

*Judgment of the Lords of the Judicial Committee
of the Privy Council, on the Petition to
carry out Order in the case of Pitts v.
La Fontaine, from the Supreme Consular
Court, Constantinople; delivered 20th No-
vember 1880.*

Present :

SIR JAMES W. COLVILLE.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an application for a peremptory Order on the Consular Court at Constantinople to carry into execution the Order in Council of the 19th May, 1880, so far as it directed Mr. La Fontaine, the Respondent, to pay certain costs to Mr. Pitts, the Appellant. In the course of the argument on the application to the Consular Court for the payment of these costs, a somewhat irregular discussion as to the nature of the Order, and the authority from which it emanated, seems to have taken place. On this point it suffices to say that when a decision of this Board has been reported to Her Majesty, and has been sanctioned and embodied in an Order of Council, it becomes the decree or order of the final Court of Appeal—the House of Lords, which was brought into the discussion, having no jurisdiction whatever in the subject-matter of it,—and that it is the duty of every subordinate tribunal to whom the Order is addressed to carry it into execution.

This, which is a first principle, their Lordships cannot presume that the Judge of the Consular Court intended in any way wilfully to violate; and the first question which arises is whether

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there is really any ambiguity in the words of the Order. These are: "And it is hereby ordered that
 " the Respondent do pay to the Appellant all such
 " costs as were incurred in the Consular Court
 " by him, or his wife the Defendant Ellen Jani
 " Pitts, of and incidental to all the Orders under
 " appeal, and the costs of opposing the rules on
 " which such Orders were made except the costs
 " of the rule of the 7th January and the Order
 " of the 5th February 1879 made thereon, and
 " such costs are to be taxed by the Consular
 " Court; and the Respondent is likewise to pay
 " to the Appellant the sum of 411*l.* 2*s.* 4*d.*
 " sterling for the costs of this Appeal." Nothing
 can be clearer upon the face of the Order than
 that it is an Order in the usual form against the
 Respondent personally to pay those costs.

This being so, the next question that arises is
 whether there is any ground on which the action
 of the Judge of the Consular Court in qualifying
 and varying the directions of the Order in
 Council can be justified. His *ratio decidendi*
 seems to have been that inasmuch as the pro-
 ceedings were taken, as it is alleged, with the
 sanction and at the instance of Sir Phillip
 Francis, the former Judge of the Consular Court,
 the provisions of the Bankruptcy Act of 1869,
 and in particular the 20th section of that
 Statute, make it so irregular and contrary to
 law to order the Respondent personally to pay
 costs, that such an Order, however plain its
 terms, must be presumed to mean that the costs
 were to be paid out of the estate, and so far only
 as the estate might extend.

With respect to this suggestion of the effect
 of directions or authority given by Sir Phillip
 Francis, it appears to their Lordships that any
 such sanction, if relied upon, ought to have
 been regularly proved by the production of an
 Order of the Court. Here we have nothing in

the way of proof but loose affidavits of conversations, or alleged conversations, between Sir Philip Francis, the then Judge of the Court, and the Counsel for the Respondent, and a dragoman of the Embassy. Again, all that appears upon those affidavits is that Sir Phillip Francis was regularly or irregularly consulted by the Counsel for the Respondent as to what proceedings it would be proper to take in order to realise the Bankrupt's interest in the mill in question, and that Sir Phillip Francis had previously consulted Mr. Constantinidis, the dragoman of the Embassy, upon that point also; and that the result was that Sir Phillip Francis directed Mr. Nasmyth, the Counsel for the Respondent, on his behalf, "to bring an action in " this Honourable Court against the said Ellen " Jani Pitts for the sale of the said property " under the supervision of this Honourable " Court." This only goes to show a sanction of the institution of proceedings in the Consular Court for the realisation of the insolvents' interest in the mill; and up to that point the decision of this Board was, that though there might have been some irregularity in the proceedings in so far as they were taken against Ellen Jani Pitts without joining her husband, that technical objection might be waived, and that the sale which took place under the Order of the Court of the bankrupts' interest was to be treated as good, and was to be upheld. But it appeared that the sale had been followed by a series of irregular proceedings against Mr. Pitts, who was not a party to the suit, the object of which was to turn out him, who was a partner in this mill with the bankrupts, and to exclude him from his share in the mill. This tribunal held that all these latter proceedings were irregular and could not be upheld; and it is quite clear that no sanction is shown to have been given by Sir Phillip Francis to these

particular proceedings, which all took place some time after his death. If, then, the sanction of Sir Phillip Francis could have availed anything to the Respondent on this occasion, the proof of it wholly fails.

Again, can it be said that, under the Bankruptcy Act of 1869 (the 20th section is the section on which the learned Judge principally relied), a trustee under that Act can in no case be made personally liable for costs. It seems to their Lordships that the law, as might reasonably be expected, is the other way. They have been referred to two cases. One is *Ex parte Angerstein, in the matter of Angerstein*, which is in Law Reports, 9th Chancery Appeals, page 479, and establishes the general rule. The Court had there ordered that the trustee should pay to the Appellant his costs of the application to the registrar which he might recover from the bankrupts' estate. It was suggested that there was scarcely any estate, and that the effect of their Lordships' Order would be that the trustee would have to pay a great part of the costs personally. But Sir George Mellish, L.J., said, "It is quite right that the Order should be in that form. The reason for ordering the trustee to pay costs is that applications of this kind to the Court of Bankruptcy are in substitution for actions at law. In an action at law a trustee in bankruptcy would be liable in the same way as any other Plaintiff. In a case where a trustee makes an application the success of which is doubtful, he ought, before making it, to get from the creditors an indemnity against the costs if he knows that there are no assets out of which they can be paid. I see no difference between the case of an official liquidator and a trustee in bankruptcy. With regard to the former, we have already laid down the rule that he must pay the costs if he fails in an application."

In every case of that kind, of course the question may arise whether the trustee, having had to pay costs to the party aggrieved by an unsuccessful and improper claim, may not, if he has acted *bonâ fide*, have a case for recouping himself out of the bankrupt estate if there are funds. That is a question to be determined in the Court of Bankruptcy in the administration of the bankrupt estate. Any Order of their Lordships here against Mr. La Fontaine would, of course, leave that question open. It is a question with which their Lordships have nothing to do, and on which they express no opinion; but it is clear that, whatever Mr. La Fontaine's right in that respect may be, it affords no reason for depriving Mr. Pitts of that which the Order gave him, and gave him consistently with general law.

The other case referred to was that of *Ex parte Stapleton, in re Nathan*, 10th Law Reports, Chancery Division, page 586. In that case Mr. Stapleton had contracted to sell a cargo to the liquidating debtor. Before the cargo was delivered the liquidating debtor became insolvent. He had given acceptances which were worth nothing for the goods, and Stapleton claimed the right of repudiating the contract, making a re-sale, and then coming in under the bankruptcy to prove the loss upon that re-sale. The registrar rejected his proof, and Mr. Stapleton then appealed to the Court. All that bears upon this case is, that upon that appeal the appeal was allowed with costs; but Lord Justice James says:—"The Order will be for the payment of costs out of the estate, not by the trustee personally. The trustee is not the Appellant." This authority does not imply that there is any inflexible rule of Court that a trustee should not be personally ordered to pay costs; although under the circumstances, the estate being

possibly fully adequate for the purpose, his costs were directed to come out of the estate. And it is to be observed that the form of the Order shows that when it is intended to qualify the ordinary liability of the trustee in bankruptcy to pay costs, such qualification is expressly mentioned in the Order.

Lastly, if we travel out of the Order in Council in order to learn from the Judgment of this Board with what intention the Order for the payment of costs was made, we find this passage :
 “ It appears to their Lordships that Constan-
 “ tinidis, instead of litigating these questions
 “ fairly, has sought to get them indirectly
 “ determined in his favour by the proceedings
 “ taken in the Consular Court in the name and
 “ at the instance of the Respondents ; that the
 “ Respondent has, from some motive or another,
 “ become his instrument and lent himself to
 “ that course of action, and that the Court has
 “ improperly sanctioned it by the Orders in
 “ question.”

It is, therefore, perfectly clear that if there was sufficient ambiguity in the terms of the Order to raise a question as to what the Board intended, the Board did intend to make Mr. La Fontaine personally responsible for the costs.

It is very possible that, as stated in the affidavits, Mr. La Fontaine may be a very respectable person, and that he may have acted *bonâ fide* though under very bad advice ; but that is his misfortune, and can form no ground for depriving the Applicant of those costs to which he is entitled.

Their Lordships will, therefore, humbly recommend Her Majesty to make in the usual way a peremptory Order for the payment of these costs, and they think that the Applicant is also entitled to the costs of the present Application.