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IN THE HIGH COURT OF AUSTRALIA.

SCHNEIDER

V.

WITCOMBE

REASONS FOR JUDGMENT.

Delivered at Sydney

on Wednesday, 9th August, 1944.

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IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY)

SCHNEIDER v. WITCOMBE

Wednesday 9th August, 1944.

JUDGMENT

LATHAM C.J: We are all of opinion that this appeal must be dismissed.

As to the £23 paid on the 24th December 1942, the position was that Schneider knew that Simpson, the Bankrupt, owed a large amount to Robinson. £400 of Simpson's money had been paid on the 2nd December into Schneider's account. Schneider knew that Robinson was unable to pay his debts as they became due. There was no dispute as to the effect of the payment in giving preference. It is not possible for Schneider to show he was paid in good faith and for valuable consideration in the ordinary course of business.

As to the other amounts - leaving out the £2/12/6 paid to the hospital, as to which no question arises, and leaving out also the payments after the sequestration order was made on the 16th March 1943- those in question are two sums of £30 and £100. An Order was made for repayment of these by virtue of the doctrine of relation back, which is embodied in sections 90 and 91 of the Act, upon the basis that that money was the money of the trustee.

That part of the case is beyond challenge. The only question is whether Schneider can bring himself within the protective provisions of section 96 or section 96A, namely, absence of notice of an act of bankruptcy, and "in good faith and in the ordinary course of business" under section 96, or under section 96A a payment made "without notice of the presentation of a bankruptcy petition, and either pursuant to the ordinary course of business or otherwise bona fide".

In my opinion there was notice of an act of bankruptcy when these payments were made on the 25th February and onthe 10th March respectively, because the transaction as to the £23 had then taken place.

I think that is sufficient to exclude any protection under the proviso contained in section 96. As far as section 96A is concerned, there is no evidence that Schneider had notice of the presentation of the bankruptcy petition but, on the other hand, the learned judge

was not satisfied that the transaction was either pursuant to or in the ordinary course of business or otherwise bona fide.

Although there is no provision in this section as to onus of proof, unless the learned Judge was satisfied that the conditions had been fulfilled the protection of the section would not have been available to the appellant. There is evidence on which it can affirmatively be found that the transaction was not pursuant to any ordinary course of business or otherwise bona fide. The putting aside into another man's bank account, by a person known to be heavily indebted of a substantial sum - the proceeds of sale by a farmer of an asset such as a farm tractor - and the payment out of moneys from that account from time to time cannot be described as in the ordinary course of business, and, further, as far as bona fides is concerned, Schneider knew that Simpson (to use his own expression) was in a jam with Robinson.

Accordingly the appeal must be dismissed. There is no ground for setting aside the findings of the learned Judge but I should add that I do not regard the facts as in any way reflecting upon the conduct or the character of Mr. Schneider.

ORDER: Appeal dismissed with costs.