[HIGH COURT OF AUSTRALIA.]

McINTOSH . . . . . APPELLANT;
RESPONDENT,

AND

SHASHOUA . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

H. C. OF A. 1931.

SYDNEY, *Aug.* 7, 10, 11.

MELBOURNE, *Nov.* 2.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Guarantees—Petition by guarantor against co-guarantor—Unpaid claim for contribution—Proof of debt—Debt purchased for purpose of founding petition—Bona fides—"Sufficient cause" for no order—Notice of assignment—Equitable debt—Joinder of assignor as co-petitioner—Refusal of payment tendered after petition—Bankruptcy Act 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *secs.* 55, 56*—*Conveyancing Act* 1919 (*N.S.W.*) (*No.* 6 *of* 1919), *secs.* 12, 170.*

A bankruptcy petition alleged that the debtor was indebted to the petitioning creditor in a certain sum, being the amount of contribution payable by the debtor to the petitioning creditor in respect of certain guarantees. The petition also alleged that the debtor was indebted to the petitioning creditor in a sum being the amount payable to the petitioning creditor as

* The *Bankruptcy Act* 1924-1930 provided by sec. 55 (1): "A creditor shall not be entitled to present a petition against a debtor unless—(*a*) the debt owing by the debtor to him . . . amounts to fifty pounds; and (*b*) . . . is a liquidated sum, payable either immediately or at some certain future time"; and by sec. 56: "(2) At the hearing" of a creditor's petition "the Court—(*a*) shall require proof of the debt of the petitioning creditor . . . and (*b*) if satisfied with the proof, may make a sequestration order in pursuance of the petition. (3) If the Court . . . (*b*) is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it may dismiss the petition."

The *Conveyancing Act* 1919 (N.S.W.) provides by sec. 12: "Any absolute assignment by writing under the hand of the assignor . . . of any debt . . . of which express notice in writing has been given to the debtor . . . shall be, and be deemed to have been effectual in law . . . to pass and transfer the legal right to such debt . . . from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor"; and by sec. 170 (1): "Any notice required or authorized by this Act to be served shall be in writing, and shall be sufficiently served . . . (*b*) if left at the last known place of abode . . . in New South Wales of the person to be served."

assignee from a company of a judgment recovered against the debtor by the company. It appeared that the debt in question represented the amount due under a judgment recovered in the Supreme Court of New South Wales by the assignor company against the debtor, who resided in that State, and that the debt was assigned by the company to the petitioning creditor by a document executed in that State. On the day that the petition was filed—but only a few hours before the filing—notice in writing of the assignment was left at the debtor's last known place of residence. At the hearing of the petition no objection was taken to the right of the petitioner to found the petition on the debt assigned, and a sequestration order was made. The debtor appealed against that order, and raised the objection on appeal.

Held, by the whole Court, that the debt alleged as arising out of the guarantees had not been proved.

But *held*, further, by *Gavan Duffy* C.J., *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the appeal should be dismissed :

By *Gavan Duffy* C.J. and *Dixon* J., on the ground that the Court should not entertain the question raised for the first time on appeal in respect of the effectiveness of the assignment of the debt ;

By *Starke* and *McTiernan* JJ., on the ground that the petitioning creditor as equitable assignee of a legal debt could present a petition without joining the assignor as co-petitioner.

Per Evatt J. : In the circumstances the rights of the petitioning creditor in relation to the debt assigned must be ascertained under the law of New South Wales ; notwithstanding the provisions of sec. 170 of the *Conveyancing Act* 1919 (N.S.W.), the leaving of the notice of assignment at the debtor's residence did not amount to "express notice in writing" within the meaning of sec. 12 of that Act : the petitioning creditor was, therefore, merely an equitable assignee of the judgment debt, and, as such, was not entitled to present the petition.

Held, further, by *Gavan Duffy* C.J., *Starke*, *Dixon* and *McTiernan* JJ., that the fact that the judgment debt was acquired in order to enable the petitioner to petition in bankruptcy was not in itself "sufficient cause" within the meaning of sec. 56 (3) (*b*) of the *Bankruptcy Act* 1924-1930 for not making the sequestration order asked for.

Held, also, by *Gavan Duffy* C.J., *Starke*, *Dixon* and *McTiernan* JJ., that a petitioning creditor is entitled to refuse payment tendered by the debtor after the presentation of the petition, and proceed with the petition.

In re Gentry, (1910) 1 K.B. 825, followed.

Order of the Court of Bankruptcy affirmed.

APPEAL from the Court of Bankruptcy, District of New South Wales and the Territory for the Seat of Government.

A bankruptcy petition presented on 2nd March 1931 by Mrs. Joan Shashoua against Hugh Donald McIntosh, alleged that McIntosh

H. C. OF A. 1931.

McINTOSH v. SHASHOUA.

was indebted to the petitioner (1) in the sum of £1,558 0s. 9d., being the amount of contribution payable to her by McIntosh in respect of two guarantees—one in the sum of £5,000 and interest and the other in the sum of £2,000 and interest—given by the petitioner and McIntosh respectively to the National Bank of Australasia Ltd. to secure the overdraft of Harry Rickards' Tivoli Theatres Ltd. with that bank, under which she had been called upon to pay and had paid on or before 24th February 1931 the sum of £5,453 2s. 8d.—McIntosh's proper proportion whereof was £1,558 0s. 9d., which he had failed to pay to her either wholly or in part; (2) in the sum of £99 2s. 2d., being the amount payable to her as assignee from the Permanent Trustee Co. of New South Wales Ltd. of a judgment obtained against McIntosh by that company on 10th February 1931; and that within six months of the presentation of the petition McIntosh had committed an act of bankruptcy in that execution levied in respect of the judgment referred to above was on 27th February 1931 returned unsatisfied. The petition was served upon McIntosh in Melbourne on 6th March 1931, and on 12th March he caused notice to be given of his intention to oppose the making of a sequestration order on the grounds (1) that he disputed the debt of £1,558 0s. 9d. referred to in the petition: (2) that he was not indebted to the petitioner either for the whole or any part of such sum as (a) one Edmund Covell was a joint guarantor with him in respect of the £2,000 referred to above; (b) there was still a sum of money owing to the National Bank of Australasia Ltd. in respect of the overdraft referred to above; and (c) the rights of the parties had not been determined and worked out by proper proceedings between the petitioner, himself, Covell and Harry Rickards' Tivoli Theatres Ltd.: (3) that the petition did not disclose any grounds for holding him liable to the petitioner in respect of the said overdraft: (4) that with regard to the debt of £99 2s. 2d. the Court should not, in the exercise of its discretion, make a sequestration order based upon such debt because the petitioner purchased the debt assigned to her with the sole object of founding the petition in bankruptcy and for improper motives, and since the presentation of the petition he had tendered payment of the amount due under the judgment, which amount had been refused, and he was now willing to pay the

amount of the said debt: and (5) that as to the last-mentioned debt the Permanent Trustee Co. of New South Wales Ltd. should have been joined as a party to the petition.

With regard to the debt of £1,558 0s. 9d., it appeared that the repayment of the overdraft of Harry Rickards' Tivoli Theatres Ltd. with the National Bank of Australasia Ltd. was the subject of two guarantees, namely, a joint and several guarantee by McIntosh and Edmund Covell, which was produced to the Court, to the extent of £2,000, and a guarantee by Miss Joan Norton (as Mrs. Shashoua then was) to the extent of £5,000. At the time of the hearing the document evidencing the latter guarantee was in London and, therefore, was not produced to the Court. Counsel for the debtor objected to any reference to the document unless it were produced and its execution by the parties thereto proved. Other evidence tendered for the purpose of proving the existence and nature of the guarantee was (1) an affidavit by the bank's accountant to the effect that the overdraft in question was secured by the two guarantees referred to above, that of Mrs. Shashoua being the later in time; that Mrs. Shashoua having been called upon to pay she had paid to the bank under her guarantee the sum of £5,453 2s. 2d., but no payments had been received by the bank from McIntosh or Covell under the guarantee given by them; (2) admissions alleged to have been made by the debtor in ground 2 of his notice of opposition, which is set out above; (3) a statement of defence signed by McIntosh as a director and filed on behalf of Harry Rickards' Tivoli Theatres Ltd. in equity proceedings brought against that company by Mrs. Shashoua, which set out that in pursuance of an agreement between Mrs. Shashoua and the company the former gave to the National Bank of Australasia Ltd. a guarantee for the repayment of the overdraft of the company with the bank to the amount of £5,000—(the statement of defence was not sworn); and (4) a conversation between a witness and McIntosh in the course of which the latter was alleged to have admitted that he was present when Mrs. Shashoua (then Miss Joan Norton) executed the document evidencing the guarantee in question.

The evidence in respect of the debt of £99 2s. 2d. showed that this sum represented debt and interest under a judgment of the Supreme

H. C. OF A. 1931.

McINTOSH v. SHASHOUA.

Court of New South Wales obtained on 10th February 1931 by the Permanent Trustee Co. of New South Wales Ltd. against McIntosh and that a writ of *fi. fa.* in connection therewith, issued to the sheriff on 26th February for execution, was returned two days later wholly unsatisfied. By a document executed in New South Wales on 2nd March the Permanent Trustee Co. assigned the judgment debt to Mrs. Shashoua, the whole amount thereof having been received by the company from her attorney duly authorized in that behalf, a written notice of which assignment was, between the hours of 12 o'clock noon and 1 o'clock p.m. of that day, left, in an envelope addressed to him, at McIntosh's last known place of residence situate in Robertson Road, Centennial Park, Sydney, the bankruptcy petition being signed between the hours of 1.30 o'clock p.m. and 2 o'clock p.m. and filed between the hours of 3 o'clock p.m. and 4 o'clock p.m. the same day. On 12th March the amount due under the judgment was, on behalf of McIntosh, tendered to Mrs. Shashoua's attorney, her solicitor, but such tender was refused—the reason given for the refusal being the acts of bankruptcy alleged to have been committed by McIntosh, and other debts owing by him which had been brought under the notice of the petitioning creditor. In the course of cross-examination the attorney under power of Mrs. Shashoua stated that the judgment debt was purchased in order that bankruptcy proceedings might be taken and "to have a second string to my bow." He denied that it was sought to make McIntosh a bankrupt so that at the subsequent examinations information might be obtained from him for use in an action for damages brought by McIntosh against Truth and Sportsman Ltd., the whole of the ordinary shares of which company were owned by the Norton Estate, in which Mrs. Shashoua had an interest, and of the trustees of which he, the attorney, was the chairman. The attorney further stated that when he sent the notice of the assignment of the judgment debt to McIntosh's house, he did not know that the latter was not there; but he learned subsequently that McIntosh had proceeded to Melbourne. The point was not taken at the hearing that the Permanent Trustee Co. of New South Wales Ltd. should have been joined as a co-petitioner, nor was the complete assignment of the judgment debt disputed.

Judge *Lukin* held (1) that the evidence established that McIntosh, with Covell, was a guarantor to the bank for the overdraft in question, and that the guarantee was in such wide terms as to make him in fact and law a co-guarantor with any person guaranteeing such overdraft; (2) that the petitioner was in fact a guarantor contemporaneously with McIntosh and for such overdraft; (3) that the petitioner's claim to contribution from McIntosh in respect of moneys paid by her under the guarantee was a debt sufficient to support the petition; and (4) that the existence of the second debt alleged, namely, £99 2s. 2d., also was sufficient for the purpose of the petition. His Honor made an order of sequestration on the act of bankruptcy alleged.

From this order McIntosh now appealed to the High Court. The grounds of appeal other than those expressly limited to the debt alleged under the guarantees referred to above, were that Judge *Lukin* was in error in making a sequestration order upon the petition of Mrs. Shashoua; that the petition ought to have been dismissed; that his Honor ought to have rejected all the evidence objected to by McIntosh on the hearing of the petition; and that his Honor ought not, in the exercise of his discretion, to have made a sequestation order in respect of the debt of £99 2s. 2d. mentioned in the petition, for the reason that "the respondent purchased the debt assigned to her with the sole object of founding the . . . petition and for improper motives, and after the presentation of the . . . petition the appellant tendered payment to the respondent of the amount due under the judgment . . . but the respondent refused to accept the tender and the appellant is now and always has been ready and willing to pay the amount of the debt . . . to the respondent."

Further material facts appear in the judgments hereunder.

Browne K.C. (with him *Robertson* and *McKell*), for the appellant. The debt of £99 2s. 2d. was purchased for an improper purpose. It was sought to make the appellant bankrupt in order that information might be elicited from him on examination and used against him in an action which he had just commenced. The debt in question was, therefore, purchased with an improper motive and for a purpose

H. C. OF A. 1931. McINTOSH v. SHASHOUA.

foreign to the distribution of the assets of the debtor. Such a circumstance constitutes an abuse of the procedure of the *Bankruptcy Act*, and is a " sufficient cause " within the meaning of sec. 56 (3) (*b*) of the Act why the sequestration order should not have been made (*In re Baker*; *Ex parte Baker* (1)). The case of *Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (2) is distinguishable because the section of the Act there being considered did not contain the words " sufficient cause," and the omission of such words is important (*In re a Debtor*; *Ex parte Lawrence* (3)).

[DIXON J. referred to *Grainger* v. *Hill* (4).]

The Court should look at the whole of the circumstances. The debt in question was purchased for the express purpose of founding a petition in bankruptcy against the appellant, which fact also should bring it within the provisions of sec. 56 (3) (*b*). As to what the position is when it is sought to make a person bankrupt on a debt bought for that purpose, see *King* v. *Henderson* (5) and *Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (2). The case of *King* v. *Henderson* leaves it still open that the Court has a discretion in the matter, and the only question is how ought that discretion to be exercised. This Court has jurisdiction to make whatever order should have been made by the Judge in Bankruptcy (see sec. 37 of the *Judiciary Act* 1903-1927).

[EVATT J. It appears that notice of the assignment of the debt was not given to the appellant personally. Has the requirement of sec. 51 (1) of the *Bankruptcy Act* been satisfied ?]

[*Bowie Wilson*, for the respondent. No question as to the proper service of the notice was raised in the Court below.]

There was no proper assignment of the debt by the Permanent Trustee Co. to the respondent and that company should have been joined as a party to the petition. This point is sufficiently raised in the objections taken to the petition. But if it is necessary to amend such objections, the appellant asks for leave to do so.

GAVAN DUFFY C.J. The majority of the Court thinks that the amendment ought not to be made.

(1) (1887) 5 Morr. 5, at p. 10; 58 L.T. 233, at p. 234.
(2) (1915) 20 C.L.R. 509.
(3) (1928) Ch. 665, at p. 669.
(4) (1838) 4 Bing. (N.C) 212; 132 E.R. 769.
(5) (1898) A.C. 720.

Browne K.C. "Express notice in writing" of the assignment was not "given" to the debtor within the meaning of sec. 12 of the *Conveyancing Act* 1919 (N.S.W.). Sec. 170 of that Act has no application except in the cases where the Act authorizes or requires notice to be served. In order to comply with the requirements of sec. 12 express notice in writing of the assignment must be brought to the actual knowledge of the debtor; there is no evidence that such was done in this case.

[DIXON J. referred to *Dearle* v. *Hall* (1).]

In the circumstances there was no "proof of the debt of the petitioning creditor" as required by sec. 56 of the *Bankruptcy Act* 1924-1930. The liability of the appellant under the guarantees can be determined only by the production in Court of the original documents. The various matters relied upon by the petitioning creditor cannot be accepted as proving such liability. The first essential in ascertaining whether the right of contribution arises under the guarantees is to have the contents fully and properly before the Court (*Rowlatt* on *Principal and Surety*, 2nd ed., p. 223). As to contribution, see *Halsbury's Laws of England*, vol. XIII., p. 30.

Bowie Wilson (with him *W. J. V. Windeyer*), for the respondent. The objections to the petition filed by the appellant contain an admission that he is a co-surety under the guarantees in question. This, taken in conjunction with the evidence of the bank accountant and other evidence before the Court, is sufficient to prove the debt arising thereunder. As soon as it can be shown that one of two guarantors has paid more than his proper proportion of the amount guaranteed, he has, to the extent of the excess paid by him over his share, a debt which, when there has been an act of bankruptcy, will support a petition (*Ex parte Snowdon*; *In re Snowdon* (2)). The debt purchased from the Permanent Trustee Co. is a legal debt of the respondent's, notice of the assignment having been given to the appellant in terms of secs. 12 and 170 of the *Conveyancing Act* 1919. Such notice was required under sec. 12 in order to perfect title and, therefore, by leaving the notice at the last known address of the appellant it was "sufficiently served" within the meaning

(1) (1828) 3 Russ. 1; 38 E.R. 475. (2) (1881) 17 Ch. D. 44.

H. C. OF A. 1931. McINTOSH v. SHASHOUA.

of sec. 170 of the Act. The word "given" in sec. 12 means "served" (*R.* v. *Deputies of the Freemen of Leicester* (1); see also secs. 11 and 85 (1) (*a*) of the *Conveyancing Act*). It is not necessary for the assignor to be joined as a co-petitioner in a petition in bankruptcy presented by the equitable assignee of the debt against the debtor (*Ex parte Cooper*; *In re Baillie* (2)).

[STARKE J. referred to *Williams' Bankruptcy Practice*, 13th ed., pp. 47, 48, "equitable debt."]

The words "in law or equity" as relating to a debt have been omitted from the Federal *Bankruptcy Act*—the *Judiciary Act* rendering such words unnecessary; such omission does not have the effect of altering the bankruptcy law upon the matter: the equitable assignee can enforce his debt without the assistance of the assignor. The debt upon which a bankruptcy petition may be founded may be either a legal debt or an equitable debt. The Federal *Bankruptcy Act* was designed to make this the uniform practice throughout the Commonwealth, and no distinction can be drawn between the two kinds of debt.

[DIXON J. referred to *Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.* (3).]

The applicability of that case depends upon the meaning of the word "debt" in the *Bankruptcy Act*. Nothing was said at the hearing of the petition as to the joining of the assignor; therefore that ground of objection was abandoned by conduct. Further, no mention is made of the matter, or of any alleged defects in the assignment, in the grounds of appeal to this Court. If deemed necessary, the matter should be referred back to Judge *Lukin* to permit of suitable amendments being made. The debt was not purchased for any purpose other than to found a bankruptcy petition thereon, which is permissible (*Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (4)); therefore *Ex parte Griffin*; *In re Adams* (5), is distinguishable. It is not incumbent upon a creditor to accept payment from a debtor after a bankruptcy petition has been filed: if he did so, he would be a preferred creditor in the event of a subsequent petition by another creditor (*In re Gentry* (6)).

(1) (1850) 15 Q.B. 671; 117 E.R. 613.
(2) (1875) L.R. 20 Eq. 762.
(3) (1924) A.C. 1, at p. 14.
(4) (1915) 20 C.L.R. 509.
(5) (1879) 12 Ch. D. 480.
(6) (1910) 1 K.B. 825.

Browne K.C., in reply. The defect in the matter of the parties to the petition can be raised under the grounds of the appeal to this Court. As to whether sec. 55 of the *Bankruptcy Act* relates to an equitable debt as well as to a legal debt, see *Williams* on *Bankruptcy*, p. 46, and also *Yate Lee and Wall, Law and Practice of Bankruptcy*, 3rd ed., p. 63. There was no legal assignment of the debt in question (*National Provincial Bank of England* v. *Harle* (1)). Whether there is a debt or not depends upon the State law. The word "debt" in sec. 55 of the *Bankruptcy Act* means a debt recoverable at law.

Cur. adv. vult.

Nov. 2.

GAVAN DUFFY C.J. AND DIXON J. The sequestration order from which this appeal is brought was made upon a petition alleging two debts. The first of these consists of an equitable liability to the petitioning creditor for contribution as a co-surety. The suretyship of the debtor was incurred separately from the alleged suretyship of the petitioning creditor, who therefore was bound to establish in support of her petition, not only that the debtor had become a guarantor, but that she also had entered into a contract of guarantee with the same principal creditor for the same debt. At the time of the hearing of the petition, a document which she alleged contained her contract of guarantee was in England, and she was obliged to resort to proof of admissions by the debtor as a substitute for primary evidence of the document. In our opinion she failed to adduce sufficient proof that she had become a co-surety with the debtor. The second of the two debts alleged in the petition consisted of a judgment debt of more than £50 which the judgment creditor had assigned in writing to the petitioning creditor. The assignment was obtained some hours only before the petition was filed. But before the filing of the petition, notice in writing addressed to the debtor was left at his last known residence. Upon this appeal the question was raised whether sec. 170 of the *Conveyancing Act* 1919 (N.S.W.) operated to authorize this mode of serving notice of assignment of a chose in action, and whether in order to constitute a legal assignment actual notice must not be given to the person liable. On the

(1) (1881) 6 Q.B.D. 626.

H. C. OF A. 1931.

McINTOSH v. SHASHOUA.

Gavan Duffy C.J. Dixon J.

other hand, it was said to be immaterial whether the assignment was legal or equitable, because the equitable assignee of a legal debt may present a petition in bankruptcy against the debtor although the assignor is not joined in the petition. For this position *Ex parte Cooper*; *In re Baillie* (1), was relied upon—a decision which is supported by *In re Montgomery Moore Ship Collision Doors Syndicate Ltd.* (2) and *In re Steel Wing Co.* (3). These questions were not raised upon the hearing of the petition before the Court of Bankruptcy, although one of the grounds taken in the notice of opposition was that the judgment creditor should have been joined as a party to the petition. In that Court it would have been open to the petitioning creditor to apply for an amendment of the petition by joining the assignor, the judgment creditor, and, if this course had been adopted, the questions would not have remained open for decision. It is not in accordance with the practice of this Court to permit to be raised for the first time upon appeal an objection which is procedural in character, and remediable in the Court below. It is, therefore unnecessary to express any opinion upon the sufficiency of the notice given to the debtor to complete a legal assignment, or upon the competence of the equitable assignee of a legal debt to petition without joining the assignor. It was urged, however, that a sequestration order ought not to have been made with this debt as its foundation, because the Court of Bankruptcy should have been satisfied that for a sufficient cause no order ought to be made (sec. 56 (3) (*b*) of the *Bankruptcy Act* 1924-1930). The petition was presented by the attorney under power of the petitioning creditor, and the cause relied upon consisted in the motives by which he was actuated in purchasing the debt and presenting the petition. These motives were investigated in the Court below, but it was not shown that the attempt to obtain a sequestration order had any collateral purpose. It was, of course, admitted that the debt was purchased for the very purpose of presenting the petition. But the evidence is consistent with the view that the object of seeking a sequestration order was to have the debtor's assets applied towards satisfying the claims of the petitioning creditor as well as of other creditors,

(1) (1875) L.R. 20 Eq. 762.
(2) (1903) 72 L.J. Ch. 624; 89 L.T. 126.
(3) (1921) 1 Ch. 349.

and that the debt was purchased because of the difficulties known to exist in adducing formal proof of the debtor's liability for contribution as a co-surety. Although the facts upon which this liability would arise could not be proved by admissible evidence in these proceedings, it appeared that the petitioning creditor's attorney bona fide believed in the existence of the liability. An attempt to use bankruptcy proceedings for the purpose of obtaining a collateral advantage is sufficient to disentitle the petitioning creditor to an order although the attempt is unsuccessful (per *Lawrence* L.J. in *In re a Debtor* (1)). But if the object of the bankruptcy proceedings is legitimate, and is not foreign to their purpose, it is not in itself a sufficient objection that the petitioning creditor's debt was acquired in order to enable him to petition in bankruptcy (*Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (2); *In re Baker*; *Ex parte Baker* (3)). The fact that after the presentation of the petition the debtor tendered payment of the assigned debt and the tender was refused cannot in this case affect the result. A petitioning creditor is entitled to refuse payment and proceed with the petition (*In re Gentry* (4)). The refusal of the tender in this case is consistent with the conclusion, if it does not strengthen it, that the petitioner truly desired to obtain a sequestration order; and it in no way tends to show that the reason why such an order was desired was anything but legitimate.

We think that the appeal should be dismissed.

Starke J. This is an appeal against a sequestration order made against Hugh Donald McIntosh on the petition of Joan Shashoua. The order was attacked upon two grounds: first, that the petitioning creditor was not entitled to present a petition because no debt was owing by the debtor to her; secondly, that there was "other sufficient cause" for not making the order.

Under sec. 55 of the Federal *Bankruptcy Act*, a creditor is not entitled to present a petition against a debtor unless the *debt* owing by the debtor to him amounts to £50. And it was contended that the petitioning creditor's debt must be a debt due at law, and not

(1) (1928) Ch. 199, at p. 212.
(2) (1915) 20 C.L.R. 509.
(3) (1887) 5 Morr. 5; 58 L.T. 233.
(4) (1910) 1 K.B. 825.

H. C. OF A. 1931.

McINTOSH v. SHASHOUA.

Starke J.

in equity. Under the English law before the *Bankruptcy Act* 1869, this was undoubtedly the rule (*Watson* v. *Humphrey* (1); *Ex parte Blencowe*; *In re Blencowe* (2)). Where the debt, however, was vested in a mere trustee for an absolute beneficial owner, the trustee could not—with some exceptions—alone sustain a petition for adjudication, and the beneficial owner must have joined (*Ex parte Culley*; *In re Adams* (3); *Ex parte Dearle*; *In re Hastings* (4)). The English *Bankruptcy Act* 1869 provided that the debt of the petitioning creditor "must be a liquidated sum due at law or in equity," and although these words do not appear in the English Acts of 1883 and 1914, the better opinion is that the word "debt" in those Acts includes an equitable debt (*Williams' Bankruptcy Practice*, 13th ed., pp. 47-48; *Wace* on *Bankruptcy*, p. 55; *In re Steel Wing Co.* (5)). *Cotton* L.J., however, said in *Ex parte Culley*; *In re Adams* (6):—"The words are, 'must be a liquidated sum due at law or in equity.' I do not think that means to deal with the question whether there is a title in equity as distinguished from the title at law, but it means simply that a debt in equity, an equitable debt, or a debt at law, a legal debt, will be either of them sufficient to support a petition, and it in no way deals with the person who must come before the Court representing the debt." However, in *Ex parte Cooper*; *In re Baillie* (7), *Bacon* C.J. held that the equitable assignee of a legal debt could present a bankruptcy petition against the debtor without joining the assignor as a co-petitioner. And that decision has been applied in the analogous case of a petition for the winding up of a company by a creditor (*In re Montgomery Moore Ship Collision Doors Syndicate Ltd.* (8); *In re Steel Wing Co.* (9); *Buckley, Companies Acts*, 11th ed., pp. 363-367). In *Re Paravicini* (10) Judge *Lukin* expressed the opinion that both legal and equitable debts were debts within the meaning of sec. 55. The history of the bankruptcy law in Australia supports this view, for in all the States except Western Australia, debts, whether due at law or in equity, were sufficient to ground a petition against a debtor. In Western

(1) (1855) 10 Ex. 781; 156 E.R. 656.
(2) (1866) 1 Ch. App. 393.
(3) (1878) 9 Ch. D. 307.
(4) (1884) 14 Q.B.D. 184.
(5) (1921) 1 Ch., at p. 355.
(6) (1878) 9 Ch. D., at p. 311.
(7) (1875) L.R. 20 Eq. 762.
(8) (1903) 72 L.J. Ch. 624.
(9) (1921) 1 Ch. 349.
(10) (1930) 3 A.B.C. 15.

Australia the *Judicature Act* was in force, and its *Bankruptcy Act* of 1892 was taken from the English Act of 1883, in which the words "whether due at law or in equity" were omitted. So it is undoubted that a debt, whether due at law or in equity, was sufficient to found a creditor's petition in all the Australian States before the passing of the Federal *Bankruptcy Act* 1924. The language of that Act is not so compelling that it must be construed in a sense contrary to the same words in the present English *Bankruptcy Act*, or to the bankruptcy law previously in force in all the States of Australia. Moreover, there seems no reason why a petition presented by a debtor himself should not be founded upon the allegation of inability to pay his debts or obligations in equity.

The petition in the present case alleged that McIntosh was indebted to the petitioner in the sum of £1,558, being the amount of contribution payable by him to her in respect of certain guarantees, and was also further indebted to her in the sum of £99 2s. 2d., being the amount payable to her as assignee from the Permanent Trustee Co. of New South Wales Ltd. of a judgment obtained against him by the said company. The former allegation was not technically proved, but the latter was established. It was argued, however, that though the petitioner had an assignment of the judgment, still express notice in writing had not been given to the debtor of the assignment, and consequently that the legal right to such judgment debt did not pass to the petitioner but only a right enforceable in equity (*Conveyancing Act* 1919 (N.S.W.) sec. 12). In answer to this contention sec. 170 of the same Act was referred to, which permits any notice required or authorized by the Act to be served in writing to be delivered personally or left at the last known place of abode of the person to be served (cf. English *Law of Property Act* 1925 (15 Geo. V. c. 20), secs. 136, 196). I do not feel called upon to express any opinion upon the contention. Assignees, however, of debts or other legal choses in action should remember that sec. 12 requires express notice in writing to the debtor. It is enough for present purposes to say that I think the assignee in equity of a legal debt can present a petition in bankruptcy against the debtor without joining the assignor as a co-petitioner.

H. C. OF A. 1931. McINTOSH v. SHASHOUA. Starke J.

The practice of the Court of Chancery made it generally necessary for the assignee to sue in the assignor's name, or at any rate to make the assignor a party to the proceedings, on one side or the other, so that the rights of all persons interested might be bound and the party proceeded against protected from further suit or molestation respecting the same matter (*Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.* (1)). In my opinion, however, this practice, as the cases show, was not so rigidly applied in petitions by creditors in bankruptcy or in the winding up of companies, for the effect of a sequestration or winding-up order was to make the property of the debtor or of the company available for the discharge of his or its liabilities. The Acts enabled a creditor who had a debt whether due at law or in equity to petition for such an order.

The second ground of attack was founded upon sec. 56 (3) (*b*) of the Federal *Bankruptcy Act*: "If the Court . . . is satisfied . . . that for other sufficient cause no order ought to be made, it may dismiss the petition." The Court will not allow proceedings in bankruptcy to be taken for an improper purpose. But there is nothing improper in a creditor who has bona fide claims against the debtor, or whose debt is insufficient to support a petition, buying up another debt for the purpose of having the debtor's assets protected and distributed in bankruptcy (*King* v. *Henderson* (2)). It is plain in this case that the petitioner had no other purpose, though offered payment of the judgment debt after the petition had been lodged. It would be quite contrary to the spirit of the *Bankruptcy Act* to compel a creditor to receive payment of the debt after an available act of bankruptcy had been committed (*Brook* v. *Emerson* (3); *In re Gentry* (4)).

For these reasons this appeal should, in my opinion, be dismissed.

EVATT J. The respondent, Joan Shashoua, formerly Norton, of London, by her attorney, W. A. Windeyer, a Sydney solicitor, successfully petitioned the Commonwealth Court of Bankruptcy to make a sequestration order in respect of the estate of Hugh Donald McIntosh, the present appellant.

(1) (1924) A.C. 1.
(2) (1898) A.C. 720.
(3) (1906) 95 L.T. 821.
(4) (1910) 1 K.B. 825.

The act of bankruptcy alleged was that execution was issued in respect of a judgment obtained against the respondent in the Supreme Court of New South Wales by the Permanent Trustee Co. of New South Wales Ltd. and such execution was "returned unsatisfied." It was not questioned that such act of bankruptcy had been committed, although a perusal of the writ of *fi. fa.* and the return thereto gives rise to considerable doubt upon the matter. The only grounds of appeal debated before this Court were (1) whether the respondent was entitled to present the petition; (2) whether the Court of Bankruptcy should have dismissed the petition for "other sufficient cause" within the meaning of sec. 56 (3) (*b*) of the *Bankruptcy Act* 1924-1930.

In order to qualify as a petitioning creditor, the respondent first relied upon an alleged debt of £1,558 0s. 9d., being the amount of contribution supposed to be payable to her by the debtor because he was a co-surety with her in respect of two guarantees to secure the indebtedness of a company known as Harry Rickards' Tivoli Theatres Ltd. to the National Bank of Australasia Ltd.,—one, limited to £5,000 and interest, given by the petitioner, the other, limited to £2,000 and interest, given by the debtor jointly and severally with one Edmund Covell.

Judge *Lukin* held that the petitioner's contract of guarantee, which document was not produced, made her responsible for the same principal debt as that for which the debtor and Covell became responsible by virtue of a document dated May 3rd, 1926. The latter document was put in evidence. The validity of his conclusion depends upon whether the petitioner's contract with the bank was sufficiently proved. What evidence was there of this?

The first piece of evidence relied on is that said to be contained in the Court documents filed in certain proceedings in the Supreme Court of New South Wales in Equity, the parties to which were the present petitioner and Harry Rickards' Tivoli Theatres Ltd. In those proceedings the petitioner alleged the existence of a contract in writing, dated September 27th, 1929, and the fact that she thereby became surety for all debts present and future, owing from the defendant company to the National Bank of Australasia Ltd. The statement of defence of the company had affixed to it

H. C. OF A. 1931.

McINTOSH v. SHASHOUA.

Evatt J.

its common seal in the presence of the appellant debtor, who was one of the board of directors. Par. 2 of the statement of defence confessed the allegation of the existence of the contract of guarantee and attempted to avoid it. But par. 1 of the defence also disputed the summary of its contents contained in the statement of claim, and required its production. It is not possible to infer from these circumstances any admission by McIntosh personally, of the existence of the contract of guarantee alleged in the suit.

Next it was said that Mr. Windeyer, the petitioner's solicitor, obtained an admission from McIntosh, which, according to the rule in *Slatterie* v. *Pooley* (1), sufficiently proved the existence and contents of the missing document. The suggestion is that, during a conversation the debtor admitted that he took Mrs. Shashoua to the bank in London and that she there signed a document of guarantee in his presence. But the precise document discussed between Windeyer and the debtor was not produced in the Bankruptcy Court, and the evidence as to the supposed admission either of the existence of its original or of its terms is extremely vague and shadowy, and it is impossible to act upon it.

In my opinion there was a complete failure to prove the existence of any petitioning creditor's debt arising from the alleged relation of co-suretyship between the petitioning creditor and the debtor.

But a second debt of £99 2s. 2d. was relied upon by the petitioner. The circumstances surrounding the creation of this debt were peculiar. At all material times Mr. W. A. Windeyer held a power of attorney from the petitioner, and he was the active agent throughout.

On February 19th, 1931, the Permanent Trustee Co. of New South Wales Ltd. signed judgment against the debtor in an action it had brought against him in the Supreme Court of New South Wales.

On February 24th, 1931, the board of directors of the judgment creditor carried a resolution which gave express authority to its manager, J. W. Barnes, to sign an assignment of the judgment debt to the petitioning creditor. On February 26th, 1931, a writ of *fi. fa.* was issued out of the Court by the attorney for the company,

(1) (1840) 6 M. & W. 664; 151 E.R. 579.

and on the same day it was delivered to the sheriff for execution. On February 27th the sheriff returned the writ "nulla bona." No written answer was made to the command of the Court in respect of any other assets of the debtor. The return was, at least, irregular.

On March 2nd, 1931, the judgment debt, together with interest, amounting in all to the sum of £99 2s. 2d. was still owing to the Trustee Co. by the debtor. On that day the deed of assignment was executed and handed to Windeyer. It assigned to the petitioning creditor the judgment debt and interest thereon in consideration of the payment of the sum of £99 2s. 2d. Mr. Windeyer then caused the deed to be lodged at the Stamp Duties Office for stamping. Before 11.30 a.m. the assignment had been duly stamped and was lifted. Windeyer then had a letter, dated the same day, March 2nd, enclosed in an envelope addressed to McIntosh, and left at his Sydney residence between 12 noon and 1 p.m. It appears that the present bankruptcy petition had already been prepared at Mr. Windeyer's office, probably before the execution of the actual deed of assignment by the Trustee Co., because neither the letter notifying the fact of assignment, nor the petition itself, contained the actual date of the assignment by the company to Joan Shashoua. The debtor was in Melbourne on March 2nd and the letter was not given to him on that day. But the petition was presented to the Court of Bankruptcy at Sydney on March 2nd, and the date of hearing fixed for March 19th. On March 6th a copy of the petition was served on the debtor, who was still in Melbourne. On March 12th the debtor, through his solicitor, offered to pay the amount of the debt to the petitioner, but Windeyer refused to accept such tender "in view of the acts of bankruptcy which your client has already committed, and in view of the other debts of which we have had notice."

Mrs. Shashoua gave no express authority to her attorney Windeyer to procure the assignment of the judgment debt. In his notice of intention to oppose the petition, the debtor claimed that the circumstances justified the Court in exercising a discretion to refuse the sequestration order, and that the Permanent Trustee Co. was a necessary party to the petition.

H. C. OF A. 1931. McINTOSH v. SHASHOUA. Evatt J.

Some time before the judgment was obtained by the Permanent Trustee Co., "Truth" newspaper—conducted by Truth and Sportsman Ltd.—the whole of the ordinary shares in which were owned by the estate of John Norton deceased—had published an article referring to the debtor. Mrs. Shashoua, who was the daughter of the late John Norton, had a substantial interest in the estate. Windeyer was solicitor for the company and chairman of the trustees of the estate. The article was not tendered, but there is sufficient evidence to show that it imputed that McIntosh was either bankrupt or insolvent. He, therefore, issued a writ for libel against the company claiming damages, and such action was pending in February and March last. The cross-examination of Mr. Windeyer reads as follows :—

> Q. "You did not want Mr. McIntosh to have an opportunity of paying that money before you filed the bankruptcy petition ?" A. "I could not; I knew he had been guilty of acts of bankruptcy."
>
> Q. "Just answer the question ?" A. "No."
>
> Q. "If he had tendered the money before you filed the petition, you would not have accepted it ?" A. "There would hardly have been time for him to do it, it was so quick. I filed the petition immediately after."
>
> Q. "If he had tendered the money, you would not have accepted ?' A. "I do not know."
>
> Q. "You did not intend to accept it ?" A. "I would have taken counsel's advice what my duty was."
>
> Q. "You did not want him to tender the money before you filed the petition ?" A. "I wanted to make sure of making Mr. McIntosh bankrupt."
>
> Q. "That was your object in buying this debt ?" A. "Yes."

The question whether the object of the bankruptcy proceedings, initiated by Windeyer in March, was to assist "Truth" in its libel action against McIntosh does not seem to have been fully investigated at the hearing. The evidential effect of a sequestration order dated March 1930, in a common law action of damages for a libel published in New South Wales several months earlier, need not be discussed. Under the practice of that State such an order may be admissible in evidence, even where the statutory defence of truth and public benefit has not been pleaded; the theory being that, although the law refuses to regard the truth of the matters charged as a defence, yet proof of the truth of some of the matters charged "mitigates" damages. Whether the fact of the making of the sequestration order after the publication of the libel would tend to

prove the truth of any of the matters charged against the plaintiff, would depend upon the terms of the publication and the generality of the innuendo assigned thereto by the plaintiff. But neither the publication nor the pleadings were put in evidence before the Bankruptcy Court,

If it was proved that the object of the petitioning creditor and the person acting for her was to affect and prejudice the pending libel action by having the fact of bankruptcy accomplished at the time of hearing, and not to have the estate of the debtor administered in bankruptcy; these facts, coupled with the other circumstances of the case, should have proved sufficient for the Court's refusing to make a sequestration order. One of such circumstances is that before the act of bankruptcy was committed, the judgment creditor and the agent of the petitioner had made an agreement to cause an assignment of the debt. Was it in pursuance of an agreement that execution was issued by the company against McIntosh? And why was the course of executing a *fi. fa.* adopted, instead of the issue of a bankruptcy notice? Would a bankruptcy notice have resulted in prompt payment? Was satisfaction of the debt desired or intended? Was the assignment taken for the purpose of procuring an act of bankruptcy? It is not possible in view of the evidence before us, to reach any findings on these points.

In my opinion the sequestration order should be discharged upon a point of law which prevents the petitioning creditor from relying upon the assigned debt as a good petitioning creditor's debt.

Sec. 55 (1) of the *Bankruptcy Act* disables a creditor of a person from presenting a petition unless "the debt owing by the debtor to him" (*a*) is a liquidated sum, payable either immediately or at some certain future time, and (*b*) amounts to £50. On March 2nd, when the petition was presented, did McIntosh "owe" a "debt" of £99 2s. 2d. to Joan Shashoua?

The power of the Commonwealth Legislature in respect of bankruptcy and insolvency enables it to legislate upon that subject matter and upon matters incidental thereto. It was competent to the Parliament to define and limit the species of obligation to be proved so as to entitle one person to institute bankruptcy proceedings against another. But Parliament has left the determination of

H. C. OF A. 1931.

McINTOSH v. SHASHOUA.

Evatt J.

the existence of a valid petitioning creditor's debt to be made according to the rules governing the choice of the appropriate law for the time being, and it is necessary in any particular case to ascertain what law is to be chosen and to apply it to the proved facts.

In the present case it is clear that the law to be applied to the facts is that of the State of New South Wales.

The debt in question came into existence by reason of a judgment of its Supreme Court. In that State and according to its laws, the assignment of the judgment debt took place. There, all the parties concerned resided, and the debt was situate in New South Wales. In short, all material circumstances happened in that State.

It will be observed that sec. 55 (1) of the *Bankruptcy Act* postulates, not only the existence of a debt, but a specific relationship between debtor and creditor in respect of the debt. It is true that McIntosh was "in debt" on March 2nd to the extent of £50, and that there was no legal obstacle to his presenting a debtor's petition under sec. 57, alleging inability to pay "his debts." Sec. 57 calls for the existence of debts, but it does not call for any relationship between debt, creditor and debtor. The inquiry under sec. 55 is whether, on the application of the law of New South Wales to the facts existing on March 2nd, McIntosh owed £99 2s. 2d. to the petitioner, such sum being payable immediately or at some future time. The answer to this question involves a consideration of sec. 12 of the *Conveyancing Act* 1919 (N.S.W.), which is included in Part II., Division 1, dealing with certain "rules of law" affecting property. The rule of law contained in sec. 12 is taken verbatim from the English *Judicature Act*, 36 & 37 Vict. c. 66, sec. 25 (6). If express notice in writing of an absolute assignment of a debt is given to the debtor, then, but not till then, the assignee obtains the legal right and the legal remedy to the debt.

But it is suggested that compliance with sec. 170 of the Act enables a notice of assignment to operate under sec. 12, although it is not given to the debtor at all. In my opinion sec. 170 does not apply so as to entitle the assignee of the debt to avail himself of the terms of sec. 12 without giving actual notice in writing to the debtor. The binding rule of law in sec. 12 is that, if "express notice in writing" is given to the debtor, certain legal consequences

follow. It is not accurate to say that the notice described in sec. 12 is "required or authorized" to be given by the Act. Sec. 170 deals only with notices in a general sense and it provides that they must be written. But writing is already treated as a necessary part of the express notice mentioned in sec. 12. One of the objects of the giving of notice to the debtor is that he shall "know with certainty" in whom the legal right to sue him is vested. He cannot "know with certainty" when all that happens is that an envelope is thrown under his front door during his absence in another State. I have used the phrase quoted from *Durham Brothers* v. *Robertson* (1), where *Chitty* L.J. said: "Where the Act applies it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred." This all proves the necessity of limiting the consequences mentioned in sec. 12 to the instances which are therein specified. In short, sec. 12 is not to be limited or construed by reference to sec. 170. The rule of law is enacted. It relates to the "protection of the original debtor and placing him in an assured position" (1).

It follows that, on March 2nd, 1931, McIntosh was in this position:—The Permanent Trustee Co. was still entitled to sue him at law on the judgment, but Mrs. Shashoua was entitled to institute a suit against him in the Supreme Court of New South Wales in its equitable jurisdiction. In the latter case, it was necessary for her to join the Trustee Co. as a party to the suit, in order that it should also be bound by the decree and prevented from suing at law for the debt.

In these circumstances it is not true to say, without qualification, that, on March 2nd, merely by reason of the deed of assignment, McIntosh "owed" a "debt" of £99 2s. 2d. to Mrs. Shashoua. No doubt the decree of the Equity Court, when made, would have ordered McIntosh to pay Mrs. Shashoua that sum of money. And, when made, it might possibly be described as an "equitable debt" owing by him to her. Of this phrase, *Jessel* M.R. said in *Ex parte Jones*; *In re Jones* (2):—"I use the words 'legal debt' advisedly; of course there can be no other debt than a legal debt, but the inaccurate phrase 'equitable debt' has crept into the books. But

(1) (1898) 1 Q.B. 765, at p. 773. (2) (1881) 18 Ch. D. 109, at p. 120.

H. C. OF A. 1931.

McINTOSH v. SHASHOUA.

Evatt J.

this liability is not really a debt at all, it is only a liability in equity to pay a sum of money, and whenever a debt is required by law in order to found any proceedings, this equitable liability will not be enough." Before suit, McIntosh's obligation in relation to the petitioner did not possess the special character or quality of a debt owing to her by him. She could not sue for its recovery as a debt in any Court in the State of New South Wales. According to the law of that State, McIntosh, on March 2nd, could safely pay the Trustee Co. and could safely pay no one else. The tripartite relationship existing between these two parties and the petitioner could not be fully or accurately described by the statement that McIntosh owed a debt of £99 2s. 2d. to the petitioner.

In my opinion this Court is bound to take notice of the fact that the petitioning creditor was not qualified to present the petition, because the Court of Bankruptcy should have inquired into the matter in accordance with the mandate of sec. 56 (2) (*a*) of the Act, which says: "At the hearing, the Court (*a*) shall require proof of the debt of the petitioning creditor." It is important to note that the Court of Appeal has expressed the opinion that "proceedings in bankruptcy are in the nature of penal proceedings inasmuch as they result or may result in an alteration of the debtor's status." These are the words of Lord *Wrenbury* in *In re a Debtor* (1). Lord *Moulton*, in the same case, treated a sequestration order as being "in the highest degree penal in its consequences" (1). The point is not one of practice or procedure but of substantive law. It is not a mere matter of formally adding the Permanent Trustee Co. as a party to the petition. The question is, has there been obedience to the command of the statute? In my view there has not, and effect should now be given to the point that, under the statute, the petitioner did not have a right to present the present petition on March 2nd, when the assignment had not been completed.

I think the opinion I have expressed is supported by the observations of *Jessel* M.R. in *Ex parte Jones*; *In re Jones* (2), already quoted. In *Caddy* v. *Beattie* (3) *Cussen* J. said: "I have some

(1) (1910) 2 K.B. 59, at p. 66.
(2) (1881) 18 Ch. D., at p. 120.
(3) (1908) V.L.R. 17, at pp. 19, 20; 29 A.L.T. 165, at p. 167.

doubt whether in a case like this, unless the assignment is a legal assignment completed by written notice under the *Supreme Court Act*, the plaintiffs have a right to say that this is a 'debt or liquidated demand' within the meaning of Order III., r. 6." This doubt is, I think, well founded.

Certain English cases which have treated an "equitable debt" as sufficient basis for a creditor's petition, seem to depend upon two circumstances. The first was the introduction of the Judicature system with its "fusion" of law and equity. But this system does not apply in New South Wales, and the position may be different when the law to be chosen for the purpose of deciding the question of a petitioning creditor's debt, is not that of New South Wales.

The second circumstance which influenced the English Courts was the inference that, by its omission of the phrase "due at law or in equity" from the stated requirement of the petitioner's debt, the British Parliament did not intend—in the *Bankruptcy Act* 1883—to alter the scope of the Act of 1869. The position is different in Australia where, in 1924 for the first time, the Parliament of the Commonwealth exercised its legislative power on the subject matter, with a knowledge of the legal position in New South Wales, and deliberately omitted any reference to "debt, . . . whether due at law or in equity," the words which had appeared in the bankruptcy legislation of that State (New South Wales *Bankruptcy Act* 1898, sec. 6 (*b*)). In these circumstances, the reasonable inference is that the Commonwealth Parliament, having no control over the subject matter of debt as such, was content to leave the admeasurement of a good petitioning creditor's debt and of the relationship between such creditor and debtor, to the appropriate law for the time being. I do not think that the English cases and practice are applicable.

In my opinion, therefore, the appeal should be allowed and the order of sequestration should be discharged.

McTIERNAN J. I agree that the appeal must be dismissed. A question was raised by the appellant at the hearing of this appeal whether a notice in writing of an assignment under sec. 12 of the

H. C. OF A. 1931. McINTOSH v. SHASHOUA. McTiernan J.

Conveyancing Act 1919 could be given by the method prescribed in sec. 170 (1) (*b*) of that Act, for serving a notice which is required or authorized by the Act to be served. That question does not appear to have been raised at the hearing of the petition. Indeed, his Honor said in his judgment :—" The existence of the second debt alleged is sufficient for the purpose of the petition. Its complete assignment is undisputed." But, in my view, it would not be necessary to express an opinion on that question, even if it could be properly raised in this appeal. I agree in the opinion of my brother *Starke*, in which he rejects the contention of the appellant that an equitable debt cannot sustain a petition in bankruptcy. There is not, in my opinion, any expression of legislative intention in secs. 54 and 55, or in any part of the Act, which renders it necessary that the meaning of the word " creditor " should be restricted to creditor at law, and of the words " the debt owing by the debtor to him " and " the debt is a liquidated sum " should be restricted to a debt at law or a legal debt. Furthermore, if reference is made to sec. 57, I cannot see any indication that the Legislature intended that the word " debts " should not include equitable debts. The principles stated in the authorities cited by my brother *Starke*, and his review of the history of the legislation relating to the subject of bankruptcy, in my opinion fully support this view of the Act.

In dealing with the debt of £99 2s. 2d. as a debt in equity, the question arises whether the sequestration order should be discharged, on the ground that the assignor or trustee was not a party to the petition. This ground of opposition to the making of a sequestration order on the petition was taken in the appellant's notice of intention to oppose the petition. However, it was not mentioned at the hearing. Probably it was not considered material, because the learned Judge said : " The complete assignment of the debt is undisputed." The notice of appeal does not specially take it as a ground of appeal. I do not think the sequestration order in this case should be discharged on account of the non-joinder of the assignor. In *Ex parte Cooper*; *In re Baillie* (1), it was held that in that case the assignee was entitled to present the petition alone. The report mentions that the assignor refused to join in the petition.

(1) (1875) L.R. 20 Eq. 762.

It has been decided that a mere trustee of a debt for an absolute beneficial owner, which is the converse of this case, is not entitled to present a bankruptcy petition against the debtor unless the cestui que trust, if capable of dealing with the debt, joins as a co-petitioner (*Ex parte Culley*; *In re Adams* (1); *Ex parte Dearle*; *In re Hastings* (2)). The reason for that rule was stated by *James* L.J., in the former case, in these words (3):—"But there is nothing in the *Judicature Act*, or in sec. 6 of the *Bankruptcy Act*, to alter the old rule of law or practice of the Bankruptcy Court, that for the safety of mankind the beneficial owner must join in the requisite oath, that the money is justly and truly due, that it has not been paid, and that he has no security for it. It was considered not sufficient to have only the oath of a man to whom in fact not a farthing was due, and who might know nothing at all about the security which the real owner had got." *Cotton* L.J., speaking on the same subject, said (4):—"But if it turned out that, although he was entitled to the legal debt, that is, entitled at law, he was not absolutely entitled to it by reason of there being a beneficial ownership in some one else, and the beneficial owner was a person who had it in his power to deal as he thought fit with the debt, either by releasing it or by receiving it, then the practice in bankruptcy was that the beneficial owner must join in the petition with the legal creditor, for the purpose of satisfying the Court that the debt had not been released or paid." (See also *In re Ellis*; *Ex parte Hinshelwood* (5); *Ex parte Owen*; *In re Owen* (6).) The source of the above-mentioned rule was described by *Vaughan Williams* J. in *In re Maund*; *Ex parte Maund* (7). His Lordship said:—"In all those cases, however, it will be seen that the person added was not essential to the petition by virtue of the requirement of the Act, but only by virtue of the rules of practice of the Bankruptcy Court. That is the explanation of the addition of the cestui que trust in *Ex parte Dearle*; *In re Hastings*. In *Ex parte Owen*; *In re Owen*, the actual amendment was not made; it was only suggested that it might be made."

(1) (1878) 9 Ch. D. 307.
(2) (1884) 14 Q.B.D. 184.
(3) (1878) 9 Ch. D., at p. 309.
(4) (1878) 9 Ch. D., at p. 310.
(5) (1887) 4 Morr. 283 (C.A.).
(6) (1884) 13 Q.B.D. 113, at p. 116.
(7) (1895) 1 Q.B. 194, at p. 197.

H. C. OF A. 1931. McINTOSH v. SHASHOUA. McTiernan J

If the Permanent Trustee Co. of New South Wales Ltd. had been joined, it would have been as a formal party only. I cannot see any ground for contending in this case that any injustice has been caused by the omission to join it (sec. 7 of the Commonwealth *Bankruptcy Act*). In *Re Ireland*; *Ex parte Billyard and Bridges* (1), *A. H. Simpson* C.J. in Eq., in dismissing an appeal against a sequestration order, held that the objections which were made to the sequestration order were purely technical, and in the course of his judgment quoted the following passage from the judgment of the Master of the Rolls in *In re Thurlow*; *Ex parte Official Receiver* (2):— "Of all the procedures in our Courts, that of the Court of Bankruptcy will be the first to brush aside all technicalities to get at what is fair and just. Dr. *Lushington* used to say of Admiralty law that it was wider than equity or common law, and that the Admiralty Court administered the law according to natural justice. That is also the rule in bankruptcy. In construing an Act of Parliament the Court will, if it can, so construe the Act as to leave the greatest latitude in the Court of Bankruptcy. Administration in bankruptcy is under the control of the Court, except where it is limited by Act of Parliament. It is not the creditors who administer bankruptcy law; it is no part of the rights of the debtor to interfere; no official receiver has a right to interfere, except subject to the control or orders of the Court; and no department of Government has any right to interfere. It is the Court of Bankruptcy alone that controls the administration through its officers, and above them is this Court of Appeal." Sec. 7 (1) of the Commonwealth *Bankruptcy Act* is similar in substance to sec. 151 (1) of the *Bankruptcy Act* which was in force in New South Wales when *Re Ireland*; *Ex parte Billyard and Bridges* was decided.

I agree that there was no admissible evidence sufficient to prove the liability of the appellant as a co-surety of the petitioner to make any contribution to her in respect of moneys paid by her as a guarantor. In face of the authority of *King* v. *Henderson* (3) and *Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (4), it cannot

(1) (1897) 18 N.S.W.L.R. (Bkcy.) 33.
(2) (1895) 2 Mans. 158, at p. 160, 161; (1895) 1 Q.B. 724, at p. 729
(3) (1898) A.C. 720.
(4) (1915) 20 C.L.R. 509.

be successfully contended that the evidence proves that there is "other sufficient cause" why the sequestration order should not have been made.

His Honor was correct in not allowing the objection to the making of the sequestration order founded on the appellant's tender of the amount of the assigned debt after service of the petition (*In re Gentry* (1)).

Appeal dismissed.

Solicitor for the appellant, *D. R. Hall.*

Solicitors for the respondent, *W. A. Windeyer, Fawl & Co.*

J. B.

H. C. OF A. 1931.

McINTOSH v. SHASHOUA.

McTiernan J.

Dist A-Gs Ref No2 of 1987 46 SASR 275

Cons Attorney-General's Reference (No2 of 1993) (1994) 73 ACrimR 567

Cons R v Simmons (1997) 68 SASR 81

1) (1910) 1 K.B. 825.

Cons R v Simmons (1997) 68 SASR 81

[HIGH COURT OF AUSTRALIA.]

CHEERS . . . . . APPLICANT;
DEFENDANT,

AND

PORTER . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Evidence—Larceny—Witness—Child—Intelligent, but no religious beliefs—Competency to take oath—Declaration in lieu—"Any person"—Corroboration—Conviction upheld—Oaths Act 1900 (*N.S.W.*) (*No.* 20 *of* 1900), *sec.* 13*—*Crimes Act* 1900-1929 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 2 *of* 1929), *sec.* 418—*Child Welfare Act* 1923 (*N.S.W.*) (*No.* 21 *of* 1923), *sec.* 110.

A charge of larceny against the defendant was proved by the unsworn and uncorroborated evidence of a boy aged nine years. Prior to the giving of

H. C. OF A. 1931.

SYDNEY, *Nov.* 26; *Dec.* 17.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

* The *Oaths Act* 1900 (N.S.W.), by sec. 13, provides as follows:—"(1) Whenever any person—(*a*) called as a witness in any Court or before any justice or other person authorized to administer an oath, whether in a civil or criminal proceeding, or (*b*) having to make a statement in any information, complaint, or proceeding in any Court or before any justice, or (*c*) required or