to Griffin, who presented a fresh petition. The bankrupt had a claim against the petitioning creditor's father-in-law, one Moojen, which could not be substantiated without legal proceedings. The Registrar found as a fact that Mrs. Edenborough's debt was acquired by the petitioning creditor "simply and solely to enable him to enforce his personal purposes against the debtor by means of the intimidation of the Bankruptcy Court; the double purpose being to stifle the proceedings against Moojen and to stifle the claim of Adams upon the Cedars" (a property of which the debtor was a mortgagee from Moojen), "the question between them (and Griffin assuredly contemplated no other interest than his own) wholly appertaining to another tribunal." *Brett* L.J. said:—"A more transparent fraud upon the bankruptcy law I do not think it is possible to imagine. A debt, which was apparently not worth a shilling, was bought up, not for the purpose of its being recovered, not for the purpose of making the debtor a bankrupt, but for the purpose of threatening to make him a bankrupt, in order to force him by that oppression to give up a just debt which was due to him." *Cotton* L.J. said:—"I agree that the appeal must be dismissed. The proceedings in bankruptcy were not taken to obtain payment of the debt, but the debt was purchased in order to take the proceedings in bankruptcy." *James* L.J. added:—"After what Lord Justice *Cotton* has said, in which I entirely agree, people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings."

The principle which I deduce from this decision is that a petitioning creditor is not entitled to an order of adjudication (or, in Victoria, sequestration) *ex debito justitiæ*, and that if it appears to the Court that the proceedings are taken solely as a means to some collateral and illegitimate end, and not as a *bonâ fide* means of obtaining payment of a debt, it may in its discretion refuse to make an order. If the end is illegitimate the rule, in my opinion, applies, whatever that end may be. The terms in which the power is conferred upon the Court of Insolvency (sec. 47) are in form permissive—"the said order *nisi* may be made absolute." Moreover, there is high authority for saying that the jurisdiction in bankruptcy is discretionary: *Per Cozens Hardy*

M.R. in *In re Sunderland* (1). This is, in my opinion, one of the few cases in which motive may be examined.

The language of Lord *Watson* in *King* v. *Henderson* (2), whatever the word "unsuitable" means, must be construed with reference to the case in which it was used. The case was not a petition for adjudication, but an action of a debtor against his creditor for damages for maliciously presenting a bankruptcy petition against him. The debt and the act of bankruptcy were not disputed. It was necessary for the plaintiff to establish not only malice but the absence of reasonable and probable cause, and the Judicial Committee held that the desire, imputed to the defendant, to procure the dissolution of a partnership of which the plaintiff was a member was not such an abuse of the process of the Court of Bankruptcy as to show absence of reasonable and probable cause for presenting the petition. In my opinion this decision is not inconsistent with *Ex parte Griffin* (3), and is not an authority applicable to the present case. The term "abuse of the process of the Court" has often been used to denote the circumstances which will induce the Court of Bankruptcy to exercise its discretionary power to dismiss a petition. In my opinion the judgment in *King's Case* cannot be construed as laying down any rule on that point, and certainly not as laying down a new and exhaustive rule superseding the law as laid down in *Ex parte Griffin* and many other cases from the time of Lord *Eldon*, and as denying the existence of the discretionary power so often asserted.

By the law of Victoria a creditor for a debt of less than £50 is not entitled to present a petition for sequestration. It is apparent in this case that the assignment of Tate's debt to the respondent was obtained solely for the purpose of making Dowling insolvent, as is shown by the resolution of 27th June "to ascertain who is behind him." It was contended that the words are capable of an innocent meaning. But, in my opinion, they show that the sole purpose of the respondents was to discover by means of an inquisitorial examination in insolvency the person or persons who had instigated Dowling to publish, or provided him with

(1) (1911) 2 K.B., 658, at p. 663. (2) (1898) A.C., 720.
(3) 12 Ch. D., 480.

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the pecuniary means of publishing, the defamatory matter contained in the pamphlets already mentioned, with a view to ulterior proceedings against them. It may be that such an attempt would have been unsuccessful, but that does not affect the character of the purpose. In my opinion the use of the process of the Court of Insolvency for such a purpose is an illegitimate use, and is such an abuse of its process as calls upon the Court to exercise its discretion by dismissing the petition.

In my opinion the petition should have been dismissed, and the appeal should be allowed.

ISAACS J. A preliminary question arose as to the ruling by *Hodges* J. that the refusal of Judge *Moule* to dismiss the debtor's summons made the question of the existence of the debt *res judicata*. In this case it matters nothing whether that ruling was right or wrong, but the authorities show it was right. I was at first inclined to take the view that the Judge of the Court of Insolvency had not to decide whether the debt was due, but only to see that a *primâ facie* case was made, so that the alleged debtor should not be harassed. I find that this was the opinion of *Molesworth* J. in *Re Lyon* (1). But the Full Court (*Barry* and *Fellows* JJ.) in *In re M'Donald* (2) decided differently, and held that the preliminary inquiry as to the existence of the debt is in the single case of the debtor's summons entrusted by the Act to the Insolvency Court, leaving the next inquiry whether an act of insolvency is committed to the Supreme Court. An appeal lies from the Insolvency Court determination as to the debt to the Supreme Court (*In re Portch* (3)). Since *In re M'Donald* the Act has been re-enacted. The act of insolvency is that the debtor "neglected to pay such sum or to secure or compound for the same." "Neglected to pay such sum" simply means "has not paid it" after having received the proper notice (*per Mellish* L.J. in *In re Tupper* (4)). I therefore think the ruling as to *res judicata* was right.

But although the existence of the debt as a matter of law may be undoubted and unchallengeable, yet it may be that, for the

(1) 4 A.J.R., 13.
(2) 5 A.J.R., 42.
(3) 7 V.L.R. (I.), 126.
(4) L.R. 9 Ch., 312, at p. 314.

purpose of determining whether the order *nisi* shall be made absolute, the Court as a Court of equity should, if required, look behind it, as in *In re Lennox* (1) and *In re Vitoria* (2), approved by the Privy Council in *King* v. *Henderson* (3). This is not necessary now, but I mention it in order to leave it open.

The main question argued was whether the creditors' object of obtaining information as to the persons behind the debtor with reference to the pamphlet is an answer to the petition.

I entertain no doubt whatever that the Society were impelled to take these proceedings, including taking the assignment of Tate's judgment, by their desire, not to get paid, nor yet to get a distribution of assets, nor to put in operation any of the penal provisions of the Act, but to try to force out of Dowling, if they could, on insolvency examination information as to the persons supposed to be behind him in the matter of the pamphlets. He may have been right or wrong as to the pamphlets. They may have been perfectly right in protecting their business, but the fact remains that the Society's real motive in forcing Dowling into the Insolvency Court was a motive not contemplated by the Insolvency Acts, but which—and this is necessary to be added—the Society apparently *bonâ fide* thought the insolvency law itself would enable them to satisfy. We have to be guided by the law and by that standard measure justice; and if, notwithstanding the ultimate object of the Society, they have the legal right to what they immediately ask, the law must take its course. Does, then, the law give them that right?

It is not easy to reconcile the reasoning in all the cases. But there are two things necessary to bear in mind—(1) the words of the Statute, and (2) the true meaning of the term "abuse of process."

The Victorian Statute of 1890 is, in the main, founded on the British Act of 1869, and, so far as the present question is concerned, the Act of 1897 does not alter the enactment. There is in the Victorian Act one significant departure from the language of the English Act.

In the latter (sec. 8) it is provided that at the hearing of the

(1) 16 Q.B.D., 315, at p. 327. (2) (1894) 2 Q.B., 387, at p. 392.
(3) (1898) A.C., 720, at p. 730.

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petition the Court "if satisfied with such proof *shall* adjudge the debtor to be bankrupt." Even under this mandatory form *Ex parte Griffin* (1) was decided, in which a collateral and improper purpose was held sufficient to induce the Court to refuse to make an order. The exact bearing of this case on the second branch I shall refer to later.

Ex parte McCulloch (2) was decided shortly afterwards. There *Bacon* C.J. in bankruptcy said: "It is quite right to bear in mind that, if the Court, administering the law in bankruptcy, finds that an inequitable use is being made of the materials upon which bankruptcy proceedings could be founded, it would disregard the legal requisites of an adjudication, for the Court of Bankruptcy has at all times (and I wish it was always recollected) been a Court of equity as well as a Court of law." To ascertain what is an inequitable use of legal process we must, of course, consult the doctrines of equity. On the appeal *James* L.J. (3) said it was not necessary to say that the adjudication was so clearly *ex debito justitiæ* that the Court had no discretion in the matter. He added: "The Chief Judge has pointed out that notwithstanding those words the Court retains its old jurisdiction to refuse to make a man bankrupt for an improper purpose." That leaves it quite open as to what is meant by an improper purpose.

In the Victorian Act the words are "the order *nisi may* be made absolute or discharged." The word "may" in such a context, no doubt denotes a duty, but it is to be noticed that the less stringent form is used. And by sec. 5 of the Act of 1890, the Court is "a Court of law and equity." So that equitable principles and the discretion that accompanies them are included within the jurisdiction, and these, as well as the doctrines of ordinary fraud, may be given effect to in a proper case, quite independently of what I have to say hereafter on the point specifically arising in this case.

On the other hand, the English Act of 1883 provides that even where the Court is satisfied with the proof of the debt, and the act of bankruptcy, it may dismiss the petition if satisfied that

(1) 12 Ch. D., 480.
(2) 14 Ch. D., 716, at p. 719.
(3) 14 Ch. D., 716, at p. 723.

the debtor is able to pay his debts, or that for some other "sufficient cause" no order ought to be made. The wide phrase "sufficient cause" is not found in the Victorian Act. But even the presence of the phrase, wide as it is, is held by the Privy Council in *King* v. *Henderson* (1) to exclude mere ulterior motive as a legitimate ground to refuse the creditor's petition. And this case binds us. The New South Wales Act there under consideration was in this respect precisely the same as the English Act of 1883, and therefore wider in its verbal limits of discretion than is the Victorian Act. The Judicial Committee held: (1) that the creditor has an absolute right to found a petition for a sequestration order on a statutory act of bankruptcy; (2) that an ulterior private purpose is not necessarily a fraud on the Court; (3) that a by-motive unless there be fraud is not a bar; (4) that an abuse of process does not exist unless the remedy is *unsuitable* and would enable the person obtaining it *fraudulently* to defeat the rights of others, whether legal or equitable. This last point decided by the Privy Council was the pivot on which the case turned. It was the *ratio decidendi*, and it appears to me that without directly disputing the accuracy of that proposition, so carefully stated and exemplified by Lord *Watson*, it is impossible to decide this case in favour of the appellant.

The only question of difficulty arises on this fourth point, the first being unquestioned, and the others, so far as they depend on fraud, not being doubtful. What, then, is "abuse of process"? for on this, as I say, the whole problem in this case turns.

In English law there has long been recognized a form of wrong by malicious use of process—such as by malicious arrest. But in order to maintain an action for malicious *use* of the process there must have been a termination of the suit in plaintiff's favour. If, however, there has been an *abuse* of the process, as distinguished from the *use* of it, it is unnecessary to show any such termination of the suit. If the object sought to be effected by the process is within the lawful scope of the process, it is a *use* of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the

(1) (1898) A.C., 720.

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fraud may be an answer; if, however, the object sought to be effected by means of the process is outside the lawful scope of the process, and is fraudulent, then—both circumstances concurring—it is a case of *abuse* of that process, and the Court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse. *Grainger* v. *Hill* (1) laid down the distinction. A writ of capias was issued, not really for the purpose of arresting the man, but to intimidate him into giving up ship's papers, to which the plaintiff had no colour of title. That was held to be an abuse of process, because the law did not provide it for that purpose. The purpose is foreign to the nature of the process (see *Ex parte Painter* (2)), and this, I apprehend, is what Lord *Watson* in *King* v. *Henderson* (3) means by " unsuitable." See also *per Williams* J. in *Gilding* v. *Eyre* (4).

Where it can be shown in a case of insolvency that the creditor is making his application not intending to pursue it to a recognized lawful end—whatever his motive may be for attaining that lawful end—but for the real purpose of attaining some other and improper end, such as extorting money as in *Davies' Case* (5), where the petition was hung up while in existence and used as a means of extortion, there is an abuse of process. So in *Ex parte Griffin* (6) the debt was bought up as a means of intimidation, and to compel the debtor to stifle a certain claim. The key to that case is really found, not in the epigram of *Cotton* L.J., which must be read subject to the facts, but in the judgment of *Brett* L.J. (7), where it is said the purchase of a debt was " not for the purpose of making the debtor a bankrupt, but for the purpose of *threatening* to make him a bankrupt, in order to force him by that oppression to give up a just debt which was due to him." So in *Re Shaw* (8), in which *King* v. *Henderson* (9) was cited, *Rigby* L.J. says:—" Now, it was admitted, and could not be denied, that if a creditor goes to his debtor and says: ' You owe me so much, I can proceed in bankruptcy against you; you

(1) 4 Bing. N.C., 212.
(2) (1895) 1 Q.B., 85, at p. 91.
(3) (1898) A.C., 720, at p. 731.
(4) 10 C.B. (N.S.), 592, at p. 598.
(5) 3 Ch. D., 461.
(6) 12 Ch. D., 480.
(7) 12 Ch. D., 480, at p. 483.
(8) 83 L.T., 754, at p. 755.
(9) (1898) A.C., 720.

will not like that; pay me something extortionate, something altogether beyond what you owe me at law, or I will file a petition;' that petition cannot be made the basis of a receiving order; and very properly, for though the petition itself will only be that which is within the right, so far as there is a right, of a creditor, and will only have the effect of distributing the property according to the rules of bankruptcy, yet the *previous conduct* of the creditor would make it plain that he was *using*, or *attempting to use*, the bankruptcy proceedings as the means of unduly *extorting* what was not due to him." What the learned Lord Justice was pointing to is the *abuse* of the proceeding as I have explained it, because he concedes that its true and legitimate *use* will only have the normal consequences.

That reconciles all the cases, and, what is more important for this Court, it harmonizes and makes plain all the expressions found in *King* v. *Henderson* (1), which, when understood, and I see no great difficulty in understanding it, ought to end the matter.

Two Victorian cases have been prominent in this discussion. *Ex parte Hill* (2), a decision of *Hood* J., is the first. If the ground of it can be taken to be that the petition was presented to extort on behalf of the debtor's partner a consent by the debtor to dissolution of the partnership on terms favourable to the partner, the decision is right, because that would be an abuse of the process. And this is, in my opinion, the real decision. If it were only that insolvency was sought with the motive that the dissolution would follow as a normal consequence, it would be wrong, because that would amount only to a use of the process. It must be remembered that the case was decided in 1894, about four years before *King* v. *Henderson* (1). *In re Morissey* (3) is the other case, and is clearly right. I think both cases can stand together.

In re Dashwood (4) is an instructive case, and may be mentioned best at this point. A creditor sought discovery of documents in bankruptcy. He would have had a perfect right to it for himself, but he was in fact acting on behalf of the

(1) (1898) A.C., 720.
(2) 20 V.L.R., 97.
(3) 24 V.L.R., 776
(4) 3 Morr., 257.

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bankrupt, who would not have had that right. The trick was disallowed. Lord *Esher* M.R. said (1):—"There is a rule, and it is a very wholesome rule, that the Court will not allow its process to be used to do indirectly that which the process of the Court will not allow to be done directly." It was a clear case of abuse exemplifying the principle with unusual circumstances.

Now, in the present case, there is no doubt the petitioning creditor wishes to *use* the process—that is, to attain by its means the very object for which it is designed by law, namely, sequestration, and this, notwithstanding there is a desire to use the sequestration afterwards for a certain purpose. But that subsequent purpose can only be reached, and is only intended by the creditor to be reached, if reached at all, by the act of the Court itself in compelling an answer to the questions put. (See *Gilding* v. *Eyre* (2)). If the facts had been different, if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process.

But nothing of that kind took place. The Society did not make any demand upon Dowling; they broke no contract; they were guilty of no fraud; they have not threatened or attempted to deprive him of any right: they have, in short, done nothing illegal or inequitable, or created any relation which could be regarded in a Court of equity, or elsewhere, as a defence to their claim to exercise the statutory right of petition. All that can be said is, at most, that the power to inquire as to any persons behind him with respect to the pamphlet is not contemplated by the *Insolvency Act*. If so, they would not obtain the information. But the desire to get the information is no breach of law or equity. The minute found in their books was no overt act; it was merely a record of what I may term the internal resolution of the Society, which affected no one but themselves, and created no right in Dowling.

The line of law between the two classes of cases is clear, though the facts are not always easy to delimit. In the present case

(1) 3 Morr., 257, at p. 259. (2) 10 C.B. (N.S.), 592, at p. 605.

they fall unmistakably on the side which entitles the creditor to say it is the "use" only, and not the "abuse," of the process which is sought, and therefore the appeal should, in my opinion, be dismissed.

POWERS J. The facts of the case have been fully referred to in the judgments just delivered by my learned brothers. I agree that the only ground on which the appeal could possibly be allowed would be on the ground that the proceedings were an abuse of the process of the Court. The only question to decide, therefore, is whether it should be allowed on the ground that the Society, on proceeding to petition for the insolvency of the appellant, was guilty of such an abuse of the process of the Court as would entitle the appellant to succeed.

It is clear that the Society instituted bankruptcy proceedings in order, after the petition was granted, to ascertain, presumably by examinations in insolvency under the Act, who was behind the appellant in publishing defamatory matter about the company and its business. There are cases in support of the view that proceedings instituted with such an ulterior motive would be considered an abuse of the process of the Court. After carefully considering *King* v. *Henderson* (1), I have come to the conclusion that the indirect motive proved in this case does not come within the words "fraud, or abuse of the process of the Court," necessary, after the decision in that case, to entitle the appellant to succeed. The proceedings were based on a lawful debt, and it was *bonâ fide* intended to proceed with the petition. The proceedings were not therefore instituted to obtain any unfair or other advantage before the insolvency. Whatever information the Society wished to obtain after insolvency could only be obtained, if at all, in accordance with law, in proceedings under the *Insolvency Act*.

It is not contended that there was any fraud, and in any case nothing that the Society did could be called fraud. In *King* v. *Henderson* (1) the Privy Council decided that "it is neither fraud nor an abuse of process to petition for a sequestration order with an indirect motive, that is, for a purpose other than

(1) (1898) A.C., 720.

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the equal distribution of the testator's assets." That is all the Society did in this case. The remarks of Lord *Watson* in delivering the judgment of the Privy Council satisfy me that the Judicial Committee did not in the case then under discussion, or in the other cases referred to in the judgment, regard indirect motives (such as those proved in this case) as sufficient to constitute either an "abuse of the process of the Court" or "fraud."

I hold the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *A. A. Sinclair.*

Solicitors, for the respondent, *Moule, Hamilton & Kiddle.*

B. L.

Foll *Kinsman & Department of Veterans Affairs, Re* (1991) 23 ALD 151

Foll *NSW Aboriginal Land Council v State Revenue* (2004) 55 ATR 222

[HIGH COURT OF AUSTRALIA.]

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

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MELBOURNE. *Sept.* 24, 27.

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

Land Tax—Assessment—Deductions—Joint owners—Owner—Trust estate—Person entitled to land for "estate of freehold in possession"—Equitable estate of freehold in possession—Trust for accumulation—Land Tax Assessment Act 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *secs.* 3, 38 (7).

The definition of the term "owner" in sec. 3 of the *Land Tax Assessment Act* 1910-1914 should be read as if after the words "'Owner,' in relation to land, includes" the words "besides absolute owners" were inserted, and so read the definition is exhaustive.