[HIGH COURT OF AUSTRALIA.]

LEVY . . . . . APPELLANT;
PLAINTIFF,

AND

KUM CHAH AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 20; *Dec.* 7.

Starke, Dixon, Evatt and McTiernan JJ.

*Bankruptcy—Deceased debtor's estate—Order for administration in bankruptcy—Judgment against executors—Signing judgment—Leave of Court of Bankruptcy—Bankruptcy Act* 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 60 (2), 155.

Sec. 60 (2) of the *Bankruptcy Act* 1924-1933 is a provision "relating to the administration of the property of a bankrupt" within the meaning of sec. 155 (4) of the Act: it therefore applies to the administration in bankruptcy of a deceased debtor's estate.

In an action against executors in respect of a debt of the deceased which would have been provable in bankruptcy the plaintiff obtained a verdict, but before judgment was signed an order that the deceased's estate be administered in bankruptcy was made under sec. 155 of the *Bankruptcy Act* 1924-1933. Later, without having obtained leave under sec. 60 (2) of the *Bankruptcy Act*, the plaintiff signed judgment for the amount of the debt and costs, to be levied of the lands, goods and chattels of the deceased at the time of his death if the executors had so much in their hands to be administered, and, if not, then the costs to be levied of the proper lands, goods and chattels of the executors.

*Held* that sec. 60 (2) applied, and the judgment should be set aside.

Decision of the Supreme Court of New South Wales (Full Court): *Levy* v. *Kum Chah*, (1935) 52 W.N. (N.S.W.) 207, affirmed.

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APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Solomon Levy against Kum Chah and Kum Hong, as executors of the will of Harry Young. The action was for money lent, and the pleas included the general issue, illegality, and the *Moratorium Acts*, but not *plene administravit*. The plaintiff recovered a verdict in the sum of £153. On 31st January 1935, after the obtaining of the verdict but before the signing of judgment, the Court of Bankruptcy, upon the application of another creditor of Harry Young, made an order under sec. 155 of the *Bankruptcy Act* 1924-1933 for the administration in bankruptcy of the deceased debtor's estate. On 26th March 1935 the plaintiff signed judgment, which, after reciting the action which had been brought and the claim which had been made, proceeded: "Judgment for the plaintiff after verdict for the sum of £153 for debt, and also £106 10s. 3d. for his costs of suit, which said debt and costs in the whole amount to £259 10s. 3d., to be levied of the lands, goods and chattels which were of the said Harry Young at the time of his death in the hands of the defendants as executors aforesaid to be administered if they have so much thereof in their hands to be administered, and if they have not so much thereof in their hands to be administered then £106 10s. 3d. for the costs aforesaid to be levied of the proper lands, goods and chattels of the said defendants."

Upon a summons by the defendants the judgment was set aside by *Stephen* J. on the ground that, as was admitted, it had been signed without the leave of the Court of Bankruptcy. An appeal against the decision of *Stephen* J. was dismissed by the Full Court of the Supreme Court: *Levy* v. *Kum Chah* (1).

An application, made by the plaintiff after the decision of the Full Court, for leave to take fresh steps in the action was refused by the Court of Bankruptcy (*Re Young* (2) ).

From the decision of the Full Court the plaintiff, by leave, appealed to the High Court.

*Sugerman*, for the appellant. An order made under sec. 155 of the *Bankruptcy Act* 1924-1933 does not have the effect of making

(1) (1935) 52 W.N. (N.S.W.) 207.

(2) (1936) 3 A.B.C. 202.

the deceased debtor a " bankrupt " within the meaning of sec. 60 (2) of that Act. Sec. 60 (2) is not a provision relating to the administration of the estate of a bankrupt. If capable of classification, it might be classified as a prohibition against the taking of proceedings against administrators. It relates, not to administration, but to proceedings outside administration. Although other requirements are expressly mentioned, nothing corresponding to the provisions of sec. 60 (2) is mentioned in the scheme as contained in sec. 130 of the English *Bankruptcy Act* 1914. Sec. 155 (5) serves all purposes that are required in the case of a deceased debtor, although something more might be required in the case of a living debtor. It is significant that the legislature has expressly re-enacted in sec. 155 (5), and applied expressly to the case of the administration of a deceased debtor's estate, the provisions of sub-sec. 1 of sec. 60; yet it has not done so with regard to sub-secs. 2 and 3 of that section. It is significant also that in sec. 88, which is similar in its purpose to sec. 60 (2), the legislature has expressly provided that its provisions shall apply to the administration of the estate of a deceased debtor. The position here arises in relation to the administration in equity of the estate of a deceased debtor. When the administration decree was made the Court of Chancery would enjoin proceedings upon a judgment which was entirely a judgment *de bonis testatoris* and not upon a judgment which was *de bonis propriis* (*Terrewest* v. *Featherby* (1); *Brook* v. *Skinner* (2); *Drewry* v. *Thacker* (3); *Clarke* v. *Earl of Ormonde* (4); *Lee* v. *Park* (5); *Reid & Co.* v. *Murphy* (6)). A general statement of the distinction between the two classes of judgment in that respect is contained in *Williams* on *Executors*, 12th ed. (1930), vol. II., p. 1275. Having obtained a verdict before the making of the order under sec. 155, the appellant was entitled to costs; the mere signing of judgment was a formality, the verdict was ascertained. This proceeding is not concerned with the methods or procedure proposed to be followed by the appellant for the purpose of enforcing his judgment. The scheme as contained in the English *Bankruptcy Act* 1914 differs somewhat from the scheme contained

(1) (1817) 2 Mer. 480; 35 E.R. 1024.
(2) (1817) 2 Mer. 481; 35 E.R. 1024.
(3) (1819) 3 Swans. 529; 36 E.R. 963.
(4) (1821) Jac. 108, at p. 124; 37 E.R. 791, at pp. 796, 797.
(5) (1836) 1 Keen 714, at p. 720; 48 E.R. 482, at p. 485.
(6) (1926) 26 S.R. (N.S.W.) 347, at pp. 349 et seq.; 43 W.N. (N.S.W.) 63, at p. 64.

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in the *Bankruptcy Act* 1924-1933. Sec. 155, from any aspect, is concerned only with the deceased debtor's property and with his debts (*Hasluck* v. *Clark* (1); *Ex parte Official Receiver*; *In re Gould* (2)). *Lloyd* v. *Public Trustee* (*N.S.W.*) (3) followed *Hasluck's Case* (1). It supplied a test as to whether the provision in sec. 91 (*b*) was a provision dealing, not with the subject matter of administration, but with the mode of administration. Until administration in bankruptcy is completed the condition *si non de bonis propriis* with regard to execution may not be fulfilled (*In re Marvin*; *Crawter* v. *Marvin* (4)). [He referred to *Walton* v. *Andrew* (5).] If the judgment cannot be signed the ultimate right against the executors completely disappears.

[STARKE J. referred to *Chitty's Archbold's Practice of the Court of Queen's Bench*, 12th ed. (1866), vol. II., pp. 1230 et seq.]

That matter was very clearly put in *Dawson* v. *Gregory* (6). Reference to administration *si non de bonis propriis* was made in *Lee* v. *Park* (7).

*Snelling* (*Amsberg* with him). The comparing of the *Bankruptcy Act* 1924-1933 with the English *Bankruptcy Act* 1914 tends to mislead. The English legislature included in the *Bankruptcy Act* 1914 only such parts of Part III. of the *Bankruptcy Act* 1883 as related to administration, and made those provisions expressly applicable in order to overcome certain confusion which had arisen under the latter Act. That system of incorporation was disregarded by the Federal legislature when framing the *Bankruptcy Act* 1924-1933. As suggested in *Lloyd* v. *Public Trustee* (*N.S.W.*) (3), the whole of the *Bankruptcy Act* 1924-1933 must be considered in order to determine whether this particular provision is one relating to administration. The point that the provisions of sub-secs. 2 and 3 of sec. 60 were not expressly incorporated may be disregarded, because sub-secs. 1 to 4 inclusive of sec. 155 provide for the making of an administration order; sub-sec. 4 provides generally for the incorporation of the provisions of the Act; and sub-secs. 5 to 11 inclusive provide for certain

(1) (1899) 1 Q.B. 699.
(2) (1887) 19 Q.B.D. 92.
(3) (1930) 44 C.L.R. 312.
(4) (1905) 2 Ch. 490, at p. 492.
(5) (1857) 14 Up. Can. R. Q.B. 594.
(6) (1845) 7 Q.B. 756; 115 E.R. 673.
(7) (1836) 1 Keen 714; 48 E.R. 482.

special matters that are only referable to deceased estates and which cannot arise in an ordinary case of bankruptcy. In view of the provisions of sub-sec. 1 of sec. 60, sub-sec. 2 of that section is unnecessary. " Property of the bankrupt " as defined in the Act is property divisible amongst creditors. The expression " provisions . . . relating to the administration of the property of a bankrupt " in sec. 155 (4) must be given a wide meaning. " Administration of the property of a bankrupt " involves, *inter alia*, the ascertainment of its nature and extent, its reduction into possession, its protection while in the hands of the trustee, its realization for the purpose of distribution amongst the creditors and the ascertainment of those creditors. The object of that administration is to enable that property to be distributed in due fashion and in accordance with the prescribed rules amongst those creditors who prove their claims. The true interpretation of *Hasluck* v. *Clark* (1) and *In re Gould* (2) is that attacking the property of someone else in endeavouring to get it into the estate is not administration of the bankrupt's property. It is not every interference with the rights of third parties that is outside the ambit of the words relating to administration. Those words cover all provisions relating to the bankrupt's property even though they may affect the rights of third parties, but do not cover the property of others (*In re Mellison*; *Ex parte Day* (3) ). It cannot be inferred from the express provision of sec. 88 that sub-sec. 2 of sec. 60 does not apply to sec. 155.

*Sugerman*, in reply.

*Cur. adv. vult.*

Dec. 7.

The following written judgments were delivered :—

STARKE J. Judgment was signed on 26th March 1935 in the Supreme Court of New South Wales for the plaintiff—the appellant here—against the defendants—the respondents here—executors of Harry Young deceased, for the sum of £153 for debt, and also for £106 10s. 3d. for his costs of suit, " which said debt and costs in the whole amount to £259 10s. 3d., to be levied of the lands, goods and

(1) (1899) 1 Q.B. 699. (2) (1887) 19 Q.B.D. 92.
(3) (1906) 2 K.B. 68, at p. 71.

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chattels which were of the said Harry Young at the time of his death in the hands of the defendants as executors as aforesaid to be administered if they have so much thereof in their hands to be administered, and if they have not so much thereof in their hands to be administered, then £106 10s. 3d. for the costs aforesaid, to be levied of the proper lands, goods and chattels of the said defendants." It is an ordinary form of judgment against an executor at common law, and the methods of executing it according to the course of the common law are well-established. Those methods are fully stated in *Williams* on *Executors*, 11th ed. (1921), pp. 1575, 1578 et seq., and *Chitty's Archbold's Practice of the Court of Queen's Bench*, 12th ed. (1866), vol. II., pp. 1230, 1233 et seq., and repetition on my part is quite unnecessary. Courts of equity had, however, jurisdiction in the administration of the assets of deceased persons, and suits for aid and relief in the administration of the estates of such persons were sometimes brought by their legal personal representatives or by one or more of their creditors. And such a court might, as Mr. *Sugerman* said, restrain creditors from suing the legal personal representatives at law, or from further proceeding against them in actions already commenced, except under the direction and control of the court. " This it did because it considered the decree which it had made to be in the nature of a judgment for all the creditors; and having taken the fund into its own hands it administered it equitably, and would not permit the executor to be pursued at law." But it seems that courts of equity would not interfere, whether by the old method of injunction, or by the modern method of an order staying proceedings, to protect an executor from liability to which he had personally subjected himself. It is questionable, I think, whether a court of equity would have prevented the plaintiff in the present case from pursuing his judgment according to the course of the common law. The learning on the matter may be found in *Story, Equity Jurisprudence*, 2nd Eng. ed. (1892), pp. 352 et seq., particularly at p. 360; *Daniell's Chancery Practice*, 7th ed. (1901), vol. II., p. 1662, and cases there collected; *Kent* v. *Pickering* (1); *Lee* v. *Park* (2); *Vincent* v. *Godson* (3); *In re*

(1) (1832) 5 Sim. 569; 58 E.R. 452.
(2) (1836) 1 Keen 714; 48 E.R. 482.
(3) (1850) 3 DeG. & S. 717; 64 E.R. 675.

*Womersley*; *Etheridge* v. *Womersley* (1). But all this is really beside the matter in question here. The question is not what order a court of equity might have made in an administration suit, but what is the construction and effect of the *Bankruptcy Act* 1924-1933 in relation to the judgment of 26th March 1935 already mentioned.

On 31st January 1935, an order was made under the Act (sec. 155) for the administration in bankruptcy of the estate of Harry Young. Upon such an order being made, the property of the deceased vested in the official receiver, and all the provisions of the Act relating to the administration of the property of a bankrupt apply only so far as applicable to the case of an order for administration in like manner as to a sequestration order (sec. 155, sub-secs. 4, 5). The Act, in sec. 60, provides that after sequestration no creditor to whom the bankrupt is indebted shall have any remedy against the property or person of a bankrupt in respect of the debt, or shall commence or take any fresh step in any action or legal proceeding unless with the leave of the court, i.e., any court having jurisdiction in bankruptcy—and on such terms as the court imposes. On 7th June 1935 a summons was issued out of the Supreme Court of New South Wales, which was, by an order of 25th July 1935, so amended as to be an application to set aside the judgment. *Stephen* J. set it aside. He held that sec. 60 was a provision relating to the administration of the property of the bankrupt within the meaning of that phrase in sec. 155 (4), and that the judgment had been signed contrary to the provisions of sec. 60 (2), and his decision was affirmed on appeal to the Full Court. Special leave to appeal to this court was granted, and the appeal now falls for decision.

The object of sec. 60 is to secure, and prevent any interference with, the due administration and distribution of the assets of a bankrupt. It confers no substantive rights on anyone, and is merely auxiliary to sequestration, to the end that the assets of the bankrupt may be protected and distributed in accordance with the rights of creditors and the provisions of the *Bankruptcy Act*. It is, therefore, properly described as a provision relating to the administration of the property of a bankrupt, and applicable, by force of sec. 155 (4),

(1) (1885) 29 Ch. D. 557.

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to the administration in bankruptcy of a deceased debtor's estate. But it was said that Part VI. of the Act contains provisions for the "Administration of Property," and that sec. 60 does not find its place in that Part of the Act. However, the position of the section in the Act cannot determine its character or effect: that depends upon its language and its operation in relation to the administration of the property of the bankrupt. Lastly, it was said that the section only operates in relation to the property and person of the bankrupt, and cannot save the executor in the present case from a liability to which the judgment subjects him personally. The judgment is against the executor *de bonis testatoris* to be levied against the executor as to costs only *et si non de bonis propriis*. But the Act is explicit as to debts provable in bankruptcy, and is also explicit, as to debts provable in an administration in bankruptcy of a deceased debtor's estate, that no creditor shall commence any action, take any fresh step in any action or other legal proceeding, or have any remedy against the property or person of the debtor. The judgment signed in this case is in conflict with these provisions and was, therefore, rightly set aside.

The appeal should be dismissed.

DIXON AND EVATT JJ. This appeal raises a difficult question as to the effect that an order for the administration in bankruptcy of the estate of a deceased debtor produces upon the rights of a creditor who before the order has recovered a verdict in an action against the executors for a debt owing by the deceased. The action was for money lent and the pleas included the general issue, illegality and the *Moratorium Acts*, but not *plene administravit*. The creditor obtained a verdict at the trial and became entitled to sign judgment against the executors as defendants for the amount of the debt and costs, to be levied of the lands, goods and chattels of the deceased at the time of his death if the defendants have so much in their hands to be administered, and, if not, then the costs to be levied of the proper lands, goods and chattels of the defendants. After verdict, but before this judgment was signed, the Federal Court of Bankruptcy made an order that the deceased's estate should be administered in bankruptcy. The creditor, as plaintiff, signed

judgment, but the judgment was set aside by the Supreme Court. It was set aside on the ground that, after such an order, no creditor of the deceased may commence or take any fresh step in any action or proceeding for the recovery of his debt unless with the leave of the Federal Court of Bankruptcy. That leave has since been refused. The opinion of the learned judge of the Court of Bankruptcy (Judge *Lukin*) (*Re Young* (1) ) was in conflict with that of the Supreme Court of New South Wales, *Halse Rogers*, *Street* and *Maxwell* JJ. (*Levy* v. *Kum Chah* (2) ), affirming *Stephen* J. His Honour considered that the provision forbidding, unless by leave, any further proceeding to enforce a claim provable in bankruptcy has no application to the administration in bankruptcy of a deceased person's estate. But he was also of opinion that, if it did apply, leave should not be granted.

The present appeal is brought by the creditor, not from the order of the Court of Bankruptcy refusing leave, but from the decision of the Supreme Court that the judgment he had signed must be set aside. The object of the creditor is to make the executors personally liable to pay the costs of the action. He recognizes that no assets of the deceased can now be taken in execution. For the order for the administration of the estate in bankruptcy operates to take them out of the hands of the executors and to vest the property in them in the official receiver. But although there be a return of *nulla bona testatoris*, the creditor conceives that the judgment as to costs may be executed against the executors as defendants *de bonis propriis*. Perhaps he desires to attempt to proceed with a view to making their property liable to seizure for the amount of the debt also on the ground that, *plene administravit* not having been pleaded, they must be supposed to have had assets in their hands. The question which thus arises depends upon the meaning and effect of some provisions of the *Bankruptcy Act* 1924-1933. But the difficulties encountered in the application of those provisions and the considerations governing their interpretation will be better understood if a brief account is first given of the situation occupied by an executor sued for the debt of his testator, a situation shared by the administrator sued for the debt of his intestate.

(1) (1936) 8 A.B.C. 202.

(2) (1935) 52 W.N. (N.S.W.) 207.

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For a liability arising in the testator's lifetime, the executor is responsible only to the extent of the assets. But the remedies provided by the common law for the enforcement of this responsibility impose upon the executor the burden of availing himself of the limitation and asserting a deficiency of assets. He might, of course, plead in bar anything which would answer the action if it had been brought against his testator, were he still alive. But if, in spite of or in default of such a plea, the creditor appears to be entitled to recover his debt, then, unless by a proper plea the executor has alleged that he had not assets to satisfy the debt, judgment passes in a form, long in use, which precludes the executor afterwards from denying that he had in his hands assets of his testator which might be applied in satisfaction of the judgment. Except in the special case of his denying his character of executor or alleging that he himself had obtained a release of his testator's debt, the form of judgment for the debt has never contained an express authority for executing it against the executor's own goods or person, but the judgment for costs has always done so. The tenor of the judgment is that the plaintiff do recover the debt and costs to be levied out of the assets of the testator, if the defendant have so much, but, if not, then the costs out of the defendant's own property. But if a return of *nulla bona testatoris* were made to a writ of *fi. fa.* which included the debt, or if without such a return the plaintiff were able to show that assets of the testator could not be found in the hands of the defendant for the satisfaction of the judgment, the plaintiff could proceed against the defendant's own property and person on the ground that he had committed a *devastavit*. The judgment is conclusive that the executor has been in possession of assets of the testator lawfully applicable to satisfy the demand and no answer is open to him unless it be consistent with the assumption that in his hands there were assets which in a due course of administration might have satisfied the debt and that he has duly administered them. He might show that in his hands assets of the testator existed which the sheriff might have taken in execution and that he pointed them out. But the required assumption has been considered to exclude almost every other answer. It is unnecessary to describe in detail the process by which at common law the

executor's liability as on a *devastavit* might be enforced. It is enough to say that three methods of proceeding were open to the plaintiff. If the sheriff ran the very small risk involved of an action for a false return and, to a writ of *fi. fa. de bonis testatoris*, made a return of *nulla bona testatoris* and of a *devastavit*, the plaintiff might at once issue a *fi. fa. de bonis propriis* or a *ca. sa.* But this course seems to have fallen into disuse. The second mode of proceeding was by a writ directed to the sheriff combining a *scire facias* inquiry with a *fieri facias*. It was called "*scire fieri*" and commanded him inquire by a jury whether there had been a *devastavit*, and, if so, to levy the amount of the judgment *de bonis propriis*. The third was by action against the executor upon the judgment suggesting a *devastavit*.

These consequences could not be avoided at law by the executor except by pleading in answer to the action brought upon the debt of his testator that insufficient assets had come into his hands. The appropriate plea has always been a general or special *plene administravit*. When debts were of different degrees the plea might take many various forms. Besides the ordinary plea that he had fully administered the assets coming to his hands, pleaded when no assets remained, and the plea admitting assets of such a value and alleging that *praeter* that sum he had fully administered the assets coming to his hands, there were pleas that debts of higher degree were outstanding and that *praeter* assets to satisfy them the executor had fully administered, and the like. Unless the executor did plead the debts of higher degree which were owing by the testator, he was taken to admit assets to satisfy them as well as the debt sued upon. Among debts of the testator of equal degree, priority might be obtained by recovering judgment against the executor. In answer to an action for another debt the judgment and no assets *ultra* might be pleaded.

If the plea of *plene administravit* is disproved, the plaintiff has judgment for the amount of the debt in the same form as when there is no such plea, viz., as to debt and costs *de bonis testatoris* and as to costs *si non de bonis propriis*. If it is disproved to the extent only of assets of less value than the debt, the judgment is for the recovery of that amount.

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See 1 *Williams, Saunders*, pp. 219-219h and 335-336b; *Williams* on *Executors*, 1st ed. (1832), pp. 1201-1226, and 12th ed. (1930), pp. 1252-1258; *Halsbury's Laws of England*, 2nd ed., vol. 14, pp. 17, 18.

In the result it may be said that at law the executor is liable to discharge every debt of his testator to the full extent of which the assets admit if properly administered and that in default of doing so he is personally liable unless he is able to and does allege a deficiency of assets which is not disproved, and that, except in that case, he is also personally liable for the costs of suit which the assets will not cover.

It remains to refer to one other right of the executor at law, a right which equity also recognized. If he did pay out of his own moneys a debt of the testator, he appears to have been entitled to retain the amount out of assets in his hands. In *Vernon* v. *Thellusson* (1) Lord *Lyndhurst* L.C. says:—"It is true that if the plaintiff cannot find goods of the testator's to the amount returned by the jury, the executor will, upon a *scire facias* suggesting a *devastavit*, be personally liable for the deficiency; but, upon the amount being satisfied out of the property of the executor, he would become entitled to the assets for which he had thus paid an equivalent. For where a claim is made against an executor, if it is shown that he has goods in his hands which were the testator's, he may prove that he has paid to that value with his own money, and this would be a sufficient discharge (1 *Inst.* 283a)." In *Gaunt* v. *Taylor* (2), speaking of an executrix who before an administration decree had according to the truth admitted assets to a certain value and pleaded *plene administravit praeter* so that judgment was given for the creditor for the amount confessed, *Wigram* V.C. said that she was "entitled to be indemnified by means of such an application of the fund as will give the creditor the benefit of his legal right, and so protect her from any personal liability under which she might be placed by the judgment against her."

The situation of the executor of an estate which did not furnish the means of immediately discharging the claims of creditors was

(1) (1844) 1 Ph. 466, at p. 470; 41 E.R. 709, at p. 711.

(2) (1843) 2 Hare 413, at p. 420; 67 E.R. 170, at p. 173.

much improved by a decree in equity for administration. After such a decree the court of equity would by injunction restrain a creditor from bringing an action at law to recover his debt from the executor. It insisted on his coming in to prove on the assets of which the court had taken control. But, if before the decree or before it was brought to his notice, the creditor had recovered judgment at law against the executor, a difficulty arose. The court was unwilling to allow execution to be levied upon the assets it was administering. But the court recognized that recovery of judgment entitled the creditor to priority. Further, an executor who had incurred a personal responsibility to the creditor through his own fault had no equity to protection at the hands of the court. For some time the Court of Chancery showed a marked disposition never to interfere with the creditor's right to recover from the executor personally. The earlier authorities are collected and to some extent discussed in the argument of Mr. *Bethell* and the judgment of Lord *Langdale* in *Lee* v. *Park* (1). But in *Vernon* v. *Thellusson* (2) and *Rouse* v. *Jones* (3), which was the analogous case of a bond creditor's claim against the heir, Lord *Lyndhurst* L.C., after referring to the misconception of the effect of judgments against executors at law shown in earlier cases, pointed out some of the difficulties which would ensue from allowing the enforcement of a judgment *de bonis testatoris*. It seems that, in general, execution of such a judgment was restrained. In *Reid & Co.* v. *Murphy* (4) *Harvey* C.J. in Eq. dealt with the question. Although most of the older authorities were cited to him, his attention was not drawn to *Rouse* v. *Jones* (3), *Vernon* v. *Thellusson* (2) or *Gaunt* v. *Taylor* (5). In the course of his judgment, his Honour said:—"It appears to me that as a matter of principle the position must be as follows: If the judgment is only a judgment *de bonis testatoris* then the equity court will restrain him from enforcing his judgment at law, but will, when the assets of the testator have been ascertained in equity, give him a priority over the other creditors, and pay the amount of his judgment. This priority he is entitled to by reason of his diligence in getting a judgment for payment of his debt before the

(1) (1836) 1 Keen 714; 48 E.R. 482.
(2) (1844) 1 Ph. 466; 41 E.R. 709.
(3) (1844) 1 Ph. 462; 41 E.R. 708.
(4) (1926) 26 S.R. (N.S.W.) 347; 43 W.N. (N.S.W.) 63.
(5) (1843) 2 Hare 413; 67 E.R. 170.

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decree which provides for payment of the debts of all creditors. If, however, the judgment at law is not only against the goods of the testator, but also in any respect *de bonis propriis* of the executors, the court will not restrain execution, as that would prejudice his execution against the executors who might in the meantime, if an injunction were granted, be getting rid of their assets. This view of the law also seems to me to get some support from the case of *In re Womersley* (1) " (2).

It is to be noticed that the Court of Chancery found itself faced with the fact that a judgment *de bonis testatoris et si non de bonis propriis* imposed on the executor a conditional liability only, namely, a liability arising from a failure to find goods of the testator. To withdraw from execution the goods of the testator would be either to alter or to prevent the fulfilment of the condition.

An order of the Court of Bankruptcy for the administration of the estate of a deceased person in bankruptcy goes much further than a decree in equity for administration. It divests the executor of the legal title to, as well as the control of, the assets. Unless it be true that it leaves him exposed to an action at law to which he cannot plead an answer, it converts claims against him into rights of proof only. It determines all priorities. Its operation, therefore, raises a number of difficulties in the case of a judgment in the usual form in an action for a debt of the deceased against the personal representative, that is, as to debt and costs to be levied of the assets which were of the deceased at the time of his death in the hands of the defendant, as personal representative, to be administered if he has so much in his hands to be administered, and if he has not, then as to costs to be levied of his own property. Suppose, first, that such a judgment has been signed before the making of the order for administration in bankruptcy. There is some difficulty in supposing that a writ of execution delivered to the sheriff, even if under State law the goods or lands of the deceased were bound by the writ, could be executed against property vested in the Federal official receiver by a statute of the Commonwealth Parliament. See, however, *Johnson* v. *Pickering* (3). But is it right for the

(1) (1885) 29 Ch. D. 557.
(2) (1926) 26 S.R. (N.S.W.), at p. 350; 43 W.N. (N.S.W.), at p. 64.
(3) (1908) 1 K.B. 1.

sheriff to make a return of *nulla bona testatoris* ? If he may, can the executor answer a *devastavit* by setting up the order of the Court of Bankruptcy ? Prior to that order, he might have applied in satisfaction of the debt the assets which under the judgment he is conclusively supposed to have had. If he is liable as on a *devastavit*, what becomes of his right of recourse to a commensurate part of the assets ? As to the costs, does not the order defeat the condition expressed in the " *et si non* " ? The condition is based upon the possession by the defendant of all the assets of the deceased. If they are withdrawn alike from his possession and from execution, can he be held liable *de bonis propriis* ? Then suppose that the order for administration in bankruptcy is made before verdict, can the defendant plead *plene administravit* ? " The essential part of the plea of *plene administravit* is, that the said defendant has no goods, which were of the said A.B. (the testator) *at the time of his death*, in the hands of the said defendant, as executor, to be administered, *nor had on the day of the suing out of the original writ* of the said plaintiff, *nor ever since* " ; and the omission of any part of the above " averments will be fatal on demurrer, as well in general as a special *plene administravit* " (*Williams* on *Executors*, 1st ed. (1832), p. 1201.)

Of course the essential averments could not be proved. Yet failing this plea, the executor would be conclusively presumed to possess sufficient assets of the deceased. Even if a special plea framed upon the Federal statute would answer the action, what is to be done if the order for administration in bankruptcy is made after verdict and before judgment is signed ?

These questions appear to us to show that when the Bankruptcy Court undertakes the administration of assets which was the function of the executor, just as when the Court of Chancery did so, the liabilities incurred by him as the person otherwise charged by law with the administration of the assets and his consequent claims upon the assets for recoupment or otherwise are matters which attend the administration and are not independent of the control and application of the deceased's property.

The provisions of the *Bankruptcy Act* 1924-1933 from which the Court of Bankruptcy derives its authority over the estates of persons

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dying insolvent are contained in secs. 155 and 156. Under sub-sec. 1 of sec. 155, a creditor whose debt would suffice for a bankruptcy petition may petition for the administration in bankruptcy of the deceased's property. Under sec. 156, the executor or administrator may present what is there called a bankruptcy petition and the court may make the like order as on a creditor's petition. That order is "for the administration in bankruptcy of the deceased debtor's estate." The court may make it unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased (sec. 155 (2) ). The property of the debtor then vests in the official receiver as trustee and he must proceed forthwith to realize the estate and distribute it in accordance with the provisions of the Act (sub-sec. 5). The provisions of the Act relating to the effect of bankruptcy on antecedent transactions are expressly made applicable (sub-sec. 4A). The transfer of the deceased's property to the official receiver operates as a discharge of the executor or administrator as between him and the receiver (sub-sec. 10). Regard must be had in the administration of the assets to the executor's or administrator's claim for funeral and testamentary expenses (sub-sec. (8). And any surplus assets must be handed back to him (sub-sec. 9). Then sub-sec. 4 contains the following provision: "With the modifications mentioned in this section, all the provisions of this Act relating to the administration of the property of a bankrupt and to trustees shall, so far as they are applicable, apply to the case of an order for administration under this section in like manner as to a sequestration order."

Sub-sec. 2 of sec. 60 is as follows:—"After sequestration, except as directed by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall commence or take any fresh step in any action or other legal proceeding, unless with the leave of the court and on such terms as the court imposes."

The judges of the Supreme Court were unanimous in considering that this is a provision relating to the administration of the property of a bankrupt. The considerations which we have already advanced

appear to us to support this conclusion. In the case of a bankrupt, it relieves both him and the property then vesting in the official receiver of the claims which the Act turns into rights of proof. Throughout the administration of the property, it prevents, except with the authority of the court, the prosecution against the bankrupt of demands which should be answered out of the assets taken for that very purpose out of his hands and into those of the court's officer, and it reinforces and protects the title of that officer to administer the assets by excluding every process against them in respect of debts answerable out of them generally. It provides the negative side to the positive provisions for the application of the assets. It excludes alternatives. In the case of a deceased's estate, this exclusion appears to us more essential. It is only by some such provision that the necessity is avoided of working out by implication, or by equities arising from the situation created by the constitution of a new administrator of the property, restraints and modifications of the remedies against the old administrator. A consideration of weight is that courts of equity found themselves obliged as soon as they began to administer assets to deal by injunction with the very same class of question.

In opposition to this view, a number of matters is relied on arising out of the provisions of the statute. Part VI. of the Act, containing secs. 81 to 118, is headed "Administration of Property." It is said that the words in sub-sec. 4 of sec. 155 refer to this Part. But the descriptive phrase "relating to the administration of the property of a bankrupt" would be but a clumsy reference to a numbered Part of a statute, and in fact the Part contains provisions, such as those in Division 4, which do not answer the description (See *In re Gould* (1) and *Hasluck* v. *Clark* (2) ).

Then sec. 60 contains in sub-sec. 1 a vesting provision which has a counterpart in sub-sec. 5 of sec. 155. It may well be that without sub-sec. 5 the executor might have been considered the proper person to administer. But the question whether a particular provision answers the description contained in sub-sec. 4 cannot depend on the arrangement and distribution of the contents of the enactment. It must depend on the inherent character and operation

(1) (1887) 19 Q.B.D. 92. (2) (1899) 1 Q.B. 699.

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of the provision. In any event the fact that sub-sec. 2 of sec. 60 was placed in the same section and immediately after the vesting provision suggests that it was considered a natural consequence of divesting the property. In fact sub-sec. 2 comes from English provisions which perform the entirely different function of holding property and process *in medio* pending the making of an ordinary order of sequestration. Sec. 155 is based on sec. 125 of the English *Bankruptcy Act* 1883, or sec. 130 of the *Bankruptcy Act* 1914. In the latter Act sub-sec. 5 incorporates, so far as applicable, a definite part of the Act described as follows : " All the provisions of Part II. of this Act (relating to the administration of the property of a bankrupt)." The brackets show that the descriptive phrase was not intended as a definition. In the former Act, sec. 125 (6) had used the expression " All the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, " and this left doubtful the purpose of the descriptive phrase. Under that sub-section it was held that no provision outside Part III. could apply (*In re Hewitt* (1) ) ; and no provision making available property which at his death did not belong to the deceased (*In re Gould* (2) ). But the provision enabling the disclaimer of onerous property does apply.

In Australia the legislature has abandoned the English limitation to a particular Part of the Act and has made the descriptive phrase an unrestricted definition. Wherever in the Act the provision may occur it is to apply if it relates to the administration of the property of a bankrupt and in other respects is applicable. No doubt some weight must be given to the fact that in England a provision staying proceedings against executors after the making of administration orders has not been found necessary. But, in its absence, we find it very difficult to know what solution should be adopted of the dilemma in which the English provisions appear to place an executor if he be sued for his testator's debt and an order for administration in bankruptcy is made. In Victoria the same set of facts as in the present case arose in 1856. The provisions then in force were somewhat different. The statute (5 Vict. No. 17, sec. 4) provided that the like proceedings should be had concerning the estate and the person in whom the administration thereof is vested as in the case

(1) (1885) 15 Q.B.D. 159. (2) (1887) 19 Q.B.D. 92.

of other estates and insolvents. The Supreme Court reached the same conclusion as we have (*M'Lelland* v. *Smith* (1) ). See, too, *M'Auley* v. *Beatty* (2).

In our opinion the appeal should be dismissed with costs.

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McTIERNAN J. I agree with the judgment of *Dixon* and *Evatt* JJ.

*Appeal dismissed.*

Solicitors for the appellant, *Lionel Dare & B. P. Purcell.*

Solicitor for the respondents, *P. N. Roach.*

J. B.

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[HIGH COURT OF AUSTRALIA.]

HARRIS AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

KING AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936. SYDNEY, *Aug.* 17, 18; *Nov.* 26. Starke, Dixon and McTiernan JJ.

*Will—Construction—Rule against perpetuities—Remoteness—Gift over on compound event—Splitting gift over.*

A testator, who died in 1880, by his will devised certain land to trustees, subject to an annuity, upon trust to pay the rents to the testator's daughter for life and from and after her death, in case she should leave a husband and one or more children, upon trust in favour of the husband and children, but if she should leave a husband and no issue, or the issue should fail during the lifetime of the husband, then upon trust to pay the rents to the husband during his life. The testator directed that after the death of his daughter

(1) (1856) 1 V.L.T. 150. (2) (1886) 12 V.L.R. 633; 8 A.L.T. 66.