[HIGH COURT OF AUSTRALIA.]

GROWDEN . . . . . APPELLANT;

AND

WILTSHIRE . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF BANKRUPTCY.

H. C. OF A. 1935.

MELBOURNE, *May* 9.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Bankruptcy notice—Petition—Creditor, a company in liquidation—Notice and petition in name of liquidator—Amendment to name of company—Liquidator—Whether a creditor in respect of a judgment debt of the company—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 52 (*j*)* *and* 53—*Companies Act* 1892 (*No.* 557) (*S.A.*), *sec.* 117.*

A bankruptcy notice in the name of the official liquidator of a company was served upon the debtor, who was directed to pay the liquidator the amount owing to the company. Subsequently, a bankruptcy petition was issued in the name of the official liquidator. It was contended that both the notice and the petition should have been issued in the name of the company and not in that of the liquidator.

* The *Companies Act* 1892 (S.A.), by sec. 117, provides: "The official liquidator shall have power—(1) To bring or defend any action, or prosecution, or other legal proceeding, civil or criminal, in the name of and on behalf of the company."

* The *Bankruptcy Act* 1924-1933 by sec. 52 provides: "A debtor commits an act of bankruptcy in each of the following cases: . . . (*j*) If a creditor has obtained a final judgment or final order against him for any amount, and execution thereon not having been stayed, has served on him in Australia, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and the debtor does not, within seven days or such time as is prescribed after service of the notice in Australia, or within the time limited in that behalf by the order giving leave to effect the service elsewhere, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action or proceeding in which the judgment or order was obtained:

Any person who is for the time being entitled to enforce a final judgment or final order for the payment of money shall be deemed a creditor who has obtained a final judgment within the meaning of this paragraph."

The Court directed that the matter should be remitted to the Court of Bankruptcy for the purpose of amending the petition by substituting the name of the company for that of the official liquidator.

Semble, per Dixon J., that sec. 52 (*j*) of the *Bankruptcy Act* does not cover a liquidator and make him a creditor in respect of a judgment debt of a company.

Decision of the Court of Bankruptcy affirmed.

APPEAL from the Court of Bankruptcy (District of South Australia).

An order was made by *Piper* J. as the result of a misfeasance summons taken out pursuant to sec. 179 of the *Companies Act* 1892 (S.A.) against Hurtle Clarence Growden and others by Reginald Beecher Wiltshire as the official liquidator of Coo-ee Pictures Ltd. (in liquidation). The order, after declaring the findings, ordered (*inter alia*) that Growden and certain others named should pay within fourteen days to the respondent as such liquidator certain amounts aggregating £7,526 7s. 6d. Of this total Growden was declared by the order to be jointly and severally liable for sums totalling £3,663 10s. 3d. and to be solely liable for £3,862 17s. 3d.

The order was duly served upon Growden, but was not complied with. Later Wiltshire applied to the Court of Bankruptcy to issue a bankruptcy notice against Growden. In this application Wiltshire was described as "the official liquidator of Coo-ee Pictures Ltd." A bankruptcy notice was thereupon issued, and Wiltshire was described therein as "the official liquidator of Coo-ee Pictures Ltd." Growden then applied to the Court for a declaration that the bankruptcy notice issued against him was invalid. The grounds upon which the notice was impugned were: (1) That it was not issued "in the name of and on behalf of" the company, and, therefore, was not a proceeding properly taken by the liquidator of the company within sec. 117 of the *Companies Act*; and (2) that the order made by *Piper* J. was not a "final judgment or order" within the meaning of sec. 52 (*j*) of the *Bankruptcy Act*. *Paine* J. dismissed the application on both grounds.

From this decision Hurtle Clarence Growden now appealed to the High Court.

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A similar bankruptcy notice was served upon Frank Leslie Growden, which was subsequently followed by a creditor's petition and a sequestration order against him. Frank Leslie Growden thereupon appealed to the High Court for an order declaring that the sequestration order, petition and bankruptcy notice were invalid, similar objections to them being raised as to the bankruptcy notice in the case of Hurtle Clarence Growden.

Alderman (with him *Kearnan*), for the appellant. The proceedings should have been "in the name of and on behalf of the company" as provided by sec. 117 of the *Companies Act* 1892, and they are wrongly brought by the liquidator in his own name. Even if he could proceed it should be as the official liquidator and not in his own personal name (*In re a Debtor* (1); *In re Winterbottom*; *Ex parte Winterbottom* (2); *Re Shirley*; *Ex parte Mackay* (3); *In re Bassett*; *Ex parte Lewis* (4); *In re Nance*; *Ex parte Ashmead* (5)). The only person who could give the bankruptcy notice was the person who actually owned the debt, which was the company and not the official liquidator. The petition should also have been in the name of the company and not, as it was, in the name of the liquidator (*Williams on Bankruptcy*, 14th ed. (1932), p. 28).

Ligertwood K.C. (with him *Wright*), for the respondent. Sec. 179 of the *Companies Act* confers a right on the liquidator to proceed under his own name, and is in addition to the right conferred by sec. 117. The practice is to issue the summons in the name of the liquidator. The order is that the moneys be paid to the liquidator, and execution would accordingly have to be levied in the name of the liquidator and not in the name of the company. Sec. 52 (*j*) of the *Bankruptcy Act* authorizes the liquidator to issue a bankruptcy notice. *In re Winterbottom*; *Ex parte Winterbottom* (6) was decided before the misfeasance section was enacted, and before the liquidator was authorized to commence proceedings in his own name. In the latter case and in *Re Shirley*; *Ex parte Mackay* (3) the bankruptcy notice could be issued only upon a final judgment, and not upon a final order. This position is now altered—in the latter case there

(1) (1929) 2 Ch. 146.
(2) (1886) 18 Q.B.D. 446.
(3) (1887) 58 L.T. 237.
(4) (1895) 2 Mans. 177.
(5) (1893) 1 Q.B. 590.
(6) (1886) 18 Q.B.D., at p. 450.

was no misfeasance section, and the only power was to proceed in the name of the company.

[RICH J. referred to *In re New Mashonaland Exploration Co.* (1).]

When *In re Bassett*; *Ex parte Lewis* (2) was decided, the bankruptcy notice could be issued only on a final judgment, and the person entitled to issue execution was not necessarily the person entitled to give the bankruptcy notice.

[McTIERNAN J. referred to *Couve* v. *J. Pierre Couve Ltd.* (*In Liquidation*) (3).]

The *Bankruptcy Act* has made the power to issue execution the test of the power to issue a bankruptcy notice. Even if the notice was irregular, there was no prejudice to the other side in the form in which the notice was issued. This was a proceeding by the liquidator of a company and as representing the company, and the Court should exercise the power given by sec. 7 of the *Bankruptcy Act*, and should hold that this proceeding is not invalidated by the defects complained of. Another course would be to refer the matter back to the Judge in Bankruptcy to allow amendments to be made under sec. 27 (2) (*b*) of the *Bankruptcy Act*.

Alderman, in reply. The provisions of the *Bankruptcy Act* should be strictly complied with, because of the interests of the public involved (*In re a Debtor* (4); *In re a Debtor* (5)). Here there has been no petition by a creditor at all, the liquidator not being entitled in his own right (*Williams* v. *Harding* (6)). "Creditor" is defined in *In re Sacker*; *Ex parte Sacker* (7). An assignee is a creditor, and entitled to give a bankruptcy notice in his own name, but a liquidator is not a creditor.

[STARKE J. referred to *Ex parte Muirhead*; *In re Muirhead* (8).]

That case was considered in *In re a Debtor* (9).

The following judgments were delivered:—

RICH J. We think that the petition ought not to have been presented in the official liquidator's name, but that the irregularity should be met by amendment. The bankruptcy notice we think operated to found an act of bankruptcy. The matter should be remitted to the Bankruptcy Court for the purpose of amending the

(1) (1892) 3 Ch. 577.
(2) (1895) 2 Mans. 177.
(3) (1933) 49 C.L.R. 486.
(4) (1935) 51 T.L.R. 277.
(5) (1908) 2 K.B. 684.
(6) (1866) L.R. 1 H.L. 9.
(7) (1888) 22 Q.B.D. 179.
(8) (1876) 2 Ch. D. 22.
(9) (1929) 2 Ch., at p. 152.

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petition by substituting the name of the company for that of the official liquidator, and of making all consequential amendments. Otherwise the appeals will be dismissed. No order as to costs.

STARKE J. The bankruptcy notice is a sufficient compliance with the *Bankruptcy Act*, secs. 52 (*j*) and 53. But the Act requires that the petition for sequestration be presented by a creditor. The company in this case, and not the liquidator, is the creditor for that purpose.

DIXON J. I agree. In substance I think the bankruptcy notice is sufficient. In requiring payment to the official liquidator as the liquidator of the company, it follows the order of the Supreme Court upon which it is founded. It is not wrong in calling upon the debtor to secure or compound for the sum ordered to be paid to the satisfaction of the official liquidator. It would have been open to little criticism in describing the counter-claim, set-off, or cross-demand by which the debtor might comply if it had called it a counter-claim, set-off, or cross-demand against the company and not against the liquidator. But this is an irregularity which could not have caused any substantial injustice, and ought not to invalidate the bankruptcy notice (sec. 7). The case is almost covered by *In re De Murrietta*; *Ex parte South American and Mexican Co.* (1), except that there the petition needed no amending, because it was presented in the name of the company.

It may be desirable to add that I do not disagree with the contention that sec. 52 (*j*) does not cover a liquidator and make him a creditor in respect of a judgment debt of the company.

EVATT J. I agree.

MCTIERNAN J. I agree.

Matter remitted to the Bankruptcy Judge to amend the petition by substituting the name of the company for that of the liquidator, and to make any consequential amendments. Otherwise appeals dismissed.

Solicitors for the appellant, *Homburg, Melrose & Homburg.*

Solicitors for the respondent, *Baker, McEwin, Ligertwood & Millhouse.*

H. D. W.

(1) (1896) 12 T.L.R. 238; 3 Mans. 35.