[HIGH COURT OF AUSTRALIA.]

HARVEY AND OTHERS . . . . . APPELLANTS;
RESPONDENTS,

AND

THE COMMERCIAL BANK OF AUSTRALIA LIMITED . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1937.

MELBOURNE, *Nov.* 15.

SYDNEY, *Dec.* 17.

Rich, Starke and Dixon JJ.

Company—Winding up—Proof of debt—Secured creditor—Valuing security—"Specific security on the property of" company—Land—Trust in favour of company—Registered mortgage in favour of creditor of company—Companies Act 1928 (*Vict.*) (*No.* 3659), *sec.* 207—*Insolvency Act* 1928 (*Vict.*) (*No.* 3705), *secs.* 194, 195.

The registered proprietor of certain land executed a declaration of trust of the land in favour of a company. He then gave a mortgage of the land to a bank to secure moneys owing by the company to the bank, which did not know of the declaration of trust. The mortgage was registered. Subsequently the company went into liquidation, and the bank claimed to be entitled to prove for the whole debt without giving up or giving credit for the security which it held over the land.

Held that the mortgage constituted a specific security on the property of the company within the meaning of secs. 194 and 195 of the *Insolvency Act* 1928 (which were made applicable to the winding up of insolvent companies by sec. 207 of the *Companies Act* 1928) (Vict.), and that, in proving its debt, the bank should have given up or given credit for the value of its security.

Decision of the Supreme Court of Victoria (*Lowe* J.): *In re P. Bird Pty. Ltd.*, (1937) V.L.R. 303, reversed.

APPEAL from the Supreme Court of Victoria.

On 28th April 1937 P. Bird Pty. Ltd. was indebted to the Commercial Bank of Australia Ltd. in the sum of £17,777 for money advanced and interest thereon. On 28th April 1937 the company went into voluntary liquidation, and Cecil Britton Harvey, Dudley Chitty and Wilfred McCrae Howitt were its liquidators. The bank lodged a proof of debt with the liquidators, but it was rejected on the ground that the bank, being a creditor holding specific securities on the property of the company, failed to realize or give credit for the value of such securities. On 23rd January 1929 Philip Bird, who was the registered proprietor of certain lands under the *Transfer of Land Act* (Vict.), executed an indenture declaring that he held the lands upon trust for the company and would transfer and deal with them as the company directed. On 27th March 1930 Philip Bird, who had become a surety for the debt of the company to the bank, executed a mortgage of the same lands to the bank to secure the moneys owing by the company to the bank. The mortgage to the bank was duly registered, but the bank did not know and was not informed of the declaration of trust in favour of the company. On 12th January 1928 the company also gave to the bank a general lien over all its assets. The bank in its proof of debt valued certain securities but refused to value or give credit for the security which it held over the land. The liquidators rejected the proof, and the bank applied to the Supreme Court of Victoria for the determination of the question whether the mortgage and the lien constituted specific securities on the property of the company within the meaning of secs. 194 and 195 of the *Insolvency Act* 1928 (which were made applicable to the winding up of insolvent companies by sec. 207 of the *Companies Act* 1928) (Vict.).

Lowe J. held that the fact that the company was the beneficial owner of the land covered by the mortgage did not make the mortgage a specific security on the property of the company within the meaning of sec. 194 of the *Insolvency Act* 1928, and he also held that the general lien did not constitute such a specific security. He accordingly held that the bank's proof of debt should be admitted by the liquidators : *In re P. Bird Pty. Ltd.* (1).

From that decision the liquidators appealed to the High Court.

(1) (1937) V.L.R. 303.

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Clyne and *Gowans*, for the appellants. The bank holds a specific security on the property of the company within the meaning of sec. 194 of the *Insolvency Act* 1928, which is applicable by virtue of sec. 207 of the *Companies Act* 1928, and as the bank has declined to value its security it is not entitled to share in any dividend in the winding up of the company. It holds a specific security over the property of the company in two respects. The mortgage given by Philip Bird to the bank is a security on the property of the company, because Bird, the mortgagor, had declared himself a trustee for the liquidating company of the land which is covered by the mortgage, so that the company is the *cestui que trust* of those properties. It is a "specific" security. Moreover, the company had given a general lien to the bank which charged all the real and personal property of the company which, or the titles to which, had in any way come into the possession of the bank. The titles to this land had come into the possession of the bank, and, therefore, the company's equitable interest created by the declaration of trust became charged. The charge so coming into existence was a specific security. With regard to the mortgage, the learned judge was wrong in holding that *In re Perkins*; *Ex parte Mexican Santa Barbara Mining Co.* (1) applied to the case. The decision depended entirely on the wording of the articles of association in that case. As to the true effect of *In re Perkins* (1), see *Mackereth* v. *Wigan Coal and Iron Co. Ltd.* (2). Secs. 72 and 179 of the *Transfer of Land Act* are also irrelevant to this case. Sec. 183 of the *Companies Act* specifies the time at which a voluntary winding up commences, and the consequences of a voluntary liquidation are set out in the *Companies Act* 1928, sec. 186 (1), and in *In re Fleetwood and District Electric Light and Power Syndicate* (3). A totally new set of considerations as to the rights of creditors applies in the winding up of a company (*Southern British National Trust Ltd.* v. *Pither* (4)). "Secured creditor" is defined in sec. 4 of the *Insolvency Act* 1928 as meaning "any creditor holding any mortgage charge or lien on the insolvent estate or any part thereof as security for a debt due to such creditor." The rule in bankruptcy is that any securities which,

(1) (1890) 24 Q.B.D. 613.
(2) (1916) 2 Ch. 293.
(3) (1915) 1 Ch. 486, at p. 490.
(4) (1937) 57 C.L.R. 89, at p. 114.

if given up, would augment the estate of the debtor must be valued (*Ex parte West Riding Union Banking Co.*; *In re Turner* (1); *In re Plummer* (2)). It is true that Bird had given a guarantee to the bank, and the giving of a guarantee by him is not the giving of a security by the company, but, where the mortgage is given over property of which the company is the owner in equity, it does create a security over property of the company of which the bank gets the benefit. That is, the bank gets a security over property of which the company is the equitable owner, and such a security must be valued (*Ex parte Connell*; *In re Clarke* (3); *In re Collie*; *Ex parte Manchester and County Bank* (4); *Re Cooksey*; *Ex parte Portal & Co.* (5)).

Dean, for the respondent. The bank has no security over any "property of the insolvent" within the meaning of sec. 194 of the *Insolvency Act*. Until the bank's claim is satisfied, there is nothing whatever to go to the company. The bank got its mortgage registered and is protected by secs. 72 and 179 of the *Transfer of Land Act*. *In re Perkins*; *Ex parte Mexican Santa Barbara Mining Co.* (6) is applicable to the present case, and the provisions of the *Transfer of Land Act* correspond to the articles of association in that case. The general lien is not a "specific security" within sec. 194 of the *Insolvency Act*. A specific security means a security over specific property and not a general charge. As the property subject to the lien is covered by a registered first mortgage, there is nothing upon which the lien can operate (*Ex parte Turney* (7)).

Gowans, in reply. "Giving up the security" means "lifting the security so far as it affects the rights of the insolvent." The view expressed in *Savage and Whitelaw* v. *Union Bank of Australia Ltd.* (8) is in accordance with that adopted in *In re Collie*; *Ex parte Manchester and County Bank* (9). The time at which it is to be ascertained whether there is a security over the property of the company is the date of

(1) (1881) 19 Ch. D. 105, at p. 110.
(2) (1841) 1 Ph. 56, at p. 59; 41 E.R. 552, at p. 553.
(3) (1838) 3 Deac. 201.
(4) (1876) 3 Ch. D. 481, at p. 483.
(5) (1900) 83 L.T. 435.
(6) (1890) 24 Q.B.D. 613.
(7) (1844) 3 Mont. D. & DeG. 576.
(8) (1906) 3 C.L.R. 1170, at p. 1175.
(9) (1876) 3 Ch. D., at p. 486.

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liquidation. Whether the security is specific or not should be decided at the date of the liquidation and not before (*In re Hallett & Co.; Ex parte Cocks, Biddulph & Co.* (1)). The words of the section are sufficiently wide to cover a security for an obligation collateral to the main debt. It is not the less security for the main debt. The definition of " secured creditor " in the Victorian Act is taken from the English *Bankruptcy Act* 1869, which was subsequently amended in England to read " security for a debt due to him from the debtor." The insertion of the last three words has been treated as effecting a change in the law in the English cases. Their omission in the Victorian Act must be treated as significant.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

RICH J. I agree with the judgment of *Dixon* J.

STARKE J. P. Bird Pty. Ltd. is indebted to the Commercial Bank of Australia in a considerable sum of money upon current account and otherwise. In April 1937 it went into voluntary liquidation, and the appellants are its liquidators. The bank lodged a proof of debt with the liquidators, but it was rejected on the ground that the bank, being a creditor holding specific security on the property of the company, failed to give up or give credit for the value of such security (See *Companies Act* 1928, sec. 207, and *Insolvency Act* 1928, secs. 194, 195).

Philip Bird was the registered proprietor of lands under the *Transfer of Land Act.* In January 1929 he executed an indenture declaring that he held the lands upon trust for the company and agreed to transfer and deal with it as the company directed. In March 1930 Philip Bird executed a mortgage of the lands to the bank to secure the moneys owing by the company to the bank. Bird became a surety of the company. The mortgage to the bank was duly registered, but it did not know nor was it informed of the declaration of trust in favour of the company. The company also gave to the bank a general lien over all its assets. " The general

(1) (1894) 2 Q.B. 256.

rule in bankruptcy is that when a creditor proves against the estate he must give up or value any securities which, if not retained by him, would go to augment the estate against which he seeks to prove. But the rule presupposes that the security held by the creditor is a security for the debt which he is seeking to prove. The rule has reference only to a proof by a secured creditor, that is to say, by a creditor who lodges a proof in respect of a debt which is secured on some property which, subject to the security, would go to augment the estate against which he seeks to prove " (*In re Dutton, Massey & Co.*; *Ex parte Manchester and Liverpool District Banking Co.* (1); *Ex parte West Riding Union Banking Co.*; *In re Turner* (2)).

The bank's security takes priority over the equitable interest of the company in the lands created by the declaration of trust (*Abigail* v. *Lapin* (3)). But the company is entitled to redeem the mortgage, and it is beneficially entitled to the lands. Subject to the bank's mortgage the lands would go to augment the assets of the company (*Re Cooksey*; *Ex parte Portal & Co.* (4)). Further, the mortgage is security for the debt which the bank sought to prove. The debt due to the bank was the sum owing to it by the company on current account and otherwise. It was no doubt secured by the guarantee and collateral mortgage given to it by Philip Bird, but it was in truth a single sum of money the payment of which by either the company or Philip Bird, the surety, satisfied the obligation to the bank (Cf. *Stock Motor Ploughs Ltd.* v. *Forsyth* (5)).

Some reference was made in the course of argument to the cases *Ex parte Connell*; *In re Clarke* (6) and *In re Collie*; *Ex parte Manchester and County Bank* (7), but all that can be extracted from them relevant to this case is that the right of proof must depend upon the bankruptcy law and not upon the representations or conduct of the company or of Bird. The bank must value the mortgage security given by Philip Bird once it is established, as here, that the debt it seeks to prove against the company is secured on some property which, subject to the mortgage, would go to augment the assets of the company. *Lowe* J. was, as I gather from his reasons, of the

(1) (1924) 2 Ch. 199, at p. 205.
(2) (1881) 19 Ch. D., at p. 112.
(3) (1934) A.C. 491; 51 C.L.R. 58.
(4) (1900) 83 L.T. 435.
(5) (1932) 48 C.L.R. 128, at p. 134.
(6) (1838) 3 Deac. 201.
(7) (1876) 3 Ch. D. 481.

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same opinion, but he felt constrained by the case of *In re Perkins*; *Ex parte Mexican Santa Barbara Mining Co.* (1) to admit the bank's proof without requiring it to give up or give credit for the value of the mortgage security. In that case a limited company petitioned against a debtor who had obtained judgment against one of the shareholders, declaring that the shareholder was a trustee of some of his shares for the debtor. It was held that the company had no lien on these shares under its articles of association for its debt and consequently was not a secured creditor. *Fry* L.J. explains the decision in these words:—"It may be said that some meaning must be given to the words, 'other the person for the time being entitled thereto as against the company.' In my opinion, these words can be satisfied in other ways. One obvious meaning of the words would include the executors or administrators of a deceased shareholder, or the trustee in bankruptcy of a bankrupt shareholder, or any person who might have obtained a judgment from a court of competent jurisdiction against the company, whether in an action or in a proceeding under sec. 35 of the *Companies Act* 1862, that he was entitled as against the company to be registered as the holder of shares. All those persons would come within the meaning of clause 20" (articles of association). "In my judgment, the words do not include *cestuis que trust* of shares, however clear the trust may be, however certain the right of the *cestui que trust*, because the company are not bound to take notice of trusts" (2). It is a decision upon the construction of a particular article and is not inconsistent with the general rule of bankruptcy already mentioned.

The general lien as a security becomes unimportant if the mortgage is valued, and it is therefore unnecessary to determine whether it does or does not constitute a specific security which should be valued.

The appeal should be allowed.

DIXON J. The question at issue in this appeal is whether, in proving its debt in the winding up of the company of which the appellants are liquidators, the respondent bank is bound to value or give up a security obtained over land which belongs beneficially

(1) (1890) 24 Q.B.D. 613.

(2) (1890) 24 Q.B.D., at p. 620.

to the company, but, in point of legal title, is vested in a third person who gave a guarantee for the debt and furnished the security to support his guarantee.

The third person is one Philip Bird, and he was a director of the company. At some time before 1929 he became registered proprietor under the *Transfer of Land Act* 1928 of five pieces of land which the company appear to have occupied or used for the purposes of its business. On 23rd January 1929, he executed a declaration of trust in favour of the company in respect of the land. The company was indebted to the bank, and Philip Bird was a surety for its debt. On 27th March 1930 he gave the bank a registered mortgage over the land to secure payment, *inter alia*, of any sum which might be payable by him to the bank or the repayment of which he had guaranteed or might thereafter guarantee. In fact he was never liable to the bank except under his guarantee. He gave the mortgage with the concurrence of the company. But the officers of the bank say that they were unaware that Philip Bird was not the beneficial owner of the land. The consequence of this transaction is that the company's debt to the bank is guaranteed by Philip Bird and the guarantee is secured by a mortgage to the bank over property of which he is the owner at law and the company is the owner in equity. If the bank have recourse to the guarantee and the mortgage by which it is secured, so that the liability is satisfied out of the mortgaged property, then because the company is the beneficial owner of the property the debt owing by the company will be discharged finally, and Philip Bird will not have the surety's usual right to claim over against the company as principal debtor. In other words, the mortgage operates to confer upon the bank the means of satisfying the debt owing by the company out of what in fact is the property of the company.

Proof of debts in a winding up is regulated by the provisions of the insolvency law, under which a creditor holding a specific security on the property of the insolvent is to be excluded from proof unless he either gives up or realizes his security or values it and gives credit for the value (sec. 207 of the *Companies Act* 1928 and secs. 194 and 195 of the *Insolvency Act* 1928 (Vict.)). The bank refuses to

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comply with these conditions of proof on the ground that the mortgage it holds is not a security upon the property of the company. " The principles applicable to cases of this kind " are stated by Lord *Lyndhurst* in *In re Plummer* (1) as follows :—" If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and, therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but, if he has a security on the estate of a third person, that principle does not apply : he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than 20s. in the pound."

There are, in my opinion, two and only two possible reasons why the bank's mortgage should not come within this rule. One is that, as between the bank and Philip Bird, who gave the mortgage, it was taken as a security over the property of a stranger without notice that he held it as trustee for the company. The other is that the mortgage directly secures the obligation of the surety and only indirectly the obligation of the principal debtor to pay the debt. The first ground rests upon a distinction that cannot now be maintained. In dealing with a security which, although taken by the creditor from a stranger in the belief that it was given over property beneficially belonging to him, nevertheless in fact affected property which would, if not so encumbered, form part of the assets of the liquidating debtor, either of two views might conceivably have been taken. One view possibly open was that the creditor's rights of proof depend upon the character in which the security was given and that, if he took in good faith a security over what he believed to be the property of a third party, he could prove on that footing. The other view was that the question is altogether independent of such considerations, which arise only out of the relations between the creditor, the debtor, and the third party; that the question arises in the application of assets in a liquidation and the adjustment of competing claims upon them; and that in such a question the

(1) (1841) 1 Ph. 56, at p. 59; 41 E.R. 552, at p. 553.

equities depend on the actual effect produced in administering the assets, and, if the subject of the security would, but for the security, form part of the assets to be administered, then inequality would be produced by allowing proof for the full amount of the debt without the proving creditors giving up the security. In the Court of Review in Bankruptcy, Sir *John Cross* (*Ex parte Connell*; *In re Clarke* (1)) espoused the first view, but his colleagues *Erskine* J. (as he became) and Sir *George Rose* adopted the second view. In *In re Collie*; *Ex parte Manchester and County Bank* (2) *James* L.J. was disposed to take the first view, but said that it would perhaps not be proper to overrule a decision pronounced by a majority of the judges in 1838. *Mellish* L.J., however, supported the second view. He regarded the other creditors as entitled to say :—" It is nothing to us what the bankrupts have represented, or what contracts they may have entered into. They cannot, by anything they may have said or done, prevent their estate being distributed according to the law of bankruptcy " (3). *Baggallay* L.J., while expressing some inclination to the decision of Sir *John Cross* in *Ex parte Connell*; *In re Clarke* (1), said that the view of the majority should be followed, but he placed his own decision on a ground which appears to me necessarily to imply that the belief of the creditor as to the ownership of the property over which he obtained the security had no importance. These cases relate to proof upon joint and upon separate assets in respect of joint and of several debts, but this circumstance is no ground of distinction. For the peculiarity of the rule in bankruptcy in such cases is that it treats the joint and each separate estate as independent funds, as distinct *personae* so to speak, for the purposes of proof.

The view that the creditor's erroneous belief makes no difference was applied by *R. S. Wright* J. in *Re Cooksey*; *Ex parte Portal & Co.* (4) to the case of a single estate of a debtor beneficially entitled to property vested in his wife, from whom the security for her husband's debt had been taken by a creditor believing that the property was hers, as she and her husband represented. His Lordship followed *Ex parte Connell*; *In re Clarke* (1) and held

(1) (1838) 3 Deac. 201; 3 Mont. & Ay. 581; 7 L.J. Bcy. 44.
(2) (1876) 3 Ch. D. 481.
(3) (1876) 3 Ch. D., at p. 487.
(4) (1900) 83 L.T. 435.

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that the creditor was obliged to value the security. With deference to the contrary view, this seems in accordance with principle. For the question is simply upon what terms the indebtedness, the obligation *in personam*, shall be proved against assets over which the creditor has no charge or security. It involves no impairment of or detraction from the rights the creditor acquired in taking the security. His full right of property in the subject of the security remains. His right to pursue all his remedies against the property and under the security are left untouched. But, when he attempts to disregard or leave in suspense the rights against the security and to enter into equal competition with other creditors in a distribution of the general assets, the fact that the general assets are actually diminished by the existence of his security cannot but be decisive. He has a first right to resort to the asset which the security is effective to exclude or withhold from the general mass of assets or fund upon which he seeks to prove. He cannot be permitted to share in respect of his entire debt equally in a distribution of the general fund and then for any deficiency to resort to the security. He must, so to speak, be marshalled on to the subject of his security first, simply because in fact it is property of the liquidating debtor otherwise forming part of the fund. If he were allowed to prove for more than the deficiency after valuing or realizing the security, he would put the other creditors in an unequal position and obtain an advantage over them. Of course he is given a choice of relinquishing his security so that the property will go into the general fund and of then standing with the other creditors. But it appears to me that the fact that the bank took the mortgage as and for a security over the property of Philip Bird is no answer to the liquidators' contention that they have a security over property of the company.

The second of the two possible reasons which I have mentioned for saying that the bank's mortgage was not within the general rule requiring valuation, realization or relinquishment as a condition of proof depends upon the fact that it does not secure directly the principal debt, but the collateral obligation created by the guarantee. I do not think that this ground takes the case outside the rule. Whilst the two obligations, that of the principal debtor and of the surety, are concurrent, yet both are for the repayment of the same

sum of money. To whatever extent the obligation expressed in the guarantee is satisfied, to the same extent will the principal debt be satisfied, and, if the source of payment is the mortgage, then it will be satisfied finally and without any right of recoupment in Philip Bird as surety. Therefore, if and when the security is enforced, the principal debt, the debt which it is sought to prove, must be discharged, in whole or in part, as a necessary consequence. It follows that the bank stands entitled to satisfy the debt it seeks to prove out of the mortgaged property, and that, subject to the mortgage, that property belongs beneficially to the liquidating debtor, the company.

In my opinion the liquidators are right, and the bank must value or realize the security given by the mortgage as a condition of proof unless it is prepared to give it up. I say nothing about the security given by the company's general lien or charge, because this appears to me to have only a theoretical significance in relation to the land in question.

Lowe J., from whose decision this appeal comes, was led to an opposite conclusion by some of the language of Lord *Coleridge* C.J. and of Lord *Esher* M.R. in *In re Perkins* ; *Ex parte Mexican Santa Barbara Mining Co.* (1). As reported, those two very learned judges appear to express themselves in a somewhat confusing manner. But the judgment of *Fry* L.J. shows what the question in the case was and by what reasoning it was solved. The decision does not seem to me to affect the matters with which the present case is concerned. By one of its articles of association the Mexican Santa Barbara Mining Co. took " a first and paramount lien on all shares for all moneys due to the company from the registered holder or holders thereof, or other the person for the time being entitled thereto as against the company." One, Dickey, was the registered holder of a number of shares in the company and he owed the company money for which the company claimed to be entitled to the lien thus given. But Perkins brought an action against Dickey and the company, claiming that he was entitled to the shares. The action was dismissed as against the company with costs. But, as against Dickey, a declaration was made that he was a trustee of a quantity of

(1) (1890) 24 Q.B.D. 613.

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the shares for Perkins and that Perkins was entitled to recover them from him. The company proceeded to file a petition against Perkins in bankruptcy in respect of the costs. They did so as on an unsecured debt. Perkins objected that the debt was not unsecured because, as he contended, he was, within the meaning of the article, a person " for the time being entitled " to the shares other than the registered holder. If he was such a person, the article clearly purported to give the company a security for his debt. It would seem to follow that it did not give the company a security for Dickey's debt, although he remained the registered holder. The decision in the case was simply that this was not the meaning of the article. But, in arriving at this result, Lord *Coleridge* and Lord *Esher* referred to the general principle that companies should disregard trusts of their shares and deal with the member on the register and also to the fact that for bankruptcy the property must be that of the debtor. In the course of pursuing this topic, some observations were made which are more easily misunderstood than understood. Of these the most in point is a statement by Lord *Coleridge* C.J. : " Now the shares are not, so far only as the company can regard them, the property of the debtor, and they cannot be security for a debt due from him to the company ; they may be security for a debt due to the company from Dickey " (1). If the articles of association really meant that debts due to the company by *cestuis que trustent* of shares held by registered holders in trust for them should be secured over the interest of the debtors in the shares, a question might arise as to the efficacy of the article to achieve its purpose. But, if the company law allowed an article to produce such an effect, there could be no doubt that the company would obtain a security from a debtor over property of the debtor. What his Lordship meant, I think, simply was that under the article the legal, not the merely equitable, title to the chose in action constituted by a share was made the subject of a lien and that the lien was given for the indebtedness of the owner of the legal, not the merely equitable, title to the share ; that, is a security over Dickey's, not Perkins', title for Dickey's, not Perkins', debt. In conclusion it should perhaps be noticed that in *In re Perkins* (2) the creditor was not

(1) (1890) 24 Q.B.D., at p. 617.

(2) (1890) 24 Q.B.D. 613.

claiming any security at all over the shares in respect of Perkins' debt. The question simply was whether the articles did or did not give a security for Perkins' debt. The case would not have been parallel to the present unless the company had, whether by virtue of its articles or otherwise, admittedly obtained a security for Perkins' debt over the shares standing in Dickey's name and then, notwithstanding the security, had claimed to treat the debt as unsecured for the purpose of a petition in bankruptcy against Perkins.

For these reasons I am of opinion that the appeal should be allowed with costs and the order of *Lowe* J. set aside. In lieu thereof it should be ordered that the respondent's summons in the Supreme Court be dismissed with costs.

Appeal allowed with costs. Order of the Supreme Court set aside. In lieu thereof order that the respondent's summons be dismissed with costs. Attendance of counsel in the Supreme Court certified for.

Solicitors for the appellants, *Doyle & Kerr.*

Solicitors for the respondent, *Smith & Emmerton.*

H. D. W.