[HIGH COURT OF AUSTRALIA.]

HENDERSON . . . . . APPELLANT;

AND

MAIN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1918.

ADELAIDE, *Sept.* 30; *Oct.* 1, 4.

Barton, Isaacs and Gavan Duffy JJ.

Insolvency—Trustee—Appointment, validity of—Appointment of person not a creditor—No appeal against confirmation of appointment—Charges against insolvent—Who may make—Insolvent Act 1886 (*S.A.*) (*No.* 385), *secs.* 32, 122, 123, 171-176, 301*—*Insolvent Act Further Amendment Act* 1914 (*S.A.*) (*No.* 1162), *sec.* 3.

Held, that assuming that a person who is not a creditor of the insolvent is not qualified to be appointed a trustee (as to which *quære*), the confirmation by the Court of Insolvency under sec. 123 of the *Insolvent Act* 1886 (S.A.) of the choice of that person as trustee may be appealed against under sec. 32, and unless so appealed against the appointment is valid and effectual.

Held, also, that a charge against an insolvent of having committed any of

* Sec. 32 of the *Insolvent Act* 1886 (S.A.) provides that "If any insolvent, trustee, creditor, or debtor, or any person claiming to be a creditor, or any person who shall have appeared and submitted to the jurisdiction of any Court, or who shall be affected by any order, determination, or direction of any such Court or of any Commissioner, shall be dissatisfied with any order, determination, or direction of such Court or Commissioner, in respect of a matter of fact or of law, or of the admission or rejection of evidence, the person so dissatisfied may appeal therefrom to the Supreme Court: Provided that, if no such appeal shall be entered within twenty-one days from the date of any such order, determination, or direction, and thereafter duly prosecuted, every such order, determination, or direction shall be final." Sec. 122 provides that "At the first or second meeting under the insolvency, a trustee of the insolvent's estate may be chosen by the votes of the majority in value of the creditors present, either personally or by attorney, or by proxy, for ten pounds and upwards." Sec. 123 provides that "When a trustee shall have been chosen by the creditors such choice shall be submitted to the Court for confirmation, and any creditor entitled to vote on the choice may be heard for or against such confirmation. The Court may confirm or refuse to confirm such choice, and if the Court confirm such choice the trustee shall be deemed duly appointed. If the Court refuse to confirm such choice, another creditor may be chosen as trustee, and so on, until the choice be confirmed." Sec. 171 provides that "At every sitting for the last examination of the insolvent the Court shall . . .

the offences mentioned in sec. 175 may be made by a creditor or the trustee and not only by the Official Receiver.

In re Nancarrow, (1916) S.A.L.R., 198, approved.

Decision of the Supreme Court of South Australia affirmed.

APPEAL from the Supreme Court of South Australia.

On 23rd November 1916 Charles Thomas Henderson was on his own petition adjudicated an insolvent by the Court of Insolvency of South Australia. On 4th December, at a first meeting of creditors, Mark Main, a proxy for Robert Reid & Co. Ltd., who were creditors of the insolvent, was chosen trustee of the estate, and on the same day the Court of Insolvency certified the appointment of Main as such trustee. On various dates from 14th December 1916 to 19th February 1917 the insolvent was examined in the Court of Insolvency in Chambers. On 21st March Main as trustee filed charges against the insolvent of offences against the *Insolvent Act* 1886. On 26th March and 2nd and 30th April the insolvent and other witnesses were examined in the Court of Insolvency by the solicitor for the trustee, and on 30th April the solicitor for the insolvent secured an adjournment of fourteen days to consider the charges. On 11th May the insolvent filed a petition to the Court of Insolvency praying for the removal of Main from the office of trustee on the ground, substantially, that not being himself a creditor he could not legally be chosen or appointed as a trustee. On 18th May the Court of Insolvency made

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inquire into his dealings and transactions and as to his property and effects, upon the oath of the insolvent and of such witnesses as the Court shall think fit . . . ; and the Official Receiver and trustee, or either of them, without notice, and any creditor of the insolvent . . . may, if he shall have given notice to the insolvent, . . . be heard . . . respecting the commission by the insolvent of any of the offences hereinafter mentioned, and the punishment to be awarded therefor, and for that purpose may put such questions to the insolvent and examine such witnesses as the said Court shall think fit, touching the dealings and transactions of such insolvent, and his property and effects," &c. Sec. 175 provides that "If any insolvent shall have committed any of the offences in this section mentioned, the Court may, at the time of awarding a certificate to the insolvent, . . . by order adjudge such insolvent to be imprisoned with or without hard labour, at the suit of the trustee as such judgment creditor as hereinafter mentioned, for any period not exceeding three years," &c. Sec. 176 provides that "The Official Receiver shall have power with the approval of the Court, to proceed with charges against the insolvent," &c. Sec. 301 provides that "The production of a certificate of the appointment of the trustee . . . shall in all Courts (except in the Court of Insolvency, on proceedings to set aside such adjudication) be conclusive evidence of the title of the trustee," &c.

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an order dismissing the petition. On the same day Matthew Goode & Co. Ltd., who were creditors, filed charges identical with those filed by the trustee on 21st March. On 28th May before the Court of Insolvency the solicitor for the trustee, in view of the last mentioned charges, proposed to ask the insolvent to acknowledge the evidence he had already given in the Court, and, an objection by the solicitor for the insolvent having been overruled, the insolvent was examined and acknowledged that evidence. After argument the Court made an order reciting that the trustee was a judgment creditor of the insolvent for the sum of £8,722 14s. 2d., and that certain of the charges had been proved to the satisfaction of the Court, and adjudging that the insolvent should be imprisoned with hard labour for fifteen months unless he should sooner satisfy his debts to the creditors. The insolvent appealed to the Supreme Court from the orders of the Court of Insolvency of 18th May and 28th May. The appeals were heard together, and on 23rd July 1917 the Full Court made an order that both of them should be dismissed.

From that decision the insolvent now appealed to the High Court.

Cleland K.C. (with him *Michell*), for the appellant. A person who is not a creditor cannot, under sec. 122 of the *Insolvent Act* 1886, be appointed a trustee. That is shown by the use of the words "another creditor" in sec. 123. If such a person is not qualified to be appointed a trustee, his appointment is a nullity. The confirmation by the Court of the choice of such a person as trustee is not an "order, determination, or direction" of the Court within sec. 32, and therefore cannot be appealed against. Until his removal he is *de facto* the trustee, and persons dealing with him are protected by sec. 301. Under secs. 171-176 the only person who can make charges against the insolvent is the Official Receiver, with the approval of the Court (sec. 176). Sec. 171 provides for a process of investigation only. Otherwise the insolvent might be convicted of any of the numerous charges mentioned in sec. 175, as amended by sec. 3 of the *Insolvent Act Further Amendment Act* 1914, evidence of which might appear in the course of the examination, without any charge at all being made against him. On that examination the insolvent has no opportunity of calling witnesses on his own behalf or of defending

himself. [Counsel referred to *In re Mew and Thorne* (1); *Yate-Lee and Wace on Bankruptcy*, 3rd ed., p. 145; *Griffith and Holmes on Bankruptcy*, p. 950; *R.* v. *Norman* (2); *Scott Fell* v. *Lloyd* (3).]

Poole (with him *F. B. Moulden*), for the respondent. Beyond the use of the words " another creditor " in sec. 123, there is nothing in the Act or in the history of the legislation indicating that the trustee must be a creditor. [He referred to the *Insolvent Act* 1860, secs. 94, 96, and the *Insolvency Act* 1881.] Assuming that the trustee was not qualified for appointment, the confirmation might have been appealed against under sec. 32, and, not having been appealed against, his appointment is valid. The trustee may properly lay charges against the insolvent (*In re Nancarrow* (4)).

[Counsel was stopped.]

Cleland K.C., in reply.

Cur. adv. vult.

Oct. 4.

BARTON J. read the following judgment:—The questions for determination in this appeal arise by reason of a judgment of the Supreme Court of this State (Full Court). Their Honors dismissed two appeals from the Court of Insolvency on the part of the now appellant. One was against the dismissal of his petition for the removal of the respondent from the position of trustee in the insolvency. The other was against an order of the Insolvency Court for the imprisonment of the insolvent with hard labour for fifteen months from 28th May 1917 unless he should sooner satisfy his debts. Under the Act the respondent as trustee is a judgment creditor of the appellant for the amount of his debts. The Full Court dismissed both appeals (which were heard as one), with costs out of the estate.

The appellant's counsel has raised four points:—(1) Is the appointment as trustee of a person not a creditor of the insolvent valid? (The respondent when appointed was not a creditor but held the proxy of an absent creditor.) (2) If the appointment is

(1) 31 L.J. Bky., 87.
(2) (1915) 1 K.B., 341.
(3) 13 C.L.R., 230, at p. 239.
(4) (1916) S.A.L.R., 198.

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not good, can the person appointed be removed on the petition of the insolvent? (3) Where the trustee has laid charges and called evidence at a final examination, can a creditor, while those charges are pending, lay practically the same charges without leave of the Court? (4) Can a creditor lay those charges at that stage to overcome a point taken on the first set of charges?

I do not quite understand the concluding part of the fourth question, but from my point of view both it and the third rest on the same considerations.

As to Question 1.—The answer depends practically on secs. 122, 123, 124 and 301 of the *Insolvent Act* of 1886 (No. 385), and the amending Act of 1914 (No. 1162). None of these sections appear to impose any limit on the choice of the creditors except so far as an intention to impose one may be inferred from the words "another creditor" in the last sentence of sec. 123. I should hesitate, without hearing further argument, to say that the limit was intended, especially on consideration of sec. 120, sub-secs. v. and x. Indeed, it may be that the words "another creditor" were intended at least to include a proxy specially authorized in terms of sub-sec. x. But in the present appeal I do not attempt to decide it, inasmuch as the answer to question 2 will render question 1 immaterial to the case.

As to Question 2.—The first three sections of Part V. appear to relate only to the due appointment of a trustee, and to the resignation or removal of one who duly holds that office. *Primâ facie*, the Legislature would not intend to apply the terms "duly appointed" and "may remove from the office of trustee" to a person who could not be "duly appointed" in the absence of a qualification to hold the office, and who therefore has never really held the office. Nor can an office not held be resigned. A trustee when appointed is entitled to a certificate of his appointment, and under sec. 301 the effect of the certificate is (except in the Insolvency Court on proceedings to set aside the adjudication of insolvency), that it is "conclusive evidence of the title of the trustee . . . and that all the estate and effects of the insolvent have been duly vested in such trustee . . . ." That appears to me to conclude the point; but on the assumption that it does not, sec. 32 must also be referred

to. That section gives certain persons the right to appeal within twenty-one days from the date of any order, determination, or direction of the Court or of any Commissioner. After the twenty-one days the order, determination, or direction is final. The insolvent is specified as one of such persons, and the right extends to "any person . . . who shall be affected by any order," &c., who shall be dissatisfied with it "in respect of a matter of fact or of law, or of the admission or rejection of evidence." If it were necessary (I do not think it is so) that the insolvent should be a person "affected" within the meaning of the section, the case is the same, for the insolvent himself is a person so affected, for the reasons pointed out by *Gordon* J. in the Supreme Court. The insolvent may not be a party interested, though I think he is, but that he is affected by the confirmation of the choice of a trustee is, I think, beyond doubt. It is contended that the confirmation of the appointment of the trustee under sec. 123 is not an "order, determination, or direction" within the meaning of sec. 32. I think the confirmation is at least a determination of the Court. The choice of the trustee by the creditors does not constitute an appointment. That effect can only take place on confirmation. Any creditor entitled to vote on the choice may be heard for or against the confirmation. There is obviously to be a decision by the Court, and as obviously, I think, that is a determination.

As to Questions 3 and 4.—These questions were founded on secs. 171 to 176 inclusive. It was conceded that if the case of *In re Nancarrow* (1) was correctly decided by the Supreme Court as to the sections mentioned and sec. 20, the present appeal must fail as to questions 3 and 4. There, as here, it was argued that a creditor has no power to lay charges. This argument was founded mainly on the fact that sec. 171 does not give that power in express terms. The section gives power to the Court at any sitting for the last examination of the insolvent to hear any creditor respecting the certificate to be awarded, respecting the commission by the insolvent of any of the offences afterwards mentioned (meaning the offences specified in sec. 175 as now amended by the Act of 1914) and the punishment to be awarded, and for that purpose the creditor

(1) (1916) S.A.L.R., 198.

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may put such questions to the insolvent and examine such witnesses as the Court shall think fit touching the dealings and transactions of the insolvent, and his property and effects. As the learned Chief Justice of South Australia remarked in *Nancarrow's Case* (1), the rights given are to enable the complaining creditor to show that offences have been committed, and, if he may do that, his Honor asked: "Why should he not be permitted to aver that the offences he is seeking to prove have been committed? To prevent him would be absurd. To concede that he may, is equivalent to allowing that he may make a charge, which is all that it is necessary to establish." By the Act the trustee is a creditor, and he has the same power under this section as any other creditor. As to the sections equally involved in that case and the present, I think *Nancarrow's Case* was rightly decided.

But it is said, quoting the words of sec. 176, that "the Official Receiver shall have power with the approval of the Court, to proceed with charges against the insolvent," and that therefore it is only the Receiver who can lay a charge. I do not think that is the meaning of the words "proceed with." As pointed out in *Nancarrow's Case* (2), the object of clause 176 is to be found in the words following those just quoted, namely, "and the costs thereof shall be paid out of the unclaimed dividend fund, so far as the insolvent's estate shall be insufficient for that purpose." The public interest may require the further investigation of charges already laid, and yet the estate of the insolvent "may not be sufficient to pay for the costs of a lengthy inquiry into his conduct." That is why the unclaimed dividend fund may be resorted to, and if the estate is insufficient, it is the Official Receiver, an officer of the Court, with the approval of the Court, who has the power to subject the fund to this liability. It is not to the purpose that charges made by the trustee have been heard or partly heard at the time when another creditor lays charges. They are all part of the same proceeding, namely, the sitting for the last examination of the insolvent, and the Court must be at liberty to make the fullest investigation of the insolvent's conduct. It was urged that such charges were criminal or quasi-criminal, and it was even suggested that they ought only to be heard

(1) (1916) S.A.L.R., at p. 211. (2) (1916) S.A.L.R., 198.

before Judge and jury, or that the power under sec. 175 should only be exercised after some such proceeding. That is not at all the purpose of the Act, which I think is explicit in empowering the Insolvency Court at the time of dealing with the certificate to adjudge imprisonment at the suit of the trustee as judgment creditor. If any other creditor has intervened under sec. 171, the effect of sec. 175 is not impaired. It may be that the words "at the suit of" the trustee, &c., mean that it is the trustee who is to claim the order for imprisonment. That he must be taken to have done here, though perhaps it is not necessary to decide that matter at present.

The imprisonment had expired before this appeal was heard, but as the Court had power to hear it, it has been thought right to do so, in order that the questions raised might be determined.

The charges contemplated by these sections differ from ordinary criminal charges. They all relate, not to felonies or misdemeanours in the ordinary sense, though the word "offence" is used, but to culpable misconduct of the insolvent in breach of his duty to his creditors. The punishments are for such misconduct disclosed in an investigation as to the transactions of the insolvent in incurring and after incurring his debts. It is true that the evidence must be such as to show the culpability of the debtor beyond reasonable doubt, and I am not aware that it is the habit of Courts of Insolvency or Bankruptcy to overlook that necessity. But the fact that besides the trustee as judgment creditor some proved creditor has laid charges substantially identical with those already laid cannot in proceedings under this Statute be held to impair the validity of the finding of the Court and the consequent award of imprisonment.

I am of opinion that the appeal must be dismissed both as to the petition and as to the imprisonment.

ISAACS J. read the following judgment:—Three questions in substance have been raised in this case.

The first is whether the respondent, not being a creditor of the insolvent, was qualified to be chosen as trustee. The learned Chief Justice thought he clearly was not qualified, and considered the words "another creditor" in sec. 123 were decisive. *Gordon* J. did

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not determine the point, but assumed it for the purposes of his judgment. It is not necessary to decide it, but I think it is very desirable to say that I am not prepared, without further argument, to hold that a trustee must always be a creditor. Whatever implication in favour of the appellant's view might arise from the words "another creditor" if sec. 123 were the only provision relevant to the point, there are other provisions such as sec. 104, sub-secs. v. to x. of sec. 120, and secs. 121 and 171 which offer considerations the other way. It is unnecessary now to say anything further on this subject, except that it is still open to consideration.

The second question is whether, assuming the appellant is right in his first contention, he is not properly met with sec. 32. That section makes every "order, determination, or direction" of the Court final unless appealed from as provided. Sec. 123 says: "The Court may confirm or refuse to confirm" the creditor's choice of trustee, and after hearing any creditor "for or against such confirmation." It is plain that the confirmation or refusal to confirm is at least a "determination," and therefore appealable and subject to the final provision in sec. 32. The result is that, whatever may be the general law as to the eligibility of a person not a creditor to be a trustee, the law of this case is that the respondent was lawfully appointed. It is plain that if his appointment is always open to challenge on the ground of its being a nullity, not only would the affairs of all parties in the insolvency be hopelessly confused, but titles to property would be unsettled. Sec. 301 would not avail once the appointment is declared a nullity.

The third point contended for on behalf of the appellant is that, conceding the trustee to be properly appointed, the order for imprisonment was incompetently made. The argument was that in view of the terms of sec. 176 no order for imprisonment can be made under sec. 175 unless the Official Receiver, with the approval of the Court, proceeds with charges against the insolvent, and then, of course, only such charges can be considered. Sec. 176, it is said, means that no charges whatever can be made against the insolvent except by the Official Receiver. This is quite opposed to the language and scheme of Part VII. and indeed of the whole Act. The Court is charged with the duty of investigating the conduct of the insolvent,

and of determining the character of certificate to be awarded to the insolvent, and whether he has so acted with respect to the matters specified in sec. 175 as to merit punishment and, if so, of awarding it within the statutory limits. That duty the Court is to discharge, and the trustee and every creditor may take part in the proceedings. The chief argument in support of the appellant's view was that sec. 171, when expressly permitting the Official Receiver, the trustee and the creditors to take part in opposing the insolvent, makes no mention of any right on the part of the insolvent to defend himself. But, in the first place, that proves too much. It is not and cannot be denied that at least the Court can penalize the insolvent in relation to his certificate both as to its quality and its suspension. Though no mention is made of any right on his part to defend himself in that respect, it cannot be doubted he has that right. In coming to a determination as to the certificate, the Court may have to consider whether any offence has been committed, and it is therefore an inseparable phase of the whole proceeding that the insolvent must be prepared to meet the possibility of being found guilty of offences, and of being punished for them both by way of certificate and imprisonment. But, though unexpressed, it is also an inherent and inseparable right of the insolvent, arising from the requirements of natural justice, that he shall have a fair opportunity of meeting the position. That, in the absence of specific legal provision regarding the procedure, is a condition which the common law attaches to the proceedings.

If authority be needed for so fundamental a proposition as that in the absence of specific provision to the contrary no man can be punished without having a fair opportunity of defending himself, a fair notice of the charge, and a fair chance of meeting it, it is found in such cases as *Lovering* v. *Dawson* (1), *Andrews* v. *Mitchell* (2) and *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (3). In *In re King & Co.'s Trade Mark* (4) *Lindley* L.J. says: "What is required by our notions of justice is, that no man shall have his case disposed of, or be aggrieved or interfered with, without ample notice to him, and an ample opportunity of

(1) L.R. 10 C.P., 711, at pp. 720, 722.
(2) (1905) A.C., 78.
(3) (1906) A.C., 535, at pp. 539, 540.
(4) (1892) 2 Ch., 462, at p. 482.

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Isaacs J.

showing cause against it." It is not contended that natural justice was violated in the present case, that the offence was not strictly proved (*Ex parte Brundrit*; *In re Caldwell* (1)), or that the conviction was not properly and precisely set out (*Smith* v. *Graham* (2)). The objection was that the whole proceeding was destitute of legal basis, because of the provisions of sec. 176. But the true function of sec. 176 is to provide an additional and a special means whereby public justice may be vindicated in a proper case, notwithstanding any compact between the parties immediately concerned, and notwithstanding the insolvent estate is insufficient to defray the cost of doing so. Sec. 171 gives a separate power to the Official Receiver as well as the trustee to intervene during the final examination and advance reasons, which may include the commission of an offence, why the insolvent should not be allowed to trade again without reservation for public safety. Costs are in the discretion of the Court (see sec. 315). But, if awarded, that means they are recoverable from the parties or the estate.

Circumstances may appear to the Official Receiver to make it desirable in the public interests that a charge should be made, although the trustee and the creditors are unwilling or unable to proceed with it, and although the insolvent estate is insufficient to meet the costs. He may then, under the distinct and independent power given by sec. 176, bring the matter before the Court, and, if the Court thinks the intervention desirable, it may approve the application, and then the unclaimed dividend fund provides the costs. In *Nancarrow's Case* (3) secs. 171 and 176 were clearly and properly interpreted.

Having regard to the nature of the proceedings, no objection can be raised to the circumstance that both the trustee and the creditor at the same time complained of substantially the same misconduct on the part of the insolvent. Each had a right to do so, just as two different creditors would have; and the question of whether the complaint was well founded or not was for the Court but a single matter for consideration both as to culpability and as to punishment.

The appellant therefore fails as to both of the orders of the

(1) 3 Ch. App., 26.
(2) 21 C.L.R., 503.
(3) (1916) S.A.L.R., 198, particularly at pp. 211, 228, 229.

Supreme Court attacked by him, and his appeal should be wholly dismissed.

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GAVAN DUFFY J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *G. F. Michell.*

Solicitors for the respondent, *Poole & Moulden.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McBRIDE . . . . . APPELLANT;
PLAINTIFF,

AND

SANDLAND . . . . . RESPONDENT.
DEFENDANT,

[No. 2.]

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1918.

ADELAIDE, *Oct.* 3.

Barton, Isaacs and Gavan Duffy JJ.

Practice—Supreme Court of State—Action—Stay of proceedings—Action founded on judgment of High Court—Proposed appeal to Privy Council—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 73, 74.

On an appeal to the High Court from a judgment in an action brought in the Supreme Court of a State, the High Court made an order declaring that the plaintiff was absolutely entitled to certain land which was then in the possession of the defendant. The plaintiff having then brought an action of ejectment in the Supreme Court, the defendant applied to that Court for a stay of the action of ejectment, alleging that she had been advised the decision of the High Court was wrong in point of law and that she was taking steps to apply