REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

MACKENZIE . . . . APPELLANT;

AND

REES AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND EXERCISING JURISDICTION IN BANKRUPTCY.

H. C. OF A.
1941.

BRISBANE,
June 18, 19.

SYDNEY,
July 28.

Rich A.C.J., Dixon, McTiernan and Williams JJ.

Bankruptcy—Interest-bearing debt—Promissory note free of interest accepted by creditor—Entry into deed of arrangement—Whether debt revived—Claim for interest upon surplus—Interest as damages for dishonour of promissory note—Court equally divided—Appeal dismissed—Variation of order appealed from—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 60 (2), 81, 84 (5), 89, 112 (1), 116 (2), 118, 121 (2)—*Bills of Exchange Act* 1909-1936 (*No.* 27 *of* 1909—*No.* 74 *of* 1936), *sec.* 62—*Judiciary Act* 1903-1939 (*No.* 6 *of* 1903—*No.* 43 *of* 1939), *sec.* 23 (2).

A creditor accepted from his debtor, in respect of an interest-bearing debt, promissory notes for the amount of the debt free of interest. Before the maturity of the notes, the debtor entered into a deed of arrangement under Part XII. of the *Bankruptcy Act* 1924-1933. The realization of the debtor's estate resulted in a surplus. The creditor having claimed to be entitled to prove for interest on the debt payable out of the surplus, *Philp* J., exercising the jurisdiction in bankruptcy of the Supreme Court of Queensland, held that the creditor was entitled to prove against the surplus for interest from the date of execution of the deed of arrangement as damages under sec. 62 of the *Bills of Exchange Act* 1909-1936. On appeal by the debtor to the High Court,

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Held, by the whole court, that, although in a bankruptcy under the *Bankruptcy Act* 1924-1933 creditors may claim upon a surplus for interest accruing since sequestration upon interest-bearing debts, there can be no claim upon a surplus for interest since sequestration as damages under sec. 62 of the *Bills of Exchange Act* 1909-1936. But *held*, by *Rich* A.C.J. and *Williams* J. (*Dixon* and *McTiernan* JJ., *contra*), that in the events which had happened the original interest-bearing debt had revived, and the creditor was therefore entitled to claim upon the surplus for interest at the contract rate from the date of execution of the deed of arrangement.

Appeal from the Supreme Court of Queensland exercising jurisdiction in bankruptcy.

Donald Mackenzie, hereinafter called the debtor, who traded as a general merchant, entered into a deed of arrangement with his creditors under Part XII. of the *Bankruptcy Act* 1924-1933 on 7th June 1933. By the deed of arrangement, clause 6, the trustee was directed to apply the proceeds of the estate in payment of costs, charges and expenses and preferential claims and "thirdly, in payment to the creditors . . . of all such debts and claims of the creditors as would by the law of bankruptcy be entitled to rank for dividend upon the estate of the debtor and in such priorities and in accordance with such rules as would be applicable under the said law of bankruptcy," and to pay the surplus (if any) to the debtor.

Goods had been supplied to the debtor by Thomas Brown & Sons Ltd. on terms that he should give a promissory note for the price payable in four months free of interest. There was evidence to show an agreement with the debtor that the amounts owing for goods supplied for more than four months should carry interest at seven per cent until payment. On 14th October 1931 his creditors agreed to allow the debtor, who was in financial difficulties, an extension of time to pay his debts, and he gave them promissory notes payable in six months, including interest. He gave Thomas Brown & Sons Ltd. a promissory note for £5,205 11s. 4d., being the amount due to them for goods, and he gave a separate promissory note for £182 3s. 8d. interest. When the time expired the debtor was unable to meet the promissory notes, and a further meeting of his creditors took place on 11th May 1932. It was resolved that an extension of twelve months should be granted to the debtor for the payment of all his liabilities of twenty pounds and over as at 1st May 1932, goods supplied after 25th April 1932 charged as 1st May to be considered as supplied on 1st May 1932, and that the amount of such liability should be reduced at the rate of one hundred and fifty pounds per month, payable by the debtor's own promissory notes, drawn at from one to twelve months, with a rest bill for the balance ; such extension to be reviewed at the end of twelve months. The promissory notes to be drawn as from 11th July 1932, free of interest, but plus exchange and stamp duty. Creditors whose amounts did not total twenty pounds were to be exempt from the terms of the arrangement, and the debtor was to endeavour to arrange a composition of ten shillings in the pound. Thomas Brown & Sons Ltd. received promissory notes for £56 10s. each, payable on 14th August 1932, and on the fourteenth day of each succeeding month up to and including 14th July 1933, and a further promissory note for £4,949 13s. 2d., payable on 14th July 1933. On 7th June 1933, when the debtor signed the deed of arrangement, the promissory notes for £56 10s., due on 14th June 1933, and for £56 10s. and £4,949 13s. 2d., due on 14th July 1933, had not been met. Thomas Brown & Sons Ltd. proved for the amount of each of these promissory notes. The estate was sufficient to enable the trustee to pay all amounts proved for, and there was a surplus left of £1,400. Thomas Brown & Sons Ltd. and other creditors who held promissory notes for their debts then claimed to prove for interest on the amounts of their debts outstanding from 7th June 1933. The trustee, George Rees, applied for directions under sec. 105 of the *Bankruptcy Act* 1924-1933, and *Philp* J., sitting in bankruptcy jurisdiction, directed that upon proof, by all the creditors holding overdue promissory notes, for damages for interest under sec. 62 (*a*) (ii) of the *Bills of Exchange Act* 1909-1936, the trustee should compute damages for interest at five per cent per annum upon the whole of each debt represented by the promissory notes up to the time of the first dividend, and then subtract the amount of that dividend from the whole debt and interest calculated upon the reduced principal up to the payment of the next dividend and so on until twenty shillings in the pound was paid on the principal debt, and that when the total amount, as damages, was computed each creditor should participate ratably in the ultimate surplus.

From that decision the debtor appealed to the High Court.

Fahey, for the appellant. The debtor is entitled to the surplus. The debt of Thomas Brown & Sons was not an interest-bearing debt. All the property of the debtor became vested in the trustee on the signing of the deed of arrangement (*Armstrong* v. *Wilkins* (1)). On the execution of the deed the debtor was discharged from the payment of his debts. The creditor cannot prove for interest after the date of the bankruptcy or the date of the execution of the deed

(1) (1940) 63 C.L.R. 489.

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of arrangement (*Re Paul & Gray Ltd.* (1); *Re Hyman* (2)). The creditor is not entitled to interest, and the surplus belongs to the debtor (*Re Rissik* (3); *Bromley* v. *Goodere* (4)). Future interest is not a contingent debt. The obligation was not incurred before the date of the sequestration order. There is a distinction between interest recoverable under contract and interest recoverable as damages (*Rosenhain* v. *Commonwealth Bank of Australia* (5)). Interest out of surplus has been refused upon a bankrupt's promissory notes (*Ex parte Cocks*; *Re Wilcox and Fraser* (6)). Where there is a surplus, a creditor is not entitled to interest unless provided for by contract (*Ex parte Williams*; *Re Wilcocks* (7)). Interest is not part of the debt. The creditor cannot claim interest as damages until there has been something in the nature of a default (*Webster* v. *British Empire Mutual Life Assurance Co.* (8); *Re Pitchford* (9); *Ex parte Matthew* (10); *Lowndes* v. *Collens* (11)).

P. L. Hart (with him *Mack*), for the respondent. The mere taking of a promissory note by the creditor was a forbearance. When the bill was not met the creditor was restored to his original position. The giving of a promissory note was conditional payment. Proof by the creditor on the promissory note does not interfere with the rule that interest may be allowed. The receipt of a promissory note is not payment, but amounts to giving time (*Sayer* v. *Wagstaff* (12)). After a promissory note is taken the original debt remains, but in the absence of agreement it cannot be enforced until the promissory note is due (*Re London, Birmingham and South Staffordshire Banking Co. Ltd.* (13)). The written document has been varied by the conduct of the parties in accepting a promissory note and interest (*Ex parte Hankey* (14); *Ex parte Mills* (15); *Ex parte Champion* (16); *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (17)). The effect of the *Bankruptcy Act* in Australia is that interest stops during the bankruptcy until it is found that there is a surplus (*Re Hyman* (18); *Re Paul & Gray Ltd.* (19)). The right to interest is postponed until payment of all creditors

(1) (1933) 33 S.R. (N.S.W.) 295; 50 W.N. 134.
(2) (1930) 3 A.B.C. 61.
(3) (1936) Ch. 68.
(4) (1743) 1 Atk. 75, at p. 79 [26 E.R. 49, at p. 51].
(5) (1922) 31 C.L.R. 46, at p. 51.
(6) (1813) 1 Rose 317.
(7) (1813) 1 Rose 399.
(8) (1880) 15 Ch. D. 169, at p. 176.
(9) (1924) 2 Ch. 260.
(10) (1884) 12 Q.B.D. 506.
(11) (1810) 17 Ves. 27 [34 E.R. 11].
(12) (1844) 5 Beav. 415, at p. 423 [49 E.R. 639, at p. 642].
(13) (1865) 34 Beav. 332, at p. 336 [55 E.R. 663, at p. 664].
(14) (1792) 3 Bro. C.C. 504 [29 E.R. 669].
(15) (1793) 2 Ves. Jun. 295 [30 E.R. 640].
(16) (1792) 3 Bro. C.C. 436 [29 E.R. 629].
(17) (1924) 1 Ch. 342; (1924) 2 Ch. 451.
(18) (1930) 3 A.B.C. 61.
(19) (1933) 33 S.R. (N.S.W.), at pp. 299, 300; 50 W.N., at p. 135.

(*Re Browne & Wingrove*; *Ex parte Ador* (1); *Bromley* v. *Goodere* (2); *Ex parte Bath*; *Re Phillips* (3)). As to the meaning of dividend, see *Knowles and Haslem* v. *Ballarat Trustees Executors and Agency Co. Ltd.* (4). The deed of arrangement allows for the distribution of the debtor's property so that the creditor may prove for interest and rank for dividend (*Re Rissik* (5)). Interest is liquidated damages under sec. 62 of the *Bills of Exchange Act*, and may be proved for under sec. 81 of the *Bankruptcy Act*. As the creditor has an interest-bearing debt and there is a surplus he is entitled to prove for interest.

Lukin, for the trustee, announced that the trustee was prepared to submit to any order that the court should make.

Cur. adv. vult.

July 28.

The following written judgments were delivered:—

Rich A.C.J. I have read the judgments of my brothers *Dixon* and *Williams*, and as the only point in controversy is whether the creditors who had interest-bearing debts, but agreed to take promissory notes on 11th May 1932, which were still current at the date of the execution of the deed of arrangement in question, are entitled to prove against the surplus for interest after that date I only wish to add a few words on that particular phase of the appeal.

In considering the operation of the deed of arrangement it is necessary that it should be kept in mind that clause 16, relating to the release and discharge of the debtor, and clause 6 (3), relating to the application of the proceeds of realization of his assets, are dealing with two entirely different matters. The former is concerned with the personal liability of the debtor for his debts. The latter is concerned with the application of his assets in satisfaction of his debts. Clause 16 merely releases the debtor from personal liability, but clause 6 (3) shows that, subject to the law of bankruptcy, his debts are left on foot for all purposes, so far as the availability of his assets for their satisfaction is concerned. Hence the fact that the debtor was released from personal liability in no way affects the applicability of general legal principles to the consequences which flow from the facts of the antecedent debt, the giving of the promissory notes and the execution of the deed of arrangement. The statement of *Parke* B. in *Ford* v. *Beech* (6) that "it is a very

(1) (1891) 2 Q.B. 574.
(2) (1743) 1 Atk., at p. 78 [26 E.R., at p. 51].
(3) (1882) 22 Ch. D. 450, at p. 454.
(4) (1916) 22 C.L.R. 212, at p. 253.
(5) (1936) Ch. 68.
(6) (1848) 11 Q.B. 852, at p. 867 [116 E.R. 693, at p. 698].

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old and well-established principle of law, that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive," is not of general application, as appears by his own judgment in *Baker* v. *Walker* (1) and by *Slater* v. *Jones* (2), and, in my opinion, it is well established by the cases referred to by *Williams* J., including the judgment of the Judicial Committee of the Privy Council in *Allen* v. *Royal Bank of Canada* (3), that if a promissory note be taken on account of a debt, then, in the absence of some arrangement to the contrary, the original debt still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditor. Or, as it is put in *Bullen and Leake*, 3rd ed. (1868), p. 540, "the giving of a negotiable security on account of a simple contract debt operates as a conditional payment, i.e. a payment if the security is paid when due; and it suspends the right of action in the meantime and is a good defence." In other words, it is not a payment at all, unless the condition of fulfilling the obligations of the negotiable security is complied with. The date from which the payment operates if the note is honoured is not material in the present case, because the note was not honoured. The relevant authorities have been discussed in two cases decided by the Supreme Court of New South Wales: *Ashby* v. *Hayden* (4) and *Havyatt* v. *Gilder* (5). In the case of *In re Raatz*; *Ex parte Raatz* (6) the view appears to have been taken that if anything occurs which prevents the condition of the payment from ever being fulfilled, such as the commission of an act of bankruptcy from which bankruptcy in fact results, the suspension of the right of action on the original debt at once comes to an end, and the creditor is remitted to his rights thereunder. It is immaterial whether this be so or not: because in the present case the note was not met on its due date. The parties by clause 6 (3) of the deed of arrangement have evinced a clear intention that the law of bankruptcy is to be applied as to payment of dividends. Since, in the case of surplus of assets, the law of bankruptcy allows interest thereout on interest-bearing debts to creditors who held promissory notes in respect of their debts, it is in accordance with the expressed intention as to the applicability of the law of bankruptcy, as manifested in clause 6 (3), that interest should be allowed at the rate which, apart from the promissory notes, the debt in question bore.

(1) (1845) 14 M. & W. 465, at p. 468 [153 E.R. 558, at p. 559].
(2) (1873) L.R. 8 Ex. 186, at p. 192.
(3) (1925) 134 L.T. 194.
(4) (1931) 31 S.R. (N.S.W.) 324; 48 W.N. 61.
(5) (1937) 37 S.R. (N.S.W.) 441; 54 W.N. 121.
(6) (1897) 2 Q.B. 80.

In my opinion the appeal should be dismissed and I agree with the order proposed by *Williams* J.

The appeal comes from the Supreme Court of Queensland exercising Federal jurisdiction in bankruptcy. As this court is equally divided the appeal fails except that the order must be varied as stated in the judgments of *Williams* J. and myself, for we are all of opinion that its present form is wrong.

Dixon J. This is an appeal under sec. 26 (2) of the *Bankruptcy Act* 1924-1933 from an order made upon an application for directions under sec. 105 (*i*) by a trustee of a deed of arrangement. The realization of the estate produced a surplus over the amount of the proved debts, and the material question upon which the trustee sought directions is whether out of the surplus certain creditors holding promissory notes should receive interest upon the amount of their debts for the time being unpaid, calculated with respect to the period between the time when the deed of arrangement took effect and the time when the final dividend was paid.

Philp J., who heard the application, directed that, upon proof by such creditors holding overdue promissory notes for damages for interest (*scil.*, under sec. 62 (*a*) (ii) of the *Bills of Exchange Act* 1909-1936), the trustee should compute the damages for interest at the rate of five per cent per annum on the whole of each debt up to the time of the first dividend, and then subtract the amount of that dividend and compute interest on the balance until the next dividend, and so on, and when the total damages had thus been calculated for each creditor, he should share ratably with the others in the surplus up to that amount.

The debtor appeals from the order upon the ground that he is entitled to the surplus over the debts proved and ascertained as at the date when the operation of the deed commenced without any allowance to the creditors in question on account of intermediate interest.

Although the order is expressed in general terms, we need concern ourselves with one creditor only, namely, the respondent Thomas Brown & Sons Ltd. That creditor was at the time of the deed the holder of a promissory note made by the debtor for £5,062 with a currency of twelve months, of which some five weeks were still to run. The note had been given by the debtor in pursuance of an arrangement with some of his creditors by which they were to give him twelve months credit free of interest, he giving them promissory notes. It appears that the original debt upon which this particular

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note was founded bore interest, probably at seven per cent per annum.

The deed of arrangement, which was duly registered, contained a clause by which the creditors and each of them thereby released and discharged the debtor from all debts and liabilities due, owing or incurred by the debtor to them or any of them, which under the *Bankruptcy Act* would have been provable under his bankruptcy had he been adjudicated bankrupt on the day of the date of the deed. The trusts of the deed required the trustee, after payment of costs, charges and expenses and of certain preferential claims, to pay and apply the proceeds of realization in paying to the creditors, by such dividends and at such times and in such amounts as the trustee should deem expedient, all such debts and claims of the creditors as would by the law of bankruptcy be entitled to rank for dividend upon the estate of the debtor and in such priorities and in accordance with such rules as would be applicable under the law of bankruptcy. The trusts required him lastly to pay the surplus, if any, to the debtor.

It appears to me, upon the terms of this deed, that the question whether the creditor, Thomas Brown & Sons Ltd., is entitled to receive interest for the period beginning with the date of the deed depends upon the answer to the further question, whether the demand for that interest is such a debt or claim of the creditor as would by the law of bankruptcy be entitled to rank for dividend upon the estate of the debtor.

The deed differs in its operation from the law of bankruptcy inasmuch as, in respect of the entire liability of the bankrupt to the creditor, it effects a discharge which is immediate and is not left to the end of the liquidation : Cf. *Bankruptcy Act*, secs. 121 (2) and 60 (2). But, while this must be borne in mind, the general principle of the deed is to give to creditors the same claims against the estate as they would have in bankruptcy.

It has been a principle of English bankruptcy law, since the time at all events of Lord *King*, that no proof should be allowed for interest accruing after the commencement of the bankruptcy, even upon interest-bearing debts (*Viner's Abridgment*, vol. 7, p. 110, Lord *King* ; *Ex parte Bennet* (1), Lord *Hardwicke*). But if there were a surplus then intermediate interest might be allowed as against the debtor. If, according to the tenor of the obligation, a debt bore interest, the debtor could not obtain the surplus until interest accruing after the commencement of the bankruptcy had been met thereout (*Bromley* v. *Goodere* (2)).

(1) (1743) 2 Atk. 527 [26 E.R. 716]. (2) (1743) 1 Atk. 75 [26 E.R. 49].

The rule and the qualification had their origin in the fact that the earlier bankruptcy laws excluded future debts alike from proof against the assets and from the relief those laws gave the debtor by the discharge of the debtor's accrued debts. Future interest not accrued at the act of bankruptcy or other commencement of the bankruptcy was not a debt provable, and therefore interest stopped at that event for the purposes of proof. Correspondingly, the debtor was not discharged from his liability to such interest, and it was therefore equitable that it should be deducted from the surplus before it was paid over to him: Cf. *Ex parte Mills* (1), Lord *Loughborough.* But afterwards changes were made in the statutory provisions, and the reasons for the rules about interest were placed on quite different grounds.

The principal rule, namely, that excluding intermediate interest from proof, came to be regarded as a rule of convenience in administration, as a practice of the Court of Bankruptcy designed to secure equality and justice among creditors where there was a deficiency. Thus, in *Ex parte Kensington*; *Re Lancaster* (2), Sir *George Rose* says: "The rule that interest stops at the bankruptcy is not a rule of law nor of equity; it is the practice in bankruptcy, adopted for convenience, as any other course might lead to many difficulties." In *Re Browne & Wingrove*; *Ex parte Ador* (3), *Lindley* L.J. says: "The rule which prevents proof for future interest is not a positive enactment, it is rather a rule of convenience." The principle is accepted in the United States of America, and the foundation upon which it rests as a necessary principle in the administration of the estate is well stated in *Re Kallak* (4):—"There are two reasons why ordinary claims of creditors are not permitted to draw interest subsequent to the adjudication: First, it is important that the proportionate interest of the several creditors in the estate be ascertained and fixed. If interest were to accrue, however, after the adjudication, the amount of the several claims would vary from time to time, according to their respective rates of interest and the proportionate share of the several creditors would be subject to constant readjustment. The second reason is the convenience of administration. If, at the declaration of every dividend, a new basis of apportionment were required, depending on varying rates of interest, the administration of the estate would be seriously complicated." In *Chemical National Bank* v. *Armstrong* (5), *Taft* C.J. (then a Circuit Judge) discussed the principles which, in his view,

(1) (1793) 2 Ves. Jun., at p. 301 [30 E.R., at p. 643].
(2) (1835) 2 Mont. & Ay. 300, at p. 305.
(3) (1891) 2 Q.B., at p. 581.
(4) (1906) 147 Fed. Rep. 276, at pp. 277, 278.
(5) (1893) 59 Fed. Rep. 372.

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resulted from the distinction between, on the one hand, the claim of the creditor in reference to the sequestered assets of the debtor and, on the other hand, the debt against the debtor :—" The amount of the claim as proven is a mere measure of the creditor's right and interest in the fund realized from the assets. . . . As against the insolvent bank the debt of the creditor continues to bear interest. As against the assets, interest is calculated only to the date of the suspension and the vesting of the title of the assets in the receiver. . . . Upon the transfer of the assets by operation of law to a trustee for creditors, the rights of creditors in the assets are fixed, and are to be determined as of that date, and are not affected by what may subsequently affect the debt by reason of which they acquire their interest therein, subject always to the limitation that the amount to be received by them from all sources shall not exceed their original debt and interest " (1) : See, further, *White* v. *Knox* (2), and *Johnson* v. *Norris* (3). In the latter case the court discusses an objection that the subsequently accruing interest should not be paid, because it has never been proved as a debt. " We do not think this objection is sound. The proof of an interest-bearing claim is proof of the interest collectible on such claim. Interest is an incident of, or a part of, the debt, and no separate proof of it is required." The principle which stops interest upon debts for the purposes of proof upon assets, so that the rights of creditors may be equitably adjusted, but allows it to run on as a claim upon a surplus, has been applied in the winding up of companies : See *Warrant Finance Co.'s Case* (4).

The principle has long received statutory recognition and, to some extent, expression : Cf. 6 Geo. IV. c. 16, sec. 132 ; 12 & 13 Vict. c. 106, sec. 197 ; rule 77 of *Bankruptcy Rules* 1870 under 32 & 33 Vict. c. 71 ; 46 & 47 Vict. c. 52, sec. 40 (5) ; and 4 & 5 Geo. V. c. 59, sec. 33 (8), and cf. sec. 66. But the Commonwealth *Bankruptcy Act* 1924-1933 contains no analogous provisions. Indeed, some difficulty may be felt in reconciling the operation of the principle as part of our law of bankruptcy with the express language of some provisions of the Act. But it is possible, I think, to give effect both to the principle and to the form in which the legislation is cast by treating the principle as one determining the order in which debts are to be discharged in the course of administration ; that is, by accepting the more modern view that the rule is one of

(1) (1893) 59 Fed. Rep., at pp. 378, 379.

(2) (1884) 111 U.S. 784 [28 Law. Ed. 603].

(3) (1911) 190 Fed. Rep. 459.

(4) (1869) 4 Ch. App. 643.

justice and convenience, as opposed to the earlier view that it depended upon the exclusion of future interest from proof and also from the release or discharge given to the debtor. Thus the wide language of sec. 81 (1) may be taken as covering intermediate interest, so that it is not altogether excluded as a claim against the assets and, at the other end, sec. 118 may be regarded as conferring upon the debtor a right to the surplus only after intermediate interest has been paid. The principle then may be considered as operating between these two termini, so to speak, and as requiring that, for the purpose of adjusting the rights of creditors, interest accruing after sequestration shall be put out of consideration in the first instance, and shall be allowed only if and when a surplus is ascertained. Secs. 60 (2), 112 (1), 116 (2), and 121 (2) do not appear to me to create any difficulty. Sec. 84 (5) applies to interest accruing before sequestration, and it is unnecessary to consider whether its application would extend to intermediate interest. Rule 246 also deals with claims up to sequestration. Sec. 89, however, presents some difficulty. For it might be thought to require that every claim against the assets, not given priority by some express provision, should rank *pari passu* with every other such claim. But the section has its counterpart in the English legislation, and there no difficulty has been felt in treating the rule as consistent with the legislation. The provision appears in sec. 40 (4) of the English *Bankruptcy Act* 1883, and yet, by sub-sec. 40 (5), express provision was made for the payment of intermediate interest out of the surplus. In *Re Browne & Wingrove* (1) *Lindley* L.J. said: "The old rule that interest accruing after adjudication could not be admitted to proof was inflexible (See *Cooke's Bankruptcy Laws*, 8th ed., vol. 1, p. 205); and it has been recognized as subsisting in very modern times, notwithstanding that the class of liabilities provable has been from time to time enlarged, and has since 1869 embraced almost, if not quite, all contractual liabilities imaginable."

It is to be noted that the provision speaks of "debts proved": "all debts proved in the bankruptcy shall be paid *pari passu*." The principle in question may be regarded as dealing with the proof of debts and as postponing proof for interest to accrue or accruing after sequestration until a surplus is established. So regarded, the principle does not conflict with sec. 89 because, until there is a surplus, the claim for intermediate interest cannot be a "debt proved." At all events, it has been decided in Australia that the principle applies to a bankruptcy under the Commonwealth Act and under the similar New-South-Wales Acts. In *Re Low*; *Ex parte Low*

(1) (1891) 2 Q.B., at p. 578.

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(1) *Walker* J. decided that under the enactments of New South Wales intermediate interest must be paid on interest-bearing debts out of a surplus. The provision corresponding to sec. 118 of the Commonwealth Act made " payment in full of all his creditors with interest " a condition of the bankrupt's title to the surplus, and that no doubt influenced the decision. But in *Re Paul & Gray Ltd.* (2) *Harvey* C.J. in Eq., after a full argument, held that it was the intention of the Federal legislature that " interest was to be paid according to the old common-law rule of bankruptcy." Speaking with reference to interest payable by contract, he formulated that rule as follows :— " There was no release of future interest. The liability to the interest still remained a liability, but, for convenience, the proof of it was carried out in two stages. First, up to the date of the sequestration. If that exhausted the assets there was an end of it, and the bankrupt was relieved from any further liability. If, on the other hand, there were still assets left after that distribution, then the liability to pay the interest was a continuing liability which also could be proved before the surplus assets were distributed to the bankrupt. That was the law until various Acts were passed in England and the various States. That was what might be called the common-law of bankruptcy."

In *Re Hyman* (3) *Lukin* J. had arrived at the same conclusion. Both *Harvey* C.J. in Eq. and *Lukin* J. followed and applied *Re Low* (4). See, too, *Re Richards* (5).

In my opinion the view so adopted is correct, and a bankruptcy under the Federal Act is governed by the principle of administration which allows no proof for interest accruing or to accrue after sequestration unless and until a surplus is found to exist, and then allows creditors to claim upon the surplus for interest accruing since sequestration upon interest-bearing debts.

But this is only the first step in the consideration of the case in hand. The next step is to apply the rule to the particular claim of the creditor Thomas Brown & Sons Ltd. Can the debt of that creditor be treated as interest-bearing within the meaning of the principle ? Primarily the creditor bases its claim to interest upon sec. 62 of the *Bills of Exchange Act* 1909-1936, which, in effect, provides that when such a promissory note is dishonoured the measure of damages, which shall be deemed liquidated damages, is to include interest thereon from maturity, but that such interest

(1) (1899) 20 L.R. (N.S.W.) B. & P. 17, at pp. 22, 23 ; 9 B.C. 59, at pp. 61, 62.
(2) (1933) 33 S.R. (N.S.W.), at pp. 300-303; 50 W.N., at p. 135.
(3) (1930) 3 A.B.C. 61.
(4) (1899) 20 L.R. (N.S.W.) B. & P. 17 ; 9 B.C. 59.
(5) (1935) 8 A.B.C. 37, at p. 46.

may, if justice require it, be withheld wholly or in part. No interest, of course, was reserved by the promissory note and it did not become overdue until after the date of the deed of arrangement. A distinction has always existed between the amount of the bill, which is the debt, and interest awarded as damages. "Where the interest is expressly agreed to be paid, it may be considered as part of one aggregate debt; but where a specified sum only is agreed to be paid, there interest is recoverable as damages, and it may depend upon external circumstances, whether any and what interest is to be recovered" (*Cameron* v. *Smith* (1), per *Holroyd* J.).

If a bill or promissory note did not reserve interest, the holder was never considered entitled to claim upon a surplus in a bankruptcy in respect of interest by way of damages. Lord *Hardwicke*, in *Ex parte Marlar* (2) said :—" But as the commissioners have established it as a rule, that note-creditors have no right to prove interest upon them, unless it is expressed in the body of the notes; I will not break in upon this rule. Even at law, where notes are for value received, and interest is not expressed, the jury do not give the plaintiff, in an action upon the notes, interest for them, but by way of damages only." Lord *Thurlow*, in *Ex parte Champion* (3), said : "I agree with Lord *Hardwicke's* rule, that where a contract is entered into for a certain sum, and interest could not be given at law but in the shape of damages, it is not the course of the court to give interest in bankruptcy." Lord *Eldon* in *Ex parte Koch* (4), a case of a demand note, said :—" If there is any contract for interest the debt will carry interest : but I have always understood the rule in bankruptcy, that debts, carrying interest, and no others, are in the case of a surplus, to have interest subsequent to the commission. It is very difficult to say, upon what ground originally in bankruptcy debts, carrying interest, were to have it out of the surplus : as the debt to be proved is the principal and interest due at the date of the commission; and the principle of the bankrupt law is to pay the debts proved, and nothing afterwards. The court however has gone so far as to give subsequent interest out of the surplus with regard to debts, carrying interest by the contract; which is the expression of all these orders. Damages are not interest; and in the cases at law it has been considered as ascertained damages; not as interest, due by the contract. It is better to abide by the rule, that has hitherto prevailed in this case of a surplus, than to introduce a new one; the consequences of which it is not easy to

(1) (1819) 2 B. & Ald. 305, at p. 309 [106 E.R. 378, at p. 380].
(2) (1746) 1 Atk. 150, at p. 151 [26 E.R. 97, at p. 98].
(3) (1792) 3 Bro. C.C., at p. 439 [29 E.R., at p. 631].
(4) (1813) 1 Ves. & B. 342, at pp. 345, 346 [35 E.R. 134, at pp. 134, 135].

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foresee." The Court of Appeal adopted the same view in *Ex parte Charman*; *Re Clagett* (1).

It follows that, in respect of the promissory note, Thomas Brown & Sons Ltd. cannot sustain a claim against the surplus for intermediate interest. For such interest would be recoverable as damages only, and, even if the promissory note had become due before the deed of arrangement, it would not have been within the rule. The proof in respect of the debt was founded upon the promissory note alone, but, in support of the order against which the debtor appeals, it is contended that the creditor may fall back upon the original debt, which, it is said, was interest-bearing. Now the promissory note was clearly not taken as a mere collateral security for the debt. It was intended to operate, at lowest, as a suspension of the liability, and it must therefore be treated as payment, though conditional no doubt and not absolute. The presumption is that a bill or note given in respect of a debt operates as payment subject to a condition subsequent or qualification by way of defeasance. If a bill of exchange or promissory note were taken absolutely in discharge of a prior indebtedness it would amount to an accord and satisfaction, not to payment. But the taking of a bill or note as a means of paying the debt was not so considered.

Though pleaders regarded it as an anomaly springing from the law merchant, such a transaction might be pleaded specially and was treated as amounting to conditional payment. Thus, in *James* v. *Williams* (2), *Alderson* B. said that the rule was that when bills of exchange were stated to have been delivered for or on account of a promissory note or any other sum in the declaration mentioned, then it was to be taken as a conditional payment; but that this rule was confined to negotiable instruments alone and that it must appear on the face of the plea that the plaintiff took an interest in the negotiable instrument. It became usual to say that the taking of the bill or note suspended the remedy during the currency of the instrument. Convenient as it might be thus to speak of the transaction, it is not accurate in principle so to express it. For at common law once the right to bring an action was suspended by act of parties the cause of action went completely. "It is a very old and well-established principle of law, that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive" (*Ford* v. *Beech* (3), per *Parke* B., where the older authorities are collected).

(1) (1887) W.N. 184.
(2) (1845) 13 M. & W. 828, at p. 833 [153 E.R. 347, at p. 349].
(3) (1848) 11 Q.B., at p. 867 [116 E.R., at p. 698].

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It is the cause of action, the debt, not the remedy, that is "suspended." The principle recognizes a discharge by payment subject to a condition subsequent. The condition is that if the bill or note is dishonoured it shall no longer be considered payment, and the original debt shall "revive," that is, be no longer affected by the receipt of the bill or note as payment: Cf. *Belshaw* v. *Bush* (1).

In the present case the promissory note was never dishonoured; it never became due. For at the date of the deed it was current and operated as payment. By the deed it was released and discharged. The original debt, therefore, never revived and must be considered paid and satisfied, and that as from the date of the giving of the promissory note (*Marreco* v. *Richardson* (2)).

It is true that as at the date of the deed the creditor had an expectancy that on maturity of the promissory note the original debt would revive, and, if his interpretation of the facts is to be accepted, bear interest. But the clause of the deed of arrangement relating to debts provable cannot be construed as enabling him to claim as at the date of the deed in respect of such an expectancy. In the event, the expectancy did not become actual. For the deed itself prevented its doing so, by discharging the debt constituted by the promissory note. In fact, there was never any liability for interest after the giving of the note, from that time up to the present.

There is some authority for the position that if during the currency of a bill of exchange given as conditional payment of an antecedent debt the debtor commits an act of bankruptcy by making an assignment to which the creditor holding the bill does not assent, the latter may base a petition in bankruptcy on the original debt and need not petition as holder of the bill of exchange (*In re Raatz* (3)). The decision relates only to the form of the petition, because of course a negotiable instrument not yet due constitutes a sufficient foundation for a petition. *Vaughan Williams* J. and *Wright* J. appear to have regarded the debtor's conduct as entitling the creditor "to treat the bill as dishonoured."

It is not easy to understand how a promissory note or bill of exchange which is not overdue but is still current can be treated as dishonoured before the date of maturity. There is no English decision which applies the doctrine of anticipatory breach to contracts completely executed on one side, still less to promissory notes and bills of exchange. It is settled in the United States that the repudiation or renunciation of a bill or note not yet due cannot be treated as an immediate breach of contract

(1) (1851) 11 C.B. 191 [138 E.R. 444]. (2) (1908) 2 K.B. 584.
(3) (1897) 2 Q.B. 80.

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entitling the holder to sue upon the note: See *Roehm* v. *Horst* (1), where *Fuller* C.J., speaking for the court, said: "In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

The principle there accepted is that the doctrine does not apply to unilateral obligations to pay money: See *Harvard Law Review*, vol. 14, p. 438, and *Harvard Law Review*, vol. 39, p. 268. The rule is stated in the following passage from the *American Restatement of the Law of Contracts*, Art. 318 e, p. 477: "The doctrine of anticipatory breach is not extended to unilateral contracts unless the promisor's duty is conditional on some future performance by the promisee. It is immaterial whether the contract was originally thus unconditionally unilateral or has become so by the performance of one party. In neither case can a breach arise before the time fixed in the contract for some performance. There must be some dependency of performances in order to make anticipatory breach possible." It is also the principle adopted in Canada. In *Melanson* v. *Dominion of Canada General Insurance Co.* (2), *Baxter* J. quoted the following passage from a judgment delivered in Upper Canada in 1858:—"Suppose a bond given conditioned to pay a sum of money, at the expiration of ten days after the happening of some named event, or a bill of exchange payable at thirty days after sight, the most positive declaration of the obligor or the acceptor, that he meant to dispute his liability, would not render the debt payable a day sooner than was stipulated for by the instrument. The declaration of an intention to dispute the right to recover payment, would not alter the time at which the right would accrue."

It is worth noticing that *Anson*, in his first edition of the *Law of Contracts*, (1879), p. 271, in dealing with the discharge by renunciation before performance due, speaks only of a contract which is wholly executory. The code contained in the *Bills of Exchange Act* 1909-1936 states exhaustively what amounts to dishonour, and does not recognize any such thing as a dishonour *cy-près*. Perhaps a justification for the decision of the Divisional Court in the case of *In re Raatz* (3) should be sought in the nature of the condition to be implied when a negotiable instrument is taken for and on account of a debt. The learned judges do not expound their reasons, but possibly they contemplated an extension of the traditional statement of the condition involved. That statement is to be found in the notes to *Williams' Saunders*, vol. 2, p. 103 b: "The acceptance of a negotiable

(1) (1900) 178 U.S. 1, at p. 17 [44 Law. Ed. 953, at p. 960].

(2) (1934) 2 D.L.R. 459, at p. 464.

(3) (1897) 2 Q.B. 80.

note or bill 'for or on account' of a debt must be taken prima facie to be in satisfaction of that debt until it appears that the note or bill remains unpaid in the possession of the creditor without any laches by him." Should the decision in *In re Raatz* (1) be taken as meaning to add as an alternative "or until the debtor commits an act of bankruptcy"? It is difficult to believe that the learned judges would adopt such a view without entering upon any examination of the doctrine or its history or of the difficulties involved.

Perhaps, instead of endeavouring to reconcile the decision with principle, it is better to treat it as dealing only with a point of bankruptcy practice, as deciding what will suffice in a petition. But, however that may be, I am unable to think that the decision affects the present case. It related to a state of facts quite different from those under present consideration. It depended on the fact that before the bankruptcy in reference to which the question arose the debtor had made an attempt to assign his estate for the benefit of his creditors. The holder of the bill refused to assent to the assignment, but regarded the attempt as an act of bankruptcy, and as relieving him from the necessity of relying on the bill alone. In the present case there was no antecedent assignment or act of bankruptcy. There was nothing prior to the making of the very deed of arrangement under which the creditor proved that could amount to a renunciation of the promissory note or to the breach of the condition attached to the receipt of the promissory note as payment, whatever extension may be made in the traditional understanding of that condition. The deed took effect upon a state of facts in which the promissory note was in operation as a subsisting payment. It was to that state of facts that the release clause applied. No doubt the release is accompanied by a provision turning the debts released into rights of proof. But what is turned into a right of proof is the debt then subsisting, and that was the debt constituted by the promissory note. The antecedent debt was paid by the note, though of course subject to the condition subsequent. But the condition subsequent could not occur.

It is impossible, in my opinion, to split the transaction between the debtor and his creditors when the deed of arrangement was made into two separate steps. It cannot be conceived first as the making of an assignment by the debtor so as to amount to a renunciation of obligation or breach of condition, followed afterwards by an independent and separate act of the creditor, an assent by them to the deed. It is, I think, impossible in any such way to regard the operation of the promissory note as terminated before the creditor

(1) (1897) 2 Q.B. 80.

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became bound. It is a deed constituted of a single transaction *inter partes* and the order in which the deed was executed or assented to is immaterial. In fact we do not know whether the deed was put forward by the debtor or by the creditors. But even if we did know, it is an instrument operating as the deed of all, and must in point of law be considered as binding all the parties simultaneously.

Accordingly, *uno ictu*, the debtor and the creditor concurred in turning the existing debt into a right of proof against assets and otherwise discharging it by release. It was, I think, in accordance with the true intention of the parties to the deed that the rights of the creditors should be fixed as they existed at the date of the deed, and, consistently with that intention, the creditor Thomas Brown & Sons Ltd. cannot maintain its claim to interest out of the surplus.

For these reasons I am of opinion that the appeal should be allowed and the order of the Supreme Court discharged except as to costs. In lieu thereof it should be ordered and declared that the debts mentioned in the application for directions do not carry interest, and that no payment out of the surplus in the hands of the trustee should be made in respect of interest thereon accruing since the date of the deed of arrangement. The costs of all parties should be paid out of the estate, those of the trustee as between solicitor and client.

McTiernan J. The trustee's application for directions resolves itself into the question whether the deed of arrangement provided for the payment of interest on debts falling within the scope of the trusts declared by the deed. The trust for the payment of the debtor's liabilities in effect bound the trustee to pay out of the property assigned to him by the deed all such debts and claims as would have been provable against the debtor's estate if it had at the date of the deed been sequestrated in bankruptcy. The terms of this trust therefore make the solution of the present question dependent on the rule in bankruptcy in Australia relating to the payment of interest on debts provable against a bankrupt's estate.

The rules applicable where the bankruptcy is governed by the Australian bankruptcy law are conveniently stated by *Harvey* C.J. in Eq. in the case of *Re Paul & Gray Ltd.* (1). He said :—" In my opinion the Federal legislature, in deliberately abstaining from following the then existing provisions of the English Act and the provisions of so many State Acts, meant to say not that no interest was to be paid, but that interest was to be paid according to the old common-law rule of bankruptcy ; that is, interest according to

(1) (1933) 33 S.R. (N.S.W.) 295, at pp. 300-303 ; 50 W.N. 134, at p. 196.

the contractual rate only. The result is that out of the surplus creditors of interest-bearing debts are entitled to the full contracted rate of interest, but non-interest-bearing debts will not carry any interest out of surplus." In the present case the trustee of the deed has paid the creditors the full amount of the debts which were proved against the debtor's property assigned by the deed and has a surplus. It is necessary to inquire whether the debts on which the creditors claim interest out of the surplus of the property were interest-bearing debts. In argument the case was limited to debts owing to the respondent company. It was, like the other creditors, a party to the deed of arrangement.

At the time the deed was executed the company was the holder of three promissory notes drawn in its favour by the appellant some time before the execution of the deed. The notes were due on a subsequent date. The company proved for the amount of each of these notes and received dividends in full payment. It is on the amount of each of these notes that the company claims that it is entitled to interest out of the surplus.

The notes are three of a series which the appellant drew in favour of his creditors in fulfilment of an arrangement of his affairs made by his principal creditors, including the company, some time before the execution of the deed. That arrangement in fact provided that the promissory notes were to be free of interest. But the company claims that it can revert to the original debt in payment of which it took the notes and that this debt was interest bearing. It relies on the familiar principle that when a promissory note is taken by a creditor instead of a money payment the presumption is that the parties intended the note to be only a conditional discharge of the debtor's liability, and that the creditor should be remitted to his prior rights if the note is dishonoured.

It may well be that the agreement under which the company took the notes was subject to the condition that if they were dishonoured at maturity the company's right to sue for the old debt and interest would be restored to it. But, nevertheless, the company agreed, subject to that condition, to take the notes instead of immediate payment of the original debt, and the appellant satisfied the company's claim by giving it the notes.

The deed of arrangement provided for the release of the appellant from all such debts and liabilities as would have been provable against his estate in bankruptcy. By virtue of the company's assent to the deed it became operative to release the rights conferred on the company by the promissory notes to receive payment in money for the amount of the notes on the due date. The deed

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operated to substitute the rights of the company as a *cestui que trust* under the deed for its rights as the holder of the notes. It released the appellant from its obligation to pay the notes at maturity, but it did not relegate the company to its right to enforce payment of the original debt in payment of which the company took the notes. The company having assented to the deed, there was a satisfaction of its rights under the notes, and the original debt was as effectually extinguished as if the appellant had, in lieu of entering with his creditors into the deed, paid the notes on the due date. For an explanation of the operation of a deed of arrangement, see *Victor Western* (*Fabrics*) *Ltd.* v. *Morginsterns* (1).

The execution of the deed of arrangement was an act of bankruptcy. As such it is relied upon as a renunciation by the appellant of the notes which the company held at the date of the deed. The insolvency of a buyer may give the vendor the right to refuse delivery of goods on credit (*Gibson* v. *Carruthers* (2)). But it is not correct that the insolvency of a party *per se* puts an end to the contract. It is the renunciation of the contract which the insolvency may imply that would dissolve it if accepted by the other party. This principle is illustrated by the following cases: *Ex parte Chalmers*; *Re Edwards* (3); *Morgan* v. *Bain* (4); *Ex parte Stapleton*; *Re Nathan* (5). See also *Restatement of the Law of Contracts*, vol. 1, sec. 324. As the deed in the present case contained the arrangements of the appellant's affairs to which the company and the general body of creditors assented, its execution was a release, but not a repudiation, of the appellant's obligations under each note. In the case of *In re Raatz* (6) it does not appear whether or not the petitioning creditors assented to the deed of assignment. It is well established that a creditor who has assented to a deed of arrangement is precluded from relying upon it as an act of bankruptcy on which to make the debtor bankrupt (*Ex parte Stray*; *Re Stray* (7))—See also cases cited in *Halsbury*, 2nd ed., vol. 2, pp. 18-19. A creditor cannot succeed in an action outside the deed for a debt if he has assented to its being dealt with under the deed (*Victor Weston* (*Fabrics*) *Ltd.* v. *Morginsterns* (1)). If it was the fact in the case of *In re Raatz* (6) that the petitioning creditors had not assented to the deed of assignment, that case is no authority for deciding that the notes held by the respondent company, which did assent to the deed of arrangement, were not released but in truth repudiated or dishonoured by its execution.

(1) (1937) 3 All E.R. 769.
(2) (1841) 8 M. & W. 321 [151 E.R. 1061].
(3) (1873) 8 Ch. App. 289, at p. 294.
(4) (1874) L.R. 10 C.P. 15, at p. 26.
(5) (1879) 10 Ch. D. 586, at p. 590.
(6) (1897) 2 Q.B. 80.
(7) (1867) 2 Ch. App. 374.

Philp J. decided that the debt provable by the company in the liquidation was not an interest-bearing debt. But his Honour decided that the company was entitled to prove for interest on the promissory notes by way of damages. To admit the company to prove for interest on that footing would be contrary to many decisions which apply to bankruptcy under Australian law, and consequently to the liquidation under the deed. It is unnecessary for me to review these decisions, as that has been done by my brother *Dixon*.

In my opinion the appeal should be allowed and the application by the trustee for directions should be answered by saying that none of the debts mentioned in the application carries interest.

Williams J. The debtor, Donald Mackenzie, trading at Goondiwindi as Mackenzie & Co., general merchant, entered into a deed of arrangement with his creditors dated 7th June 1933. On 5th July 1933 the deed was duly registered in accordance with sec. 193 of the Federal *Bankruptcy Act* 1924-1933, and received the assent of a majority in number and value of the creditors.

Thomas Brown & Sons Ltd. was one of the creditors of the debtor. It had supplied goods to him for some years prior to October 1931 on the terms that he gave promissory notes for the price, payable in four months time free of interest. If the notes were not met at maturity the debtor gave further extended promissory notes for varying periods, the amounts of which included interest at seven per cent.

The debtor became unable to pay his debts. On 14th October 1931 some of his creditors met, and, *inter alia*, agreed to allow him an extension of time to pay, he to give them promissory notes payable in six months, the amounts of which were to include interest at seven per cent. Thomas Brown & Sons Ltd. took a promissory note for the sum of £5,205 11s. 4d., being the amount of their account; and a separate one for £182 3s. 8d., being the amount of the interest. The other creditors each took the one promissory note for the combined amount of principal and interest.

The debtor was unable to pay the promissory notes, and a further meeting of his creditors took place on 11th May 1932. It was resolved "that an extension of twelve months be granted to the debtor for payment of all his liabilities of twenty pounds (£20) and over as at 1st May 1932, goods supplied after 25th April 1932 charged as at 1st May to be considered as supplied on 1st May 1932, and that the amount of such liability be reduced at the rate of £150 per month, payable by the debtor's own promissory notes, drawn at from one to twelve months, with a rest bill for the balance; such

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extension to be reviewed at the end of twelve months. The promissory notes to be drawn as from 11th July 1932, free of interest, but plus exchange and stamp duty. Creditors whose amounts do not total twenty pounds to be exempt from the terms of this arrangement and the debtor to endeavour to arrange a composition of ten shillings in the pound."

Pursuant to this resolution Thomas Brown & Sons Ltd. received promissory notes for £56 10s., payable on 14th August 1932, and on the fourteenth day of each succeeding month up to and inclusive of 14th July 1933, with a rest bill for the balance of their debt, namely, £4,949 13s. 2d., also payable on the last-mentioned date. The promissory notes for £56 10s. represented the share of this creditor in the sums of £150, which the debtor had agreed to pay each month in discharge of his indebtedness to his creditors to whom he owed over twenty pounds on 1st May 1932. The amount of the indebtedness to Thomas Brown & Sons Ltd. was calculated by leaving out of account the promissory note for £182 3s. 8d., which was paid in three monthly instalments commencing from 27th May 1932. On 7th June 1933 the debtor executed the deed of arrangement already mentioned. At the time the promissory notes for £56 10s. due on 14th June and 14th July respectively, and the promissory note for £4,949 13s. 2d., were still current. He also owed Thomas Brown & Sons Ltd. the sum of £480 10s. 7d. for goods sold and delivered, presumably on and after 1st May 1932. By the deed of arrangement, clause 6, the trustee was directed after payment of costs, charges and expenses and preferential claims to apply the proceeds of realization of the debtor's estate " in payment to the creditors by such dividends and at such times and in such amounts as the trustee shall deem expedient of all such debts and claims of the creditors as would by the law of bankruptcy be entitled to rank for dividend upon the estate of the debtor and in such priorities and in accordance with such rules as would be applicable under the said law of bankruptcy and to pay the surplus if any to the debtor." By clause 16 the creditors released and discharged the debtor from all debts and liabilities due, owing, or incurred from or by the debtor to them or any of them which under the said Act would have been provable in his bankruptcy had he been adjudicated bankrupt on the date of the deed.

The effect of the deed was to make the property assigned to the trustee available to satisfy all such debts and liabilities as would be provable under sec. 81 of the Act if a sequestration order had been made on 7th June 1933 and to release the debtor from all such debts and liabilities. By this section a very wide range of debts and liabilities are deemed to be debts provable in the bankruptcy, but it expressly provides that demands in the nature of unliquidated damages arising otherwise than by breach of contract, promise or breach of trust shall not be so provable.

But the section must be construed in the light of the "general rule in bankruptcy—whether a right and a reasonable rule or not—that there is to be no proof in bankruptcy for interest subsequent to the bankruptcy," because "the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time" (per *James* L.J. in *In re Savin* (1)). Whenever, therefore, there is a deficiency of assets, no proof for interest accruing after adjudication will be allowed. The rule applies whether the interest is on a secured or unsecured debt. So, too, in the case of a partnership, separate creditors cannot have interest out of the separate estate until the joint creditors have received twenty shillings in the pound (*In re Savin* (2) ; *Ex parte Bath, In re Phillips* (3) ; *In re Browne & Wingrove* ; *Ex parte Ador* (4) ; *Ex parte Mills* (5) ; *Ex parte Findlay* ; *Re Collie* (6) ; *Ex parte Reeve* (7)).

The trustee of the deed therefore acted correctly when he only allowed the creditors to prove in the first instance for the principal of their debts with interest, if any, accrued due up to 7th June 1933.

But the estate was sufficient to enable the trustee to pay twenty shillings in the pound on the amounts of these proofs, and still to leave a surplus of £1,400, against which the six creditors, Thomas Brown & Sons Ltd., S. Hoffnung & Co. Ltd., E. Rich & Co. Ltd., D. & W. Murray Ltd., Robert Reid & Co. Ltd., and R. F. Evans, then claimed to prove for interest on the amounts of their debts outstanding from time to time after the date of the deed until payment.

The claim was made in two ways: (1) that the original debts were interest bearing by contract, or, alternatively, (2) that from the maturity of the promissory notes interest at five per cent per annum by way of damages should be awarded under the *Bills of Exchange Act* 1909-1936, sec. 62.

The trustee applied to *Philp* J., sitting in bankruptcy, for directions whether the respective debts due to these creditors or any of them carried interest or, if so, from what date or dates and at what rates. From his affidavit it appears that at the date of the deed

(1) (1872) 7 Ch. App. 760, at p. 764.
(2) (1872) 7 Ch. App. 760.
(3) (1882) 22 Ch. D. 450 ; (1883) 27 Ch. D. 509.
(4) (1891) 2 Q.B. 574.
(5) (1793) 2 Ves. Jun., at p. 303 [30 E.R., at p. 644].
(6) (1881) 17 Ch. D. 334.
(7) (1804) 9 Ves. Jun. 588 [32 E.R. 731]

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the creditors other than R. F. Evans each held three promissory notes similar to those held by Thomas Brown & Sons Ltd. R. F. Evans held a promissory note for £115 13s., payable on 31st December 1932, which was duly presented for payment and dishonoured. The date of maturity of all the other promissory notes was therefore subsequent to that of the deed of arrangement.

In the case of T. Brown & Sons Ltd., there was evidence to show an agreement with the debtor that the amounts owing for goods supplied for more than four months should commence to carry interest at seven per cent until payment.

Philp J. held that the trustee, upon proof by creditors holding overdue promissory notes for damages for interest, should compute the damages for interest at the rate of five per cent per annum on the whole of each of the debts represented by the promissory notes up to the time of the first dividend ; and then the amount of that dividend should be subtracted from the whole debt and interest calculated upon the reduced principal up to the payment of the next dividend ; and so on until twenty shillings in the pound was paid on the principal debt ; and that when the total damages for interest of each such creditor were computed such creditor should participate ratably in the ultimate surplus according to the amount of damages so computed.

It is against this order that the debtor has appealed to this court.

I am satisfied, for the reasons given by my brother *Dixon*, that creditors who have debts which bear interest by contract can prove against the surplus for the interest which accrues after the date of adjudication on the respective amounts of their debts outstanding from time to time. To the authorities to which he has referred I will add *Page* v. *Commonwealth Life Assurance Society Ltd.* (1) and *Jowitt* v. *Callaghan* (2).

The debt of £5,205 11s. 4d. owing by the debtor to Thomas Brown & Sons Ltd. on 11th May 1932 was a debt which, by the contract between the parties, bore interest at seven per cent per annum. On that date the creditor agreed with the debtor to give him an extension of time to pay the debt, the terms being that it should be reduced by twelve monthly instalments of £56 10s., and the balance to be paid at the end of twelve months. The promissory notes already mentioned were to be given for these instalments and balance. The debtor therefore received three months' credit to pay the first instalment, with an additional month to pay each succeeding one, and fifteen months to pay the last instalment and the balance.

(1) (1936) 36 S.R. (N.S.W.) 85, at pp. 97, 98.

(2) (1938) 38 S.R. (N.S.W.) 512 ; 55 W.N. 188.

In *Byles* on *Bills*, 20th ed. (1939), p. 240, the learned author states :—" If a bill or note is taken on account of a debt and nothing is said at the time, the legal effect of the transaction is this—that the original debt still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditor. This effect of giving the bill has also been described as a conditional payment." This statement is amply borne out by the authorities : See *Baker* v. *Walker* (1) ; *Bottomley* v. *Nuttall* (2) ; *Cohen* v. *Hale* (3) ; *In re Romer & Haslem* (4) ; *Mears* v. *Western Canada Pulp and Paper Co. Ltd.* (5) ; *In re a Debtor* ; *Ex parte the Debtor* (6) ; *Marreco* v. *Richardson* (7) ; *Allen* v. *Royal Bank of Canada* (8) ; *Ashby* v. *Hayden* (9) ; *Havyatt* v. *Gilder* (10). In *Currie* v. *Misa* (11) *Lush* J. said :—" The security is offered to the creditor, and taken by him as money's worth, and justice requires that it should be as truly his property as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue the debtor as if he had given no security." On 7th June 1933 the balance of the original debt, which had not been discharged by the payments made commencing on 14th August 1932 and ending on 14th May 1933, was still in existence, but the remedy to recover this balance was suspended pending the maturity of the outstanding notes. The deed of arrangement constituted an available act of bankruptcy (sec. 52 (*a*)). Consequently no creditor with notice could have safely accepted payment of his debt within the following six months. The debtor had therefore placed himself in such a position that he could not fulfil the condition on which alone the conditional payments would become absolute, namely, honouring the notes at maturity. They had, in effect, " proved unproductive." This circumstance, in my opinion, put an end to the suspension of the remedy on the original debt, and Thomas Brown & Sons Ltd. could have filed a petition for a sequestration order based on this balance as a debt immediately payable (*In re Raatz* (12)). I agree respectfully with the view expressed by the two distinguished judges who comprised the Divisional Court in that case, and by *Chalmers*, *Bills of Exchange*, 6th ed. (1903), pp. 309-310, that the act of bankruptcy

(1) (1845) 14 M. & W. 465 [153 E.R. 558].
(2) (1858) 5 C.B. N.S. 122 [141 E.R. 48].
(3) (1878) 3 Q.B.D. 371.
(4) (1893) 2 Q.B. 286.
(5) (1905) 2 Ch. 353, at pp. 359, 360.
(6) (1908) 1 K.B. 344.
(7) (1908) 2 K.B., at pp. 589, 593.
(8) (1925) 134 L.T. 194.
(9) (1931) 31 S.R. (N.S.W.) 324 ; 48 W.N. 61.
(10) (1937) 37 S.R. (N.S.W.) at p. 446.
(11) (1875) L.R. 10 Ex. 153, at p. 164.
(12) (1897) 2 Q.B. 80.

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entitled the creditor to treat the notes as "practically dishonoured." It derives strong support from the cases which show that, where a purchaser becomes insolvent, the lien of an unpaid vendor, who is the holder of promissory notes which are still current, immediately revives. This lien, or in other words the right to retain possession of the goods until they have been paid for, is a security for the payment of the original debt (*Dixon* v. *Yates* (1); *Gunn* v. *Bolckow Vaughan & Co.* (2)).

Assuming that a sequestration order had been made, and that I am wrong in believing that the right to sue on the original debt revived upon the execution of the deed, the position would still be that when the notes were dishonoured at maturity the creditor could have proved in respect of the original debt, to use the words of *Cockburn* C.J. in *Cohen* v. *Hale* (3), as "a debt subsisting all along, just as if the cheque" (in this case notes) "had never been given." So, too, the lien of an unpaid vendor would then have revived, if it had not already done so at the earlier stage (*Miles* v. *Gorton* (4); *Griffiths* v. *Perry* (5); *Ex parte Chalmers*; *Re Edwards* (6); *Grice* v. *Richardson* (7)).

Instead of presenting such a petition Thomas Brown & Sons Ltd. preferred to assent to the debtor's estate being liquidated out of court, the terms of the deed being sufficiently wide to give them the same rights of proof as they would have had if a sequestration order had been made. The fact that the deed released the debtor from personal liability is immaterial. The debts themselves were not discharged. They were converted into rights to prove against the estate (*Jowitt* v. *Callaghan* (8)).

It is true that Thomas Brown & Sons Ltd. proved on the promissory notes, but at that time there was no question of any surplus. They should now be allowed to amend their proof or lodge a new proof, but not so as to disturb prior dividends (*Ellis & Company's Trustee* v. *Dixon-Johnson* (9)). A similar position to the present one arose in *Ex parte Hankey* (10), affirmed *sub nom. Ex parte Mills* (11), and discussed in *Ex parte Boyd*; *Re Boyd* (12). There, a creditor, who had proved on the notes, was allowed to amend and prove on the original debt in order to recover interest out of the surplus. In

(1) (1833) 5 B. & Ad. 313, at p. 341 [110 E.R. 806, at pp. 816, 817.]
(2) (1875) 10 Ch. App. 491, at p. 501.
(3) (1878) 3 Q.B.D. 371, at p. 373.
(4) (1834) 2 C. & M. 504 [149 E.R. 860].
(5) (1859) 1 E. & E. 681 [120 E.R. 1065].
(6) (1873) 8 Ch. App. 289.
(7) (1877) 3 App. Cas. 319, at pp. 323, 324.
(8) (1938) 38 S.R. (N.S.W.) 512, at p. 519; 55 W.N. 188, at p. 190.
(9) (1924) 1 Ch. 342, at p. 357.
(10) (1792) 3 Bro. C.C. 504 [29 E.R. 669].
(11) (1793) 2 Ves. Jun. 295 [30 E.R. 640].
(12) (1824) 1 Gl. & J. 285, at pp. 296, 297.

Ex parte Mills (1) Lord *Loughborough* L.C. said: "I cannot distinguish the case of interest due by contract, where there is no note, from the case where there is a note." The notes were payable on demand but appear to have been current at the date of the bankruptcy, and it was not suggested that this prevented proof of the original debt.

The effect of the arrangement made on 11th May 1932 was to suspend the running of interest on the original debt so long as the promissory notes were duly paid from time to time. The last note that was paid was the one which matured on 14th May 1933. Interest at seven per cent would therefore commence to run from the date of the "practical dishonour," namely, 7th June 1933.

The further question arises whether, even if the original debts were not interest bearing by contract, the creditors could claim interest at five per cent per annum by way of damages under sec. 62 of the *Bills of Exchange Act* for non-payment of the promissory notes at maturity. I think it must be answered in the negative, in view of the authorities referred to by my brother *Dixon*, which show that such damages cannot be proved against the surplus in the absence of express statutory provision. To those authorities I will add *Ex parte Sammon*; *Re Sammon and Pierson* (2) and *Ex parte Phillips*; *Re Phillips* (3), and mention that *Re Horatio Clagett*; *Ex parte Charman* (4) is also reported in the *Times Law Reports* (5).

It follows that in my opinion the appeal fails substantially and should be dismissed, but the order of the court below, except with respect to costs, should be discharged. The trustee should be advised that Thomas Brown & Sons Ltd. are entitled to prove against the surplus for interest at the rate of seven per cent per annum from 7th June 1933 on the amount of their debt of £5,062 13s. 2d. outstanding from time to time after that date; and the other creditors should be allowed to prove *pari passu* if they can establish that their original debts carried interest by contract. The motion should be referred back to the learned judge to do what is just in accordance with this advice.

Having regard to the radical alterations made in the order of the court below, the costs of all parties of this appeal should be paid out of the surplus; those of the trustee as between solicitor and client.

(1) (1793) 2 Ves. Jun., at p. 302 [30 E.R., at p. 644].
(2) (1831) 1 Mont. 253.
(3) (1834) 1 Mont. & Ay. 674.
(4) (1887) W.N. 184.
(5) (1887) 4 T.L.R. 18.

Appeal dismissed. Order of Philp J. except with respect to costs discharged. Direct the trustee that Thomas Brown & Sons Ltd. are entitled to prove against surplus for interest at the rate of seven per cent per annum from 7th June 1933 *on the amount of their debt of* £5,062 13*s*. 2*d*. *outstanding from time to time after that date and that the other creditors should be allowed to prove pari passu if they can establish that their original debts carried interest by contract. Costs of all parties of the appeal —those of the trustee as between solicitor and client— to be paid out of surplus. Refer the matter to the court below to do what is right pursuant to this order.*

Solicitors for the appellant, *O'Shea, Corser, Wadley & Scanlan.*
Solicitors for the respondent, *Flower & Hart.*
Solicitors for the trustee, *Chambers, McNab & Co.*

B. J. J.