[HIGH COURT OF AUSTRALIA.]

MILLER . . . . . APPELLANT;
DEFENDANT,

AND

CAMERON AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *Mar.* 12, 13.

SYDNEY, *April* 29.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Trustee—Removal—Assignment of property for benefit of creditors—Welfare of beneficiaries.

Evidence—Pleading—Evidence not relevant to any issue raised by pleadings admitted without objection at trial of action.

In determining whether or not it is proper to remove a trustee, the Court will regard the welfare of the beneficiaries as the dominant consideration.

A trustee of a settlement assigned his estate for the benefit of his creditors, and, subsequently, on the death of his co-trustee, became sole trustee of the settlement. His functions as trustee involved the exercise of important discretionary powers in respect of the settled property, which was of considerable value. He was requested both by the settlor and the beneficiaries to resign his office as trustee, but he refused to do so. In an action in the Supreme Court of Tasmania it was ordered that he be removed from his position as trustee.

Held that the making of the order for his removal was a proper exercise of the Court's discretion.

The pleadings in the action did not allege misconduct on the part of the trustee, but evidence tending to establish misconduct was admitted without objection at the trial.

Held that, in the circumstances, the evidence might properly be taken into account.

Decision of the Supreme Court of Tasmania (*Clark* J.) affirmed.

APPEAL from the Supreme Court of Tasmania.

The plaintiffs, Eva Eschells Clair Cameron, suing in her personal capacity and as sole executrix of Robert Cameron deceased, Annie Mary Jane Cameron, Robert William Clive Cameron and Hugh Cathcart Cameron, brought an action in the Supreme Court of Tasmania, seeking the removal of the defendant, Ernest Granville Miller, from the trusteeship of an indenture dated 9th August 1904. The plaintiffs were the sole surviving beneficiaries under the indenture, which was made between Robert Cameron, since deceased, of the first part, Annie Mary Jane Cameron, his wife, of the second part, and Ernest Granville Miller and Ernest Henry Ritchie, of the third part. By the indenture Robert Cameron conveyed the lands mentioned in the indenture to Miller and Ritchie upon trust to sell. Until sale the lands were to be held on the trusts indicated and after sale the proceeds were to be held on the trusts specified.

Robert Cameron, the settlor, died after the action was commenced and before trial, and Ernest Henry Ritchie died after the hearing but before judgment was delivered, leaving Miller as the sole surviving trustee.

The statement of claim alleged that on 6th May 1927 Miller owed to secured and unsecured creditors £9,850 4s. 6d. and on the same date Miller owed to totally unsecured creditors £6,995 4s. 10d.; that on 6th May 1927 Miller executed an indenture under the provisions of the *Bankruptcy Act* 1924-1927 whereby he assigned his estate to a trustee for the benefit of his creditors, who were paid a dividend of 5s. 10d. in the pound; that Miller was a person of small or no means, and that Miller had refused or neglected to resign his trusteeship although requested by all the plaintiffs to do so. The defendant gave evidence that between April 1927 and June 1933 he had an income of £420 per annum, and that at the time of the action he had an income of close on £400 per annum and that his expenditure on his home and his personal expenditure amounted to £264 per annum. The value of the trust property and the income derived therefrom, which would now go into the hands of the defendant, were considerable.

Clark J. ordered the removal of the defendant from the trusteeship and ordered the appointment of two or more persons as trustees in

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his place. He also ordered the defendant to pay the plaintiffs' costs after allowing for certain costs due to the defendant. The defendant appealed to the Full Court of Tasmania, which dismissed the appeal with costs.

From this decision the defendant now appealed to the High Court.

Hall, for the appellant. As the appellant as trustee was entitled to commission which would exceed £300 he is entitled to appeal as of right (*Amos* v. *Fraser* (1)). There was no question raised as to the personal fitness of the appellant. His present position alone should be considered (*Assets Realization Co.* v. *Trustees, Executors and Securities Assurance Corporation* (2)). No order should have been made against the appellant for costs, as he was guilty of no misconduct. Misconduct means misconduct in relation to trust affairs (*Rules of Court* (Tas.) (Second Schedule to Act 23 Geo. V. No. 58), Order LXXVIII., rule 1).

Tasman Shields, for the respondents. The Court will remove a trustee who is in financial difficulties even if he is improving his financial position (*In re Adam's Trust* (3) ; *Chamber* v. *Jones* (4)), and if trust moneys can come into the hands of an insolvent trustee he should be removed (*In re Barker's Trusts* (5)). Usually a trustee is entitled to his costs in the absence of any improper conduct on his part (*In re Jones* (6)), but here it was improper for the trustee not to resign when he was insolvent and after he was requested to resign. In these circumstances it was improper to contest the present action.

Hall, in reply. The rule as to the removal of bankrupt trustees applies only to cases of recent bankruptcy, and in the present case seven years have elapsed since the appellant assigned his estate.

Cur. adv. vult.

(1) (1906) 4 C.L.R. 78.
(2) (1895) 65 L.J. Ch. 74.
(3) (1879) 12 Ch. D. 634.
(4) (1902) 2 S.R. (N.S.W.) (Eq.) 177 ; 19 W.N. (N.S.W.) 248.
(5) (1875) 1 Ch. D. 43.
(6) (1897) 2 Ch. 190.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Full Court of Tasmania dismissing an appeal from a judgment of *Clark* J. by which it was ordered that the defendant Miller be removed from his position as trustee under a settlement dated 9th August 1904. The plaintiffs in the action are the personal representative of the settlor and all the persons beneficially interested under the settlement. By the settlement lands were settled for the benefit of the wife, children and other relatives of Robert Cameron. The trustees were the defendant and Ernest Henry Ritchie who practised as solicitors in partnership under the firm name of Miller & Miller. On 18th December 1933 all the beneficiaries under the settlement asked Miller to resign his position as trustee. The settlor, who was then alive, made the same request. In subsequent correspondence it was stated on behalf of the plaintiffs that the fact that the defendant had assigned his estate to a trustee for the benefit of his creditors was a sufficient justification for the request. In the statement of claim the plaintiffs also relied upon the allegation that the defendant was a man of small or no means.

It has long been settled that, in determining whether or not it is proper to remove a trustee, the Court will regard the welfare of the beneficiaries as the dominant consideration (*Letterstedt* v. *Broers* (1)). Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of the trust estate. Accordingly, even though he has been guilty of no misconduct, if a trustee is in a position so impecunious that he would be subject to a particularly strong temptation to misapply the trust funds, the Court may properly remove him from his office as trustee. No distinction in this connection can be drawn between a bankruptcy and an assignment for the benefit of creditors. A trustee who becomes bankrupt is removed almost as of course (*Bainbrigge* v. *Blair* (2)). There may be exceptions under special circumstances to this rule, but the rule is generally applied (*In re Barker's Trusts* (3)). If the bankruptcy is explained by financial misfortune without moral fault and the trustee has recovered from pecuniary distress he may be allowed to retain his office (*In re Adams' Trust* (4)).

(1) (1884) 9 App. Cas. 371, at p. 387.
(2) (1839) 1 Beav. 495 ; 48 E.R. 1032.
(3) (1875) 1 Ch. D. 43.
(4) (1879) 12 Ch. D. 634.

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In this case no complaint is made concerning the administration of the trust property by the defendant. Reliance is placed upon the fact that he assigned his property for the benefit of creditors in 1927, paying a dividend to unsecured creditors of 5s. 10d. in the £, and upon the circumstances which led up to that assignment. These circumstances were not pleaded, and, as the evidence relating to them involves a reflection upon the character of the defendant, it has been urged for the appellant that the evidence should not be regarded. What happened at the trial was that evidence was given on behalf of the plaintiffs which showed that the defendant had become financially involved by reason of his ownership of a dairy farm known as Myrtle Grove farm. His partner and co-trustee, Mr. Ritchie, gave evidence that the defendant had run into debt on this account to the extent of about £12,000 without Ritchie being aware of it, and that Ritchie had to find a very substantial sum from his own pocket in order to save the credit of the firm. Though the defendant remained for some years after 1927 a member of the firm of Miller & Miller he did so under a written agreement with his partner under which he drew a salary of £420 per annum but under which he had none of the ordinary rights or powers of a partner. He was specifically prohibited from engaging the credit of the firm and from conducting or interfering in the management except under Ritchie's direction. This agreement also provided that the whole of the assets and property of the partnership should be the property of Ritchie. Ritchie gave evidence at the trial but died before judgment. The defendant himself gave evidence on the matter and said: "At the time of the assignment I owed over £12,000 on Myrtle Grove account and my own account and part of that was clients' money."

It was urged that this evidence should not have been taken into account by the learned Judge because the fact to which it was relevant (the character of the defendant) was not pleaded. It is true that if evidence which is irrelevant to any issue is wrongly admitted neither the Court of first instance nor a Court of appeal should pay any attention to it for the purpose of deciding the case, and it may be that in such a case a new trial should be ordered or

other remedy given in an appellate Court (*Jacker* v. *International Cable Co. Ltd.* (1)). The position, however, is very different where the evidence said to have been wrongly admitted is clearly relevant to an issue which might have been raised by the pleadings for the purpose of supporting a claim made or a defence raised, where it has been admitted without objection, where no party has been taken by surprise, and where all parties have had the opportunity of giving evidence on the matter, and *a fortiori* when they have used that opportunity.

The parties in this case fought out at the trial the question of the circumstances in which Miller made the assignment for the benefit of his creditors and I do not think that either of them can now fairly "hark back to the pleadings and treat them as governing the area of contest" (*Gould and Birbeck and Bacon* v. *Mount Oxide Mines Ltd. (in liquidation)* (2)). For this reason I am of opinion that the learned Judge was entitled to take this evidence into account in arriving at his decision.

The learned Judge of first instance found that it was about September 1930 when the plaintiffs first became aware of the fact that the defendant had executed the assignment of 1927 but that they did not then know the particular circumstances to which reference has been made. He found that it is not likely that they became so aware until after 30th June 1933. It is suggested that the delay of the plaintiffs in taking legal proceedings amounts to laches or involves acquiescence. In my opinion no question of laches or acquiescence arises. This is not a case where a plaintiff is enforcing a right which he might lose by laches or abandon by acquiescence. The plaintiffs are appealing to the discretion of the Court to exercise its powers in all the circumstances as they stand at the date when the application is made. The defendant has not changed his position so as to create any estoppel which can operate against the plaintiffs. No case is made either by the pleadings or on the evidence against the five plaintiffs on these matters.

The evidence showed that the defendant had only a small amount of free assets and that he was in arrears in payment of interest under mortgages. In the case of one mortgage he had paid no

(1) (1888) 5 T.L.R. 13.

(2) (1916) 22 C.L.R. 490, at p. 517.

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interest at all since 1927 and some £700 was owing for interest. The value of the trust estate is about £30,000 and the annual income is about £1,700.

It should be added that under the indenture of settlement several matters of great importance to the beneficiaries such as the fixing of the amounts to be paid in certain annuities and the determination of the propriety and advisability of selling the settled property, are specifically left to " the absolute and uncontrolled discretion " of the trustees.

The position therefore may be summarized in the following way :— The defendant is the sole trustee of property of very substantial value. In 1927 he assigned his estate for the benefit of creditors and paid a small dividend. That assignment was brought about by an unfortunate enterprise of the defendant which he endeavoured to maintain by wrongfully using his clients' moneys. He did not inform his partner of the position until he could do nothing else. His partner came to the rescue but did not allow him thereafter to take any part in the management of the firm though he did permit him to remain nominally and ostensibly as a partner. Since 1927 the defendant has hardly improved his financial position and he must still be regarded as being in an uncertain, if not precarious, financial state. The settlor originally, and now the personal representative of the settlor (who has been substituted as one of the plaintiffs for the settlor) together with all the beneficiaries, ask that the defendant be removed from his office as trustee.

In all these circumstances, there is, in my opinion, no doubt that the Judge was fully entitled to exercise his discretion by removing the defendant and I can see no reason for challenging any part of his judgment.

By the judgment of the Supreme Court of Tasmania the defendant is ordered to pay the costs of the action. It is urged on his behalf that in the absence of evidence of misconduct of the trustee such an order cannot be made. Certainly, as a rule, a trustee is allowed his costs out of the trust estate if his conduct has been honest, even though it may have been mistaken. In the ordinary case a trustee brings or contests legal proceedings on behalf of the trust and not on his own behalf. He is often a necessary party to proceedings

where he ought to be present even though he may do no more than submit to the judgment of the Court. In such a case the trustee receives his costs. The position is admittedly different in a case of misconduct. In this case there has, however, been no misconduct in the management of the trust estate.

In this case the trustee was asked to resign his office by every person interested in the execution of the trust. In my opinion his refusal to resign in all the circumstances of the case has resulted in legal proceedings which ought to have been avoided. The defendant would have acted wisely and properly in resigning as soon as he was asked. In defending this action and in prosecuting this appeal the defendant has been representing and supporting his own interests and not those of the trust estate. He has failed to show that his interests coincide with the interests of the trust estate. In such a case I consider it quite proper that he should pay the plaintiffs' costs of the action and of the appeal to this Court.

STARKE J. This is an appeal by Ernest Granville Miller from an order of the Supreme Court of Tasmania removing him from the trusteeship of a settlement dated 9th August 1904.

No general rule can be laid down for the removal of trustees from their office. The only guide is the welfare of the beneficiaries, and a trustee may be removed if the Court is satisfied that his continuance in office would be detrimental to their interest (*Letterstedt* v. *Broers* (1)). In the present case, the order removing the appellant from his office is clearly right, and indeed necessary for the protection of the trust estate. The capital value of the estate, we are informed, is some £30,000 or £40,000, and the income is in the neighbourhood of £1,200 or £1,400 per annum. Under the settlement, the appellant and one Ritchie were the trustees, but Ritchie died after the hearing of the proceedings to remove the appellant and before the order was made removing him. The appellant is now the sole trustee under the settlement, with wide discretionary powers. He is a solicitor, and before the death of Ritchie carried on the practice of a solicitor in partnership with him, under the name of Miller & Miller. He is impecunious. In May of 1927 he assigned his estate for the benefit

(1) (1884) 9 A.C., at p. 386.

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of creditors, who received a dividend of 5s. 10d. in the £. At the time of the assignment he owed over £12,000, and this indebtedness represented drawings from the firm, which, to a considerable amount, were made without the knowledge or authority of his partner Ritchie, as was found by the learned Judge who heard the proceedings, and included moneys owing to clients of that firm. Moreover, the settlor and all the beneficiaries under the settlement have requested him to retire, but he has refused to do so. It is not suggested that the appellant has misapplied any moneys of the settlement of which he is a trustee, and he contends that the misapplication by him of the moneys of the firm and its clients is irrelevant because the allegation was not charged in the statement of claim. The relevancy of the matter, if properly laid, to the question whether the appellant is a suitable and proper person to remain a trustee was hardly disputed. However, evidence was led by the plaintiffs in the action and by the appellant himself in relation to the matter without any objection being taken. The appellant is bound by the course of the trial and cannot now rely upon the contention that the charge against him was insufficiently stated.

The appeal should be dismissed.

DIXON J. The appellant seeks the reversal of an order for his removal from office as trustee of a settlement. He did not obtain special leave to appeal to this Court but appealed as of right, relying upon the prospective remuneration attached to the trusteeship to give the matter at issue the necessary value in money. No objection to the competency of the appeal was taken and it is unnecessary to do more than notice that a question exists whether the appeal does lie as of right.

The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must

be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorize the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight.

In the present case circumstances are relied upon in favour of the trustee's removal which, in my opinion, do provide a foundation for the jurisdiction. It appears that in an attempt to combine the pursuits of an orchardist with the practice of his profession of a solicitor, he incurred as an orchardist an ever increasing indebtedness to the firm of solicitors of which he was a member. His sole partner was called upon as a result to find a large sum from his own resources to meet liabilities of the firm arising from the drain upon the funds it held caused by his drawings upon his private account. The trustee assigned his assets for the benefit of his creditors and his partner, who was also his co-trustee, took over his share in the partnership in satisfaction of his debt to the partnership. By this means he obtained relief from his unsecured debts, but he has still secured creditors of some importance.

The beneficiaries and the settlors joined in requesting the trustee's resignation, and, at first, he was prepared to retire, but his co-trustee and partner in announcing the fact imposed a term that some money owing by the trust to the partnership should be paid off. This condition was not fufilled. Time passed during which the two trustees remained in association in practice, an association involving a fixed remuneration for the appellant and the enjoyment of the profits of the business by his former partner. Then their relationship terminated. The beneficiaries, now with the support apparently of his co-trustee, again called upon him to retire, and on his refusal, brought the present suit. The co-trustee died after the hearing was concluded and before the delivery of judgment, which was reserved.

Under the settlement the power of appointing a new trustee resides in the surviving or continuing trustee. There are many discretionary powers conferred upon the trustees and by the exercise of some of them the interests of the beneficiaries may be affected.

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Rents and moneys arising from the settled property must pass through the hands of the trustees.

During the trial not only the good faith of the trustee towards his partner in reference to the amount of his drawings from the firm but also the propriety of his use of funds to answer those drawings were brought into question. The pleadings did not allege as grounds for the removal of the trustee any dishonesty or misbehaviour on his part in relation to his partner or otherwise. But no objection was taken at the trial to the evidence, and, apart from any question of pleadings, its relevance to the question before the Court could not be denied. I think the primary Judge was fully entitled, if not bound, to take it into account. The case, therefore, reduces itself to one in which one of two solicitor-trustees of a settlement involving important discretionary powers and requiring the receipt and control of money compounds with his creditors other than secured creditors, severs his connection with his co-trustee through whose subsequent death he becomes sole trustee, and refuses the unanimous request of all the beneficiaries and the settlors to resign. These facts must entitle the Court to enquire into the circumstances attending the trustee's financial failure and to consider how far they may impair the confidence felt in his further administration of the trusts. A discussion in detail of these matters is unnecessary. It is enough to say that a sufficient foundation appears for the decision of the learned Judge who ordered the appellant's removal.

I think the appeal should be dismissed with costs.

EVATT J. I concur in the judgment of my brother *Dixon*.

McTIERNAN J. I agree with the judgment of my brother *Dixon*.

Appeal dismissed with costs.

Solicitor for the appellant, *M. D. Weston*, Launceston.

Solicitors for the respondents, *Shields, Heritage, Stackhouse & Martin*, Launceston.

H. D. W.