[HIGH COURT OF AUSTRALIA.]

THE OFFICIAL ASSIGNEE OF THE ESTATE OF TURNBULL . . . APPELLANT;

AND

GOLDSTEIN AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1921.

SYDNEY Aug. 2, 3, 12.

Knox C.J., Higgins and Rich JJ.

Bankruptcy—Loan by money-lender—Illegal security—Bankruptcy of borrower—Subsequent seizure and sale of goods under security—Claim by Official Assignee for value of goods—Imposition of condition by the Court—Permitting money-lender to prove for amount of loan—Bankruptcy Act 1898 (*N.S.W.*) (*No.* 25 *of* 1898), *secs.* 3 (2), 10, 45, 47, 134; *Sched.* III., *rr.* 22-25 — *Money-lenders and Infants Loans Act* 1905 (*N.S.W.*) (*No.* 24 *of* 1905), *sec.* 2.

A money-lender registered under the *Money-lenders and Infants Loans Act* 1905 (N.S.W.) had lent to a bankrupt before the sequestration order a certain sum of money and had taken as security bills of sale over certain chattels, but, in contravention of sec. 2 of that Act, not in the registered name of the money-lender. Portion of the money lent was applied by the borrower in payment of some of his creditors. After the sequestration order the money-lender seized and sold the chattels the subject of the bills of sale. On a motion to the Supreme Court in its bankruptcy jurisdiction by the Official Assignee under sec. 134 of the *Bankruptcy Act* 1898 for an order for payment to him by the money-lender of the value of the chattels seized and sold, the Supreme Court made the order asked for, but imposed a condition that the money-lender should be admitted to prove as a creditor in the estate of the bankrupt in respect of the sum of money lent.

Held, that no condition either in that form or having a similar effect should be imposed upon the Official Assignee.

Per *Higgins* J.: Sec. 134 enables the Court to give effect to any equitable right in respect of the assets seized, and to impose such terms as are justifiable in equity with respect thereto; but there is no equitable principle qualifying the legal right of the Official Assignee to claim the assets or their value.

H. C. OF A. 1921.

OFFICIAL ASSIGNEE v. GOLDSTEIN.

Quære, whether, the securities being void and the transaction in respect of the loan being a penal offence by the money-lender by force of sec. 2 of the *Money-lenders and Infants Loans Act* 1905, the money-lender had any right to stand in the place of those creditors whose debts had been paid out of the loan and be admitted to prove in the bankruptcy.

Lodge v. *National Union Investment Co. Ltd.*, (1907) 1 Ch., 300, distinguished.

Ex parte James; *In re Condon*, L.R. 9 Ch., 609; *In re Thellusson*; *Ex parte Abdy*, (1919) 2 K.B., 735, and *In re Wigzell*; *Hart* v. *Barclay's Bank*, 37 T.L.R., 373, 526, discussed.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Re Turnbull*; *Ex parte Official Assignee*, 21 S.R. (N.S.W.), 169, in part reversed.

APPEAL from the Supreme Court of New South Wales.

On 1st March 1919 Wilfred Ernest Turnbull borrowed from Solomon Goldstein, who was registered in New South Wales as a money-lender under the *Money-lenders and Infants Loans Act* 1905 (N.S.W.), the sum of £1,400, and gave as security a mortgage of land and two bills of sale, one over a motor-car and the other over certain household and office furniture. These bills of sale were taken in the name of Dudley Henry and not of Solomon Goldstein. On 31st May 1919 Turnbull's estate was sequestrated on his own petition, and Charles Fairfax Waterloo Lloyd was appointed Official Assignee thereof. At various dates thereafter Goldstein seized the goods the subject of the bills of sale, and they were sold by George Barnard under instructions from Goldstein.

On 4th November 1920 a motion was made to the Supreme Court in Bankruptcy on behalf of the Official Assignee for an order that he was entitled to be paid by Goldstein and Barnard, the respondents, the value of the motor-car and household and office furniture, the Official Assignee alleging that the respondents had converted such goods to their own use or had wrongfully deprived the Official Assignee of the use and possession of them, for an order directing the respondents to pay to the Official Assignee the value of such goods, and for an order referring it to the Registrar in Bankruptcy to inquire and ascertain such value.

The motion was heard by *Harvey* J., who on 8th November made an order declaring that the Official Assignee was entitled to be paid by the respondents the value of the goods in question;

ordering that it be referred to the Registrar in Bankruptcy to inquire and certify the value of such goods; and ordering that the amount of the value so certified should be paid by the respondents to the Official Assignee within fourteen days after service upon the respondents of an office copy of such certificate. The order then proceeded: "Provided always that the respondent Solomon Goldstein shall be admitted to prove as a creditor in the estate of the said bankrupt in respect of all principal moneys advanced by the said Solomon Goldstein to the said bankrupt but not in respect of any interest upon such principal moneys And this Court doth order that the said Solomon Goldstein shall not be admitted to prove as a creditor in the said estate in respect of such principal moneys until the said amount so certified as aforesaid and the costs hereinafter directed to be taxed shall have been paid to the applicant or his solicitor Mr. Harold Prescot Harriott respectively." The order then went on to order that the Official Assignee's costs of the motion should be taxed and paid by the respondents to him within fourteen days after service upon the respondents of the certificate of taxation: *Re Turnbull; Ex parte Official Assignee* (1).

From that decision the Official Assignee now appealed to the High Court.

The other material facts appear in the judgments hereunder.

Loxton K.C. and *Harriott*, for the appellant. The Supreme Court in Bankruptcy had no jurisdiction to impose such a condition as that the respondent Goldstein should be allowed to prove in the bankruptcy for the amount of the loan. The Registrar is the tribunal which can admit or reject proofs of debt (*Bankruptcy Act* 1898 (N.S.W.), Sched. III., rr. 22-25), and the Official Assignee cannot comply with the condition. Nor is there any jurisdiction to impose a condition which will have the same effect. Under sec. 10 upon bankruptcy all the property of the bankrupt vests in the Official Assignee and is divisible among the creditors who prove, and sec. 45 gives the right to prove and states what debts are provable. The property seized by Goldstein was vested in the assignee at the time of seizure, and if the Official Assignee had brought an

(1) 21 S.R. (N.S.W.), 169.

H. C. OF A. 1921.

OFFICIAL ASSIGNEE v. GOLDSTEIN.

action against Goldstein for trover and conversion Goldstein would have had no answer to it, and no terms could have been imposed upon the Official Assignee in such an action. Sec. 2 (1) (c) of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.) prohibits a money-lender from taking any security in the course of his business otherwise than in his registered name, and sec. 2 (2) makes a breach of that prohibition a penal offence. The loan being illegal and the transaction void, there is no debt, and Goldstein could not prove under sec. 45 of the *Bankruptcy Act* in respect of the money advanced (*Cornelius* v. *Phillips* (1)). Goldstein had no right, legal or equitable, in respect of the loan, and as the transaction was illegal he is not entitled to any relief in the nature of that which he was given. [Counsel also referred to *In re Clark*; *Ex parte Beardmore* (2); *In re Campbell*; *Ex parte Seal* (3); *Gedge* v. *Royal Exchange Assurance Corporation* (4).]

[RICH J. referred to *Sinclair* v. *Brougham* (5).]

Maughan K.C. and *Mason* (with them *Abrahams*), for the respondents. Although the respondent Goldstein may not have any legal or equitable rights he was entitled to have the condition made, or at any rate a condition that the Official Assignee should refund to him out of the moneys recovered from the respondents an amount which would be equal to a dividend in the estate on the sum of £1,400 less anything recovered on the other security. He is so entitled on the principle that, where the Court finds that its officer is insisting on legal or equitable rights which an honest man would not insist on, it will compel him not to insist on them (*Ex parte James*; *In re Condon* (6); *Ex parte Simmonds*; *In re Carnac* (7); *In re Rhoades*; *Ex parte Rhoades* (8); *In re Tyler*; *Ex parte Official Receiver* (9); *Tapster* v. *Ward* (10); *In re Thellusson*; *Ex parte Abdy* (11)). This rule is based on morality and passes over all legal and equitable rights. The fact that the transaction was illegal does not make it any the less dishonourable to keep the money. The

(1) (1918) A.C., 199, at p. 205.
(2) (1894) 2 Q.B., 393, at pp. 402, 408, 411.
(3) (1911) 2 K.B., 992, at p. 1000.
(4) (1900) 2 Q.B., 214, at p. 220.
(5) (1914) A.C., 398.
(6) L.R. 9 Ch., 609.
(7) 16 Q.B.D., 308.
(8) (1899) 2 Q.B., 347, at p. 355.
(9) (1907) 1 K.B., 865.
(10) 101 L.T., 503.
(11) (1919) 2 K.B., 735.

Court looks upon itself as a quasi-litigant and waives its strict legal or equitable rights just as a private litigant may do. The rule applies where money proceeding from the applicant for relief has swollen the assets in the hands of the Official Assignee or has paid off creditors who otherwise would have proved in the bankruptcy. The question the Court asks is: Is the action of the Official Assignee honourable? It is not honourable if the money lent has gone to pay off creditors of the bankrupt. This motion being made under sec. 134 of the *Bankruptcy Act*, the Court has all the power of a Court of Equity, and if the motion is equivalent to the Official Assignee seeking equitable relief the case of *Lodge* v. *National Union Investment Co.* (1) applies, and he will not be given relief without doing what is honourable, that is, without paying off the loan. If Goldstein pays such a sum as would give the creditors twenty shillings in the pound and pay all costs, charges and expenses, he should not be called upon to pay anything more. [Counsel also referred to *Story's Equity Jurisprudence*, 13th ed., vol. II., p. 305, sec. 301; *In re Wigzell*; *Hart* v. *Barclay's Bank* (2).]

[HIGGINS J. referred to *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (3).

[RICH J. referred to *Chapman* v. *Michaelson* (4).]

Harriott, in reply, referred to *Ex parte Skip* (5); *In re Robinson's Settlement*; *Gant* v. *Hobbs* (6).

Cur. adv. vult.

Aug. 12.

The following written judgments were delivered:—

KNOX C.J. AND RICH J. On 1st March 1919 Wilfred Ernest Turnbull borrowed from Solomon Goldstein the sum of £1,400, the greater part of which was applied in payments to creditors of Turnbull. Goldstein was a registered money-lender, but the securities for repayment of the loan, which covered furniture, a motor-car and other chattels, as well as certain real property, were taken

(1) (1907) 1 Ch., 300.
(2) 37 T.L.R., 526.
(3) 22 Ch. D., 61.
(4) (1909) 1 Ch., 238.
(5) 2 Ves., 489.
(6) (1912) 1 Ch., 717, at p. 723.

H. C. OF A. 1921.

OFFICIAL ASSIGNEE v. GOLDSTEIN.

Knox C.J. Rich J.

in the name of Dudley Henry, a brother-in-law of Goldstein, who was also a registered money-lender. Goldstein acted on the advice of his solicitor in taking the securities in Henry's name, this course being adopted in order to avoid difficulties which might have arisen in the registration of the securities if taken in a name apparently that of a German national. It is admitted, and indeed could not be denied, that these securities were void by force of sec. 2 (1) (c) of the *Money-lenders and Infants Loans Act* 1905, and that the transaction was an offence punishable under that section. It follows that Goldstein had no title whatever, either legal or equitable, to the chattels comprised in the securities, and that he could not recover from Turnbull by any process of law or in any Court any portion of the £1,400 which he had lent Turnbull. If he had seized the goods, Turnbull could have maintained an action at law for damages for conversion in which it would have been the duty of the Judge, on the admitted facts, to direct the jury to find a verdict for the plaintiff for the full value of the goods seized without any reduction by reason of the advance made by Goldstein. At this stage, therefore, the position was that Goldstein had no claim either at law or in equity to the money or the goods. His only hope of recovering anything, except by means of a purely voluntary payment by Turnbull, lay in the possibility that the latter might take proceedings in equity to recover possession of the securities themselves, and that in that case the Court of Equity might follow the decision in *Lodge* v. *National Union Investment Co.* (1) and refuse relief except upon condition of repaying the amount of the loan. It is unnecessary for us to consider in this case whether that decision would now be followed.

This being the position on 31st May 1919, Turnbull's estate was on that day sequestrated on his own petition under the *Bankruptcy Act* 1898, and thereupon, by force of sec. 10 (1) of that Act, the property of the bankrupt vested in the present appellant as his Official Assignee and became divisible among the creditors of the bankrupt in accordance with the provisions of the Act. The proof of debts and their payment are dealt with in Part II. of the Act (secs. 45 *et seqq.*). For the purpose of this case it is sufficient to point

(1) (1907) 1 Ch., 300.

out that by sec. 45 all debts and liabilities, with certain exceptions, to which the debtor is subject at the date of the sequestration order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the sequestration order, are provable; and that subject to the preferential payment of certain classes of debts all debts proved in the bankruptcy are to be paid *pari passu* (sec. 48 (4)). It is clear that on the making of the sequestration order the goods comprised in the securities to Henry vested in and became the property of the appellant as Official Assignee of Turnbull. At various dates after the making of that order and with knowledge of the bankruptcy, Goldstein seized the goods comprised in the securities, having first demanded from the appellant payment of the amount advanced by him to Turnbull, and the goods so seized were sold by the respondent Barnard under instructions from Goldstein. The seizure and sale of these goods was a wrongful act on the part of Goldstein, and cannot be relied on by him as conferring any rights on him as against the appellant. It was in fact not disputed that neither Goldstein nor Barnard would have had any defence to an action of trover and conversion by the appellant or any right to obtain, or chance of obtaining, in such an action any relief whatever. The goods having been seized and sold, the appellant on 24th May 1920 instituted proceedings against Goldstein and Barnard under sec. 134 of the *Bankruptcy Act* 1898 to recover the value of the goods so seized, alleging that the respondents wrongfully converted the same to their own use or wrongfully deprived the appellant of the use and possession thereof.

On the hearing of the motion it was conceded by the respondents that there was no answer to the claim of the appellant; but they took up the position that the case was one in which the Court should direct the appellant not to insist on his strict legal rights but to do what was suggested to be only fair and honest as between man and man, that is, to allow the respondent Goldstein to prove in the bankruptcy for the actual amount paid to the bankrupt at the time the securities were given. The learned Judge, relying on the decisions in *Lodge* v. *National Union Investment Co.* (1) and *In re Thellusson*; *Ex parte Abdy* (2), acceded to the request of the

(1) (1907) 1 Ch., 300.

(2) (1919) 2 K.B., 735.

H. C. OF A. 1921.

OFFICIAL ASSIGNEE v. GOLDSTEIN.

Knox C.J. Rich J.

respondents and made the order as asked by the Official Assignee, but on terms that Goldstein should be allowed to prove in the bankruptcy for the principal moneys which he lent to Turnbull. This is an appeal by the Official Assignee from that order.

The first objection raised to the order is that the condition imposed by the learned Judge is one with which it is impossible for the appellant to comply. It is clear that the appellant has no power to procure the admission of a proof by the respondent Goldstein in respect of the sum actually advanced by him to the bankrupt or any sum. Under the provisions of the Act (secs. 3 (2) and 47, and rules 22, 23 and 24 of the Third Schedule) the question whether a proof is to be admitted or rejected is one for judicial determination by the Registrar. Except on an appeal from a decision of the Registrar the Court itself has no power to order him to admit a proof of debt; and if a proof be rejected by the Registrar the Court, on appeal from him, could only properly order the proof to be admitted if judicially satisfied that the debt sought to be proved was provable in accordance with the provisions of the Act. Consequently this objection to the order made by *Harvey* J. is, in our opinion, well founded.

It was, however, argued before us that this objection went only to a matter of form, and it was suggested that the appellant might be put upon terms to pay to the respondent Goldstein out of the money to be received under the order a sum equal to the dividend which he would receive if he were admitted to prove for the amount advanced to the bankrupt. One answer to this contention is that an order to this effect would be opposed to the clear and express provisions of the Act which vest in the Official Assignee all the property of the bankrupt and require him to distribute that property among the proved creditors. If property seized and sold by Goldstein did not pass under the securities given, as is admitted, it belonged to the bankrupt, and so vests in the appellant, who was under a statutory duty to dispose of it in accordance with the provisions of the Act and not otherwise. But it was said that, when the Official Assignee takes proceedings to recover property of the bankrupt to which he is legally entitled, the Court will not allow him to assert his title to the property if the circumstances are such that

it would be dishonourable for him to do so, and that the Court will impose such terms on him as will prevent him from reaping the advantage of a dishonourable course of conduct pursued by the bankrupt. It may not be out of place to observe that it was the wrongful act of Goldstein in seizing and selling property to which he had admittedly no title whatever that compelled the Official Assignee to institute proceedings to recover the value of that property, and it is hard to see on what ground Goldstein can claim that his position is improved by reason of his own wrongful act. If he had not seized the property the Official Assignee would have obtained it without the necessity of taking proceedings, and the only courses open to Goldstein would then have been (*a*) to prove his claim as a creditor or (*b*) to apply to the Court of Bankruptcy for an order on the Official Assignee to discharge the debt of honour of the bankrupt. If the former course was open to him it is still open, and no decision on the present proceedings will affect it; but we do not desire to be taken as suggesting that he has any provable debt. With regard to the alternative course, it is said that such an order would be within the authority of the line of cases commencing with *Ex parte James*; *In re Condon* (1), and extending to *In re Thellusson*; *Ex parte Abdy* (2), at any rate if the assistance of the decision of *Parker* J. in *Lodge* v. *National Union Investment Co.* (3) can be invoked. In our opinion the last mentioned decision has no application to the facts of the present case, even assuming that it was correctly decided—as to which we express no opinion. In that case the plaintiff was invoking the assistance of a Court of Equity in a matter in which the giving or withholding of assistance was entirely within the discretion of the Court, and *Parker* J. thought he was justified in refusing assistance except on condition of the plaintiff undertaking to pay the amount of a loan made to him in contravention of the *Money-lenders Act*. In the present case there is no assertion by the appellant of any equitable right: his claim is a purely legal claim which might have been asserted in an action of trover and conversion. In such an action the Courts of common law in New South Wales, where the *Common Law Procedure*

(1) L.R. 9 Ch., 609.
(2) (1919) 2 K.B., 735.
(3) (1907) 1 Ch., 300.

H. C. OF A. 1921.

OFFICIAL ASSIGNEE v. GOLDSTEIN.

KNOX C.J. RICH J.

Act is still in force, would, in our opinion, have no jurisdiction to impose any terms on the plaintiff.

The argument based on the rule in *Ex parte James* (1) remains to be considered. The history of this rule and its development through a long line of cases has recently been expounded by a Divisional Court and by the Court of Appeal in *In re Wigzell* (2), and it is therefore unnecessary to discuss in detail the various cases in which it has been applied or held to be inapplicable. It is sufficient to say that it is difficult to extract from these cases any definite guide as to the circumstances in which the rule is applicable. But it is clear that the rule has never been applied to give effect to a transaction which is positively forbidden by law on pain of fine or imprisonment. It is, indeed, difficult to conceive how it can be the duty of the Court of Bankruptcy or of any Court to compel its officer to give effect to a transaction which the law declares to be wholly illegal and void. (See *Cornelius* v. *Phillips* (3); *Victorian Daylesford Syndicate Ltd.* v. *Dott* (4); *Bonnard* v. *Dott* (5); *In re Robinson's Settlement*; *Gant* v. *Hobbs* (6).) In effect that would be the result of the order made by *Harvey* J. in the present case. The law has been authoritatively stated to be that a loan made in contravention of sec. 2 of the *Money-lenders Act* is not recoverable in any form of action because the transaction is positively forbidden by law. How, then, can it be proper for the Court of Bankruptcy to insist on such a loan being repaid as a condition of ordering a wrongdoer to pay to the legal owner the value of property which has been seized by the wrongdoer without any justification at law or in equity but in reliance on a security the taking of which is a punishable offence? It is not necessary to consider whether the rule extends to cases in which the obligation of honour arises from the conduct of the bankrupt, and not from that of the Official Assignee. So far as we are aware the first case in which the rule was thus applied was *In re Thellusson* (7). But in that case the conduct of the person for whose benefit the rule was applied was free from any taint of illegality. The case made by the respondent

(1) L.R. 9 Ch., 609.
(2) 37 T.L.R., 373; 526.
(3) (1918) A.C., at p. 205.
(4) (1905) 2 Ch., 624.
(5) (1906) 1 Ch., 740, at pp. 746-747.
(6) (1912) 1 Ch., 717.
(7) (1919) 2 K.B., 735.

Goldstein may be stated thus:—"I lent money to the bankrupt and took securities from him in a manner forbidden by law under pain of fine or imprisonment. I could never by any form of proceedings in any Court recover that money from Turnbull or enforce those securities against him, because the transaction was wholly illegal and void. As between Turnbull and myself no right accrued to me by reason of the money lent being applied in payment of his creditors. But, because Turnbull subsequently became bankrupt and, perhaps, because I committed a further wrongful act by seizing the property comprised in those securities, I am entitled as against Turnbull's Official Assignee to be repaid out of Turnbull's property, which vested by law in his Official Assignee for distribution among approved creditors, some part at least of the money I lent to Turnbull." The statement of such a contention should, we think, be sufficient to ensure its rejection.

It was suggested during the argument that the fact that the money lent by Goldstein to Turnbull was applied in payment of debts which would otherwise have been provable in Turnbull's bankruptcy might give rise to some right in Goldstein to stand in the place of those creditors and be admitted to prove in the bankruptcy. If any right of this kind exists, as to which we express no opinion, nothing in this decision prevents Goldstein from asserting it, but such a right, if it exists, affords no answer to the claim of the Official Assignee on this motion—a claim, as pointed out above, for the value of goods belonging to the Official Assignee which the respondents unlawfully and without any colour of right seized and sold.

For these reasons we are of opinion that the order appealed against should be varied by striking out the following words, namely: "Provided always that the respondent Solomon Goldstein shall be admitted to prove as a creditor in the estate of the said bankrupt in respect of all principal moneys advanced by the said Solomon Goldstein to the said bankrupt but not in respect of any interest upon such principal moneys And this Court doth order that the said Solomon Goldstein shall not be admitted to prove as a creditor in the said estate in respect of such principal moneys until the said amount so certified as aforesaid and the costs

H. C. OF A. 1921.

OFFICIAL ASSIGNEE v. GOLDSTEIN.

KNOX C.J. RICH J.

hereinafter directed to be taxed shall have been paid to the applicant or his solicitor Mr. Harold Prescot Harriott respectively."

The respondents are to pay the costs of this appeal.

This order is not to prejudice any proceedings the respondent Solomon Goldstein may be advised to take with regard to money applied in payment of any legitimate debts of Turnbull.

HIGGINS J. The motion and the facts have been sufficiently stated in the judgment of my learned brothers.

Now, under sec. 134 of the *Bankruptcy Act* 1898 the Court in its bankruptcy jurisdiction has power to decide all questions whatsoever, whether at law or in equity, in any case of bankruptcy coming within the cognizance of the Court, "or which it may deem expedient or necessary to decide for the purpose of doing *complete justice* or making complete distribution of property." Under sub-sec. 4 the Court may determine the question where the Official Assigneee "claims any property as part of the bankrupt's estate"—the claim made by this motion—"and make such order thereupon as he may deem expedient or necessary, for the purpose of doing *complete justice* between all the parties interested"; and under sub-sec. 7 "the Court shall have the same power of giving relief to any party interested . . . as the Supreme Court would have if such matter or proceeding were pending before it in either its common law or equitable jurisdiction." In short, the Court can do complete justice, and give effect to any equities. In my opinion, these provisions enable the Court to give effect to any equitable right in respect of the assets seized, whatever be the form of the motion, and to impose such terms as are justifiable in equity with respect thereto. But, even if under the equitable jurisdiction of the Supreme Court Goldstein is entitled to be allowed to prove for the £1,400, it has been pointed out that the condition in the form prescribed by the learned Judge of first instance is one that it is impossible for the Official Assignee to perform. The Official Assignee does not admit, or reject, proofs: that is the function of the Registrar, acting judicially (*Bankruptcy Act* 1898, sec. 3 (2), sec. 47; Sched. III., rules 22-25).

But has Goldstein any equitable right which he could assert against the appellant in any proceeding? It is provided in sec. 2 (1) (c) of the *Money-lenders and Infants Loans Act* 1905 as follows: "A money-lender, as defined by this Act, . . . shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender otherwise than in his registered name." It is also provided that if the money-lender fail to comply with the requirements of the section, he shall be liable on first conviction to a fine of £100, and for a second conviction to imprisonment for three months or to a fine of £100, or to both. It has been held, under the English Act from which this *Money-lenders and Infants Loans Act* is copied, that, the transaction being illegal and Goldstein made liable to punishment, there can be no debt arising out of the illegal transaction. Under sec. 10 (1) of the *Bankruptcy Act*, on the sequestration order the property of the bankrupt (and the property included the assets in the securities held by Goldstein) vested in the Official Assignee, and was divisible among the creditors of the bankrupt. Goldstein was not a creditor of Turnbull, at the sequestration, *under the illegal contract*; and the property of the bankrupt was all divisible among those who were creditors and have proved as such (sec. 80 (2))—to the exclusion of Goldstein. Goldstein, in law, was a criminal; and, as the result of the crime of (innocently) using another man's name in the transaction, he can take no benefit from the securities. There was no debt owing to him *under the illegal contract* at the sequestration for which he could have sued or for which he can now prove on the estate. This position is clear from the decision of the Court of Appeal in *Bonnard* v. *Dott* (1), where a money-lender, being a defendant, counterclaimed for the breach of the express contract to deliver certain further documents. The contract—that is, the contract of lending and borrowing—is void, so far as concerns the money-lender. The lender cannot compel the borrower to return the money lent, while the borrower, being one of the class which the Act meant to protect, can compel the lender to

(1) (1906) 1 Ch., at p. 745.

H. C. OF A. 1921. OFFICIAL ASSIGNEE v. GOLDSTEIN. Higgins J.

return the securities, "*at any rate on the terms of repaying the amount lent*" (see also *Victoria Daylesford Syndicate Ltd.* v. *Dott* (1)).

On the other hand, Goldstein's money has been applied in paying off Thomas and Berkman, creditors. These creditors could (as I assume) have proved on the estate; but by the aid of Goldstein's money the estate is relieved of the two debts, and the value of the net estate has been increased at the expense of Goldstein. The Act makes the transaction of loan illegal, but it does not purport to turn the transaction into a gift. Goldstein's money, not being a gift to Turnbull, has been traced into the hands of legitimate creditors, satisfying their claims. The question is: Is the estate at the same time to be treated as under no obligation to Goldstein, and yet as taking the benefit of the increased value imparted to it by the transaction? Is the estate of the bankrupt not only protected from all loss attributable to the illegal transaction, but is it also to be allowed to be a gainer by that transaction?

It appears, according to *In re Robinson's Settlement*; *Gant* v. *Hobbs* (2), that the money cannot be recovered by Goldstein as money had and received under an implied agreement where the consideration, the agreement under which the money was paid by Goldstein, has failed. The point was raised by eminent counsel in that case after the Court had decided that a mortgage was invalid as given to an unregistered money-lender. The Master of the Rolls, *Fletcher Moulton* and *Buckley* L.JJ. seem to have rejected the argument very emphatically, and *Cave* K.C. thought it not becoming for him to argue the point further (3). The Master of the Rolls treated the point as settled by *Bonnard* v. *Dott* (4), which I have mentioned above; but in that case there seems to be no argument as to an implied contract when the express contract is void. That the illegality of the express contract does not infect with illegality all the relations of the lender and the borrower would appear from the case of *Lodge* v. *National Union Investment Co.* (5), where *Parker* J., in an equitable action by the borrower to recover securities mortgaged to an unregistered money-lender—the mortgage

(1) (1905) 2 Ch., 624.
(2) (1912) 1 Ch., 717.
(3) (1912) 1 Ch., at pp. 723-724.
(4) (1906) 1 Ch., 740.
(5) (1907) 1 Ch., 300.

being illegal under the *Money-lenders Act*—refused to order the lender to deliver up the securities except on repayment of the money actually advanced by him. The learned Judge in that case treated the decisions under the old Usury Acts, which made usurious contracts illegal and imposed penalties, as authorities to guide him under the *Money-lenders Act*. The same principle would appear from the case of *Dott* v. *Brickwell* (1), where an unregistered money-lender was held to be entitled to maintain an action for misrepresentation whereby the lender was induced to advance the money. He was not suing *on the contract* of lending, and it might be urged that the *Money-lenders Act*, sec. 2 (1) (c), merely forbids the express agreement in the course of the business of money-lender. If it be said that to give effect to any such implied agreement where the express agreement, being illegal, cannot be carried out would render the Act nugatory, the statement is inaccurate. The lender would, at most, get back his money without interest, as there is no (valid) agreement for interest. The Act is not nugatory if it prevents the money-lender who does the business illegally from getting any interest or profit as well as subjects him to the penalty. But the principle that the lender who lends on a contract which is *ultra vires* of the borrower is not entitled to recover the money as for money had and received, is laid down in *Sinclair* v. *Brougham* (2). The reasoning seems to be that if the whole transaction of lending under the circumstances is made invalid by law, there cannot be any implied contract to repay in the transaction (see per Viscount *Haldane* (3), per Lord *Parker* (4) and per Lord *Sumner* (5)). The law cannot imply a promise to repay where the promise, if express, would be invalid. It does not follow, however, that in *ultra vires* contracts other than contracts of borrowing a count for money had and received will not lie—as in the case of money paid for the purchase of land which the company had no power to sell, or as in the case of a policy of insurance which the company had no power to issue (see per Lord *Parker* (4) ; *In re Phœnix Life Assurance Co.* (6)).

(1) 23 T.L.R., 61.
(2) (1914) A.C., 398.
(3) (1914) A.C., at p. 414.
(4) (1914) A.C., at p. 440.
(5) (1914) A.C., at p. 452.
(6) 2 J. & H., 448.

H. C. OF A. 1921. OFFICIAL ASSIGNEE v. GOLDSTEIN. Higgins J.

There are, however, certain cases of high authority which have to be faced. In *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1) a society which had no power to borrow overdrew its account with its bankers, depositing deeds as security for the balance due from time to time. Some of the moneys borrowed had been applied in payment of withdrawing members, salaries, &c., and it was held that the bankers were entitled to hold the deeds as security for such part of the money advanced as had been applied in payment of the liabilities of the society properly payable and had not been repaid to the bankers. In *Bannatyne* v. *MacIver* (2) the same doctrine was applied to the case of a London agent for a business firm who had exceeded his authority by borrowing. *Collins* M.R. (3) said: "Those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit, so as, in substance, to make those other people pay their debts." As a result, the Court of Appeal decided that, so far as the money borrowed could be shown to be applied for the benefit of the defendant firm in paying claims for which it was legally liable, the money could be recovered on equitable grounds. In *Sinclair* v. *Brougham* (4) Lord *Parker* said, speaking of money borrowed *ultra vires* of a society, "it appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association . . . the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied." The House of Lords leaves the question open whether this is because there is no real increase in the indebtedness of the company through the transaction under such circumstances, or whether the principle rests on subrogation of the lender to the rights of the legitimate creditors who have been paid off (5). "Secondly" (says Lord *Parker*) "it appears to be also well settled that the lender in an *ultra vires* loan transaction has a right to what is known as a tracing order." At law the lender can recover the money so long as he can

(1) 22 Ch. D., 61.
(2) (1906) 1 K.B., 103.
(3) (1906) 1 K.B., at p. 108.
(4) (1914) A.C., at pp 440-441.
(5) (1914) A.C., at p. 441.

identify it. In equity the relationship between the directors or agents and the lender is treated as a fiduciary relationship, and the money is treated as trust money in their hands. But these cases, however, are cases where the borrowing transaction was *ultra vires*, not prohibited by law—illegal; and in *In re Wrexham, Mold and Connah's Quay Railway Co.* (1) *Vaughan Williams* L.J. drew the distinction sharply:—"If the *ultra vires* loan is to be treated as an illegal prohibited transaction, as distinguished from a contract into which the company have no capacity to enter, *there is no action at law or in equity by which the lender can recover back moneys which he had paid over in pursuance of the illegal contract.* If, on the other hand, the *ultra vires* loan is to be treated merely as something *ultra vires*, and not as an illegal transaction, there is no reason why the lender should not recover the money thus paid from the company, as money received to the use of the lender, by reason of the failure of consideration arising out of the incapacity of the company to borrow, provided always that the dealing by the company with the money has not been such as to show that, notwithstanding the form of action adopted, the money has really been so dealt with by the company as that, in the interval between the lending of the money and the bringing of the action, the company has increased its borrowing obligations beyond its borrowing powers." This is a dictum, not a decision; but it was a dictum in a case in which the members of the Court of Appeal all addressed themselves to the fundamental principles governing the relations of a company which borrowed *ultra vires* from a bank, and the borrowed moneys were applied by the company in discharging legal debts and liabilities.

There is, however, another class of cases, starting from *Ex parte James*; *In re Condon* (2), and culminating in *In re Thellusson*; *Ex parte Abdy* (3), a case on which the learned Judge below relies in this case, as well as *Lodge's Case* (4). *Lodge's Case* relates to the *Money-lenders Act*; *Thellusson's Case* did not. *Thellusson's Case* is based on the principle that the trustee in bankruptcy is an officer of the Court, and that the Court ought to set an example to the

(1) (1899) 1 Ch., 440, at p. 456.
(2) L.R. 9 Ch., 609.
(3) (1919) 2 K.B., 735.
(4) (1907) 1 Ch., 300.

H. C. OF A. 1921.

OFFICIAL ASSIGNEE v. GOLDSTEIN.

Higgins J.

world by paying back money to the person who is in justice entitled to it although it is not recoverable by any form of action. In *James's Case* the facts were simple. A creditor had levied execution, and had received the proceeds from the sheriff. Bankruptcy ensued, and the trustee threatened the execution creditor with proceedings if the proceeds of the execution were not paid to him. The creditor complied under the mistake of law that the trustee was entitled to the moneys, and afterwards claimed a refund. This was not a case of proof against the estate: it was just the same as if the trustee had treated another man's hat as belonging to the bankrupt, and refused to return it. The trustee was compelled to return the money. The subsequent developments of *James's Case* have rather startled me, but I do not feel justified in saying, in the face of such high authority, that they are wrong. Indeed, I rather think that the decision in *In re Thellusson* may be justified on the ground that moneys paid under a mistake of fact (for both parties were ignorant of the receiving order) can be recovered from the official assignee if they have reached his hand, as well as from the bankrupt before his bankruptcy. It appears that all the three Judges recognized the mistake of fact, although they chose to base their decision on the principle of *Ex parte James* (1) and "dishonourable" conduct of the assignee (2). The trustee or assignee took no better right to that money than the debtor (*Ex parte Holthausen* (3)). I notice that in *In re Wigzell* (4), a case decided on 15th March of the present year, relating to the analogous position where a trustee in bankruptcy follows property acquired by the bankrupt after sequestration, *Scrutton* L.J. said that *Thellusson's Case* went further than any case before, the trustee being treated as bound where the bankrupt had "dishonourably" received money from another person after the receiving order. But even in *Wigzell's Case* (5) the Master of the Rolls said: "If the sums so paid out" (drawn out by the bankrupt from his bank) "went to relieve the estate by satisfying creditors, the County Court Judge might have said that he ought only to give the trustee the £165 paid into the bank" by the bankrupt, "subject to a

(1) L.R. 9 Ch., 609.
(2) (1919) 2 K.B., at pp. 745, 750-751, 753-754, 757-758.
(3) L.R. 9 Ch., 722.
(4) 37 T.L.R., 526, at p. 528.
(5) 37 T.L.R., at p. 527.

deduction from that of the amount by which the estate had benefited by its being available for payment out" (see also in *In re Clark*; *Ex parte Kearley* (1)).

I have referred to these three lines of cases because they leave the law in an unsatisfactory state as applicable to the relations of Goldstein to the official assignee. In my opinion, however, it is not "necessary" or "expedient," or even proper, to decide the ultimate rights of Goldstein on this application. He seized after sequestration, and sold, goods which admittedly were vested in the Official Assignee of the bankrupt; and he must restore them, or their value. He cannot rely on his wrongful act as a basis for putting pressure on the Assignee to grant his claims. The right (if any) which Goldstein has in respect of such money of his as was applied in payment of Turnbull's legitimate creditors can be asserted whether the goods, or their value, be restored or not; and there is no equitable principle qualifying the legal right of the Official Assignee to claim the assets seized, or their value. The right (if any) of Goldstein is not in respect of the assets converted, or relevant to the claim for their conversion. The right of the Assignee to the goods is unconditional; and, if Goldstein is to get any relief, it must be in a direct, substantive proceeding. In the present state of the authorities any proceedings taken by Goldstein would be risky; but he ought to be allowed to take the risk if he choose.

I concur with my learned brothers in varying the order as proposed, though not quite on the same grounds; but it ought to be distinctly understood that the decision is without prejudice to any proceedings which Goldstein may be advised to take with regard to his money applied in payment of any legitimate debts of Turnbull.

Appeal allowed. Order appealed from varied as above stated. Respondents to pay costs of appeal.

Solicitors for the appellant, *Harriott & Solomon.*

Solicitors for the respondents, *John Williamson & Sons.*

B. L.

(1) 6 Morr. Bky., 42, at p. 47.