ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

TOONE

V.

GREGORY & HICKEY PTY. LIMITED
AND ANOR.

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 8th September, 1954.

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

C.7163/51

TOONE

v.

GREGORY & HICKEY PTY. LTD. & ANOR.

ORDER

Appeal allowed with costs. Discharge order of Court of Bankruptcy. In lieu thereof order that order of sequestration dated the 13th February 1951 be annulled.

TOONE

v.

GREGORY & HICKEY PTY. LTD. & ANOR.

JUDGMENT.

FULLAGAR J.
KITTO J.
TAYLOR J.

TOONE

v.

GREGORY & HICKEY PTY. LTD. & ANOR.

This is an appeal from an order of the Federal Court of Bankrupty (Clyne J.) refusing an application by the appellant, Colin Toone, for the annulment of an order of sequestration made against him by that Court on the 13th February 1951. The petitioning creditor was the respondent company, Gregory & Hickey Pty. Ltd. The act of bankruptcy alleged was that a writ of fi. fa., issued in respect of a judgment debt, had been returned unsatisfied. The judgment was a judgment entered in default of appearance in an action for the price of goods sold and delivered. The substantial ground of the application, and of the appeal to this Court, was that the appellant was never indebted to the respondent company.

The existence of the judgment debt as such cannot be disputed. It has, however, been long settled that a court of bankruptcy in all cases may, and in many cases must, "go behind" a judgment and satisfy itself as to whether the judgment was entered in respect of an antecedent debt really existing. It is nothing to the point that the judgment is a judgment of a court having jurisdiction and that it cannot by any means be set aside: In re Fraser: Ex parte Central Bank of London, (1892) 2 Q.B. 633. The law on the subject has recently been fully considered by this Court in Corney v. Brien, (1951) 84 C.L.R. 343. That was a case in which the appeal was from a sequestration order. The present is a case in which the appeal is from an order refusing annulment of a sequestration order. The application for annulment, however, was made under sec. 124 of the Bankruptcy Act 1924-1950 on the ground that "the sequestration order ought not to have been made", and, as Clyne J. said in Re Cook, (1946) 13 A.B.C. 245, at p. 259, citing Re Griffiths, (1892) 3 B.C. (N.S.W.) 6, at p. 9, the Court

is entitled -we think indeed that it is bound - "to consider not only the case as disclosed at the time the order was made, but as it would have been disclosed had all the true facts been before the Court on the making of the order." It follows that a debtor who seeks the annulment of a sequestration order may ask the Court to inquire "whether, when the facts behind the judgment are known, there is sufficient evidence to satisfy the court that a debt really existed" (Ex parte Lennox: In re Lennox, (1885) 16 Q.B.D. at p. 326). "The existence of the judgment is no doubt prima facie evidence of the existence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there really is a debt due to the petitioning creditor" (In re Fraser: Ex parte Central Bank of London, (1892) 2 Q.B. at pp. 636-7). The judgment will not be reopened as a matter of course. The circumstances in which it should be reopened were considered fully in Corney v. Brien. Generally speaking, where the judgment has been obtained as the result of a trial, and there is no suggestion of fraud or collusion, the court will not go behind the judgment: see In re Flatau: Ex parte Scotch Whisky Distillers Ltd., (1888) 22 Q.B.D. 83, at p. 86, and cf. Delph Singh v. Wood, (1918) 25 C.L.R. 497. But, where the judgment in question is a judgment by default, the Court will "go behind" the judgment if there is what is regards as a bona fide allegation that no real debt "lay behind" the judgment. "The court", said Latham C.J. in Petrie v. Redmond, (1942) 13 A.B.C. 44, at p. 49, "looks with suspicion on consent judgments and default judgments".

In the present case, not only was the judgment a default judgment, but it was entered without the knowledge of the debtor that an action had been commenced against him, it was in respect of a transaction of which he knew nothing, and the sequestration order was made in his absence. The case is clearly one in which the facts "behind" the judgment require full investigation.

The creditor's judgment was obtained on a writ directed to "Colin Toone trading as the 'Cumberland Manufacturing Company'". The claim, as has been said, was for the price of goods sold and delivered. That the goods were ordered and delivered has never been disputed. The appellant, Toone, however, maintains that they were not ordered by him or delivered to him, that no person had any authority to order them or to receive delivery of them on his behalf, and that he has not at any time traded or carried on business under the name of "Cumberland Manufacturing Company".

Toone was serving in the Royal Navy during the war. When his ship was at Sydney in 1945, he met and married the adopted daughter of a man named Jenkins, who was in fact an undischarged bankrupt. Jenkins was apparently at that time working, as manager or in some other capacity, in a business carried on at Guildford under the name of Cumberland Manufacturing Coy. A man named Biddle was registered under the Business Names Act 1934 (N.S.W.) as the proprietor of this business. Between the marriage and April 1946 certain conversations took place between Toone and Jenkins with reference to the taking over of the business by them. The exact purport of these conversations cannot be determined on the material before the Court. Toone says, and this seems likely enough, that the proposal was that a limited liability company should be formed, in which Jenkins and Toone and others should take shares. Toone told Jenkins that he had no capital, as was the fact. Jenkins told him that "that could be arranged". No definite arrangement of any kind had been made when Toone in March or April 1946 left for England, one of the purposes of the voyage being the obtaining of his discharge from the Navy.

About this time two powers of attorney are said to have been given by Toone to Jenkins. One of these, a document executed by Toone in England on the 23rd May 1946, was put in evidence. It will be necessary to refer to this document later. The other was not produced. Toone says that Jenkins told him

that he had burnt it. There was no reliable secondary evidence of its contents. It is not even clear which of the two powers was the first in point of time, but it seems rather more probable that the document of 23rd May 1946 was executed first, and that the other was obtained because this document was considered inadequate for its purpose - whatever that purpose may have been. The evidence of Jenkins is practically worthless, both because it is of the vaguest character, and also because very serious doubt attaches to the credibility of Jenkins. The effect of Toone's evidence seems to be that the purpose of the first power was to authorise the taking up of shares in a company to be formed, and that the purpose of the second was to authorise the borrowing of money to pay for shares. There is nothing intrinsically improbable about this, but, so far as it relates to the extant instrument, it is inadmissible, and, so far as it relates to the other instrument, it does not amount to satisfactory evidence of its contents.

In March 1947 a transfer of the business of the Cumberland Manufacturing Coy. from Biddle to Toone was registered under sec. 10 of the Business Names Act 1934. The necessary notification of the change in proprietorship was signed by Biddle on the 17th March 1947 and by Jenkins, purporting to act as Toone's attorney, on the 24th March 1947. The change, however, was registered as having taken place on the 1st July 1946. On the 14th November 1946 an agreement, purporting to be made between Biddle and Toone, was signed by Biddle and by Jenkins as Toone's attorney. By this agreement Biddle purported to "hire" to Toone certain plant machinery and tools on the premises of the Cumberland Manufacturing Coy. for a period of two years at £10 per week. The goods were to remain the absolute property of Biddle, and Toone might determine the hiring at any time by delivering possession of the goods to Biddle. There is no evidence whatever of any other document or transaction evidencing or effecting a transfer of the business to Toone.

Toone did not return from England to Australia until July 1948. During his absence Toone had nothing whatever to do with the conduct of the business, and he appears to have known nothing of the agreement of November 1946 or of the registration of himself as proprietor of the business. He put nothing into the business, and received nothing from the business. The goods, for the price of which the petitioning creditor obtained its judgment, were delivered in October and December 1947, i.e. while Toone was still in England. They were ordered by Jenkins and supplied to the premises occupied by the "Cumberland Manufacturing Coy." The writ was issued on the 21st June 1948, when Toone was still out of Australia. It appears to have been served at the registered address of the Cumberland Manufacturing Company in reliance on sec. 20 of the Business Names Act. It did not come to Toone's knowledge until long after judgment in default of appearance had been entered against him on the 2nd November 1948. Nor does he appear to have known anything of the writ of fi. fa. which was returned unsatisfied on the 14th February 1949.

When Toone returned to Sydney in July 1948, he went with his wife to live with Jenkins and his wife, but they remained there only for a period of about four weeks. During that period Toone worked on the premises of the Cumberland Manufacturing Coy., receiving a total sum of about £10 as wages. On one occasion he handed a sum of about £100 to Jenkins for the purpose of paying wages which Jenkins told him he was unable to pay. Jenkins, he says, promised to repay him this sum. In August, about four weeks after his arrival, he noticed a certificate of the registration of the proprietorship of the business hanging up in the office, and thus learned for the first time that he himself was registered as the proprietor. He says that he complained to Jenkins and demanded that Jenkins should have the registration changed. Jenkins denies this. However, almost immediately after this, a

quarrel took place between Toone and either Jenkins or his wife, and Toone left Jenkins's home and the business, and went with his wife to live at Manly. From that time onwards Toone had nothing whatever to do with the business, which continued to be conducted by Jenkins as it had been since 1946.

The bankruptcy petition, which was dated the 23rd May 1949, was apparently served, like the writ in the action, by leaving it on the premises of the Cumberland Manufacturing Coy. in reliance on sec. 20 of the Business Names Act. It came on for hearing before the Court on the 23rd August 1949, but Toone had no knowledge of the proceedings until a considerable time afterwards. Jenkins proceeded to handle the matter himself. He instructed counsel, who purported to appear for Toone, but had in fact no authority whatever to appear for Toone, and succeeded in obtaining no less than eight adjournments. These seem to have been obtained partly on the false pretence by Jenkins that he believed Toone to be in England, and partly on the pretext that a sale of the business as a going concern could be effected at a price which would pay all creditors in full. Jenkins said, probably with truth, that he "wanted to keep Toone out of it". Toone seems first to have heard of the bankruptcy proceedings at some time early in 1950, when he received some official document, which Jenkins, falsely stating that he believed Toone to be in England, had caused to be sent to Toone at his former English address, and which came back redirected to Toone at Sydney. About the same time Biddle showed him a newspaper in which the proceedings were referred to. After this he had certain telephone conservations with Jenkins, who told him that a sale of the business as a going concern was likely, and that he (Jenkins) "would carry the thing through and finalise it". The sequestration order was made on the 13th February 1951. Counsel appeared ostensibly for Toone, and admitted that the debt was owing by Toone to the petitioning creditor, but he was instructed by Jenkins, and on this occasion, as on the others, he had no authority whatever to appear for Toone or to make any admission on his behalf.

In refusing Toone's application for annulment of the sequestration order, Clyne J. said:- "While I completely distrust Jenkins, I also completely distrust Toone. I regard them both as two dishonest schemers. In my opinion, Toone decided to take over from Biddle the Cumberland Manufacturing Coy.; and it was for this and also other purposes that he obtained and executed the power of attorney in favour of Jenkins in May 1946". This "finding", however, by no means disposes of the present appeal. In the first place, although there is ample ground for regarding Jenkins as a thoroughly dishonest person, the evidence discloses no justification whatever for describing Toone as a "dishonest schemer". On the contrary, whatever may be his present legal position, it strongly suggests that Toone was a victim, rather than an accomplice, of Jenkins. In the second place, it is exceedingly improbable, to our minds, that Toone ever formed, before he went to England or while he was in England, any actual intention of purchasing the business for himself from Biddle. He had no means, he knew nothing of business, he paid nothing, he did nothing whatever in the way of carrying it on, and he never even made any inquiry as to its conduct. We can find no reason for doubting him when he says in effect that he thought that the business would or might be taken over as a sort of "family concern" and that a company would be formed in which he would hold shares and that this would involve borrowing money on his behalf. This is, in substance, what he told Mr. Ryan at his interview with that gentleman on the 18th June 1951.

His Honour's judgment proceeds:- "In my opinion, when he returned to Australia in July 1948, he discovered that the Cumberland Manufacturing Coy. was far from prosperous, and he thereupon set about to escape his responsibilities as the registered proprietor of the firm." What conduct on his part constituted a "setting about to escape his responsibilities" it is impossible to say. It may be assumed that, if he had found the business in a flourishing condition, he would have been content

to accept the proprietorship of it. Such an attitude would have been in no way discreditable. When he found that it was not in a flourishing condition, he did not "set about" anything. He simply did nothing, beyond urging Jenkins to have the particulars registered under the Business Names Act altered. In this respect, he was doubtless foolish. If he had sought and received competent advice, he would almost certainly have taken some action. But his misguided inactivity can hardly be described as "setting about" to escape anything.

When once the facts behind the judgment were reopened - and we have said that it was clearly a case where the Court was bound to go behind the judgment - the question which emerged for decision was whether the purchase of goods by Jenkins from Gregory & Hickey Pty. Ltd. was a purchase on Toone's behalf authorised by Toone. That question depended and depends on an examination of the evidence. Whatever the learned judge may have thought of Toone, the question which we have to determine is whether there is evidence on which a court ought to be satisfied that Jenkins had authority to take over Biddle's business on behalf of Toone, to carry it on on his behalf, and, in the course of carrying it on, to order the goods supplied by Gregory & Hickey Pty. Ltd. so as to make Toone liable to pay for them. In our opinion, there is no such evidence.

There is not indeed a complete absence of evidence to support the petitioning creditor's claim, because, in an action for the price of the goods, mere production of a copy of the entry in the register under the Business Names Act would be, by virtue of sec. 17(3) of that Act, prima facie evidence that Toone was at the material time the proprietor of the business carried on under the name of the Cumberland Manufacturing Coy., and it may be assumed that this is equivalent to prima facie evidence of authority to order the goods. On the other hand, the entry creates no estoppel, because there is nothing to suggest that Gregory & Hickey acted on the faith of the register when they supplied the goods. Nor could it in any case create

any estoppel unless it were proved that Toone authorised the notification to the Registrar which led to the entry being made.

Toone seeks to rebut the prima facie evidence afforded by the register. He denies that he ever authorised the notification which led to the making of the entry, and he says that his name was entered in the register without his knowledge or consent. Toone's denial of authority is, of course, not decisive, but upon that denial two observations fall obviously to be made. The first is that it is certainly not inherently incredible. We have already said that we can find nothing in the evidence to warrant the conclusion that Toone is dishonest or a "schemer". It has been said again and again that, in order to justify such a conclusion, there must be not merely evidence but strong and cogent evidence. Actually, the evidence, as a whole, seems to us to be quite consistent with the view that Toone was entirely innocent and ignorant of what was being done during his absence of two years and three months. It is to be remembered that Jenkins (who was rightly, we think, regarded by his Honour as a dishonest man) had a good reason for not carrying on the business in his own name. He was an undischarged bankrupt.

The second observation to be made is that, if Toone really gave authority for the making of the entry in the register, one would certainly expect clear and unambiguous evidence of that authority to be readily available. In fact there is no evidence of such authority at all.

It would seem that authority to purchase the business on Toone's behalf could have been effectively given by Toone to Jenkins by word of mouth. Written authority would not be necessary in law, although, in a matter of such importance, one would expect written authority to be sought and given. But there is no evidence of any oral authority. All the evidence is that no oral authority was given. Toone simply denies that any such authority was given. He says indeed that there was no question of his becoming a purchaser of the business: what was

discussed before he went to England was, he says, the formation of a company. Jenkins says that before Toone left for England there was a discussion about his "taking over" the business. "But", he says, "there was nothing concrete". This is clearly inconsistent with the giving of any oral authority before Toone's departure in April 1946.

If there is no evidence of any oral authority, is there any evidence of any written authority? There is evidence that two powers of attorney were given by Toone to Jenkins. Only one of these was produced, and this must be considered first. It is a document dated the 23rd May 1946. It was prepared in Barnsley, Yorkshire, and must have been executed by Toone very shortly after his arrival in England. It recites the absence of Toone from Australia and his consequent inability to "manage his affairs in Australia". It then appoints Jenkins "to act in, conduct, and manage, all my affairs in Australia with power" to execute documents of all kinds, to commence prosecute or compromise legal proceedings and "to deal with and manage my property of whatsoever kind and wheresoever situate in Australia". So far it is, in our opinion, quite clear that the instrument gives no power to purchase and carry on a business on Toone's behalf. Powers of attorney are among the most strictly construed of all instruments, but, apart altogether from any rule of construction, the language used cannot be construed as giving any such authority. "My affairs in Australia" means "all matters in which I am interested in Australia." The expression does not authorise the creation of entirely new "affairs" for the donor of the power. To purchase a business and proceed to carry it on ostensibly for the donor is not to conduct or manage the donor's affairs within any reasonable meaning of those words. The instrument proceeds to give certain "particular" powers, of which the only one that is possibly relevant is a power "for me and in my name to purchase or take on lease or otherwise such lands houses tenements or chattels as he may think desirable". The goodwill of a business

is not, in our opinion, a "chattel" within the meaning of this clause. But, in any case, what Jenkins purported to do on behalf of Toone went far beyond anything that can possibly be taken to be authorised by this power. It is impossible, in our opinion, to find anything in this power of attorney which comes anywhere near to authorising the purchasing and carrying on of a business with all that is involved therein - the payment of money, compliance with the Business Names Act, the buying and selling of goods from day to day, the rendering of services for reward from day to day, the opening of a bank account, the drawing of cheques, the borrowing of money on overdraft or otherwise, the employment of servants, the payment of wages, and so on. Toone, it may be remembered, had, when he left Australia, no money, and, so far as appears, no bank account. The power of attorney contains a provision that it is "to be given the widest interpretation" and is to be "construed as an express authority to act in and deal with my affairs in Australia as fully and effectually as I myself could do." But clearly these words carry the matter no further.

With regard to the other power of attorney, we have no real evidence of its contents. As we have said, we cannot even say with any high degree of probability whether it was given before or after the instrument of 23rd May 1946. Toone seems to have thought that it was given after that instrument, and he is to some extent supported by the contents of that instrument. For Toone says that the project discussed before his departure for England was the formation of a company in which he was to have shares. And he says, in effect, that the power of 23rd May 1946 was required because an earlier power was defective in that it did not give authority to borrow money for the purpose of taking up shares. The power of 23rd May 1946 does give power to "accept the <u>transfer</u>" of shares in companies and to vote at meetings of any company or companies, but it gives no power to accept an allotment of shares, or to borrow money for any purpose.

Jenkins seems to have thought that the power of attorney of 23rd May 1946 was the second power given, the first having been on a printed form. He does say that his wife wrote to Toone in England putting before him a proposition for the purchase of the business from Biddle for £2000. This evidence was, of course, inadmissible. It is in any case very confused, and it is not really possible to make anything of it. The suggestion seems to be that Jenkin's wife wrote to Toone some time after receipt of the power of 23rd May 1946, and put before him some proposition for which a second power of attorney was required. But it is quite consistent with Jenkins's evidence that the second power of attorney had to do with the formation of a company in which Toone was to have shares. Jenkins indeed says that a power of attorney was obtained "so that we could form the company." And, after he had said that his wife's letter to Toone contained "the whole of the terms, and what it was proposed to do", he was asked: "About the forming of the company?", to which he replied: "That is so, and running it for such period of time until the project wasgoing." So far as a purchase of the business for £2000 is concerned, it should be pointed out that no such purchase was ever made. If Biddle ever transferred the business to anybody, it was a transfer without consideration. There is not the slightest evidence to justify saying that any relevant authority was conferred upon Jenkins by any power of attorney not produced.

The position then on the whole case seems to stand thus. The court is bound to "go behind" the judgment obtained by Gregory & Hickey in this case. "When the facts behind the judgment are known", the question is whether "there is sufficient evidence to satisfy the court that a debt really existed" (Ex parte Lennox: In re Lennox, (1885) 16 Q.B.D. at p. 326). The judgment creditor can make a prima facie case by mere production of a copy of the entry in the register under the Business Names Act. The entry is prima facie evidence that Toone was the proprietor of the business in the course of conducting which the goods were

ordered and received. But the entry in the register merely raises an artificial presumption, which is capable of being rebutted by evidence that it was procured by a person acting without Toone's authority. Toone did not procure it himself, and he swears that it was procured without his authority, and that he never authorised Jenkins or anybody to purchase the business from Biddle or conduct it on his behalf. His denial is by no means inherently incredible. On the contrary, such facts as are clear tend to support it. He was absent from Australia for two years and three months. He never put a penny into the business, or received a penny from it. He never sought or received any accounts or reports relating to the business or its conduct. The man who actually procured the entry is a man whose every act must be open to grave mistrust and suspicion. Again, if Toone did give the necessary authority, that authority, oral or in writing, might be expected to be capable of ready proof. It was in Jenkins's interest to prove the authority, if he could. Moreover, he had quarrelled with Toone, and they had not become reconciled. There is, in fact, a complete absence of proof. Oral authority is not even suggested. A power of attorney is produced, which is clearly insufficient for the purpose. There appears to have been a second power of attorney, but only Toone gives any evidence of its contents: Jenkins says that the power under which he acted was the power actually produced. It is obviously impossible to say that the necessary authority was given to Jenkins by this second power of attorney.

These considerations, and a reading of the whole of the evidence, lead us to think that Toone's denial of authority is probably true. At least it seems quite clear that a court cannot be satisfied on the evidence that the necessary authority was given. It was argued that Toone had after his return to Australia ratified the acts of Jenkins. But ratification cannot be found in the absence of some affirmative words or conduct indicative of assent to, or adoption of, the acts of the person who has purported to

act as agent. Toone, as has been pointed out, simply did nothing. So long as his name remained with his knowledge on the register of business names, he took the risk of incurring liability to anyone who dealt the Cumberland Manufacturing Coy. on the faith of the register. But mere inactivity cannot be held to amount to ratification of everything or anything that Jenkins had done during his absence. It is impossible to infer any actual intention to ratify or adopt. He appears to have toyed for a few days with the idea of accepting proprietorship of the business, but, so far as actual intention is concerned, it seems clear that he elected to have nothing to do with it. Nor did he assume possession or control of the business or of anything connected with the business, or do any act or thing inconsistent with the attitude which he now maintains.

In the result no debt antecedent to the judgment debt is established, and it follows that the sequestration order ought to have been annulled.

The appeal should be allowed with costs, and the order of the Court of Bankruptcy discharged. In lieu thereof, it should be ordered that the sequestration order be annulled. There should be no order as to the costs of the proceedings for annulment in the Court of Bankruptcy.