H. C. OF A. 1933. DEPUTY FEDERAL COMMISSIONER OF TAXATION v. EVANS LTD.

I therefore agree that the sum of £4,260, which was payable and paid under the document of sub-lease, was demanded and given as a premium in connection with a leasehold estate.

The appeal should therefore be allowed.

McTIERNAN J. I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for the appellant, *Albert A. Wolff*, Assistant Crown Solicitor for Western Australia.

Solicitors for the respondent, *Downing & Downing.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

COUVE . . . . . APPELLANT;

RESPONDENT,

AND

J. PIERRE COUVE LIMITED (IN LIQUIDATION) AND ANOTHER . . . . } RESPONDENTS.

APPLICANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1933. SYDNEY, *Aug.* 11, 14. MELBOURNE, *Sept.* 21. Dixon, Evatt and McTiernan JJ.

Company—Winding up—Misfeasance by director—Fraudulent preference—Undrawn salary of managing director—Company's assets taken in lieu thereof after presentation of petition—Measure of loss—Companies Act 1899 (*N.S.W.*) (*No.* 40 *of* 1899), *secs.* 152*, 162*.

Company—Winding up—Misfeasance by director—Proceedings by liquidator for order for repayment—Defences—Assets insufficient to meet amount due under debenture—Proceedings effective to benefit debenture-holder only.

The appellant was the managing director of a company of which he was the only substantial shareholder. After the presentation of a petition for the

The *Companies Act* 1899 (N.S.W.) provides, by sec. 152: "Where a company is being wound-up by the Court, or under the supervision of the Court, all dispositions of the property, effects, and choses in action of such company, . . . made between the commencement of the winding-up and the order for winding-up shall, unless the Court otherwise orders, be void." By sec.

winding up of the company the appellant caused large supplies of the company's goods to be delivered to other businesses owned by him as a set-off, as he claimed, for undrawn salary due to him by the company.

Held, that the taking of the goods by the appellant was a fraudulent preference amounting to a misfeasance within the meaning of sec. 162 of the *Companies Act* 1899 (N.S.W.).

The assets of the company, which by debenture were charged with the payment of certain moneys, were insufficient to meet the amount due to the debenture-holder, and there was, therefore, no surplus available for distribution among the unsecured creditors. On a notice of motion taken out by the liquidator it was contended that as the recovery of the value of the goods could advantage only the debenture-holder, who would be entitled to it under the debenture, the liquidator could not maintain the proceedings in the interest of that secured creditor alone.

Held, that as the appellant's liability to the company was direct the contention was not an answer which could properly be made by him.

Held, also, that the measure of the loss to the company was the value of the goods at the time, at latest, when the liquidation order was made.

In re Etic, Ltd., (1928) Ch. 861, at p. 875, applied.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) (unreported), affirmed.

APPEAL from the Supreme Court of New South Wales.

The appellant, Joson Pierre Couve, was the managing director of the respondent Company, J. Pierre Couve Ltd., in which he held all except six of the three thousand two hundred and six shares issued. A petition for the winding-up of the Company was presented on 7th July 1932, and an order for its compulsory winding-up was made on 2nd September 1932. Cecil James Breydon was appointed as the official liquidator of the Company. The article of association by which the appellant was appointed to the office of managing

162: "Where in the course of a winding-up it appears that any . . . director, manager, liquidator, or any officer of the company being wound-up has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, creditor, or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him—(i) to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just; or (ii) to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just."

H. C. OF A. 1933.

COUVE v. J. PIERRE COUVE LTD. (IN LIQUIDATION).

director provided that so long as he held that office his salary should be at the rate of £1,000 per annum. In fact, for a long period, the appellant drew as salary only £10 or £12 per week, and the balance remained undrawn. After 7th July 1932 and prior to 2nd September 1932 the appellant caused large supplies of the Company's goods to be delivered to other businesses owned by him in Sydney and Melbourne in part satisfaction, as he claimed, of his undrawn salary. At all material times the assets of the Company constituted the security under a debenture in favour of Gutermann & Co., of Baden, Germany, for the payment of moneys in respect of goods supplied by that firm to the Company. Upon investigation by the liquidator it was found that the assets of the Company were insufficient to meet the sum due to the debenture-holder, and there was, therefore, no prospect of any surplus available for distribution among the unsecured creditors. By a notice of motion taken out by him under the provisions of the *Companies Act* 1899 (N.S.W.) the liquidator sought 1. a declaration that the appellant "has misapplied and is accountable for and liable to contribute to the assets of the . . . Company the sum of" (*inter alia*) £569 12s. 9d. " . . . being . . . money's worth belonging to the Company wrongfully and in breach of trust drawn by him from the . . . Company," and, 2. an order directing the appellant to pay the amount claimed to the liquidator. The sum of £569 12s. 9d. was the landed cost, plus five or ten per cent, as shown in the Company's books, of the goods delivered to the other businesses of the appellant between the date of the presentation of the petition for the winding-up of the Company and of the order therefor.

Harvey C.J. in Eq. made the declaration and order as asked. In the course of his judgment, he said:—But I think the official liquidator has an equal right, or at any rate a right to pursue those goods into Mr. Couve's hands notwithstanding that when he recovers the money it may be he will have to hold it for the debenture holder as being covered by his security. It seems to me it is a transaction which is exactly hit at by sec. 152 of the *Companies Act* as a dealing with the property of the company between the date of the commencement of the winding up and the winding up. And the official liquidator has a right in his own name and on his own behalf

as representing the general body of creditors to follow those goods and recover the money which Mr. Couve has attempted to put into his pocket as against the undrawn salary. In my opinion Mr. Couve is liable to pay to the liquidator the amounts specified in pars. (*a*) (*b*) and (*c*) of the summons as being portion of the assets of the Company which Mr. Couve has attempted to deal with and dispose of in the interval between the lodging of the petition and the making of the order. It is quite true that the official liquidator may have to account for those proceeds to the debenture holder, but that is a matter between him and the debenture holder.

From that decision Couve now appealed to the High Court.

Other material facts appear in the judgment of *Dixon* J. hereunder.

Maughan K.C. (with him *Mann*), for the appellant. As the debenture holder has taken possession of all the assets of the respondent Company the liquidator is not entitled to sue for any goods that formerly belonged to the Company. The debenture covered the whole of the assets of the Company. The goods in question were taken by the appellant in satisfaction of salary due to him by the Company. If the appellant was wrong in so doing the proper order would be for such goods to be delivered up by him to the Company. This he is prepared to do. The matter does not come within the provisions of sec. 162 of the *Companies Act*, therefore the liquidator was not entitled to take proceedings under that section. There is no wrong *per se* in a managing director purchasing goods from the company, or taking goods in discharge of a debt due to him by the company. So that at the time the goods were taken there was no misfeasance or breach of trust on the part of the appellant.

[DIXON J. referred to *In re Washington Diamond Mining Co.* (1).]

In that case there was an element of fraud; in the present case there is no fraud. Misfeasance must be in the nature of a breach of trust resulting in a loss to the company. There must be some moral wrong (*Cavendish Bentinck* v. *Fenn* (2)).

[EVATT J. referred to *In re Etic, Ltd.* (3).]

(1) (1893) 3 Ch. 95.
(2) (1887) 12 App. Cas. 652.
(3) (1928) Ch. 861, at p. 875.

H. C. OF A. 1933.

COUVE v. J. PIERRE COUVE LTD. (IN LIQUIDATION).

The Legislature could not have intended to make that which was proper at the time it was done a misfeasance retrospectively. The appellant did not misapply or retain " any moneys of the company." The Court did not " otherwise order " within the meaning of sec. 152 of the Act, therefore the goods in question were the goods of the Company until seized by the debenture holder and were then his. In these circumstances the trial Judge was in error in ordering the appellant to pay money, the only order his Honor was entitled to make was to order the appellant to deliver up the goods. The liquidator ought not to be allowed to use the machinery of the Court in order to recover the goods for the debenture holder, nor should the latter be allowed to bring such proceedings in the name of the liquidator (*Ex parte Cooper*; *In re Zucco* (1)). The law on the subject is incorrectly stated in the case of *Albert Gregory Ltd.* v. *C. Niccol Ltd.* (2), which should, therefore, be overruled. In the circumstances of this case the goods are the property of the debenture holder, therefore the liquidator has no property therein to enforce. The amount shown in the notice of motion as being the value of the goods in question is the " book" value of such goods, and does not necessarily indicate their actual value.

Abrahams K.C. (with him *C. D. Monahan*), for the respondents. [Counsel announced that they appeared also for the debenture holder.] The appellant stood in two relationships to the Company with regard to the transaction—(*a*) he was a director of the Company, and (*b*) he was the recipient of the goods. As a director of the Company he was liable to attack under sec. 152 of the *Companies Act*. The words used in the notice of motion were a clear indication that the proceedings were taken under sec. 162 of the Act. As to the duties, powers and liabilities of directors, see *In re City Equitable Fire Insurance Co.* (3). It is a misfeasance if a director give a preference to himself (*In re Washington Diamond Mining Co.* (4); *Palmer's Company Precedents*, 13th ed. (1927), Part II., p. 715).

[EVATT J. referred to *Re Neath Harbour Smelting and Rolling Works* (5).]

(1) (1875) L.R. 10 Ch. 510.
(2) (1916) 16 S.R. (N.S.W.) 214.
(3) (1925) Ch. 407.
(4) (1893) 3 Ch. 95.
(5) (1887) W.N. (Eng.) 87; 56 L.T. 727.

That case is important as showing the combined effect of secs. 152 and 162 of the *Companies Act*. The parting with the goods of the Company to himself after the presentation of the petition for winding up was a misfeasance by the appellant: *In re Répertoire Opera Co.* (1). As sec. 152 confers upon the Court power to determine the validity of dispositions of property of the Company the Court has a corresponding power thereunder to declare such dispositions invalid. Other instances of summary proceedings taken out by the liquidator under the equivalent section to sec. 152 are to be found in the cases of *In re Civil Service and General Store Ltd.* (2), and *In re Wiltshire Iron Co.*; *Ex parte Pearson* (3).

[DIXON J. referred to *Halsbury's Laws of England*, 2nd ed. vol .v., p. 651.]

There is no evidence before the Court that the goods taken by the appellant are still in his possession. When a transaction is void the Court can either order the wrong-doer to return the goods, or to pay the value of such goods. In the circumstances the appellant has wrongfully converted the goods of the Company to his own use, and, therefore, the Company is entitled to have the goods returned to it, or compensation therefor. There was no suggestion by the appellant in the Court below that the goods could be returned, or that the value thereof was not as stated. As to whether the liquidator, as distinct from the debenture holder, was the proper party to bring the proceedings: see *Albert Gregory Ltd.* v. *C. Niccol Ltd.* (4). The decision in *Ex parte Cooper*; *In re Zucco* (5) only applies when somebody requests the liquidator or official assignee to take proceedings; then it is a question for the liquidator to consider whether it is his duty to take proceedings which will, or may, only result in benefit to the secured creditors. See also *In re Anglo-Austrian Printing and Publishing Union* (6). For whom the Company will hold the money is immaterial. The debenture holder may or may not have a right in respect of the goods.

Maughan K.C., in reply. The matter should be referred back to the Judge of first instance in order that the decree in the redemption

(1) (1895) 2 Mans. 314.
(2) (1887) 57 L.J. Ch. 119.
(3) (1868) L.R. 3 Ch. 443.
(4) (1916) 16 S.R. (N.S.W.) 214.
(5) (1875) L.R. 10 Ch. 510.
(6) (1895) 2 Ch. 891, at p. 894.

H. C. OF A. 1933.

COUVE v. J. PIERRE COUVE LTD. (IN LIQUIDATION).

suit might be brought under the notice of his Honor. By that decree the assets of the Company were ordered to be delivered up to the debenture holder. *Re Neath Harbour Smelting and Rolling Works* (1); *In re Civil Service and General Store Ltd.* (2); and *In re Répertoire Opera Co.* (3) are cases where the respondents in those actions had misapplied moneys of the company, and come within the very words of sec. 162, but, in this case, there was no taking of money. On the facts of this case the liquidator has asked for the wrong relief. The mere fact that a person has the goods of another person is not conversion.

Cur. adv. vult.

Sept. 21.

The following written judgments were delivered :—

DIXON J. Upon the hearing of this appeal the appellant complained of so much of the order appealed from as declared that he is accountable for or liable to contribute to the assets of the liquidating Company a sum of £569 12s. 9d. which represents the price or value of goods taken over by him from the Company after the petition was presented and before the winding up order was made.

The appellant was managing director of the Company, of which he and his wife were the only substantial shareholders. He took a first debenture or other security over the assets of the Company, apparently to secure advances in some form or other. Subject thereto, the Company gave a floating charge in favour of a firm called Gutermann & Co. of Baden, Germany, who supplied the Company with goods. The Company's articles of association provided that, while the appellant held the office of managing director, he should be remunerated at the rate of £1,000 per annum. In fact he drew a salary of only £10 or £12 a week. Although the residue of his salary was not credited to him in the books of the Company, nor included among the liabilities in its balance-sheets, a note did appear in the latter stating that against an amount owing by the appellant to the Company there was a contingent liability for balance of

(1) (1887) W.N. (Eng.) 87; 56 L.T. 727.

(2) (1887) 57 L.J. Ch. 119.

(3) (1895) 2 Mans. 314.

salary due which would more than cover his indebtedness. The appellant carried on business in Melbourne and the indebtedness referred to was incurred mainly for supplies of goods to this business. He also had a place of business of some sort in Park Street, Sydney. For some time before April 1931 he was absent in Europe, and upon his return in that month, he appears to have found the Company in difficulties. At any rate, in June 1931 he went into possession of its assets under his first debenture. At the end of the same month he opened business on his own account at a new address in Sydney, in Castlereagh Street. At some time, not exactly fixed, he gave instructions that the balance of his salary should be credited in the books of the Company against his existing liability and against any further supplies of goods. On 7th July 1932, the petition was presented upon which the winding up order was afterwards made and on that date, by virtue of sec. 91 of the *Companies Act* 1899 of New South Wales, the winding up commenced. Notwithstanding the presentation of the petition, the appellant caused large supplies of the Company's goods to be made to his Sydney and his Melbourne businesses. The goods were charged to him in the Company's books at prices obtained by adding five or ten per cent to the landed cost of the goods. The last of these entries was made under the date 1st September 1932. At the same time probably as this entry was made, the debits were carried over to a salary account and to this account was credited the difference between the amount of salary drawn up to 30th June 1932, and the amount payable under the article of association. The difference was distributed in two amounts between the account for the period before 30th June 1932, which does not concern this appeal, and the account for the period commencing 1st July 1932, which includes the supplies of goods in respect of which the order appealed from was made. A further sum was also credited for his salary to 31st August 1932. A redemption suit was instituted by the liquidator and Gutermann & Co., the second debenture holders, which resulted in the appellant receiving £40 with interest and costs and going out of possession of the assets of the Company, apparently in favour of Gutermann & Co. for whom the respondent Breydon, although official liquidator, seems also to have acted. The assets of the Company will not suffice to meet

H. C. OF A. 1933.

COUVE v. J. PIERRE COUVE LTD. (IN LIQUIDATION).

Dixon J.

the sum owing to Gutermann & Co. and secured over the assets by their debenture. There is, therefore, no prospect of any surplus distributable among unsecured creditors.

After an examination of the appellant had been held before the Master in Equity, the official liquidator by a notice of motion framed as a misfeasance proceeding applied for an order for payment by the appellant of various sums including the amount of £569 12s. 9d., which is the subject of this appeal. It was upon this proceeding that the order appealed from was made. The sum of £569 12s. 9d. is the amount debited to the appellant for goods supplied between 7th July, the date when the petition was presented, and 2nd September, the date of the winding up order. Sec. 152 of the *Companies Act* 1899, so far as material, provides that where a company is being wound up by the Court all dispositions of the property effects and choses in action of such company made between the commencement of the winding up and the order for winding up shall, unless the Court otherwise orders, be void.

It could not be denied that this provision rendered futile the attempt to transfer property in the goods in question to the appellant at a price to be satisfied by setting off the arrears of salary. But the objection was raised that misfeasance proceedings were not a proper remedy. Sec. 162 of the New South Wales Act, which is taken from sec. 165 of the English Act of 1862, authorizes this summary remedy against a director only when it appears that he has misapplied or retained in his own hands or become liable or accountable for any moneys of the Company or been guilty of any misfeasance or breach of trust in relation to the Company. The case is not one of misapplication or retention of moneys or of liability or accountability for moneys of the Company. If the attempted set-off be alone considered void under sec. 152 and the transaction be treated as a sale to the appellant, no doubt he is under a pecuniary liability for the price. But this is a simple contract debt for goods sold and delivered and not " a liability for moneys of the Company." But, in any event, sec. 152 operates to avoid the disposition of the goods and it is not possible to consider the transaction in such a manner. The case is one in which goods have been taken under a title which has been avoided. Accordingly, if the appellant is amenable to misfeasance proceedings in respect of the transactions, it must be under the words " guilty of any misfeasance or breach of trust in relation to the Company." But it is contended on his

behalf that these words describe conduct of a character to which the facts of this case do not belong. For this contention reliance is placed upon the considerations, first, that if the petition for winding up had been refused the transaction impeached would have been valid, and, second, that even now it is only invalid under sec. 152 "unless the Court otherwise orders." Lord *Macnaghten's* description of the nature of misfeasance proceedings is cited from *Cavendish Bentinck* v. *Fenn* (1): "It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company." It must be remembered, however, that this statement is but an allusion to what was laid down by *James* L.J. in *In re Canadian Land Reclaiming and Colonizing Co.*; *Coventry and Dixon's Case* (2) who said:—"I am of opinion also that the word 'misfeasance' in that section means misfeasance in the nature of a breach of trust, that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any moneys of the company, or by which the company's property has been wasted, or the company's credit improperly pledged." Here the important qualification is contained in the words introduced by "that is to say." They cover an improper dealing with assets for the director's own advantage. The authorities upon the scope of misfeasance proceedings have recently been collected and examined by *Maugham* J. in *In re Etic, Ltd.* (3). His conclusion is expressed at p. 875 as follows:—"The conclusion at which I have arrived is that sec. 215 (*i.e.* sec. 162 of the New South Wales Act) is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would include a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company."

The appellant's conduct in the present case appears to come fairly within this language. It must be remembered that the

(1) (1887) 12 App. Cas., at p. 669. (2) (1880) L.R. 14 Ch. D. 660, at p. 670.
(3) (1928) Ch. 861.

H. C. OF A. 1933. COUVE v. J. PIERRE COUVE LTD. (IN LIQUIDATION). Dixon J.

transaction which he conducted was intended to operate to give him an advantage in the event of the winding up order being made. In directing that his undrawn salary should be credited and that goods should be applied against it, he was not providing for the contingency of the petition being dismissed, but for the event of the winding up order being made. He acted with full knowledge that the petition had been presented and that, except under the shelter of the Moratorium, the Company could not carry on. In virtue of his *de facto* power as director he sought an advantage which the law would not permit and he endeavoured to obtain it by taking over property of the Company which otherwise would be assets for the payments of debts, whether secured, or unsecured, is immaterial. No difficulty was felt in *In re Washington Diamond Mining Co.* (1) in treating a fraudulent preference as a misfeasance: see per *Kay* L.J., at p. 115. The conduct of the appellant appears to merit the same description. In the event it amounts to an active breach of duty committed for the director's own benefit in administering the assets of the Company. The fact that at the time it was committed its wrongful character was contingent upon the success of the petition does not seem material inasmuch as it was done to protect the doer against that very event.

A second contention relied upon in support of the appeal is that, as the recovery by the liquidator of the value of the goods can advantage no creditor except Gutermann & Co., who will be entitled to it under their debenture, the liquidator cannot maintain the proceedings in the interest of that secured creditor alone. This does not appear to be an answer which can properly be made on the part of the appellant. His liability to the Company is direct. He has not shown that under the debenture the legal property in the goods in question had vested in Gutermann & Co. so that they, and they alone, were entitled directly to recover them or their value. It was suggested that this was the result of the redemption proceedings, but in the Supreme Court these proceedings were not proved or referred to and in this Court new evidence is not admitted. Counsel were not agreed as to the effect of that suit upon the chattels in dispute, but, if there is any inconsistency between, or duplication in, the rights established in the two proceedings, it will be for the Supreme Court to relieve against the consequences. The argument that, merely because the general body of creditors would get no

(1) (1893) 3 Ch. 95.

advantage and the liquidator was actuated by a desire to benefit the secured creditor, the misfeasance proceedings must fail, appears to confound the liabilities of the delinquent to the liquidating Company with the relation between its liquidator and its creditors. The contention is not supported by *Ex parte Cooper*; *In re Zucco* (1), which deals only with the latter relation. That case merely held that the liquidator ought not to lend his name to the secured creditor to bring proceedings for his sole advantage. If proceedings had in fact been brought in the name of or by the liquidator, there is nothing in *Ex parte Cooper*; *In re Zucco* to suggest that the party proceeded against could raise, as a defence, the question whether the liquidator acted properly in instituting them. In *Albert Gregory Ltd.* v. *C. Niccol Ltd.* (2), the opinion that he could not do so was expressed by the Full Court of New South Wales.

The last ground relied upon in support of the appeal is that an error was made in the order appealed from in requiring the appellant to pay the full price of the goods debited to him in the Company's books. The remedy authorized by sec. 162 in such a case as the present is confined to ordering the delinquent to contribute such sums of money to the assets of the Company by way of compensation in respect of the misfeasance as the Court thinks just. It is said that the price so debited affords no true measure of the loss suffered by the Company: *non constat* that a director obtaining goods against a salary would not take them over at a nominal price greatly in excess of their true value. In the affidavits some evidence appears to the effect that goods similar to some of those in question have been sold by the liquidator at a very much lower price. On the other hand, the depositions of the appellant contain his answers given in a cross-examination directed to show that he had taken over the goods at an undervalue and these answers lend support to the conclusion that the price was unfair to neither party. The question whether an enquiry should be directed as to the proper amount of compensation does not appear to have been distinctly raised in the Supreme Court, and in his judgment *Harvey* C.J. in Eq. takes it for granted that the correct amount is that entered in the books. The measure of the loss is the value of the goods at

(1) (1875) L.R. 10 Ch. 510.

(2) (1916) 16 S.R. (N.S.W.) 214.

H. C. OF A. 1933.

COUVE v. J. PIERRE COUVE LTD. (IN LIQUIDATION).

Dixon J.

the time at latest when the liquidation order was made and I think that the materials before the Supreme Court contain ample evidence that the prices debited were not then excessive. On the whole, the appellant has not established that the order is erroneous in this respect. It is, perhaps, desirable to add that the respondent's counsel assured us that the order appealed from and that made in the redemption suit would not be given an application which would result in the appellant's accounting twice for the goods in question.

The appeal should be dismissed with costs.

EVATT J. I agree with the judgment of my brother *Dixon*.

MCTIERNAN J. I also agree that the appeal should be dismissed with costs for the reasons contained in the judgment of my brother *Dixon*.

Appeal dismissed with costs.

Solicitors for the appellant, *E. R. Mann & Co.*

Solicitors for the respondents, *McLachlan, Westgarth & Co.*

J. B.