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AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS v. HABERFIELD PROPRIETARY LTD.

Appeal allowed. Order appealed from discharged. Rule nisi for prohibition discharged with costs. Respondents to pay the costs of the appeal.

Solicitors, for the appellants, *Brown & Beeby.*
Solicitors, for the respondents, *Dawson, Waldron & Glover.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MOY . . . . . APPELLANT;

AND

BRISCOE & COMPANY LIMITED . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 26, 27.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Bankruptcy Act 1898 (*N.S.W.*), (*No.* 25 *of* 1898), *secs.* 133, 137—*Supreme Court and Circuit Courts Act* 1900 (*N.S.W.*), (*No.* 35 *of* 1900), *sec.* 15—*Vacancy in office of Judge in Bankruptcy—Delegation of powers of Judge to Registrar in Bankruptcy.*

Act of bankruptcy—Notice of intention to suspend payment of debts—Bankruptcy Act 1898 (*N.S.W.*), (*No.* 25 *of* 1898), *sec.* 4.

The *Bankruptcy Act* 1898, sec. 133, provides that the bankruptcy jurisdiction of the Supreme Court shall be exercised by the Judge of that Court duly appointed under the title of Judge in Bankruptcy. The *Supreme Court and Circuit Courts Act* 1900, sec. 15, provides that where under any Act any jurisdiction, power or authority of the Supreme Court is to be exercised by any one Judge, any other Judge may for any reasonable cause exercise such jurisdiction, power or authority in all respects as the Judge designated might have exercised it.

During a short interval which elapsed between the resignation of the titular Judge in Bankruptcy and the appointment of his successor, one of the other Judges of the Supreme Court purported to exercise the power of delegation

conferred by sec. 137 of the *Bankruptcy Act*, which provides that the Judge (defined in sec. 1 as the Judge having jurisdiction in Bankruptcy or any Judge acting as such) may delegate to the Registrar such of the powers vested in the Court as may be expedient.

Held, that the delegation was valid, notwithstanding that there was at the time no titular Judge in Bankruptcy.

A statement by a debtor to the agent of a creditor, in answer to a demand by the creditor for the payment of a debt, that he has placed his affairs in the hands of accountants to prepare a statement of his accounts for him, and that in the meantime he had been advised not to pay any accounts, amounts to a notice that the debtor has suspended or is about to suspend payment of his debts, within the meaning of sec. 2 of the *Bankruptcy Act* 1898, and is therefore an available act of bankruptcy.

Rule laid down by *Bowen* L.J. in *In re Lamb* ; *Ex parte Gibson*, 4 Morr., 25, at p. 32, applied.

Decision of *Street* J. : *Re Moy* ; *Ex parte Briscoe & Co. Ltd.*, (1907) 7 S.R. (N.S.W.), 164, affirmed.

APPEAL from a decision of *Street* J., Judge in Bankruptcy of the Supreme Court of New South Wales.

Walker J., the Judge in Bankruptcy appointed under the *Bankruptcy Act* 1898, resigned on 29th January 1907, and his successor, *Street* J., was appointed a few days later. In the interval the respondents presented a petition for the sequestration of the appellant's estate, and *A. H. Simpson*, C.J. in Eq., for the purpose of enabling the Registrar in Bankruptcy to deal with the petition, purported to delegate to him the power to do so, under sec. 15 of the *Supreme Court and Circuit Courts Act* (No. 35 of 1900), and sec. 137 of the *Bankruptcy Act* (No. 25 of 1898). The Registrar heard the petition and made an order for the sequestration of the appellant's estate. The act of bankruptcy was notice of suspension of payment of debts.

The appellant appealed to *Street* J., who dismissed the appeal with costs: *Re Moy* ; *Ex parte Briscoe & Co. Ltd.* (1).

From that decision the present appeal was brought, the amount involved being over the appealable amount.

The facts, and the sections of the Acts referred to, appear in the judgment of *Griffith* C.J.

(1) (1907) 7 S.R. (N.S.W.), 164.

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Bradburn (*Perry* with him), for the appellant. The terms of sec. 15 show that the legislature presumed the existence of a Judge in Bankruptcy at the time when the section was to be applied. No other Judge can exercise the power of the Judge in Bankruptcy when there is no such Judge. *A. H. Simpson* C.J. in Eq., could not under the circumstances have sat as Judge in Bankruptcy, and therefore he could not delegate the powers of that Judge. Judge, in the definition sec. 2, means the Judge duly appointed, either in the first instance or by virtue of sec. 15 of the *Supreme Court and Circuit Courts Act*. Under the latter section there must be a Judge in whom the jurisdiction "is vested," and a reasonable cause. The words do not naturally cover the case of a vacancy in the office. If that had been intended it would have been expressly stated. The Executive could have got over any difficulty by appointing an acting Judge in Bankruptcy, who could have exercised all the powers of that Judge. The power of delegation under sec. 137 (2) of the *Bankruptcy Act* is given to the Judge personally, and can only be exercised by him: *Re Home*; *Ex parte Edwards* (1). Sec. 15 was intended to provide for the temporary inability of the Judge in a special jurisdiction to sit, owing to some temporary cause such as illness or being engaged in another Court.

Notice of intention to suspend payment, in order to constitute an available act of bankruptcy within sec. 4 (1) (*h*), must be made to the creditor direct. In the present case the statement was made to another person, and was merely tentative, not intended to be acted upon, and was made on an occasion when the debtor would not have reasonably supposed that it would be acted upon. Under the circumstances it was natural for the debtor to suppose that he would be allowed time to refer his books to an accountant in order that he might ascertain how he stood, and in the meantime he would preserve the *status quo*. Nobody but the petitioning creditor was pressing him, and he was issuing a writ. There was no suspension in the sense in which it is used in the Act, and there was no formal and deliberate statement of intention as regards suspension. Where the question is what effect the notice would naturally have on the

(1) 54 L.J.Q.B., 447; 2 Morr., 203.

mind of the creditor, the Court should be strict in examining whether it was given to the creditor and intended as a notice: *Ex parte Blanchett*; *In re Keeling* (1). It should be given to a person authorized to receive it either expressly or by virtue of his employment, and with a clear intention to convey a definite meaning, not a mere casual statement of what the debtor contemplates doing for the present. [He referred to *Companies Act*, No. 40 of 1899, sec. 223; *Re Bacon*; *Ex parte Foley* (2); *In re Reis*; *Ex parte Clough*; *Clough* v. *Samuel* (3); *Ex parte Oastler*; *In re Friedlander* (4); *Trustee of Lord Hill* v. *Rowlands* (5).]

[GRIFFITH C.J. referred to *In re Reis*; *Ex parte Clough* (6).

O'CONNOR J. referred to *In re Pike* (7); *In re Fischer* (8).

ISAACS J. referred to *In re Scott*; *Ex parte Scott* (9); *In re Dagnall*; *Ex parte Soan and Morley* (10).]

Knox K.C. (*Clive Teece* with him), for the respondents. Sec. 15 applies whenever it is necessary that some Judge should exercise the jurisdiction in Bankruptcy and it is expedient for any reasonable cause that a Judge other than the titular Judge in Bankruptcy should do so. It gets rid of the difficulty that would arise in a case of urgency owing to the absence or illness of the Judge, and applies *à fortiori* where there is no titular Judge at all. The jurisdiction is vested permanently in the Supreme Court, not in any particular person, and may be exercised by any person who comes within the provisions for that purpose in the Acts dealing with the subject. The definition of Judge in Bankruptcy includes any Judge acting as such. For the time being he holds the office, to which the exercise of jurisdiction is attached. The non-existence of a Judge in Bankruptcy duly appointed is very different from the non-existence of the office. Sec. 15 is an enabling section, and will be read *ut res magis valeat quam pereat*. [He was not called upon on the question whether there had been an act of bankruptcy or not.]

GRIFFITH C.J. The *Bankruptcy Act* 1898 confers jurisdiction

(1) 17 Q.B.D., 303.
(2) 6 N.S.W. Bkptcy. Cas., 85.
(3) (1905) A.C., 442.
(4) 13 Q.B.D., 471, at p. 475.
(5) (1896) 2 Q.B., 124.
(6) (1904) 2 K.B., 769.
(7) 6 N.S.W. Bkptcy. Cas., 87.
(8) 1 N.S.W. Bkptcy. Cas., 84.
(9) (1896) 1 Q.B., 619.
(10) (1896) 2 Q.B., 407.

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upon the Supreme Court. All the judicial acts necessary to be done to give effect to that Act are to be done by the Supreme Court, and they collectively make up the jurisdiction of the Supreme Court. Sec. 133 provides that the jurisdiction in insolvency under the earlier Act and the jurisdiction under this Act "shall . . . be the bankruptcy jurisdiction of the Supreme Court." The section goes on to provide that "the bankruptcy jurisdiction of the Supreme Court shall, except as herein otherwise provided, be exercised by such Judge of the Supreme Court as may from time to time be duly appointed in that behalf by the Governor under the title of Judge in Bankruptcy."

For a few days in January last there was no titular Judge in Bankruptcy. *Walker* J. had resigned, and his successor had not been appointed. During that interval one of the other Judges of the Supreme Court, *A. H. Simpson* C.J. in Eq.—purporting to exercise the authority conferred by sec. 137 of the *Bankruptcy Act*, which provides that: "The Judge may delegate to the Registrar such of the powers vested in the Court as it may be expedient for the Judge to delegate to him"—made an order of delegation under which the Registrar acted in making the order of sequestration.

It is suggested that, as there was no titular Judge in Bankruptcy at that time, this power of delegation could not be exercised. Whether it could or could not depends upon the provisions of sec. 15 of the *Supreme Court and Circuit Courts Act* 1900, which enacts that:—"Where under any Act any jurisdiction, power, or authority is vested in the Chief Judge in Equity, the Judge exercising the Matrimonial Causes Jurisdiction of the Court, the Judge in Bankruptcy, or the Probate Judge, then"—in certain specified cases of which one is—"for any reasonable cause any other Judge may exercise such jurisdiction, power, or authority in all respects as such Judge in whom the same is so vested might have done, and shall while so acting have co-ordinate jurisdiction with and all the powers and authority of, such Judge, subject to the same right of appeal."

It is contended that that section only applies in cases where there is in existence a titular Judge of one of the classes mentioned. Strictly speaking, no doubt, sec. 15 is not quite accurate. The *Bankruptcy Act* does not vest the jurisdiction in the Judge,

but in the Supreme Court, and directs that jurisdiction to be exercised by the Judge. Sec. 15, therefore, must be read as meaning that, where under any Act, any jurisdiction, power, or authority of the Court is to be exercised by a particular Judge, any other Judge may in the specified cases exercise that jurisdiction as fully as the Judge designated might have done.

In other words, any other Judge may exercise any jurisdiction, power, or authority which attaches to the office of the designated Judge. In this view it makes no difference whether the office of the Judge is for the moment vacant or not. The jurisdiction is the jurisdiction of the Court, and may be exercised by any Judge.

There is another argument which perhaps would be sufficient to dispose of the objection. The *Bankruptcy Act* provides by sec. 3 that the term "The Judge" means "the Judge having jurisdiction in bankruptcy under this Act"—that must mean the Judge by whom jurisdiction ought to be exercised—"or any Judge acting as such." I think it would be difficult to contend successfully that the word as so defined does not include any Judge of the Supreme Court acting *de facto* as Judge in Bankruptcy. It may be a case for the application of the maxim *Quod fieri non debuit factum valet.*

For these reasons I think that the objection to the authority of the Registrar fails.

As to the merits, I agree with the conclusions arrived at on the question of fact by the learned Judge from whose judgment the appeal is brought. All that can be said in the appellant's favour has been said by Mr. *Bradburn*. The question is really one of fact. There was a conflict in the oral evidence given before the Registrar, who believed the evidence of the agent for the petitioning creditor as to an interview between him and the debtor. The learned Judge was not prepared to dissent in this respect from the Registrar. He referred to that evidence and, accepting it as true, thought there was clear proof of the commission of the act of bankruptcy relied on, which was that the debtor had given notice to one of his creditors that he had suspended, or was about to suspend, payment of his debts.

The rule of law to be applied in construing that provision is

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stated in the passage from the judgment of *Bowen* L.J. in *In re Lamb*; *Ex parte Gibson* (1) cited by *Street* J.:—"We have in each case to ask ourselves, and in each case to answer the question, what is the reasonable construction which those who receive this statement of the debtor would have a right, under the circumstances of the debtor's case, to assume, and would assume, to be his meaning as to what he intends to do with respect to paying, or suspending payment of, his debts."

Street J. also referred to the speech of Lord *Macnaghten* in the case of *Clough* v. *Samuel* (2). In that case Lord *Macnaghten* was the dissenting Lord, so that his opinion is not binding, but there can be no doubt of the accuracy of the passage quoted:—"The notice need not be in writing. It is enough if notice is given to any one of the creditors. No particular form is required. There is nothing said in the Act about the debtor's intention. The question is what effect would the communication have on the minds of the persons to whom it is addressed. That is the test laid down by this House. It is only a matter of common sense. . . . All that is required is that a communication proceeding from the debtor, made seriously, should give the creditors or any of the creditors to understand from the state of circumstances as disclosed at the time that the debtor has suspended or that he is about to suspend payment."

For myself I do not think there is any substantial conflict in the evidence between the debtor's and the creditors' witnesses. The facts were that the debtor had a demand made upon him by the petitioning creditors for a debt amounting to £1,200. Demand had been made for payment, and an action at law was threatened. The agent of the petitioning creditors went to the debtor and had a conversation with him. The debtor told him that he had placed his affairs in the hands of Messrs. Starkey & Starkey, accountants, as he put it, "to prepare a statement of my accounts for me, and that in the meantime I had been advised not to pay any accounts."

Although, as Lord *Macnaghten* said, there is nothing in the Act about the intention of the debtor, yet, if you know what his intention is, you are in some way advanced on the inquiry. In this case, there is no doubt that the debtor formed the intention

(1) 4 Morr., 25, at p. 32.

(2) (1905) A.C., 442, at p. 446.

that he would not pay his creditors until he had ascertained the result of the examination into his affairs by a firm of accountants. That was his state of mind. He had made up his mind that he would not pay, that is to say, that he would suspend payment, for a certain time. When asked by the petitioning creditors' agent why he would not pay, he said, "I have been advised not to pay until I have ascertained certain facts." That, it seems to me, would convey to any ordinary person that the debtor did not intend to pay his debts in the meantime, in other words, that he had suspended or was about to suspend payment for a time. The term "suspension" implies that the stoppage is not intended to be permanent. It is suggested that, even so, that was not a notice of suspension. I agree that the notice must be a deliberate statement, but when a man is asked why he does not pay a debt and he replies, "Well, I won't pay you because I have made up my mind not to pay anybody at present," I think that is a deliberate communication of intention to the creditor. The notice need not be anything more than such a deliberate communication of intention. Therefore, all the elements involved in an act of bankruptcy were proved, and the learned Judge was right in his conclusion.

* O'Connor J. and Isaacs J. concurred.

Knox K.C. asked for an order declaring that the costs of the appeal be petitioning creditors' costs. The Supreme Court could make such an order. There is no rule of Court giving him these costs. [He referred to *In re Bright*; *Ex parte Wingfield and Blew* (1).]

Griffith C.J. The costs of the appeal will be petitioning creditors' costs. We cannot order costs out of the estate unless the estate is before the Court.

Appeal dismissed with costs, to be costs of the petitioning creditors.

(1) (1903) 1 K.B., 735.

* *Barton* J. owing to illness was unable to be present during the second day of the hearing of the appeal.

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Solicitor, for the appellant, *A. H. Jones.*

Solicitors, for the respondents, *Perkins, Stevenson & Co.*

C. A. W.

Cons *Frank, Re; Ex parte Piliszky* (1987) 16 FCR 396

Appl *Aliem v DCT (Qld)* 76 ALR 137

[HIGH COURT OF AUSTRALIA.]

LILA ELIZABETH BAYNE . . . . APPELLANT;

AND

BAILLIEU AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1907.

MELBOURNE, *Sept.* 9.

Griffith C.J., Barton and O'Connor JJ.

Insolvency—Order nisi for sequestration based on judgment for costs of prior action—Appeal pending to High Court from prior judgment—Adjournment of insolvency proceedings.

After notice of appeal to the High Court from a judgment dismissing an action with costs, the defendants in the action, having in a subsequent action recovered judgment for the costs, presented a petition for sequestration of the plaintiff's estate, the act of insolvency being failure to comply with a debtor's summons founded on the judgment and to satisfy a writ of *fieri facias* issued upon it.

It was not suggested that the debtor had any estate, or that the judgment creditor would obtain any advantage from the sequestration other than putting difficulties in the way of prosecuting the appeal.

Held, that an order of sequestration ought not to have been made, but that the petition should have been either adjourned until after the hearing of the appeal or dismissed.

An order absolute for sequestration having been made under these circumstances, and the prior judgment having, on appeal to the High Court, been discharged, an application was made to the Supreme Court to annul the sequestration.

Held, that the application ought to have been granted, notwithstanding that the judgment for the costs was still standing.

Judgments of *Hood* J. and of *Hodges* J. reversed.