[HIGH COURT OF AUSTRALIA.]

ROZENBES AND OTHERS . . . . APPELLANTS;
RESPONDENTS,

AND

KRONHILL AND ANOTHER . . . RESPONDENTS.
PETITIONERS,

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY, DISTRICT OF VICTORIA.

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MELBOURNE, *June* 14, 15; *Oct.* 15.

Dixon C.J., Webb and Fullagar JJ.

Bankruptcy—Petition for sequestration—Improper issue—Extortion—What constitutes abuse of process—Discretion of Court to make sequestration order notwithstanding—Practice and procedure—Bankruptcy Act 1924-1954 (*No.* 37 *of* 1924—*No.* 83 *of* 1954), *ss.* 54 (1), 56 (2) (3).

The ultimate principle involved in the question whether a creditor should be debarred by reason of alleged extortion from obtaining a sequestration order against a debtor is that a court will not countenance an abuse of its process. There is an abuse of process if a pending bankruptcy petition, or a threat of proceedings in bankruptcy, is used as a means of extortion; for, although that word is not a technical term and has in bankruptcy law no special significance divorced from its ordinary implications, extortion connotes an actual exertion of pressure by the creditor and a real intention on his part to use the process for some collateral purpose that is not legitimate. Since, however, the power of the court to dismiss a petition supported by the constituent facts for sequestration is discretionary and results in a denial to a creditor of what is prima facie a legal right, proof of extortion and hence of abuse of process does not necessarily entitle a debtor to have a petition dismissed.

Authorities on "extortion" reviewed.

Decision of the Federal Court of Bankruptcy, District of Victoria (*Clyne* J.), affirmed.

APPEAL from the Federal Court of Bankruptcy, District of Victoria.

On 18th October 1955 Jacob and Julia Kronhill petitioned the Federal Court of Bankruptcy, District of Victoria, for a sequestration order in respect of the estates of Uszer Zelik Rozenbes, Betti Rozenbes, Chaim Rozenbes and Dina Rozenbes on the ground

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that on 8th August 1955, they made an assignment of their property to a trustee for the benefit of their creditors generally and thereby committed an act of bankruptcy.

The petition was heard before *Clyne* J. when the making of a sequestration order in respect of each of their estates was opposed by the debtors on the ground, *inter alia*, that the petitioning creditors had been guilty of extortion.

Clyne J. rejected the debtors' contention and made a sequestration order in respect of each of the estates of the debtors.

From this decision the debtors appealed to the High Court.

The evidence, so far as material, and the findings of *Clyne* J. thereon appear sufficiently in the judgment of the Court hereunder.

A. H. Mann Q.C. (with him *E. A. H. Laurie*), for the appellants. If a petitioning creditor seeks to gain for himself an advantage over other creditors or over the debtor by using his rights as a petitioner as a bargaining point either with the debtor or his friends or relatives he thereby commits an abuse of the process of the court such as to disentitle him to relief on his petition. [He referred to *In re Atkinson*; *Ex parte Atkinson* (1); *In re Otway*; *Ex parte Otway* (2); *Re Shaw*; *Ex parte Gill* (3); *In re Goldberg* (4); *In re A Debtor* (5); *In re Judgment Summons*; *Ex parte Henleys Ltd.* (6); *In re Majory* (7).] The present case is within the scope of the decision in *In re Goldberg* (4). This Court should arrive at its own independent conclusion on the facts. [He referred to *Light* v. *Mouchemore* (8).]

R. J. Davern Wright, for the respondents. The onus is on the debtor to establish sufficient cause why a sequestration order should not be made and it is in the light of that and of the fact that bankruptcy is a public and not a private matter that this question must be considered. The difference between motive and purpose is made clear on the authorities. [He referred to *King* v. *Henderson* (9); *Cain* v. *Whyte* (10); *McIntosh* v. *Shashoua* (11).] In the present case all the evidence is that the debtors are hopelessly insolvent. The question of appellate courts reviewing findings of fact has recently been considered in *Paterson* v. *Paterson* (12).

(1) (1892) 9 Morr. 193, at pp. 195, 196.
(2) (1895) 1 Q.B. 812, at pp. 813, 814.
(3) (1901) 83 L.T. 754.
(4) (1904) 21 T.L.R. 139.
(5) (1928) Ch. 199.
(6) (1953) Ch. 195, at pp. 199-207; 209, 212, 213, 214.
(7) (1955) Ch. 600, at pp. 623, 624.
(8) (1915) 20 C.L.R. 647.
(9) (1898) A.C. 720, at p. 731.
(10) (1933) 48 C.L.R. 639, at pp. 645, 646.
(11) (1931) 46 C.L.R. 494, at p. 505.
(12) (1953) 89 C.L.R. 212.

Only two cases namely *Re Shaw*; *Ex parte Gill* (1) and *In re Goldberg* (2), support the proposition put by the appellants. Other cases are quite inconsistent with it. [He referred to *In re Bebro* (3); *In re Sunderland* (4); *In re Majory* (5).] In so far as it relates to bankruptcy the observations *In re A Judgment Summons*; *Ex parte Henleys Ltd.* (6) are *obiter*. [He referred to *In re Majory* (7).] The first proposition (8) is contrary to the idea that any arrangement in the shadow of bankruptcy must amount to extortion. In the absence of fraud or secrecy there is no extortion. [He referred to *In re Majory* (9).] As to what constitutes an abuse of process, see *Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (10).

A. H. Mann Q.C., in reply.

Cur. adv. vult.

Oct. 15.

THE COURT delivered the following written judgment:—

This is an appeal from a sequestration order made by the Federal Court of Bankruptcy (*Clyne* J.). The appellant debtors are Uszer Rozenbes, Betti Rozenbes, Chaim Rozenbes and Dina Rozenbes, who carry on business in partnership under the trade name of "Rose & Bess Knitwear". Uszer Rozenbes and Dina Rozenbes are the son and daughter respectively of Chaim Rozenbes, and Betti Rozenbes is the wife of Uszer Rozenbes. The petitioning creditors and the respondents on this appeal are Jacob Kronhill and his wife, Julia Kronhill, who carry on business in partnership under the trade name of "Nicewear".

The act of bankruptcy on which the petition was founded was that the debtors had made an assignment of their property to a trustee for the benefit of their creditors generally (*Bankruptcy Act* 1924-1954, s. 52 (*a*)). The making of the sequestration order was resisted on the ground (as stated in the affidavit of Uszer Rozenbes) that the petition "is not genuine but is in pursuance of an improper purpose, namely to extract from the debtors a sum of money as a benefit for themselves as against other debtors". The word "extortion" is often used to describe conduct of the kind thus alleged. The petition was also resisted on the ground that it was

(1) (1901) 83 L.T. 754.
(2) (1904) 21 T.L.R. 139.
(3) (1900) 2 Q.B. 316, at pp. 317, 320, 321, 322.
(4) (1911) 2 K.B. 658, at pp. 663, 664, 665, 667, 668.
(5) (1955) Ch. 600, at pp. 611, 612, 616, 617.
(6) (1953) Ch. 195.
(7) (1955) Ch. 600, at p. 621.
(8) (1955) Ch., at p. 623.
(9) (1955) Ch. 600, at pp. 611, 612, 616, 617, 623, 624.
(10) (1915) 20 C.L.R. 509, at pp. 521-523.

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in the best interests of the creditors generally that the estate of the debtors be administered under the deed of assignment. Only the first ground was argued on this appeal. With regard to the second ground, it is of some importance to note that in rejecting it *Clyne* J. said : " I think it is clear that there are many matters which require an examination of the debtors' affairs, an examination which cannot be made under an administration but can be made under a sequestration order." With regard to the first ground, it is necessary to consider the evidence in some little detail.

The deed of assignment was executed by the debtors on 8th August 1955 and was registered in the Court of Bankruptcy on 5th September 1955. It does not appear to have been executed by any of the creditors, but Mr. Smail, who is the assignee under the deed, says in his affidavit that within twenty-eight days of its registration it was assented to by a majority in number and value of the creditors, that is to say by twenty-six creditors whose debts total the sum of £15,003 7s. 0d. The total amount of the debts was £27,751 19s. 10d., and the assets were stated at £9,931 7s. 0d. The debt of the petitioning creditors, which is disputed as to part, was stated at £5,996 19s. 0d. and was the second largest of the debts. The petitioning creditors refused to assent to the deed, and presented their petition to the Court of Bankruptcy on 18th October 1955. It was heard on 8th and 9th December 1955, and the sequestration order was made on 9th December 1955. Between the execution of the deed and the presentation of the petition certain conversations are alleged to have taken place between Jacob Kronhill and various persons and it is on these conversations that the appellant debtors rely. Uszer Rozenbes, who gave evidence both by affidavit and orally, was unable to give other than hearsay evidence as to these conversations, and his evidence on the subject may be ignored. Five witnesses, however, gave direct evidence.

Hersz Bachrach, who was apparently a friend of the Rozenbes family, gave evidence that in September 1955 a meeting took place at his house at which were present Mr. and Mrs. Kronhill, one Nachman Gryfenberg and Mojsze Rozenbes, who is a brother of Uszer Rozenbes. He said that he asked Mr. Kronhill not to proceed in the court in the matter against Mr. Rozenbes. Mr. Kronhill, he said, would not agree to that but asked for a sum of money. At first he demanded " about £2,000 " and later on was prepared to agree to £1,500. He did not remember the exact words, but that was the meaning of it. It did not concern Mr. Kronhill who paid : as long as he got the money he was agreeable to do what the other creditors were doing. He knew that the

Rozenbes business was hopelessly bankrupt. He told Mr. Kronhill: "I do not have the money to pay and I do not propose to pay. Nobody has got the money to pay you."

Nachman Gryfenberg gave evidence of what is apparently another conversation which took place about the same time and at which the same persons were present. At this conversation Mojsze Rozenbes proposed to give to Mr. Kronhill a small machine or machines, apparently worth about £300, and another £1,000 in promissory notes. He told Mr. Kronhill that that was a fair proposition. He said that what those present other than the Kronhills wanted to do was to avoid "any court things". He said that they were friends of both sides and that is why they intervened. The offer was refused. Mr. Kronhill, he said, would have accepted it if it had been money but not promissory notes. He said: "If I can remember, he said he wanted £2,000". To this Mojsze Rozenbes said that he could not raise that sum.

Bella Rozen, who also was a friend of the Rozenbes family, said that in September 1955 she went to see Mr. Kronhill concerning the affairs of the Rozenbes family. She had heard that there was "a big bankruptcy in the business" and that "everybody was willing to let them work except Mr. Kronhill". She went by herself to see Mr. Kronhill. She thought, she said, that he would not refuse her if she went to his place, but she was mistaken. Mr. Kronhill, she said, told her that "if he could get at least £2,000 he would agree for them to work". She said that she could raise among the family about £1,000, that if he would agree to take £1,000 she thought she could raise so much money among the friends of the family. But, she said, he refused, telling her that he wanted to get £2,000.

Mojsze Rozenbes gave evidence but he could remember very little, and what he said was very confused. It seems plain that no reliance could be placed on it.

The witnesses so far referred to gave evidence before *Clyne* J. on 8th December 1955. It would appear that at the conclusion of the evidence his Honour expressed the view that the evidence failed to establish the objection, because none of the conversations was between Kronhill and the debtors or between Kronhill and persons shown to represent the debtors. The matter was, however, adjourned to the following day when his Honour apparently intended to pronounce his decision. When the court sat on the following morning, Chaim Rozenbes was called, with the leave of the court, to give further evidence on behalf of the debtors. He said that a conversation took place in the factory of Mojsze

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Rozenbes between himself and Jacob Kronhill. Kronhill had come to the factory to inspect a machine in which he was interested. He could not remember the date of the conversation. He said that it was after the second meeting of creditors and before the third meeting. He said that Kronhill said that he would sign the deed only if he, Rozenbes, could find £2,000 to pay him, to which he answered that he was unable to find that sum. Mr. Kronhill said that he would not sign otherwise, and he told him to go to his friends and acquaintances and try to raise this sum of £2,000. He said that if Rozenbes was prepared to pay him £2,000 he would "sign the arrangement". Rozenbes replied that Kronhill knew that he was unable to raise the sum of £2,000, and that in any case "he could not do such a thing because if he had any money it would be divided among all the creditors and not only for Mr. Kronhill".

Neither Mr. nor Mrs. Kronhill was called as a witness. *Clyne* J. in his reasons for judgment said: "The principal ground of objection, the serious ground of objection, is that the petitioning creditors were guilty of an attempted extortion as the price of their assenting to the deed of arrangement. The evidence in support of this ground was vague and uncertain. The evidence which was given yesterday was that the friends of the debtor tried to induce Jacob Kronhill to assent to the deed and he stipulated for some consideration as a condition of doing so, whether £2,000 or £1,500 plus some machinery is uncertain. There is, however, no evidence that these friends from the evidence given yesterday, had any authority expressed or implied to do what they were attempting to do. So far as the evidence given yesterday to support this alleged extortion is concerned, I think that it has failed. The evidence given this morning by the father, Chaim Rozenbes, does not satisfy me. It seems to be evidence which came into existence after what was said yesterday. I think it is unsatisfactory, and I do not accept it. Assuming that I came to the conclusion that Jacob Kronhill was in fact extorting money or trying to extort money from the debtors or the debtors' friends, I am still not sure whether in trying to get some money from the debtors upon the conditions stated that this amounted to extortion. I find upon the facts, however, there has been no extortion or attempt to obtain money without the consent of the other creditors."

From the passage quoted it would appear that his Honour regarded the evidence of Bachrach, Gryfenberg and Mrs. Rozen as "vague", but was not prepared to reject it. He seems to have indicated, however, that, in his opinion, that evidence could afford no ground for refusing the petition, because it did not establish

that the witnesses were representing the debtors at the interviews to which they respectively deposed. So far as the evidence of Chaim Rozenbes on 9th December is concerned, his Honour seems to have regarded it as a fabrication designed to overcome the view which he had expressed immediately before the adjournment on the preceding day.

Two observations must be made on what his Honour said. In the first place, the ground on which the debtors were resisting the making of a sequestration order was, in effect, that the presentation of the petition was an abuse of the process of the court. On the issue thus raised, it was not irrelevant, but it could not be decisive, that the conversations, which were put forward as establishing the affirmative of it, were not with the debtors or with persons representing the debtors but with strangers. In the second place, it is by no means easy to justify the view that the evidence of Chaim Rozenbes was a fabrication. No reason for so strong a view was revealed by cross-examination, and a good reason was put forward for not calling this witness on 8th December. He was an old man who had recently suffered a severe heart attack. If this were so, it was natural that it should not be desired to put him in the witness-box unless it were absolutely necessary. It had not been anticipated that it would be held necessary to prove that suggestions for the payment of money had been made to one or more of the debtors themselves. When it appeared that this was regarded as necessary Chaim Rozenbes insisted on giving evidence himself. To these considerations must be added the important fact that Jacob Kronhill was not called to deny any of the evidence given against him. No reason has appeared why he should not have been called if he was able to make such a denial.

No tribunal, of course, is bound to believe uncontradicted evidence, and the advantages of seeing and hearing witnesses have often been emphasised. But, in all the circumstances of the present case, it would seem that the only proper course for this Court to follow is to assume that the evidence given before *Clyne* J. (some of which is, as his Honour said, somewhat vague) ought to be accepted as substantially true, and to inquire whether it discloses sufficient ground for saying that his Honour ought to have refused to make a sequestration order.

The only relevant provisions of the *Bankruptcy Act* are contained in ss. 54 and 56. Section 54 (1) provides that "Subject to the provisions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition

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being presented either by a creditor or by the debtor, make an order, in this Act called a sequestration order." Section 56 (2) provides: "At the hearing, the Court—(*a*) shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of them; and (*b*) if satisfied with the proof, may make a sequestration order in pursuance of the petition." Section 56 (3) provides: "If the Court—(*a*) is not satisfied with the proof of the petitioning creditor's debt, or of the service of the petition, or of the act of bankruptcy; or (*b*) is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it may dismiss the petition." In *Cain* v. *Whyte* (1), this Court expressed agreement with a judgment of the Supreme Court of Queensland (*Henchman* J.) in which his Honour said: ". . . prima facie, on proof of the matters mentioned in s. 56 (2), the Court will proceed to make an order for sequestration, and . . . it is for the debtor to show some cause overriding the interest of the public in the stopping of unremunerative trading, and the rights of individual creditors who are unable to get their debts paid to them as they become due. Something has to be put before the Court to outweigh those considerations before it can be said that sufficient cause is shown against the making of a sequestration order" (2).

There is a good deal of English authority on the subject of what has been called "extortion". The cases are not free from difficulty and it seems desirable to refer specifically to several of them. In *Re Atkinson; Ex parte Atkinson* (3) money had been exacted by a petitioning creditor, who was a solicitor, and promissory notes for further sums had been demanded and received, as the price of agreeing to a series of adjournments of the petition. The receiving order which had been made by the registrar was discharged. *Fry* L.J. said: "the moment the court sees that the petition is made a means of extorting money, a petitioner should not be able to get a receiving order . . . . What he attempts to do is to obtain a private advantage which would injure other creditors, and which must be restrained by the court" (4). An almost exactly similar case is *In re Davies; Ex parte King* (5). The case of *In re Otway; Ex parte Otway* (6), was a case where an attempt had been made to exact a sum of money as the creditor's price of agreeing to an adjournment of a pending petition. The attempt actually

(1) (1933) 48 C.L.R. 639.
(2) (1933) 48 C.L.R., at p. 646.
(3) (1892) 9 Morr. 193.
(4) (1892) 9 Morr., at pp. 196, 197.
(5) (1876) 3 Ch. D. 461.
(6) (1895) 1 Q.B. 812.

failed, but the fact that it had been made was considered sufficient ground for discharging a receiving order which had been made by the registrar. It is to be noted, incidentally, that there was another good ground for discharging the receiving order in this case.

One point that occurs to one with regard to these three cases is that to make the debtor bankrupt, instead of refusing the petition, might have been a very good way of compelling the offending creditor to disgorge his ill-gotten gains: cf. *Ex parte Edwards; In re Chapman* (1). It is, however, quite understandable that what was done should be regarded as an abuse of process. They may seem somewhat remote from the present case. The two cases primarily relied upon by counsel for the debtors were *Re Shaw*; *Ex parte Gill* (2) and *In re Goldberg* (3). In the former the petitioning creditor had said that he would not assent to a proposed composition unless the debtor gave him a promissory note for the balance of the debt. The debtor refused. A subsequent petition by the creditor on the act of bankruptcy constituted by the composition was dismissed. *Rigby* L.J. said: "To use or even attempt to use bankruptcy proceedings for the purposes of fraud or extortion, although the attempt may fail, is a sufficient cause for refusing on the petition of that creditor to make a receiving order" (4). In *In re Goldberg* (3) there was an assignment for the benefit of creditors. One of the debtor's relatives offered to purchase the estate for a sum sufficient to pay 7s. 6d. in the pound. The majority of the creditors accepted, but one creditor wrote saying that he would not accept unless bills for a further 2s. 6d. were given by the debtor and indorsed by a relative of his. This was refused, and the creditor then presented the bankruptcy petition. A receiving order made by the registrar was discharged by the Court of Appeal. It was said that there had been "an attempt to obtain a secret advantage over other creditors".

The next two cases are of some value as illustrating the limits of the doctrine. The first is *In re Bebro* (5). The importance of this case is that it shows that there must be real "extortion", in the sense of pressure put upon the debtor, or other evidence that the process of the court has been used for some purpose other than its legitimate purpose. *Rigby* L.J. said: "The first petition was presented with the *bona fide* object of putting the bankruptcy law in force for the recovery of a debt, and there was no departure from that object from first to last" (6). *Webster* M.R. said: "The court must be satisfied that the bankruptcy proceedings

(1) (1884) 13 Q.B.D. 747.
(2) (1901) 83 L.T. 754.
(3) (1904) 21 T.L.R. 139.
(4) (1901) 83 L.T., at p. 755.
(5) (1900) 2 Q.B. 316.
(6) (1900) 2 Q.B., at p. 322.

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have been used to extort or get from the debtor a larger amount than the creditor could have lawfully received by means of the proceedings " (1). The other case is *In re Sunderland* (2). In that case *Buckley* L.J. regarded *Re Shaw*; *Ex parte Gill* (3) as a case of attempted fraud by means of a secret arrangement. He said that it was not extortion " to make openly a claim which cannot be supported in law, and to decline to assent to a deed of assignment when the claim is not admitted " (4).

In the case of *In re a Debtor* (5) the facts were somewhat complicated, and need not be set out. The essence of the case was that a creditor, while his petition was pending, had sought to obtain from the debtor, as his price for agreeing to a dismissal of the petition, a sum of £160 for costs which the debtor was not liable to pay. Lord *Hanworth* M.R. said : " But there is a principle which must be jealously guarded—namely that the process of the Bankruptcy Court must not be abused " (6). *Sargant* L.J. said : " To my mind the attempt to obtain so large a sum as £160 for costs due from some other person, for which the debtor could not by any stretch of imagination be deemed to be personally liable, was a very strong instance of an attempt to use bankruptcy proceedings—the threat of bankruptcy—for the purpose of obtaining a collateral advantage unconnected with the bankruptcy for the benefit of the petitioning creditor " (7). There is an important passage in the judgment of *Lawrence* L.J. His Lordship said : " The principle upon which the court acts in these cases is that it treats a demand of this nature as evidence that bankruptcy proceedings were taken not with the *bona fide* intention of obtaining adjudication but for some collateral purpose " (8).

The next case is *In re A Judgment Summons* ; *Ex parte Henleys Ltd.* (9) in which *Jenkins* L.J. reviewed the authorities at some length. The main point decided in that case is not relevant to the present case, but a sum which the debtor was not legally compellable to pay had been exacted by a creditor by means of a threat of bankruptcy. Again it is made plain that the essence of the matter is that the process of the Bankruptcy Court must not be abused. *Jenkins* L.J. said : " The object of proceedings in bankruptcy is to make the debtor's assets available for rateable distribution amongst his creditors. No creditor is entitled to have

(1) (1900) 2 Q.B., at pp. 320, 321.
(2) (1911) 2 K.B. 658.
(3) (1901) 83 L.T. 754.
(4) (1911) 2 K.B., at p. 665.
(5) (1928) Ch. 199.
(6) (1928) Ch., at p. 206.
(7) (1928) Ch., at p. 210.
(8) (1928) Ch., at p. 212.
(9) (1953) Ch. 195.

recourse to such proceedings *for the purpose of obtaining* some collareral advantage for himself" (1). (The italics are ours).

The latest case is *In re Majory* (2). The conclusions to be drawn from the cases are stated in a series of five propositions by Lord *Evershed* M.R. for himself, *Jenkins* L.J. and *Romer* L.J. The case seems finally to establish that the ultimate principle involved is that a court will not allow its process to be abused. There is an abuse of process if a pending bankruptcy petition, or a threat of proceedings in bankruptcy, is used as a means of extortion. The word "extortion" is not a technical term, and it has in bankruptcy law "no special and artificial significance divorced altogether from the ordinary implication of the word". The court will look strictly at the conduct of a creditor using or threatening bankruptcy proceedings, and extortion may be held to have taken place if the creditor has used, or attempted to use, a pending petition, or a threat of a petition, in order to extract from the debtor money which the debtor is not bound to pay, or in order to obtain some secret and unfair advantage over other creditors. But extortion will not be held to have taken place "in the absence of *mala fides* or anything amounting to oppression in fact". There must be a real intention on the part of the creditor to use the process for some other end than its legitimate end, and there must be a real exertion of pressure.

The question of what constitutes an abuse of the process was considered by *Isaacs* J. in *Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (3). His Honour distinguished between purpose and motive, and said: "Where it can be shown in a case of insolvency that the creditor is making his application not intending to pursue it to a recognized lawful end—whatever his motive may be for attaining that lawful end—but for the *real purpose* of attaining some other and improper end, such as extorting money as in *Davies' Case*, (4), where the petition was hung up while in existence and used as a means of extortion, there is an abuse of process" (5). (Italics are ours.) On this basis his Honour reconciled the cases cited with *King* v. *Henderson* (6). This appears to be in accord with the views expressed in *In re a Debtor* (7) and *In re Majory* (2). The two latest English cases and the observations of *Isaacs* J. in *Dowling's Case* (8), while they expressly accept *Re Shaw*; *Ex parte Gill* (9), may be thought to suggest that that case and the case of *In*

(1) (1953) Ch., at p. 212.
(2) (1955) Ch. 600.
(3) (1915) 20 C.L.R. 509, at pp. 521, 523.
(4) (1876) 3 Ch. D. 461.
(5) (1915) 20 C.L.R., at p. 522.
(6) (1898) A.C. 720.
(7) (1928) Ch. 199.
(8) (1915) 20 C.L.R., at pp. 521-523.
(9) (1901) 83 L.T. 754.

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re Goldberg (1), represent extreme examples of the application of the principle involved. The case of *Ex parte Griffin*; *In re Adams* (2), was a case of gross fraud, but the headnote seems to state correctly the general rule as conceived by the Court of Appeal in *In re Majory* (3), and by *Isaacs* J. in *Dowling's Case* (4). That headnote reads :— " When the court sees that a bankruptcy petition is presented, not with the *bona fide* view of obtaining an adjudication, but for a collateral purpose and with the view of putting pressure on the debtor, it will refuse to make an adjudication, even though there be a good petitioning creditor's debt, and an act of bankruptcy has been committed " (2).

On this understanding of the principle to be applied, a finding in the present case that the petitioning creditors had been guilty of such extortion as to disqualify themselves from presenting a petition would not seem to be justified by the evidence. It cannot, in our opinion, be said that it establishes an attempt to abuse the process of the court.

In the first place (though this alone does not carry one very far) there is no evidence of any actual threat to present a petition for sequestration. The creditors refused to sign the deed, and it was doubtless anticipated that that refusal would be followed by bankruptcy proceedings, but what happened does not seem to have followed on any actual threat. Nor (though this again is not conclusive) did the creditors approach the debtors with any demand for payment of money or any other benefit. The position seems to have been that the debtors were very anxious not to be made bankrupt, and their friends and relations were very anxious that they should not be made bankrupt. If there is any substance in the allegations made by Jacob Kronhill in his affidavit, the debtors had special reasons for wishing to avoid an administration in bankruptcy. But no advantage appears to have been taken of the position in this regard. What happened was that first certain friends of the debtors, and then one of the debtors, approached Jacob Kronhill and pressed him to sign the deed. It was not unnatural that Kronhill, being so importuned, should say to those friends : " Well, if you're so anxious for me to sign the deed, so anxious to save your friends from bankruptcy, why don't you come to the rescue in a practical way and raise some money to pay part of what is owing to me and my wife ? "—or that he should say to Chaim Rozenbes : " Your friends are very anxious to help you : they have been pressing me to sign this deed : why don't you get them to do something practical

(1) (1904) 21 T.L.R. 139.
(2) (1879) 12 Ch. D. 480.
(3) (1955) Ch. 600.
(4) (1915) 20 C.L.R., at pp. 522, 523.

and raise some money?" That was, we think, in effect, what happened. It is clear that Kronhill knew throughout that he had not the slightest hope of obtaining any money from any of the debtors themselves. The evidence does not establish that he at any time put any pressure on any of the debtors, that he threatened bankruptcy proceedings in order to obtain a secret advantage over other creditors, or that in presenting his petition to the court he had any other object in view than the due administration of the estate in bankruptcy. It does not establish (to use the words of *Lawrence* L.J. in *In re a Debtor* (1)) that "bankruptcy proceedings were taken not with the *bona fide* intention of obtaining an adjudication but for some collateral purpose" (2). In all the circumstances, looking at the matter in the light of the latest authorities, we do not think that extortion or attempted extortion is proved.

There is another consideration which leads to the conclusion that the appeal should be dismissed. In *Re Shaw*; *Ex parte Gill* (3), *Rigby* L.J. uses language from which it might be inferred that, if "extortion" of any degree is proved, the court has no discretion in the matter but must dismiss the petition. But this, with great respect, cannot be correct. It is only because it has a discretion that the court can deny to a creditor what is prima facie his legal right. It is to be observed that in the present case there was substantial ground for thinking, as *Clyne* J. did think, that the debtors' affairs needed investigation, and that an administration in bankruptcy was therefore preferable to an administration under the deed of assignment. Even if the question whether the creditors were guilty of extortion were more doubtful than we think it is, this consideration might, in our opinion, properly weigh down the scale in favour of making a sequestration order.

The appeal should, in our opinion, be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *Jack Cohen*.
Solicitors for the respondents, *Alfred L. Abrahams & Co.*

R. D. B.

(1) (1928) Ch. 199.
(2) (1928) Ch., at p. 212.
(3) (1901) 83 L.T. 754, at p. 755.