

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
The Commercial Bank of Australia, Limited,
v. The Official Assignee of the Estate of John
Wilson & Company, from the Supreme Court
of New South Wales (In Bankruptcy); delivered
February 24th, 1893.*

Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

THE HON. GEORGE DENMAN.

[*Delivered by the Lord Chancellor.*]

THE sole question for determination in this case is whether the Appellants, the Commercial Bank of Australia, are entitled to prove against the estate of the bankrupt John Wilson for the sum of 6,250*l.* or 3,250*l.*

The question turns upon the construction of an Agreement entered into in the year 1890 between the Appellants and three persons, O'Connor, Hart, and Freehill, who with others, including Wilson, had become guarantors to the bank for the discharge of a liability incurred or to be incurred by Her Majesty's Theatre and Grand Opera House Company of Sydney, Limited. The parties to the guarantees were not in all cases the same, but nothing turns on that. After reciting the several guarantees that had been entered into, the Agreement further recites

that Hart and Freehill had offered and proposed to pay to the said bank the sum of 2,000*l.* in discharge of their respective individual liabilities under the said joint and several guarantees, and that O'Connor had offered and proposed to pay 500*l.*, and to give the bank his promissory notes for a further sum of 500*l.* in discharge of his individual liability under the joint and several guarantees. The Agreement further recites that the bank had "declined to receive the said moneys in reduction of the said account,"—that is the account due by the principal debtor, Her Majesty's Theatre and Grand Opera House Company Limited—"but have agreed with the said Francis Bede Freehill, James N. Hart, and Daniel O'Connor, that they will not look to them for more than 1,000*l.* each, on condition that the same sums or their equivalent shall be deposited to a separate account with the said bank, to be appropriated by the said bank in satisfaction, in part or in whole, of the said debt of Her Majesty's Theatre and Opera House Company, Limited, when and so soon as the said bank may deem prudent, the receipt of such sums to be entirely without prejudice to the bank's right to sue or look to the other guarantors for the full amount of the said guarantees, it being understood that such moneys shall be and remain as a security to the bank for the due payment of the said respective sums of 1,000*l.* each, credited to a special suspense account with the said bank accordingly." Then the agreement witnesses "that, in pursuance of the said Agreement, and in consideration of the sum of 2,000*l.*, paid by the said James N. Hart and Francis Bede Freehill, and 500*l.*, together with the said promissory notes, paid by the said Daniel O'Connor, at or before the execution hereof

“ to the credit of a suspense account with the
 “ said bank (receipt whereof is hereby acknow-
 “ ledged), the said bank doth hereby release
 “ and discharge the said Daniel O’Connor,
 “ James N. Hart and Francis Bede Freehill,
 “ their heirs, executors, and administrators,
 “ respectively, of, from, and against all debts,
 “ claims and demands whatever of the said
 “ bank against them, the said Daniel O’Connor,
 “ James N. Hart and Francis Bede Freehill,
 “ under and by virtue of their said joint and
 “ several guarantees and all actions, suits, or
 “ causes of action in respect thereof. Provided
 “ nevertheless and these presents are executed
 “ upon this express condition, that nothing
 “ herein contained shall release, or be construed
 “ or operated to release, the said Daniel O’Connor
 “ in the event of either or any of the said
 “ promissory notes being dishonoured, or to
 “ release or in any manner to prejudice or
 “ affect any claim or demand which the said
 “ bank has or ever had upon or against the
 “ said John Shepherd, John Wilson, or Jamer
 “ Allison,”—(who were the co-guarantors)—
 “ or either of them, or their or either of their
 “ respective estates and effects.”

There can be no doubt that the object of the
 bank in not receiving this sum in discharge of
 the account due by the principal debtor was to
 preserve their right, if it could lawfully be done,
 to prove against the estate of any of the co-
 sureties who might become bankrupt. The
 contention on behalf of the Respondent in support
 of the judgment below, which was dissented from
 by the Chief Justice, has been first, that the effect
 of the Agreement, to which their Lordships have
 directed attention, was to operate as payment of
 the principal debt *pro tanto*, and that therefore
 3,000*l.* of the debt having been in fact discharged
 there could be no proof except for the balance ;

and secondly, that even if it was not to be regarded as payment, supposing the question had arisen between Wilson and the bank, yet Wilson being bankrupt and his estate in process of distribution amongst his creditors, an arrangement of this description could not prevail to affect the right of the Assignee in Bankruptcy, and consequently that in the bankruptcy the bank could prove for no more than the balance.

The Agreement it is said amounted to a payment. The question is whether it amounted to payment of a part of the principal debt; because unless it did the principal debt still remains, and not having been in any part discharged, the bank are entitled to prove for it against the estate of the surety. Their Lordships have pointed out that it certainly was the intention of the parties to this Agreement that the principal debt should not be discharged. It is said that this has nevertheless been done in spite of the intention of the parties. Their Lordships are unable to agree that that is so. The arrangement which the Agreement embodies appears to their Lordships to amount to this—that the liability of the guarantors who were dealt with by that Agreement should, in lieu of their personal liability to pay the entire sum guaranteed in case of default of the principal debtor, be as between them and the bank limited in this way, that there should be substituted for it the deposit in the bank of a sum of money less than the whole amount, but which should afford a complete security to the bank *quoad* the amount to which it extended. Accordingly the sum of 3,000*l.*—taking the promissory notes, they having been paid, as equivalent to cash—was deposited in the bank to a suspense account. The bank no doubt had power when it thought it prudent to do so to appropriate that sum to the payment of the principal debt *pro*

tanto, and as soon as they made such appropriation it would undoubtedly operate as payment. They never have made such appropriation. The question is whether prior to appropriation it operated as payment of the debt. Their Lordships are unable to see why it should do so. The money was put to a special account called a suspense account, presumably in the names of these guarantors who had paid it in. At all events it was ear-marked as a special account. Down to the time of appropriation by the bank of this amount their Lordships are unable to see anything which could discharge the principal debtor. If that debtor had come and tendered the entire amount due, the bank would have been neither justified, as it appears to their Lordships in saying, nor bound to say that, 3,000*l.* of the amount having been already paid, all that they were in a position to receive was the residue. Upon the whole of the terms of the Agreement there appears to be nothing more than a substitution of a certain sum of money deposited in the bank as security, in lieu of the personal liability of guarantors which down to that time had rested upon these persons who were parties to the Agreement with the bank.

Apart, therefore, from any question arising out of the bankruptcy, their Lordships cannot think that the carrying out of such an arrangement as this in any way affected the liability of Wilson, the co-surety, for the total amount of the debt due to the bank.

But then it is said that, Wilson having become bankrupt, and the question being one affecting his creditors, this Agreement must be regarded in their favour as a payment, and that otherwise it would be an evasion of the Bankruptcy law. Their Lordships are unable to concur in this view. Supposing that no such Agreement as this had been entered into, the creditors of Wilson

would have been in no better position than if this Agreement is held to have the effect contended for by the Appellants. How, then, can a transaction, which does not prejudice the position of the creditors, but which leaves their position exactly what it would have been if there had been no such Agreement, be said to be an evasion of the Bankruptcy law? Their Lordships find it difficult to understand the proposition when so stated; and in their opinion upon the true view of the Agreement and its consequences, that is really what the contention on the part of the Respondent amounts to. The truth is that the fallacy which lurks in the argument of the Respondent is this, that it is suggested that the comparison is to be between the position of the creditors of Wilson if no such Agreement had been entered into, and the position of the creditors of Wilson if they can claim the benefit of this sum as a payment. No doubt, if they can so claim the benefit of it as a payment, their position would be better than it would have been if there had been no Agreement; but in their Lordships' opinion, for the purpose of seeing whether the Agreement on its true construction (and their Lordships have already pointed out what in their view is the true construction) is, or would effect, an evasion of the Bankruptcy law, the comparison must and can only be made between the position of the creditors without any Agreement, and the position of the creditors supposing the Agreement to have been entered into and to be construed as their Lordships have held it must be construed.

For these reasons their Lordships find themselves unable to concur in the judgments arrived at by the Courts below, and they will humbly advise Her Majesty that the Appeal should be allowed, that the judgments below should

be reversed, and that it be declared that the Appellants are entitled to prove under the bankruptcy for the amount of the full sum of 6,250*l.*, without making deduction of the sum of 3,000*l.* The Respondent must pay the costs in the Courts below and of this Appeal.

