

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Levi v. Ayers and others, from the Supreme Court of South Australia ; delivered 28th May, 1878.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE questions to be determined in this case are raised by two Appeals which have been consolidated. One is an Appeal from an Order of the Supreme Court of South Australia in Equity, dated the 9th October, 1876, which affirmed an Order of the Primary Judge of the same Court, dated the 29th August, 1876, allowing a demurrer put in by the Defendants, Sir Henry Ayers, Robert Barr Smith, Thomas Giles, and Thomas Drury Smeaton, to the re-amended Bill of the Plaintiff. The other is an Appeal from an Order of the said Primary Judge, dated the 19th December, 1876, by which, after disallowing the objection of the other Defendants, William Selby Douglas and William Townsend, that they were improperly made parties to the suit, he allowed their demurrer to the re-amended Bill for want of equity. The case, therefore, of all the Defendants is now the same, the question being whether any case for equitable relief has been made against them, and that question must, of course, be determined upon the facts stated in the re-amended Bill.

These facts may be shortly summarized as follows:—

The New Zealand Banking Corporation Limited was a duly incorporated company under the Imperial Statute known as "The Companies Act, 1862." On the 2nd June, 1866, an order was made by the Court of Chancery for winding up that Company, under which an official liquidator was appointed, and other proceedings were had in conformity with the Statute. At the date of the winding-up order and for some time previously the Plaintiff, Frederic Levi, was the registered owner of 2,070 shares in this Banking Corporation Company, of which 1,125 were held by him as the nominee and trustee of the firm of Philip Levi and Company, out of whose assets 1*l.* had been paid on each of such last-mentioned shares; the shares being accordingly treated as, and being, in fact, part of the partnership assets. The firm of Philip Levi and Company consisted of the Plaintiff, Philip Levi, Edmund Levi, and Alfred Watts, and carried on the business of merchants, both in the City of London and at Adelaide in South Australia; the business being managed in London by the Plaintiff alone, and in South Australia by his three partners above-named. In September 1866, Philip Levi and Company became insolvent, and on the 17th of that month the three Australian partners executed a deed for the benefit of their creditors, purporting to be a deed made under the provisions of division 6 of the Colonial "Insolvent Act, 1860." On the 23rd February, 1867, a similar deed was executed in the name of the Plaintiff, under a power of attorney, dated the 1st December, 1866, which had been sent out by him from London for that purpose. The effect of the two deeds was to vest the joint assets of the firm, and the separate estates of the respective partners therein, in the Defendants, Sir Henry Ayers, William Selby Douglas, Robert Barr Smith, and William Townsend, as trustees for the creditors; and in the schedule of the property assigned, which was annexed to each deed, were included the before-mentioned 1,125 shares in the New Zealand Banking Corporation, estimated at the value of 1,090*l.* 2*s.* 5*d.* The Bill admitted that these deeds were duly executed, and were, in all respects, valid and legal deeds in conformity with the Colonial "Insolvent Act, 1860," with respect to arrangements between debtors and creditors by deed,

except, as regards both, in so far as the power to trustees to retire, and of appointing new trustees, contained in such deeds might not be authorized by the Act; and, as regards the later deed, in so far as such deed might not be valid as a deed under the Act, by reason of its having been executed under a power of attorney, or by reason of the fact that the said Frederic Levi was resident and domiciled out of South Australia.

The Bill also suggested a further objection to the later deed, which was probably intended to apply to both, viz., that the power to appoint new trustees could not be exercised consistently with the Act without the sanction and approval of the Court of Insolvency or the creditors of the insolvents. The power of the trustees to retire and to appoint new trustees was exercised on several occasions, and, as the Bill alleges, without the express "sanction or approval of the Court of Insolvency, or of the creditors of the parties to the said trust deeds, or of either of them." The general result was that two of the original trustees, the Defendants William Selby Douglas and William Townsend, retired, and the Defendants Thomas Giles and Thomas Drury Smeaton became new trustees under both deeds.

The 23rd paragraph of the Bill, upon which much stress has been laid, after stating that at the respective times when the two creditors' deeds were executed the trustees knew that the Banking Corporation was in a state of liquidation, and that the official liquidator was pressing the firm of Philip Levi and Co. in connection with certain credits which that firm had obtained from the Corporation, proceeds thus:—

"It was at the commencement of the liquidation anticipated that after payment of all the creditors in full there would be a considerable sum divisible amongst the shareholders. The said shares were consequently included in the said trust deeds as a valuable item of property, which the debtors were bound to specify and to assign over for the benefit of the creditors. The second schedules to both the aforesaid deeds were respectively prepared, so far as the London assets were concerned, from a statement of affairs brought out by Mr. Edmund Levi, who left London for Adelaide in the month of May 1866, and the Defendants never raised any objection to the shares being comprised in the said deeds; and the Plaintiff charges that under the circumstances they must be deemed in equity to have accepted,

and that they did in fact accept the said shares as part of the assets of the said partnership, which they were bound to realize and dispose of for the benefit of the joint creditors, and that they cannot now repudiate any liability which has subsequently arisen in respect thereof."

Whatever may have been the anticipated result of the liquidation of the New Zealand Banking Corporation in 1866, the actual result was far from favourable; the plaintiff was placed on the list of contributories, and has become personally liable, as between himself and the official liquidator, to pay calls on the 1,125 shares, to the amount of 6,187*l.* 10*s.* 10*d.*, with interest running from different dates; and also to pay any future calls that may be made upon him as a contributory. The shares are still standing in the Plaintiff's name on the register of members of the company. The New Zealand Banking Corporation Limited was not included in the schedules to the trust deeds as a creditor in respect of the calls, and has not assented to the deeds, or been admitted to prove as a creditor thereunder, and the plaintiff, "except so far as he is protected, if at all, by the trust deed of the 23rd February, 1867, continues liable to satisfy the said calls." The 37th paragraph of the Bill states that the "writ is instituted with the authority, and by the directions of the official liquidator of the Banking Corporation for the benefit of that company." On those facts the Bill prayed:—

1. For a declaration that the Defendants as trustees of the joint estate of Philip Levi and Co., were liable, out of such joint estate, to pay the present arrears of calls and all interest thereon, and any future calls that might be made in respect of the said 1,125 shares, and thereout to keep the Plaintiff indemnified against all actions, suits, &c., for or in respect of the said shares or any of them; and an order for payment in accordance with such declarations; or
2. For a similar declaration in respect of the separate estate of the Plaintiff, and an order for payment in accordance therewith; or
3. For a similar declaration and order in respect of the surplus of the joint estate, after the payment thereof of the partnership creditors; or
4. Only in case the second deed should be

held not to be a valid and subsisting deed, under division 6 of "The Insolvent Act, 1860," for a like declaration and order in respect of dividends upon the debt created in respect of the said shares; treating such debt as a debt proved or proveable against the joint estate.

The equity of the Plaintiff, if any, against the trustees must be founded upon these two propositions, or one of them, viz.: 1st, That the transferee of shares formed under "The Companies Act, 1862," who takes the beneficial ownership, is bound to indemnify the transferrer against all liabilities in respect of them subsequent to the date of the transfer; 2nd, That a trustee whose name is on the register, though personally liable as a shareholder, is entitled to be indemnified by his *cestui que* trust.

These propositions, as general rules, are indisputable. Their application, however, and particularly that of the first, to the present case depends upon various considerations of greater or less nicety.

In what way can the trustees be said to have become the transferee of these shares, taking the beneficial interest thereof? Simply by having executed and acted under two deeds, in the nature of a *cessio bonorum*, for the benefit of creditors, which assigned that beneficial interest, together with all the other property of the insolvent debtors.

That the law makes a distinction between persons taking an assignment of shares or the beneficial interest therein by way of contract and under an ordinary deed, and the assignees of a bankrupt or insolvent who take his whole estate by operation of law, is clearly established. The reasons for the distinction are pointed out by Sir William Grant in his Judgment in the case of *Wilkins v. Fry* (1 Mer., 244), though the question in that particular case was whether the assignees of a bankrupt who had sold his leasehold property had a right, independently of positive stipulations, to require from their vendor an indemnity against the covenants in the lease. In *Turner v. Richardson* (7 East, 335) and other cases it was treated as settled law that assignees in bankruptcy are not bound to accept a *damnosa hereditas*, and that they have consequently an option to accept or to repudiate property which is or may be injurious to the estate.

The substantial question, therefore, in this case is whether the trustees are to be treated as the assignees of shares under an ordinary deed, or as persons taking in the character and with only the rights and liabilities of assignees under a bankruptcy or an insolvency.

It appears to their Lordships that in deciding this question they ought to look to the substance rather than to the form of the transaction; to the nature of the functions undertaken by the trustees rather than to the machinery by which those functions were created.

By "The Colonial Insolvent Act, 1860," division 6, commencing at section 172, provisions are made with respect to arrangements by deed between debtors and their creditors; and it is enacted by that section that any debtor may, by deed containing the particulars, and executed and attested as thereinafter provided, convey and assign to trustees his estate and effects for the benefit of his creditors. By section 179 every such deed is rendered binding and effectual in all respects upon the creditors who shall not have signed the deed as if they had duly signed the same, and vests in the trustees the property of whatever kind or wherever situate of the debtor, including all debts due to him, upon the trusts and for the purposes in and by such deed declared, and such trustees are authorized to recover the property and debts in their own names as trustees for the estate of the debtor in like manner as assignees in insolvency.

Section 172 enacts that every such deed shall be executed by the debtor, and also by the trustees thereof, within seven days of such execution by the debtor, and by each of them in the presence of a practitioner of the Supreme Court, a Justice of the Peace for the said Province, or a clerk of a local Court, and that each witness shall attest such deed, and specify the date on which the execution so attested was made. It was also enacted by section 174 that every such deed shall contain in a schedule annexed thereto a true and particular account of all the property of the debtor, subject to certain exceptions not material in this case, and shall also contain in a like schedule the names of the several creditors of the debtor, and the amount due, or supposed to be due, to them respectively.

Their Lordships entertain no doubt that trustees under trust deeds which fall strictly within the provisions of the Colonial Statute, stand in respect of the point under consideration upon the same footing as assignees under a regular bankruptcy or insolvency, and have the same option of either accepting or repudiating such shares as are in question in this suit.

It was indeed contended on behalf of the Plaintiff that the express declaration in the deeds that it should be lawful for the trustees to refuse to accept any lease, or agreement for a lease, or any agreement for the purchase of lands, which the trustees should deem not to be beneficial to the creditors, impliedly restricted the trustees from refusing to accept shares or any other description of property; but their Lordships are of opinion that it had no such effect. The declaration was introduced rather to limit the general right of refusal which the law would otherwise have allowed the trustees, by requiring them to state such refusal in writing within fourteen days after being called upon to elect whether they would accept or refuse property of the description therein specified.

A question however arises on the Bill whether the two trust deeds in this case were deeds within the provisions of the sixth division of "The Insolvent Act, 1860."

These deeds were framed with a view to the administration of the insolvents' estates under the Statute; and were formally executed in accordance with its provisions; the estate has been so administered, and their Lordships are not prepared to say that any of the objections suggested by the Bill, viz., the insertion of a power to allow the trustees to retire, and to replace them by new trustees; the exercise of that power without the express sanction of the Insolvent Court, or the domicile of the Plaintiff, and the execution of his deed under his power of attorney, are, any of them, fatal to the character of the deeds as deeds under the 6th division of "The Insolvent Act, 1860." But whatever might have been the weight of any of these objections, if taken at the proper time by a non-assenting creditor, their Lordships agree with Mr. Justice Gwynne in the conclusion that they cannot prevail when proceeding from the mouth of the Plaintiff. They must therefore hold as between

him and the trustees that the latter had, in respect of the shares, the same option of acceptance or repudiation as would have belonged to ordinary assignees under a regular bankruptcy or insolvency. Have they then exercised that option by taking to the shares? Their execution of the deeds, their acceptance of the trusts, and general action under them, do not of themselves constitute such a taking to, or acceptance of this particular asset. The insolvent estate has never derived the slightest benefit from it, and could not have done so, since the shares have turned out to be worse than worthless, and are now treated as creating a liability instead of a benefit. The trustees have never done any special act in relation to them, and the legal title to them remains as it was before the execution of the deeds. The cause, however, comes on upon demurrer, and it is, therefore, necessary to consider the effect of the allegations in the 23rd paragraph of the Bill which has been already cited. Their Lordships agree with Mr. Justice Gwynne that this paragraph imports not an allegation that the trustees did in point of fact accept the transfer of the shares, but merely the charge of a conclusion in equity from the facts stated in the Bill, a conclusion which is erroneous if the trustees had the option which their Lordships have decided that they had.

It seems to be quite contrary to the principle of the laws relating to bankrupts or insolvents, that the assignees, taking the property for division amongst his creditors, should be liable, either personally or out of the assets of the estate, to indemnify the bankrupt or insolvent in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate, and from which claims he has not been discharged by his bankruptcy or insolvency. The subject was fully considered by Sir William Grant in the case of *Wilkins v. Fry* above referred to.

These considerations appear to their Lordships to be a sufficient answer to any claim of the Plaintiff against the trustees for payment or indemnity out of the joint estate of Philip Levi and Co., or out of the separate estate of the Plaintiff.

The trustees have incurred no liability to indemnify the Plaintiff out of the assets to be adminis-



tered by them or otherwise. Their duty is to apply the assets in payment of the joint and separate creditors, and to hand over the surplus, if there be any (of which there is no proof), to the insolvents.

The rights of the insolvents *inter se* cannot be dealt with in this suit. The official liquidator, and the Company which he represents, have in this suit no higher rights than the Plaintiff, who states that he is suing for their benefit, and under their authority. It is unnecessary to determine whether they could or could not have come in under the insolvency, and entitled themselves to dividends on their claim out of either the joint or separate estate, because they have not so come in, or sought to make the requisite proof.

It appears, therefore, to their Lordships that the Plaintiff's suit wholly fails, and they will humbly advise Her Majesty to affirm the orders under appeal, and dismiss this Appeal.

The Appellants must pay the costs of the Appeal.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that this is crucial for ensuring the integrity of the financial data and for facilitating audits.

2. The second part of the document outlines the various methods used to collect and analyze data. It describes the use of both primary and secondary data sources, and the importance of using appropriate statistical techniques to interpret the results.

3. The third part of the document focuses on the application of the findings to the specific context of the study. It discusses the implications of the results for policy-making and for future research in the field. It also highlights the need for continued monitoring and evaluation to ensure that the findings are being implemented effectively.

4. The final part of the document provides a summary of the key findings and conclusions. It reiterates the importance of the research and the need for further work in this area. It also includes a list of references and a list of figures and tables.