[HIGH COURT OF AUSTRALIA.]

THE SOUTHERN BRITISH NATIONAL TRUST LIMITED (IN LIQUIDATION) . . . APPELLANT;
DEFENDANT,

AND

PITHER AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *May* 4, 5.

MELBOURNE, *June* 9.

Latham C.J., Rich and Dixon JJ.

Assignment—Chose in action—Right to future dividends—Dividends to be applied in payment for debentures—Construction of charging clause in debentures—Assignment fraudulently obtained—Rights of other debenture holders—Equities.

The plaintiff, who was a creditor of a bank, proved his debt in its liquidation. After receiving some dividends he was induced by fraud to assign his right to future dividends to a trust company, which, subsequently, was ordered to be wound up. The deed of assignment provided that the dividends should be applied by the trust company in payment of the purchase price of certain debentures applied for by the plaintiff. The debentures were part of a series of debentures to be issued by the trust company, which informed the plaintiff that he had been allotted a specified number of those debentures. He did not take up or receive the debenture scrip, but his name was placed on the trust company's list of debenture holders. By the debentures each debenture holder obtained a charge on, *inter alia*, "all investments . . . of the net proceeds of sales of debentures of this series" and "all moneys being net proceeds of sales of debentures of this series . . . held by the trust pending investment." The plaintiff claimed a declaration that by reason of the fraud the assignment was void and inoperative and not binding upon him and payment to him of outstanding dividends. The claim was resisted on the ground that innocent third parties, namely, the other holders of debentures of the series, had acquired rights in the chose in action the subject matter of the assignment.

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Held that the plaintiff was entitled to the relief claimed :—

By *Latham* C.J., on the ground that the chose in action did not fall within the charging clause of the debentures and the duty of the directors of the trust company to preserve property which might become subject to the charge did not confer any interest in such property on the debenture holders.

By *Rich* and *Dixon* JJ., on the ground that, assuming that the debenture holders acquired an equitable interest in the chose in action, they took subject to all equities affecting the title of their assignor, the trust company.

APPEAL from the Supreme Court of Queensland.

In a suit brought in the Supreme Court of Queensland by Abraham Pither of Benambra, Victoria, grazier, against the Primary Producers Bank of Australia Ltd. (In Liquidation) and the Southern British National Trust Ltd. (In Liquidation), the plaintiff alleged that on 6th December 1933 the Southern British National Trust Ltd. (In Liquidation)—referred to as the trust company—by false and fraudulent representations induced him to sign (*a*) an application to the directors of the trust company for the allotment to him of a number of " ' B ' series perpetual income first mortgage investment trust debentures of £10 each " upon the terms of a prospectus issued by the trust company, the purchase price to be provided out of certain dividends payable to the plaintiff by the liquidators of the defendant bank, and (*b*) a document—referred to as a deed of assignment—wherein, after reciting *inter alia* that the liquidators of the bank had admitted the plaintiff's proof of debt in the sum of £19,899 18s. 8d. ; that after payment of certain dividends there still remained an amount of £4,726 4s. 6d. to the credit of the plaintiff's account in respect of the admitted claim ; that the plaintiff had applied to the trust company for one of the debentures described above for each £10 of the sum then standing to his credit in the books of the bank in respect of his admitted claim ; and that the plaintiff had proposed to the trust company that it should accept payment for the debentures in the manner therein provided to which the trust company had agreed, the plaintiff, as beneficial owner, assigned " unto the trust all that the right of the assignor to receive from the liquidators of the bank all dividends hereafter to become payable in respect of the said admitted claim to the assignor against the bank," and it was provided that the trust company as

and when it should receive any of the dividends should apply them in payment of the purchase price of the debentures applied for by the plaintiff. The plaintiff alleged that as soon as he became aware of the falsity of the representations made to him he by notice in writing given to each of the defendants countermanded the deed of assignment and refused further to be bound by it. He sought (*a*) a declaration that the deed of assignment was void and inoperative and not binding on him; (*b*) a declaration that he was entitled to receive from the defendant bank all dividends payable in respect of his admitted claim against the bank which had not already been paid by its liquidators, and in particular the sixth, seventh and eighth dividends amounting to the sum of £4,726 4s. 6d.; (*c*) an injunction restraining the liquidators of the bank from paying those dividends to any person, body or corporation other than the plaintiff; and (*d*) an order that the liquidators of the bank pay the dividends to the plaintiff.

The defendant bank entered a submitting appearance.

In its statement of defence the trust company denied the allegation that by its false and fraudulent representations the plaintiff had been induced to sign the documents referred to, and said, *inter alia*, that prior to his alleged rescission or countermand of those documents other debentures of the same series had been issued for valuable consideration to other persons and upon the assignment to the trust company of the debts due by the bank they became and continued to be the subject of the charge in favour of all the holders of debentures of that series; thus innocent third parties did prior to the plaintiff's alleged rescission and/or countermand for value acquire an interest in the debts, or, alternatively, the other debenture holders acquired subject to the rights of the creditors of the trust company an interest in the debts the subject matter of the assignment, and in either case the plaintiff was precluded from exercising his alleged right to rescind and/or countermand the assignment.

By clause 1 of the debenture the trust company in consideration of the sum of £10 paid to the trust bound itself to pay to the registered holder of the debenture at the time and in the events provided by the conditions indorsed thereon the sum of £10, and until payment

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thereof to pay interest thereon in manner provided by the conditions. Clause 2 was as follows :—" The trust hereby charges with the due performance of its obligations hereunder—(*a*) all investments and securities from time to time forming or representing investments of the net proceeds of sales of debentures of this series and of any reserve in respect of this series ; (*b*) all moneys being net proceeds of sales of debentures of this series from time to time held by the trust pending investment as provided in the said conditions ; (*c*) all moneys being net proceeds of the sale realization or release of any such investments and held by the trust from time to time pending reinvestment ; and (*d*) the annual net earnings (as defined in the said conditions) from the said investments held by the trust from time to time pending appropriation and distribution."

After evidence had been given at the trial before *Webb* J. it was admitted on behalf of the trust company that it could not contest the allegations of fraud, though the agents who had made the representations were themselves innocent. Judgment was given for the plaintiff.

From that decision the trust company appealed to the High Court, the defendant bank being joined with the plaintiff as respondent to the appeal.

Further material facts appear in the judgments hereunder.

Teece K.C. (with him *Kitto*), for the appellant. Although the dividends receivable in the future do not fall within the expressed words of clause 2 of the debentures, there is an implied obligation on the appellant company in a transaction such as this to preserve the chose in action, so that the debenture holders would have the benefit of those dividends. Thus, the dividends would answer the description in par. *b* of clause 2. The judge of first instance failed to recognize the equitable right of the debenture holders to have the fund, constituted by the dividends receivable, preserved. Upon the bank going into liquidation the respondent Pither's debt became converted into a claim for dividends, and became a chose in action capable of assignment (*In re Milan Tramways Co.* ; *Ex parte Theys* (1)), and, as established by the documentary evidence, Pither did

(1) (1884) 25 Ch. D. 587.

assign that chose in action to the appellant. That assignment had the immediate effect of making the property in the subject matter of the assignment part of the security for all debentures and, as innocent third parties had for value thus acquired an interest in that property, Pither lost his right to rescind the assignment (*Clough* v. *London and North Western Railway Co.* (1); *Tennent* v. *City of Glasgow Bank* (2); *Houldsworth* v. *City of Glasgow Bank* (3); *In re Hull and County Bank*; *Burgess's Case* (4)). Immediately a company goes into liquidation it loses all beneficial interest in its property; the property remains vested in the company but the beneficial interest passes immediately to the creditors in the first place and then to the shareholders (*In re Oriental Inland Steam Co.*; *Ex parte Scinde Railway Co.* (5); *Burgess's Case* (6); *In re Vocalion (Foreign) Ltd.* (7)).

[RICH J. referred to *Knowles* v. *Scott* (8).]

The words actually used in the document of assignment are immaterial. What Pither assigned was his right to receive from the bank through its liquidators his proper share of the assets when ascertained. In the event of their security being in jeopardy debenture holders are entitled to appoint a receiver (*In re London Pressed Hinge Co. Ltd.*; *Campbell* v. *London Pressed Hinge Co. Ltd.* (9)).

[DIXON J. referred to *Oakes* v. *Turquand and Harding* (10), and *Tennent* v. *City of Glasgow Bank* (11).]

The debentures do not create a floating charge. The proceeds of sale of investments cannot be applied in payment of any charge or debt of the company but must be retained for debenture holders. Where, as here, a company has power to issue debentures the directors have an implied power not only to issue them for cash payable *in futuro*, but also for the assignment of some property which is capable of being converted into money. That being so, there must be an implied covenant by the company with the debenture holders that in the event of its receiving as consideration for the debentures

(1) (1871) L.R. 7 Ex. 26, at p. 35.
(2) (1879) 4 App. Cas. 615, at p. 621.
(3) (1880) 5 App. Cas. 317.
(4) (1880) 15 Ch. D. 507.
(5) (1874) 9 Ch. App. 557.
(6) (1880) 15 Ch. D., at pp. 511, 512.
(7) (1932) 48 T.L.R. 525.
(8) (1891) 1 Ch. 717, at p. 722.
(9) (1905) 1 Ch. 576.
(10) (1867) L.R. 2 H.L. 325, at pp. 361, 362.
(11) (1879) 4 App. Cas. 615.

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not cash but a chose in action which will ultimately result in money, it will keep the chose in action intact so that the debenture holders will not lose the benefit of the charge given by clause 2 (*b*). A right over certain property based on an agreement, expressed or implied, enforceable in a court of equity is an equitable interest in that property (*London and South Western Railway Co.* v. *Gomm* (1)). There is an implied obligation on the appellant company to keep the chose in action intact, otherwise it would be derogating from its own grant in that it would not be able to give to the debenture holders what by the debentures it had contracted to give to them (*Hooper* v. *Herts* (2)). This chose in action comes within the express words of par. *a* of clause 2. The provisions of sec. 85 of the *Companies Act of* 1931 of Queensland do not apply to this asset because, as the mortgage debenture was registered in Victoria and not in Queensland, it is not a Queensland asset. The Queensland legislature has no power to provide that an unregistered mortgage shall not give any security over assets in Victoria and New South Wales. The asset was domiciled in Victoria (*New York Life Insurance Co.* v. *Public Trustee* (3)); therefore the security is not void. The mere fact that a company is in liquidation in one State does not prevent a creditor pursuing all his remedies in another State (*Primary Producers Bank.* v. *Hughes* (4) ; *In re Russian Bank for Foreign Trade* (5)). Pither's right of rescission, having been lost, could not be revived by the fact that the company went into liquidation, and, therefore, the security became void as against the liquidators.

Macrossan (with him *Walker*), for the respondent Pither. The subject matter of the transaction of 6th December 1933 between Pither and the appellant company was a chose in action (*In re Milan Tramways Co.*; *Ex parte Theys* (6) ; *Spence* v. *Coleman* (7)). It was an equitable chose in action ; therefore it was assigned subject to all equities, including Pither's equitable right to rescind

(1) (1882) 20 Ch. D. 562, at pp. 580, 581.
(2) (1906) 1 Ch. 549, at p. 559.
(3) (1924) 2 Ch. 101, at p. 115.
(4) (1931) 32 S.R. (N.S.W.) 14; 48 W.N. (N.S.W.) 240.
(5) (1933) 1 Ch. 745.
(6) (1884) 25 Ch. D. 587.
(7) (1901) 2 K.B. 199, at pp. 204, 205.

the assignment because of the fraud practised upon him (*Cockell* v. *Taylor* (1); *Barnard* v. *Hunter* (2); *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 117; *Lewin* on *Trusts*, 13th ed. (1928), pp. 884, 885, par. 10). Under the so-called debenture the other debenture holders acquired no rights whatever in the subject matter of the assignment, and, even if they did, their rights were purely equitable rights and were later in point of time than Pither's right of rescission.

[DIXON J. referred to *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 114, and *Barry* v. *Heider* (3).]

Pither's equity was better than, and therefore prevails over, that of the other debenture holders (*Shropshire Union Railways and Canal Co.* v. *The Queen* (4)). The case of *Clough* v. *London and North Western Railway Co.* (5) was a case of an absolute transfer of a chattel. The "debenture" was only a contractual agreement on the part of the appellant to pay money to the debenture holders on certain conditions; there was no absolute agreement to pay the money in all events and the only security was that provided by clause 2. Nothing has been received by Pither; therefore no difficulty arises on the question of *restitutio in integrum* (*Halsbury's Laws of England*, 2nd ed., vol. 23, p. 112, par. 157). A right to a future undeclared dividend is not money, nor does it form or represent "investments of the nett proceeds of sales of debentures" within the meaning of par. *a* of clause 2 of the debentures, nor is it "moneys being nett proceeds of sales of debentures . . . held by the trust pending investment" within the meaning of par. *b* of that clause. The true nature of the transaction between Pither and the appellant was an agreement by Pither that he would lend to the appellant on these "debentures" the future dividends he might receive in the liquidation of the bank as and when he would receive them. The assignment was merely ancillary to that transaction. Decisions of the courts founded entirely on the provisions of the *Companies Acts* are irrelevant and are not applicable here. They all follow the principles enunciated in *Oakes* v. *Turquand and Harding* (6); the judgments in that case rested entirely upon the

(1) (1852) 15 Beav. 103, at p. 118; 51 E.R. 475, at p. 481.
(2) (1856) 2 Jur. (N.S.) 1213, at p. 1215.
(3) (1914) 19 C.L.R. 197.
(4) (1875) L.R. 7 H.L. 496.
(5) (1871) L.R. 7 Ex. 26.
(6) (1867) L.R. 2 H.L. 325.

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statutory position of a shareholder as a contributory under the *Companies Act*. Pither was not a shareholder of the appellant, nor were the other debenture holders its creditors.

[DIXON J. referred to *Tennent* v. *City of Glasgow Bank* (1).]

The distinction between the position of a debenture holder who, on the ground of fraud, has elected to rescind a contract to take debentures, and the position of a shareholder in relation to a similar position under a contract to take shares in a company is pointed out in *Palmer's Company Precedents*, 14th ed. (1933), Part III., pp. 439, 440. Pither was prompt in the exercise of his right to rescind (*Erlanger* v. *New Sombrero Phosphate Co.* (2)). So far as the contract between Pither and the appellant had not been carried out at the date of the liquidation of the appellant, it, being no longer enforceable, could not thereafter be carried out (*In re Consolidated Land Co. (Ltd.)*; *Ellerby's Claim* (3)). The question of the *locus* of the debt does not arise, especially in the case of a company in liquidation. The domicile of the bank, its winding up, and liquidators were all in Queensland—the winding up of the bank in Queensland was stayed—and Pither had a right to sue the bank in Queensland (*R.* v. *Lovitt* (4)), where a substantial part of its assets were situate.

Coen, for the respondent bank, submitted to any order the court thought fit to make.

Teece K.C., in reply. The rule that an assignee takes subject to equities is subject to the exception that the equity of a person to set aside becomes no longer an equity when the interests of third parties intervene. It is an aspect of the rule that there cannot be a rescission unless the parties can be restored *in statu quo* (*Clough* v. *London and North Western Railway Co.* (5); *Erlanger* v. *New Sombrero Phosphate Co.* (6); *A. H. McDonald & Co. Pty. Ltd.* v. *Wells* (7)). In *Barry* v. *Heider* (8), which was approved by the Privy Council in *Great West Permanent Loan Co.* v. *Friesen* (9), the

(1) (1879) 4 App. Cas., at p. 622.
(2) (1878) 3 App. Cas. 1218, at pp. 1278, 1279.
(3) (1872) 20 W.R. 855.
(4) (1912) A.C. 212, at p. 219.
(5) (1871) L.R. 7 Ex. 26.
(6) (1878) 3 App. Cas., at pp. 1277 et seq.
(7) (1931) 45 C.L.R. 506, at p. 512.
(8) (1914) 19 C.L.R. 197.
(9) (1925) A.C. 208.

right of the assignor of an equitable interest to rescind by reason of undue influence was not held superior to the right of the assignee of the equitable interest.

[DIXON J. referred to *Abigail* v. *Lapin* (1).]

The transaction before the court in *Ellerby's Case* (2) was merely an agreement to lend certain sums of money at future times. The principles stated in that case were more fully enunciated in *South African Territories Ltd.* v. *Wallington* (3). This was not an agreement that Pither should lend money to the appellant by instalments as dividends became payable, which could be terminated at any time as soon as the position of the company became doubtful; it was definitely an assignment, an assignment on trust, firstly, to apply money in a particular way, and, secondly, to pay the surplus to the assignor. An assignment of dividends was considered by the court in *In re Irving*; *Ex parte Brett* (4).

Macrossan, by leave, referred to *Goldsbrough, Mort & Co. Ltd.* v. *Commonwealth Agricultural Service Engineers Ltd.* (5) and *Morison* on *Rescission of Contracts* (1916) p. 192.

Cur. adv. vult.

June 9.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff was a depositor in the Primary Producers Bank of Australia Ltd., which was ordered to be wound up by the Supreme Court of Victoria on 21st September 1931. On 29th September 1931 the bank went into voluntary liquidation in Queensland where it was registered as a company. The winding up was ordered to be continued subject to the supervision of the court. The Victorian winding up was then stayed subject to conditions. The plaintiff's proof of debt against the bank was allowed for £19,899. In June 1933 three dividends had been paid amounting to 12s. 6d. in the £ and further dividends were expected. The defendant, The Southern British National Trust Ltd., conducted a campaign to sell an issue of 250,000 debentures described as perpetual income first mortgage investment trust debentures of £10 each. The

(1) (1934) A.C. 491.
(2) (1872) 20 W.R. 855.
(3) (1898) A.C. 309.
(4) (1877) 7 Ch. D. 419.
(5) (1930) S.A.S.R. 201.

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plaintiff was approached by agents of the trust company and was persuaded to apply for 124 debentures. He assigned to the trust company his right to the fourth dividend from the bank in order to pay for the debentures. These debentures were allotted to him and were subsequently sold by him. No question arises about them in the present case. On 6th December 1933 the plaintiff was induced by representations of the company's agents to apply for further debentures. He signed an application for as many debentures as could be purchased by future dividends from the bank. He also executed an assignment to the trust company of " all that the right of the assignor to receive from the liquidators of the bank all dividends hereafter to become payable in respect of the said admitted claim of the assignor against the bank and all the estate and interest of the assignor in such dividends to hold the same unto the trust its successors and assigns absolutely." The assignment also appointed the trust company as plaintiff's attorney to receive and give discharges for the dividends and provided that the company should apply the dividends when received in payment of the purchase price of the debentures, paying to the assignor any amount received by it in excess of the purchase price of the debentures. Notice of the assignment was given to the bank. The future dividends in fact proved to be sufficient in amount to provide purchase money for 621 debentures with a surplus of a few pounds. On 21st December 1933 the trust company informed the plaintiff of the allotment of 621 debentures.

On 12th January 1934 the plaintiff became doubtful as to the merits of the trust company and asked the company to cancel the authority to collect the dividends and to advise the bank accordingly. He also independently sent advice of cancellation to the bank. In February 1934 the plaintiff withdrew his cancellation and the 5th dividend paid in March 1934 was applied by the trust company towards the purchase price of the debentures. On 30th August the plaintiff again revoked the authority which he had given to the trust company to collect the dividends, and informed the company that he wished to cancel the assignment and that he had written accordingly to the bank. By the *Companies (Liquidation) Act* 1935 (N.S.W.), sec. 2, it was specifically directed that the trust company

be wound up under the supervision of the court, the winding up to be deemed to commence on 11th April 1935. The Supreme Court of Queensland also ordered the trust company to be wound up, the winding up being ancillary to the winding up in New South Wales. The plaintiff took proceedings in the Supreme Court of Queensland against the trust company and the bank for a declaration that the assignment was void and inoperative and not binding upon him because he had been induced to make it by the fraud of the trust company, and he claimed the payment to him by the bank of the outstanding dividends. After evidence had been given at the trial it was admitted on behalf of the trust company that the company could not contest the allegations of fraud, though the agents who had made the representations were themselves innocent. The bank submitted to any order which the court might make. The defendant trust company contended that the interest of the plaintiff in the dividends was, according to the terms of the debentures, subject to a charge for all the debenture holders, who had therefore acquired interests for value in good faith in the dividends which the plaintiff had assigned, and that therefore the plaintiff was no longer able to repudiate the assignment. *Webb* J. rejected this contention and gave judgment for the plaintiff. An appeal is now brought to this court.

It is not contested that, if only the plaintiff and the defendant were concerned, the plaintiff would be entitled to the relief which he claims. The argument against him rests entirely upon the alleged rights of holders of other debentures in the " B " series. These debentures, in a maze of words, in effect, gave the debenture holders a first charge over and only over all their own moneys less certain expenses, the amount of which depended on the decision of the directors of the trust company. The debentures are described as perpetual debentures and the principal can be claimed only if the trust company is wound up or in certain other events, and then repayment is only to be made out of the property charged by the debentures.

Clause 2 of the debenture provides that the trust charges with the due performance of its obligations :—" (*a*) All investments and securities from time to time forming or representing investments of

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the net proceeds of sales of debentures of this series and of any reserve in respect of this series; (*b*) All moneys being net proceeds of sales of debentures of this series from time to time held by the trust pending investment as provided in the said conditions; (*c*) All moneys being net proceeds of the sale realization or release of any such investments and held by the trust from time to time pending reinvestment; and (*d*) The annual net earnings (as defined in the said conditions) from the said investments held by the trust from time to time pending appropriation and distribution."

It has not been contended that pars. *c* and *d* are relevant, but it has been argued that the interest of the plaintiff in the future dividends which he assigned to the trust company is property covered by the charge created by *a* and *b*. If this is so, then the plaintiff's right to receive dividends from the bank became subject to this charge in favour of the other debenture holders, and it is urged that, as they are innocent third parties who gave value for the assignment which they received by way of charge, the plaintiff cannot now repudiate the transaction so as to deprive them of their rights under the charge. Reference is made to *Clough* v. *London and North Western Railway Co.* (1) and *Oakes* v. *Turquand and Harding* (2).

The first question to be answered is whether the plaintiff's interest in the dividends falls within the charging clause of the debentures. The charge created by clause 2 (*a*) applies to investments and securities from time to time forming or representing investments of the net proceeds of sales of debentures &c. In my opinion, the right of the plaintiff to obtain payment of further dividends cannot be regarded as an investment or security forming or representing an investment of the net proceeds of any sale of debentures. The debentures which the plaintiff agreed to buy were to be paid for by the moneys to be received as dividends from the bank. The right to receive those dividends cannot itself be regarded as an investment of the dividends nor can it be regarded as a "security forming or representing" such an investment. Further, the charge applies only to investments &c. representing the net proceeds of sales. The net proceeds of sales are ascertained after deducting certain expenses as determined from time to time by the directors of the trust company.

(1) (1871) L.R. 7 Ex. 26. (2) (1867) L.R. 2 H.L. 325.

When debentures have been sold and the net proceeds of sale have been ascertained and invested, clause 2 (*d*) applies; but it cannot apply until investments of net proceeds have come into existence.

Clause 2 (*b*) deals with moneys before they are invested. It applies to moneys being net proceeds of sales of debentures from time to time held by the trust pending investment. It cannot be said that the right to receive dividends from the bank is money being held by the trust pending investment. Accordingly, in my opinion, the right to receive the future dividends before they were declared, and also, for the same reasons, the right to receive them after they had been declared, do not constitute property which was subject to the charge.

It was argued that the directors of the trust company (or the company itself) were under an obligation to preserve, in the interests of all debenture holders, any property which the trust company might hold which would or might become property subject to the charge in favour of the debenture holders. Doubtless this is the case, and if the directors (or the company) were guilty of negligence in looking after such property, the persons to whom the duty of care was owed would have a remedy if they suffered injury as a result of such negligence. But this principle does not avail to extend the area of the charge. The fact that the directors (or the company) owe a duty in respect of property, even if that duty is owed to the debenture holders, does not give to the debenture holders any interest in the property (*Bank of Scotland* v. *Macleod* (1)). This principle is more especially applicable when there are documents, such as the debentures in this case, explicitly specifying the nature and extent of the proprietary interests intended to be created. Thus I am unable to hold that the fact that the directors or the company may owe a duty to the debenture holders in relation to the plaintiff's rights against the bank operates, before those rights have been turned into money or investments, to give any interest in the rights to the debenture holders.

If I had been of opinion that the debenture holders had acquired any rights in the subject matter of the assignment by the plaintiff

(1) (1914) A.C. 311.

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to the company, I would have found some difficulty in holding that such rights would not have prevented the plaintiff from seeking to set aside the assignment from him to the company on the ground of fraud. The argument for the plaintiff is that the company, as assignee of the chose in action consisting in the debt owed to the plaintiff by the bank, takes subject to equities, and that it therefore takes subject to the right of the plaintiff to set aside the assignment to the company on the ground of fraud. There is no doubt that, if the transaction out of which the debt arose is voidable on the ground of fraud, any assignee of the debt takes subject to this defect in the title of the assignor (*Mangles* v. *Dixon* (1)). Such an equity would be an equity arising out of the same transaction as the debt assigned. In this case, however, the argument for the plaintiff on this point seeks to make the rights of the ultimate assignee subject to an equity which is quite unconnected with the debt, but which arises out of, and is connected only with, an assignment of the debt. In my opinion it is not clearly and finally established that the rule that an assignee of a chose in action takes subject to equities goes so far as is contended. The rule is stated in *White and Tudor's Leading Cases in Equity* in the following way (9th ed. (1928), vol. I., p. 136, note 6, notes to *Ryall* v. *Rowles* (2)) :—" The assignee, whether of a chose in action or a trust fund, can acquire no greater rights under the assignment than those enforceable by the assignor, and he therefore takes subject to all defences existing in respect of the right assigned which would be available against the assignor seeking to enforce the right assigned; provided that the matters on which such defences are based occurred before notice of the assignment was given to the person liable. This principle is shortly expressed by the statement that the assignee takes subject to all equities." " Assignor " in this statement means the original creditor. It is evident that an alleged defect in an assignment cannot be a defence available to the debtor as against the original creditor. Such a matter affects the relation between the assignor and his assignee, not the relation between the assignor and the debtor. As to equities which leave unchanged the character of the debt assigned, though affecting the relation between an assignor

(1) (1852) 3 H.L.C. 702; 10 E.R. 278.

(2) (1750) 1 Ves. Sen. 348; 27 E.R. 1074.

and an assignee of that debt, see *In re Milan Tramways Co.*; *Ex parte Theys* (1); *Government of Newfoundland* v. *Newfoundland Railway Co.* (2). In *Halsbury's Laws of England*, 2nd ed., vol. 4, at p. 459, the law is thus stated: "Though the assignee takes subject to equities available against the assignor, he is only thereby made liable to equities against the original assignor, not to those available against an intermediate assignor, so that where a liability (such as a set-off) only attaches to the intermediate assignor the ultimate assignee can maintain his action freed from the equity." I think that the rule (in its strict sense) that an assignee of a chose in action takes subject to equities refers only to equities affecting the debt, and not to equities affecting intermediate assignments of the debt, and therefore this rule does not apply in this case to prejudice the title, if any, of the debenture holders as assignees from the assignee (the company) of the original creditor-assignor (the plaintiff).

But the debtor can, if he has doubts as to the validity of an assignment, require the ultimate assignee to prove that he really is an assignee under a subsisting assignment. It may, however, be the case that an assignor (such as the plaintiff) is precluded from repudiating an otherwise voidable assignment because it would be inequitable for him to do so as against ultimate assignees (such as the other debenture holders). This particular question whether an ultimate assignee takes subject to an equity to set aside, not the transaction out of which the debt arose, but an intermediate assignment, has been considered in earlier cases than those cited. In *Barnard* v. *Hunter* (3) the ultimate assignee was really the transferee of a mortgage over a legal life estate which, some years later, was sold, the proceeds being paid into court. The matter was, for a reason which I do not understand, treated as if the transferee of the mortgage were an assignee of part of the fund, and general statements were made to the effect that the assignee of any equitable interest could take no better interest than his assignor. (As to this general proposition, cf. *In re Overend, Gurney & Co.*; *Ex parte Swan* (4)—a case which shows that these statements cannot be accepted as universally true). But the statements in *Barnard* v. *Hunter* (3) are made subject

(1) (1884) 25 Ch. D. 587. at p. 593.
(2) (1887) 13 App. Cas. 199, at p. 211.
(3) (1856) 2 Jur. (N.S.) 1213.
(4) (1868) L.R. 6 Eq. 344, at p. 360.

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to the expressly stated qualification that the ultimate assignees in that case were in the position of taking no better interest than their immediate predecessor in title because a prior assignor (who had been defrauded in making his assignment) was " no party to the assignment " to the claimants—the ultimate assignees.

The same question is discussed in *Cockell* v. *Taylor* (1), a case to which my brother *Dixon* refers in his judgment. In that case also the principle is recognized that an assignor who (as in the present case) has made a voidable assignment, may be precluded from exercising his right to set aside that assignment if his conduct has " affected that right " because he has done something " to countenance " the " subsequent dealing " with the chose in action which was assigned (2). In such a case the assignor would be in the position of what in *Barnard* v. *Hunter* (3) was described as a " party to the assignment " to the ultimate assignees.

The assumption which I am making in discussing this part of the case is that the debenture holders other than the plaintiff acquired rights by way of charge over the chose in action assigned by the plaintiff to the trust company. Upon such an assumption they are the ultimate assignees. If they were parties to these proceedings, they might be able to show that the plaintiff, himself an applicant for debentures and an actual debenture holder, knew that the other debenture holders would have a charge as defined in the debentures. If this charge covered what he assigned to the company, he must be taken to have known that his assignment to the company involved an assignment by way of charge to the debenture holders. Thus he would be in substance " a party to the assignment." If these facts were established, there would, in my opinion, be much to be said for the proposition that the acquisition for value of rights by innocent third parties, the other debenture holders, would, if they took their debentures upon the faith of the existence of such a charge, prevent the plaintiff from obtaining the aid of a court to set aside his assignment to the company. The evidence, however, does not establish that such a state of facts exists, and in the view which I take that other debenture holders (whether prior or subsequent to

(1) (1852) 15 Beav. 103; 51 E.R. 475.

(2) (1852) 15 Beav., at p. 119; 51 E.R., at p. 482.

(3) (1856) 2 Jur. (N.S.) 1213, at p. 1215.

the plaintiff) acquired no such rights, this question becomes hypothetical in character, and it is not necessary for me to decide it.

In my opinion the judgment of the Supreme Court should be affirmed.

RICH J. It is unnecessary to decide whether upon the proper construction of the debenture in question and upon its true effect in equity the security it affords extends to future payments of the dividends in the liquidation of the Primary Producers Bank which were assigned by the plaintiff. The debenture would in any event give to other debenture holders only a charge over the assigned chose in action and this would be subject to all equities, including the plaintiff's equity to set aside the assignment. It is a rule and principle of this court, and of every court, I believe, that where there is a chose in action, whether it is a debt, or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has, against the assignee, exactly the same equities that he would have as against the assignor (*Phipps* v. *Lovegrove* ; *Prosser* v. *Phipps* (1) ; see also *Athenaeum Life Assurance Society* v. *Pooley* (2) and *Roxburghe* v. *Cox* (3)). It is of the essence of an equitable assignment that the assignee takes no better title than his assignor had, and takes subject to all equitable interests and defects affecting the title. It is necessary not to overlook the distinction between an equitable interest and an equity of a personal nature. But an equity to set aside an instrument for fraud or undue influence may affect the title of the assignee under the instrument and is not necessarily personal.

The principle relied upon by Mr. *Teece* is exemplified by the cases of *Directors &c. of Central Railway Co. of Venezuela* v. *Kisch* (4) and *Oakes* v. *Turquand and Harding* (5), which may be treated as the beginning. Except in cases of liquidation, where the shareholders' and creditors' rights are fixed upon the insolvency of the company or its liquidation, there must be some reason to suppose that the third party taking an interest in the chose in action has been or may have been misled

(1) (1873) L.R. 16 Eq. 80, at p. 88.
(2) (1858) 3 DeG. & J. 294 ; 44 E.R. 1281.
(3) (1881) 17 Ch. D. 520, at p. 526.
(4) (1867) L.R. 2 H.L. 99, at pp. 125, 126.
(5) (1867) L.R. 2 H.L., at pp. 348, 361, 362.

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into believing that he had a better right than the person under whom he took. There is no such reason in the present case. The respondent Pither was induced to agree to take debentures and to make the assignment of his claim in the liquidation of the respondent bank by misrepresentations. The transaction was brought about quite independently of transactions with other debenture holders, none of whom, for all that appears, ever heard of Pither. There was no public register of debentures to inspect. The appellant company entered Pither's name in its own list of debenture holders, but that is not a public document open to general inspection as of right, and in fact does not appear to have been the basis of any other subscription. In my opinion the appeal should be dismissed with costs, the costs of the respondent bank being limited to those of a submitting party.

DIXON J. The question upon which the decision of this case turns does not involve many facts and they may be reduced to a relatively simple statement.

Pither was a creditor of the Primary Producers Bank of Australia Ltd. and proved his debt in its liquidation. After receiving some dividends, he was induced by fraud to assign his right to future dividends to the Southern British National Trust Ltd. which also is now being wound up. The deed of assignment provided that the dividends should be applied by the latter company in payment of the purchase price of debentures to be taken up by Pither. These were part of a series of £10 debentures to be issued by the Southern British National Trust Ltd. and Pither, when he executed the deed of assignment, made an application for as many of them as the dividends might cover. His application was acknowledged and he was informed that he had been allotted six hundred and twenty-one of them. He did not actually take up or receive the debenture scrip, but his name was placed on the trust company's list of debenture holders. Under the assignment, the trust company obtained one dividend from the liquidator of the bank, but Pither then repudiated the assignment and brought the suit out of which this appeal arises to have it set aside.

The only answer which the liquidator for the trust company can make to his claim for relief is that innocent third parties have acquired rights in the subject matter of the assignment. The third parties are other debenture holders who took up debentures of the same series. The form of debenture is singular. Although it professes to be a floating security, what it seems to do is to give a fixed charge to the debenture holders over all the proceeds of the sale of debentures and the investments of such proceeds. Accordingly each debenture holder obtained a charge on what all the debenture holders, including himself, might pay for the debentures issued. It is said that, because his fellow debenture holders acquired in this manner a charge over the moneys paid or payable in respect of his debentures, there can be no rescission of the assignment fraudulently obtained from him for the purpose of paying for his debentures.

The first answer made on behalf of Pither to this contention is that he does not seek restoration of the moneys already paid under the assignment, that, whether these moneys have been appropriated in the full payment of some debentures or in part payment of all of them, he is content to leave the amount in possession of the trust company with the charge created by the debentures attaching to it; but that what he does seek is the avoidance of the assignment as a title to the receipt by the trust company of further payments from the liquidators of the Primary Producers Bank of Australia Ltd. These further payments do not, it is said on his behalf, fall within the charge created by the debentures until they are actually reduced into possession. For on the express terms of the charge the only description of assets within which such payments could fall is: "all investments and securities . . . forming or representing investments of the net proceeds of sale of debentures of this series" and "all moneys being net proceeds of sales of debentures of this series . . . held pending investment."

I agree in the view that this language cannot, as a matter of the mere meaning of words, include the chose in action assigned by Pither as a means of enabling the trust company to obtain moneys in payment of the debentures allotted to him. But I think that the argument presses too far the consequence of the meaning of the language of the debenture. If the proceeds of a chose in action are charged by the person

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in whom it is vested, he necessarily comes under equitable obligations in respect of the chose in action itself. He is bound to exercise his rights in respect of the chose in action in such a way as will not defeat or impair the charge. It may perhaps be a question whether the chargee obtains in consequence an equitable interest in the chose in action or an equity only against the person in whom it is vested. But, in any case, I am of opinion that the chargees in the present case, that is, the debenture holders, would take no better title to the chose in action than the trust company. If the title of the trust company is voidable for fraud, as in favour of Pither it clearly was, then the charge of the debenture holders is necessarily subject to the same defect of title. The contention made on behalf of the liquidator of the trust company is ill founded. It is not a case in which the acquisition by innocent third parties of rights in property prevents rescission of an antecedent transfer or assignment which otherwise would be voidable. The subject matter is a chose in action and the ordinary rule applies. The equitable interest, if any, created by the debentures in the chose in action is no better than an assignment in equity of a chose in action and such an assignment is subject to all equities affecting the title of the assignor.

We are not here concerned with any question between the assignor of a chose in action and the debtor. The indebtedness of the Primary Producers Bank of Australia Ltd., in liquidation, is not in dispute. It has been proved in the winding up and in respect of it dividends have become payable and further dividends will become payable. The question is entirely as to the title of the debt considered as assignable property.

Confusion sometimes arises between the two very different applications of the statement that the assignee of a chose in action takes subject to all equities affecting the assignor. When this statement is made in relation to the rights and liabilities of the debtor or obligor, it means that every assignee takes subject to all defences available as between the original parties to the obligation up till the completion of the first assignment by notice. The debtor's liabilities may be discharged in whole or in part by some transaction with the immediate assignee, as, for instance, by payment to him. In that case an assign of an assignee would take subject to that

defence also. But it is not every defence open to the debtor against such an intermediate assignee that is available against a subsequent assignee. Set-off is an instance. As between the original parties to a transaction resulting in a common law debt, set-off is by statute a legal defence to the cause of action, wholly or *pro tanto*. Every assignee must take subject to the defence. But, before the fusion of the jurisdictions, if the debtor was entitled to a liquidated demand against the assignee of the debt, who before the *Judicature Act* was necessarily an assignee in equity only, it was not available to him as a legal defence to an action to enforce the debt, which was of course brought in the name of the assignor. It has been decided that, if the assignee against whom such a cross-demand on the part of the debtor exists assigns the debt in turn, his assignee is not subject to the cross-demand, in spite of the *Judicature Act* (*In re Milan Tramways Co.*; *Ex parte Theys* (1)). This decision is responsible for a paragraph in the article on choses in action in *Halsbury's Laws of England*, 2nd ed., vol. 4, p. 459, par. 840, which may be correct enough if understood as confined to the relations of the debtor or obligor to the assignee of the chose in action, but has no application to the relations *inter se* between an intermediate and subsequent assignee. The paragraph is as follows :—" Though the assignee takes subject to equities available against the assignor, he is only thereby made liable to equities against the original assignor, not to those available against an intermediate assignor, so that where a liability (such as a set-off) only attaches to the intermediate assignor the ultimate assignee can maintain his action freed from the equity."

But when the statement that the assignee of a chose in action takes subject to all equities affecting the assignor is made in relation to the title of the assignee as against a prior assignor in a succession of assignments, it has an altogether different application. It describes the operation of the principle of *nemo dat quod non habet* in respect of equitable titles. The assignment was an equitable title ; for choses in action formerly assignable at law are not within the doctrine. The *Judicature Act*, although authorizing a legal assignment of choses in action, preserves the equitable rule founded

(1) (1884) 25 Ch. D. 587.

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on the equitable nature of the title. It expressly makes an assignment "subject to equities having priority over the right of the assignee" (Cf. English *Law of Property Act* 1925, sec. 136 (1)).

An assignment operating in equity only gave no higher equitable interest than the assignor possessed. If the title of the assignor was defeasible in equity, or was subject to equitable interests in third parties, so was the title of the assignee. In *Cockell* v. *Taylor* (1) Taylor had taken a charge upon a mortgage from the mortgagees to secure an advance made by him to them. The subject of their mortgage was a fund in court claimed by the original mortgagor. The mortgage arose out of a transaction between the mortgagor and the mortgagees which was found to be an unconscientious dealing and liable to be set aside. In dealing with the question whether Taylor's claim was superior or subject to this defect, Sir *John Romilly* M.R. said :—"The rule relative to the equities which attach on a chose in action has been discussed and established in many cases. It has not been disputed, nor can it be doubted, that the purchaser of a chose in action does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title, but that the purchaser of a chose in action takes the thing bought subject to all the prior claims upon it. If, therefore, the share of the plaintiff Collett in the fund in court had been charged with a sum to another person unknown to Taylor, Taylor would have taken this interest in the fund subject to that charge. The question here raised arises from the circumstance that the prior equity is an equity in the assignor of the chose in action to dispute and set aside that assignment on the ground of fraud; and it is suggested that, although there be not any doubt or question as to the general rule, yet that this must be taken with some qualification when the person himself who asserts the equity has created the interest under which the assignee of the chose in action claims it. But I have not come to that conclusion. I cannot, on this ground, draw any distinction between the different sorts of equities affecting a chose in action, or alter their priorities. Assuming, as I do, for the purpose of this present argument, that the plaintiff Collett has a prior equity to this chose in action, and that the title to it of the

(1) (1852) 15 Beav. 103; 51 E.R. 475.

person through whom Taylor claims is either void or subject to that of the plaintiff, the circumstance that the plaintiff has been induced to create or countenance such title by instruments which the court holds to be void will not, in my opinion, postpone or alter his original title " (1).

In *Barnard* v. *Hunter* (2), Hunter, a solicitor, purchased from one Lyde, who was his client, certain interests represented by a fund in court. He then assigned the interests by way of mortgage. Having held that, as between Lyde and Hunter, the transaction could not stand because of Hunter's position of influence arising from his relation of solicitor to Lyde, his client, Lord *Cranworth* proceeded to deal with the rights of the mortgagees from Hunter. He said :—" First, it is said they are purchasers for valuable consideration without notice. That is quite a mistake. That is a plea applicable to cases where you are seeking to take something away from a person. There you may protect yourself by showing you are a purchaser without notice ; but that is not this case. This is a fund realized in another suit—a fund which is a chose in action, as to which the question is, who has the best claim upon it in equity ? There is no doubt that Hunter, by the assignment from Lyde, would have been the best claimant upon it, and then, so far as Hunter was concerned, those claiming under him would be persons entitled. The question is, whether, if Hunter's title be rendered null and void, all the claims under Hunter must not follow the same road ; and in my opinion that clearly is so. The suggestion is, that though the rule would apply in certain cases, yet when the equity enforced against the assignee is an equity personally, that then persons claiming under the assignee cannot be damnified, because the mortgagee's title is affected by circumstances peculiar to himself. It appears to me that is an entire misapprehension of the rule. Those who claim under Hunter, claiming an assignment of an equity, must take as he took. Lyde assigns to Hunter, and Hunter assigns to these several mortgagees, and when it turns out that Hunter's title is likely to be defeated by Lyde, it follows as a matter of course, that those who claim under Hunter are in the same position. That is a doctrine which, generally speaking, cannot be controverted " (3).

(1) (1852) 15 Beav., at pp. 118, 119; 51 E.R., at pp. 481, 482.
(2) (1856) 2 Jur. (N.S.) 1213 ; 28 L.T. (O.S.) 152.
(3) 2 Jur. (N.S.), at p. 1215 ; 28 L.T. (O.S.), at p. 153.

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Upon the complicated facts of the case, the actual application of the doctrines enunciated by Lord *Cranworth* may be open to the observation that it is not at all clear that the assignment of the interests took place after and not before the subject matter was converted into a claim upon a fund in court, a chose in action. But this observation does not, in my opinion, affect the soundness of his Lordship's view of the principle. When an equitable assignment is made whether of a legal debt or of the benefit of an equitable obligation or of some equitable interest, the assignee obtains only an equitable right. That right depends altogether upon the principles administered by the Court of Chancery in its exclusive jurisdiction. No question arises of affecting or overriding the enjoyment of rights at law. If, in his turn, the equitable assignee assigns the right or interest he has derived, he imparts no more than the equitable rights subsisting in him. If, in his hands, they are liable to defeasance they remain so liable in the hands of the assignee from him. Of course in some respects the consequences may be affected or disturbed by the operation of the rule giving priority according to notice to the debtor or fund holder. But I think the general rule is that, as between successive assigns of a chose in action, defects in title are transmitted. This view is accepted by *Pollock, Principles of Contract*, 10th ed. (1936), pp. 218 et seq., and by *Williston, Harvard Law Review*, vol. 30, p. 102.

The position of an equitable assignment of a chose in action, and, therefore, of an assignment under the *Judicature Act*, is quite different from the transfer of a chattel personal. The transferee of a chattel personal who held under a title voidable at law or in equity or subject to equitable interests in third parties could nevertheless transfer the legal title. If he did so and the transferee took bona fide and for value, he obtained an indefeasible title free from equities. Thus in *Clough* v. *London and North Western Railway Co.* (1) when the court says that, if an innocent third party has acquired an interest in the property it will preclude rescission, no more is meant than that the innocent third party obtains bona fide and for value a legal right from the actual owner at law of property, a right free from equities or matters of defeasance. But even in the case of a chose in action

(1) (1871) L.R. 7 Ex., at p. 35.

estoppel or rules founded upon principles of estoppel may give an assignee a title free from the defects to which his assignor's title was subject. If the assignor is invested with the *indicia* of ownership, that is, if he is allowed to become ostensible owner, an assignment on the faith of his appearance of ownership may be indefeasible. Further, it may have been intended that assignees should take the chose in action free from equities and then the assignor may not be at liberty to depart from the assumption so invited. "Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities" (per *Cairns* L.J., *In re Agra and Masterman's Bank*; *Ex parte Asiatic Banking Corporation* (1)). Such considerations, however, have, in my opinion, no application to the present case. The charge in favour of the debenture holders is an equitable charge. No debenture holders were in fact misled by the assignment, or acted upon the faith of it. In acquiring their debentures, they did not act on the faith that the appellant would make an assignment or had done so. So far as appears, no other debenture holder knew anything about it. It is an ordinary example of the general rule. A discussion of the considerations mentioned is necessary only because reliance was placed upon the well known rule that a member of a company loses on the commencement of a winding up any right he might otherwise have had to the rescission of his contract of membership. It was contended that the principle upon which this rule rested was applicable to the relations of the debenture holders created by the debentures in the trust company. It was conceded that the winding up of that company was not material, but it was said that the mutual or interdependent interests of the debenture holders in the assigned moneys brought into play the same principles as prevented shareholders rescinding a contract of membership after winding up, a rule applicable even although the claims of creditors would be satisfied. It is unnecessary to examine the basis of this firmly settled rule. But the decided cases show that its adoption was influenced by a

(1) (1867) 2 Ch. App. 391, at p. 397.

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consideration of the position occupied by shareholders in an unincorporated company, who, of course, like partners, could not by repudiating their contract *inter se* escape liability to creditors (See per Earl *Cairns* L.C., *Tennent* v. *City of Glasgow Bank* (1)). It was also influenced by the fact that creditors may be supposed to have acted on the faith of the membership (*Bulch-y-Plwm Lead Mining Co.* v. *Baynes* (2) ; *Oakes* v. *Turquand and Harding* (3)).

But the fact that, when the company suspended and went into liquidation, an entire change took place in the relation of creditors and shareholders to the assets and of shareholders *inter se* made the rule inevitable (see the judgment of *Jessel* M.R. in *Burgess's Case* (4)).

It has, in my opinion, no application to the charge created in favour of other debenture holders in this case, which presents no analogy. This may be seen by considering the not improbable hypothesis that every debenture holder may have been induced by improper means to make a similar assignment. Could it be possible if that were the case, that the charge of all on the future dividends assigned by each prevented any of them rescinding ?

In my opinion the appeal should be dismissed with costs.

Appeal dismissed. The costs of the respondents to be paid by the liquidator of the Southern British National Trust Ltd. (In Liquidation) out of the assets, those of the respondent bank as submitting party.

Solicitors for the appellant, *Cannan & Peterson*, Brisbane, by *W. P. McElhone & Co.*

Solicitor for the respondent Pither, *Justin O'Sullivan*, Brisbane, by *J. Hickey & Quinn.*

Solicitor for the respondent bank, *Neil O'Sullivan*, Brisbane, by *Murphy & Moloney.*

J. B.

(1) (1879) 4 App. Cas., at p. 621.
(2) (1867) L.R. 2 Exch. 324 at p. 327.
(3) (1867) L.R. 2 H.L., at p. 361.
(4) (1880) 15 Ch. D., at pp. 511-514.