[HIGH COURT OF AUSTRALIA.]

COCK . . . . . APPELLANT;

AND

HOWDEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1915.

MELBOURNE, *Sept.* 21, 22.

Griffith C.J., Powers and Rich JJ.

Insolvency—Trustee—Inquiry into conduct—Order for repayment of money—Motion—Notice to trustee—Insolvency Act 1897 (*Vict.*) (*No.* 1513), *sec.* 32—*Insolvency Rules* 1898 (*Vict.*), *rr.* 19, 20.

Sec. 32 of the *Insolvency Act* 1897 (Vict.) provides that "the Court" of Insolvency "shall take cognizance of the conduct of assignees and trustees; and in the event of the Court having any reasonable ground for believing that any assignee or trustee is not faithfully performing his duties and duly observing all the requirements imposed on him by any Act rules or otherwise with respect to the performance of his duties or is omitting to use reasonable diligence with respect to the performance of his duties, or in the event of any complaint being made to the Court in regard thereto by any creditor or the insolvent or any person interested, the Court shall inquire into the matter and take such action thereon as may be deemed expedient."

Rule 19 of the *Insolvency Rules* 1898 provides that every application to the Court (unless otherwise provided by the Rules or the Court shall in any particular case otherwise direct) shall be made by motion, and rule 20 provides that where any party other than the applicant is affected by the motion no order shall be made unless upon the consent of such party, or upon proof that notice of the intended motion has been served upon such party.

Held, that on an inquiry held under that section an order should not be made for the repayment by the trustee to the trust estate of sums of money paid out of it by him in the absence of a motion on notice to the trustee, or the consent of the trustee to the proceedings being treated as a motion on notice to him, that such an order will be asked for.

Decision of the Supreme Court of Victoria varied.

APPEAL from the Supreme Court of Victoria.

On 20th February 1909 Charles Matthew Germain Cock by deed assigned his estate to a trustee, John McAlister Howden, for the benefit of his creditors. On 22nd May 1914, on the complaint of Cock, the Court of Insolvency, thinking it fit that an inquiry should be ordered into certain matters concerning the conduct of Howden which were brought before it by Cock, ordered that Howden should attend at the Court for the purpose of such inquiry, "and for the purpose of the Court taking such action upon such inquiry as it may deem expedient."

An inquiry was accordingly held before His Honor Judge *Moule*, and the evidence of a number of witnesses was taken. At the close of the evidence the learned Judge made an order for the repayment by Howden to the trust estate of three several sums of £133 6s. 9d., £203 15s. 3d. and £25, and he further ordered Howden to pay to Cock the sum of £25 for his costs of the inquiry.

From that decision Howden appealed to the Supreme Court, which reversed the decision of the Court of Insolvency with costs, and ordered Cock to pay to Howden £20 towards his costs in the Court of Insolvency.

From that decision Cock now appealed to the High Court.

Mitchell K.C. and *S. R. Lewis*, for the appellant.

Starke and *Morley*, for the respondent.

The judgment of the COURT was delivered by

GRIFFITH C.J. This was an application made to the Court of Insolvency under sec. 32 of the *Insolvency Act* 1897, which authorizes that Court on the complaint of, amongst other persons, the debtor, to inquire into the conduct of the trustee and to take such action thereon as may be deemed expedient. A complaint was duly made and an inquiry held at which various facts were elicited, upon which, at some stage of the proceedings, the Court was asked to make an order against the trustee for repayment to the estate of certain sums of money paid out of it by him. Strictly speaking, an order of that sort should be made in separate

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proceedings upon notice to the trustee. The Rules provide that every application to the Court shall be by motion, of which notice is to be given to the party affected, unless the Court otherwise orders. Now, if in the course of the proceedings all the facts had been elicited, and all the parties had agreed that the proceedings should be treated as a motion on notice, it would be too late afterwards for the trustee to object to an order on the ground of the absence of formal notice. For the appellant it is said that that is exactly what happened. For the respondent, however, it is said that it is not; that his counsel did not realize until after the close of the inquiry that an application was being made for an order against his client for repayment of these sums of money. As the matter stands, there being a conflict as to what happened, we think we cannot safely act upon the assumption that the matter was treated on that basis. In that view it appears that the Court did not act in accordance with the maxim *Audi alteram partem*, and, therefore, that the order cannot stand. Under these circumstances it is not necessary, and for other reasons it is not desirable, to express any opinion on the merits.

On the appeal to the Supreme Court that Court was apparently of opinion that the conduct of the trustee, so far from being blameworthy, was meritorious. I have indicated my own opinion on that question during the argument, and will say no more about it.

Mr. *Starke* has very properly admitted that if the judgment of the Supreme Court stands it should be without prejudice to any proper proceedings being taken for the return of these sums of money to the trust estate. Moreover, we think that the order of the learned Judge of the Court of Insolvency for payment of the costs of the proceedings by the respondent was within his jurisdiction, and was properly made.

The result is that the judgment of the Supreme Court must be varied by inserting after the words reversing the order of the Court of Insolvency the words "except so far as it directs the payment of costs by the appellant Howden to the respondent Cock, but without prejudice to any claim that may be made against the appellant in a proper proceeding by a competent

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complainant for repayment of the sums of £133 6s. 9d., £203 15s. 3d. and £25 in the said order mentioned," and by omitting the direction for payment by Cock of £20 towards the costs of Howden in the Court of Insolvency. The order of the Court of Insolvency will be restored so far as regards the costs to be paid by Howden to Cock. There will be no order as to the costs of this appeal.

Order accordingly.

Solicitors, for the appellant, *Morgan & Fyffe.*
Solicitor, for the respondent, *J. W. Dixon.*

B. L.

[HIGH COURT OF AUSTRALIA.]

PEDEN . . . . . APPELLANT;
PLAINTIFF,

AND

LITTLE AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1915.

MELBOURNE, *Sept.* 9.

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

Book Debts—Assignment—Portion of debt to become due—Special leave to appeal to High Court—Book Debts Act 1896 (*Vict.*) (*No.* 1424), *secs.* 2, 3.

Special leave to appeal from the Supreme Court of Victoria refused.

APPLICATION for special leave to appeal.

One John Diwell had entered into a contract with John Little and several other persons, who were the committee of a church, for carrying out certain repairs to the church for a sum of £239