ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

FORBES

V.

JAQUES

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 5th May, 1955.

J. J Gourley, Govt. Print., Melb.

C.7163/51

RE : JOHN WOOLCOTT FORBES

FORBES

V.

JAQUES

O R D E R

Appeal dismissed with costs.

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JUDGMENT

DIXON C.J.
WILLIAMS J.
KITTO J.

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JUDGMENT

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This is an appeal by Eunice Australia Woolcott Forbes the wife of the bankrupt John Woolcott Forbes from an order of the Federal Court of Bankruptcy (Clyne J.) that she pay to Stanley Theodore Jaques, the Official Receiver and trustee of the estate of the bankrupt, the sum of £5,802.19. 2. His Honour declared (a) that the sum of £2,000 paid into the Bank of New Zealand account in the name of the respondent on or about the third day of February 1949 was the bankrupt's money and not that of the respondent; (b) that the dealing in the shares of R.U.R. (Aust.) Limited and the profit made therefrom was the dealing and profit of the bankrupt and not that of the respondent; and (c) that the transaction in respect of the 30,000 shares in Amalgamated Tin Limited was the transaction of the bankrupt and not that of the respondent. Pursuant to these declarations His Honour ordered that the respondent account to the Official Receiver for the sum of £2,000; for the sum of £625 received by the respondent as a dividend on shares in R.U.R. (Aust.) Limited; for the sum of £673. 3. 2 received by the respondent on the sale of 400 shares in R.U.R. (Aust.) Limited;and for the sum of £2,504.16. 0 being the profit received by the respondent in respect of the

transaction in the shares in Amalgamated Tin Limited. The above sum of £5,802.19. 2 is the addition of these four sums.

The estate of the bankrupt was sequestrated on 16th April 1940. At that time he was abroad, but he was subsequently arrested and brought back to Australia late in 1943, and in March 1944 was convicted of certain criminal offences and sentenced to five years penal servitude. The appellant with the three children of the marriage had also been abroad but she returned to Australia with the children at the end of 1942. Whilst the bankrupt was serving his sentence she maintained herself and the children from her own resources and from gifts received from relatives and friends of the bankrupt. The bankrupt was released from gaol on licence on the 20th July 1947. At that time the appellant was living in a flat at Bellevue Hill and the bankrupt, on his release, resumed cohabitation with her there. Thereafter, they lived first in Sydney, then in Melbourne and later in Sydney again. Until they moved to Melbourne they continued to live in the flat at Bellevue Hill. They moved to Melbourne in February 1949 and returned to Sydney in the middle of 1950. When they returned to Sydney the appellant purchased a house at Wallaroy Road, Woollahra.

Forbes, upon his release from gaol, recommenced an active business life and he was soon in complete control of the business of several companies. He appears to have had no difficulty in finding men to act as directors of these companies who were prepared to perform their duties as directors in the most perfunctory fashion. They attended directors meetings, not to discuss and direct the business of the companies, but simply to carry out the formalities necessary to complete business transactions which he was carrying on in the names of these companies. In 1949 the appellant had a current account with the Bank of New Zealand, 339 George Street, Sydney. On the 7th February 1949 the sum

of £2,000, received by her by cheque from Father Bossence, was credited to this account. This is the sum which his Honour held was the property not of the appellant but of the bankrupt. On the 9th August 1950 the sum of £1,000 received by the appellant from one Hatch was deposited to the credit of this account. On the 22nd August 1950 the sum of £2,000 received by the appellant from one Atkinson was paid to the credit of this account. Prior to the receipt of the £2,000 from Bossence the transactions in this account, both credits and debits, were on a moderate scale, but from this time onwards the account became very active, and large sums were paid into and withdrawn from it. They involved extensive investments in shares and in the purchase and sale of real estate and they led the Official Receiver to claim that on and after 1st January 1949 the account was, in fact, used solely for the bankrupt's transactions as a means of disposing of large sums of cash he had received and that this course was adopted by the bankrupt, with the connivance of the appellant, in order to conceal his after acquired property and thereby defraud his creditors.

The appellant had been examined under Section 80 of the Bankruptcy Act and had only disclosed, in addition to the account in the Bank of New Zealand, small accounts in her name and in trust for her three children in the Commonwealth Savings Bank, Martin Place. But during the hearing of the notice of motion, when the evidence for the applicant had closed, she disclosed another account in the Government Savings Bank, Barrack Street, which she had opened in her maiden name. The foundation of the Official Receiver's case was the purchase by the appellant of 4,000 shares in Spring Valley Tin Limited on 3rd November 1948 for £501.17. 6. They were sold on 8th April 1949 for £1,416. 5.10. On the Section 80 examination the appellant had said that these shares were purchased for cash. She was unable to give a

satisfactory explanation of the origin of the cash and the Official Receiver claimed that she must have received the cash from her husband. It was not until the Official Receiver's case had closed that the appellant disclosed that she had withdrawn the sum of £501.17. 6 from her account in Barrack Street. As this account was opened whilst her husband was still in gaol, the Official Receiver felt himself unable to contend that it contained the bankrupt's money and the failure to establish that this initial purchase was made with the bankrupt's money caused a large part of the Official Receiver's case to collapse. In connection with this case a large amount of evidence was admitted subject to objection and it was still objected to by Mr. Webb on the hearing of this appeal, but as the Official Receiver has not cross-appealed but simply seeks to uphold the order made in his favour it is unnecessary for us to express an opinion on the admissibility of this evidence. We shall simply discuss the transactions that are the foundation of the order under appeal. The facts have already been set out by his Honour with some elaboration and we shall not repeat them in detail but merely in outline. On their face the transactions appear to be the transactions of the appellant, but the Official Receiver claims, and his Honour so held, that their ostensible purport is all a sham and that the appellant was acting simply as a dummy for her husband and as a cloak to mask the fact that they are in truth the transactions of the bankrupt.

We shall commence with the Bossence transaction. Of Bossence his Honour said: "The part played in this transaction by Father Bossence was not a creditable one but though subjected to a severe cross-examination I accept in substance his evidence." Ostensibly Bossence, being charitably disposed, made the appellant a present of £2,000 so that, as he said in a letter enclosing the cheque, she would no longer be worried about the education of her three girls "who are now

at the expensive age. I feel great pleasure at being able to do this as a proof of my regard for yourself and John". He said that he had known them both for over fifteen years. Actually, while Bossence knew Forbes fairly well and had some business dealings with him, he had only met the appellant once prior to the date of the gift. Forbes had recently made an investment in shares for him and this gave Forbes an opportunity to summon Bossence to his house so that he might suggest to Bossence the whole of the strange transaction that took place. Briefly, it was that Bossence should give his cheque for £2,000 to the appellant ostensibly as a gift and that Forbes would reimburse Bossence for the whole amount. Bossence said he agreed to the transaction because Forbes told him that he (Forbes) had met all his liabilities and would get his discharge in about two months and that he was simply being asked to do Forbes a favour in the meantime. Bossence gave his cheque to Forbes on February 2nd and received £2,000 in ten pound notes from Forbes on February 3rd. The covering letter, which was written at Forbes' suggestion, was not replied to. The letter, if taken at its face value, was a cruel hoax. Bossence was told in so many words that the object of the transaction was to hide from the Official Receiver the fact that Forbes, whilst still a bankrupt, was transferring £2,000 in cash to his wife. No motive whatever existed why Bossence should make a present of £2,000 to the appellant and it was never intended that he should do so. The transaction, taken as a whole, was a transaction entirely between Bossence and Forbes. Bossence simply acted as a conduit pipe to transfer Forbes' money to his wife. The evidence left it wide open to his Honour to draw the inference that the whole purpose, substance and reality of the transaction was that it was simply a device by which Forbes could cloak the fact that he had banked £2,000 of his after acquired property in the name of his wife.

It remains to examine the other two transactions in which his Honour found for the Official Receiver and which, as Mr. Manning said, really formed part of the one transaction. One of the companies controlled by the bankrupt was Capital Investments Corporation Limited. This company controlled another company R.U.R. (Aust.) Limited in which it held the majority of the shares and the principal business of which appears to have been the marketing of a patent medicine. In August 1950 the appellant purchased 10,000 £1 shares in R.U.R. Limited from Capital Investments Corporation Limited for £3,000. To enable the appellant to raise this sum, Forbes arranged with Hatch that he should lend her £1,000 for six months at ten per cent. interest and with Atkinson that he should lend her £2,000 for twelve months at the same rate of interest. These moneys were paid into the appellant's account with the Bank of New Zealand, and out of this account she paid the vendor £3,000, that is 6/- per share. At the time of the sale the R.U.R. Company, under the direction of the bankrupt, was about to engage in a vigorous advertising campaign to boost the sales of the patent medicine. This campaign appears to have been successful for the appellant received a dividend of £625 on the shares in January 1951 and sold 400 of them in February 1951 for £673. 3. 2.

At this stage it occurred, even to a member of the normally dormant board of Capital Investments Corporation Limited, that it was a strange transaction for this company to sell shares for 6/- for which it had paid £1. To quieten his anxiety Forbes arranged that the appellant would resell 2,600 shares, that is the balance of the shares, to the company receiving as consideration 30,000 2/6 shares in Amalgamated Tin Limited valued at £2,625 (that is 1/9 a share) and £25 5 in cash which was credited to the appellant's account. At this time Capital Investments Corporation Limited

was purchasing shares in Amalgamated Tin Limited for 2/6 a share. Between November 1951 and November 1952 the 30,000 shares were sold at varying prices for £5,129.16. 0. The appellant's maiden name was Brackett-Smith and the 30,000 shares, after being transferred into the name of the appellant, were transferred by her to Mary Brackett. The signature on the transfer was Eunice Forbes per J.W.F. as that of the transferor and Mary Brackett as that of the transferee. The appellant thereupon became the registered holder in the name of Mary Brackett of 30,000 shares in the books of Amalgamated Tin Limited. A large bundle of share certificates in the name of Mary Brackett was produced in evidence all dated 29th June 1951. The form of transfer endorsed on these certificates is signed by Mary Brackett as the transferor and in every case the signature is in the handwriting of Forbes. There were altogether two hundred and ninety-eight of these transfers.

Hatch who lent the bankrupt £1,000 was a pharmaceutical chemist. He joined the board of Capital Investments Corporation Limited at Forbes' suggestion and became one of its most dormant members. He lent the £1,000 to the appellant at Forbes suggestion so that, as Forbes said, he could make some money for her. Forbes arranged the loan, its term, the interest to be paid, and for the delivery of scrip as security. The appellant repaid the £1,000 together with £100 as interest at the end of the twelve months. Atkinson was a clerk in the office of a sharebroker named Wharton with whom Forbes did business. He met Forbes at Wharton's office. Forbes asked Atkinson to go and see him and the loan was then arranged. Forbes told him the loan was wanted so that Mrs. Forbes could invest it and to help them to get on their feet again. Forbes arranged a meeting with Mrs. Forbes at their home so that Atkinson could say he knew her. Atkinson gave Forbes a bank cheque for the money and Forbes gave him £100 in cash in part payment of interest. Forbes

gave Atkinson as security for the loan first of all R.U.R. shares and then, when he wanted the shares back again, £2,000 worth of Commonwealth bonds. The loan was repaid by Forbes giving Atkinson a bank cheque on account of Mrs. Forbes for £2,100.

The loans were arranged by Forbes so that the appellant might be able to purchase the R.U.R. shares which Forbes had contrived that Capital Investments Corporation Limited should sell to her at a gross undervalue. He was prepared so to contrive because he regarded Capital Investments Corporation Limited with its dormant board as his creature prepared to carry out his wishes. It was apparently a company which was engaged in buying and selling shares but it does not appear to have had a share premium account. At any rate its directors had no idea what profits and losses were being made out of these transactions. They attended board meetings and signed on the dotted line whatever cheques, transfers and other documents were put before them. When the propriety of the transaction was unexpectedly challenged he arranged for the balance of the R.U.R. shares to be transferred back to the company. He also arranged for the shares in Amalgamated Tin Limited to be transferred to the appellant in their stead. Can there be any doubt on the evidence that the R.U.R. shares ostensibly held by Capital Investments Corporation Limited were regarded by Forbes as shares the profits of which could be disposed of as he thought fit, or, in other words, were regarded by him as his own property? The activities of Capital Investments Corporation Limited were simply cloaks for his own activities. Again the evidence left it wide open to his Honour to draw the inference that the whole purpose, substance and reality of the transaction was that the appellant's name was used simply as a device to conceal in her name property that was in truth the property of the bankrupt.

The questions that arise on the appeal are

all questions of fact. The duty of the appellate court in such an appeal has, of course, been referred to on many occasions. Many of the cases are collected in the recent decision of this Court in Paterson v. Paterson, 89 C.L.R. 212 at pp. 218-224. The duty is touched upon in the still more recent decision of the House of Lords in Benmax v. Austin Motor Co. Ltd., 1955 1 A.E.R. 326. Counsel for the appellant contended that in the present case there was no evidence to support the declarations made by his Honour. He referred to the passages in the judgments of Griffith C.J. which occur in Jack v. Smail, 2 C.L.R. 684 at pp. 695-698 and in Scott Fell v. Lloyd, 13 C.L.R. 230 at p. 241. In the latter passage his Honour pointed out that a Court is not entitled to reject the evidence, all of which if believed points only the one way, and then affirmatively to find to the contrary. With this statement we agree, but it is not this case. The problem here is to draw the proper inferences from the evidence the Judge believed, or, in other words, as Viscount Simonds said in the Benmax case at p. 327 to evaluate the facts. In Myers v. Elman, 1940 A.C. 282 at p. 324, Lord Wright pointed out that even "where there is a denial on oath of the charge by a party charged, and no direct evidence to the contrary, a judge or jury may in certain events be entitled to refuse to believe that denial, and to act upon the circumstantial evidence in the case". Here Hatch and Atkinson both swore and probably believed that they were lending the money to the appellant and not to Forbes. But they did not know and were not intended to know whether they were lending the money to the appellant beneficially or to her on behalf of Forbes. When the loans are considered as part of the larger transaction of which they formed part, the facts and inferences from the facts, within the circumference of inferences that are reasonable and probable, must lead, we think, to the conclusion and only to the conclusion reached by his Honour. In the case

of the Bossence transaction, the inference seems irresistible that the complacent Bossence was used by the wily Forbes as an agent covertly to hide £2,000 of his own money in the bank account of his wife.

We were asked to review his Honour's order for costs. He ordered the appellant to pay the whole of the costs of the motion. It was submitted that this order was too severe since a large part of the case for the Official Receiver collapsed and he had only a partial success. But the proper order for costs lies very much within the discretion of the trial judge. If the Official Receiver claimed more than he was held to be entitled to, it was mainly because the appellant had failed to disclose the account in Barrack Street until the close of his case. He achieved considerable success on the motion and a high percentage of the evidence was admissible for this purpose. In all the circumstances we do not think that we should interfere.

For these reasons we would dismiss the appeal.