Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Administrator-General of Jamaica (in the matter of the bankruptcy of Rees) v. Lascelles De Mercado and Company, from the Supreme Court of Judicature of Jamaica; delivered 3rd February 1894.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

This is an appeal from an Order of the Supreme Court of Jamaica, dated the 1st of August 1892, discharging an adjudication in bankruptcy against one Rees, a logwood dealer and storekeeper. A Provisional Order in bankruptcy was made against Rees on the 31st of December 1891, followed by an Absolute Order on the 22nd of March 1892. The act of bankruptcy upon which these Orders were founded was the execution of a bill of sale in favour of the Respondents Lascelles, De Mercado, and Company on the 2nd of December 1891, which was held by the Judge in Bankruptcy to be a fraudulent assignment. On the 12th of January 1892 the Respondents gave notice of motion to set aside the Provisional Order. After several adjournments the application was dismissed by Nathan J. sitting in bankruptcy on the 22nd of March 1892, the day on which the Order Absolute was made. On appeal the Order of Nathan J.

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was reversed, and it was held by a majority of the Full Court, consisting of Sir A. Gib Ellis, C.J., and Northcote, J., Nathan, J., dissenting, that the bill of sale was not fraudulent. And the orders in bankruptcy were consequently discharged.

It was objected before their Lordships that the application of the respondents ought to have been made in the first instance to the Full Court under sect. 10 of the Bankruptcy Jurisdiction Amendment Law, No. 17 of 1877. This objection was taken before Nathan, J., and disallowed by him. The point does not seem to have been raised in the Court of Appeal when the error in procedure, if it was an error, might easily have been set right. At any rate it is not noticed in the judgments delivered on the appeal. Their Lordships would be slow to give effect to any objection not affecting the merits of the case, unless it were reasonably clear that it had been pressed in the Court below. But they think it right to add that they see no ground for limiting the power of the Court exercising jurisdiction in bankruptcy to revoke a provisional order or annul an adjudication under sect. 151 of the Bankruptcy Law, 1879.

Happily there is no conflict of evidence in this case. Nor can there be any doubt as to the law to be applied. The decisions of the Court of Appeal in England in Ex parte King 19, Ex parte Ellis 20, and Ex parte Johnson 21, are in point. And notwithstanding the criticism of the learned counsel for the appellant their Lordships think those decisions good sense and good law.

The facts of the case may be stated very shortly.

By an agreement dated the 4th of June, 1891, Rees agreed to sell and the respondents agreed to buy a minimum quantity of 3000 tons of

logwood and logwood roots deliverable on an average of 500 tons a month. It was further agreed that all logwood and logwood roots over and above the 3,000 tons which Rees might buy, or which he might cut or dig during the term of the agreement, should be supplied by Rees to the Respondents, save and except such quantities as he might require for his existing contracts with other parties. The prices of roots and straight wood were fixed on the basis of the prices then ruling in the United States. It was however provided that if the market should decline the price should be reduced correspondingly, so as to secure the Respondents a net profit of 5*s*. per ton, and that if the market should advance, or if the Respondents should make sales by which the net profit should exceed 5*s*. per ton, half of such extra profit should be paid to Rees. The wood and roots were to be consigned to the Respondents, and they agreed to pay Rees such money as he might require from time to time, but their advances were not to exceed a total sum of 2,000*l*. uncovered. The agreement was to expire on the 31st of December 1891, when Rees was to square any balance that might be at his debit in the Respondents' books.

It seems that Mr. Charles De Mercado was the member of the firm of Lascelles, De Mercado, & Co. who negotiated the contract of the 4th of June and managed the business. Shortly afterwards he went to the United States. On his return in August he found that Rees had drawn upon his firm in excess of the limit specified in the agreement. The Respondents, however, continued to make advances to Rees during the month of September. The advances stipulated for in the agreement were intended to enable Rees to purchase logwood for the purposes of the contract. When Rees was taxed with

making short deliveries he declared that he had any quantity of logwood, but that the rains prevented it being sent down. His contract, he said, would be kept at the end of December. Later on, however, he admitted *141 that some of the respondents' money had gone to buy drays, harness, and mules, and that some had gone to pay for an ironmonger's business which he had bought. Then Mr. De Mercado insisted on security being given and on more rapid deliveries. All the time Rees assured Mr. De Mercado that he had practically no other creditors, and that he was perfectly to shew his assets and liabilities. His assets were put down at£11,600 in all. His total liabilities were represented to be£7700, of which the sum of £6200 was owing to the respondents. He was closely questioned, both by Mr. De Mercado himself and by his solicitor, Mr. Farquharson, as to the items in this memorandum, and as to his position generally. He satisfied them both that the memorandum was a true and honest account, and that, although his money was looked up, the value of his assets exceeded his liabilities by nearly £4000. Then Mr. De Mercado advanced him £600 more to pay off an overdraft with his bankers, and on the same day, the 2nd of November, he executed a bill of sale of his drays, harness, and mules, and his stock in trade in the ironmongery business, to cover his indebtedness to the respondents.

During the month of November the deliveries of logwood were rather more satisfactory. On the 30th of that month Rees applied for another advance to pay off an overdraft of £500 with the Colonial Bank. Rees was again questioned by Mr. De Mercado and his solicitor as to his position, and again he succeeded in satisfying

them both that he was perfectly solvent. Mr. De Mercado then consented to pay 500*l.* to Rees' account with the Bank, and promised to make him further advances if the business worked satisfactorily, on Rees undertaking to execute a fresh bill of sale which he did on the 2nd of December. This bill of sale included some cattle and mules not included in the former bill of sale, and it is not disputed that it comprised substantially the whole of Rees' available property. In view of the execution of the second bill of sale the bill of sale of the 2nd of November was not registered.

On the 14th of December the Respondents, in accordance with Mr. De Mercado's promise, advanced a further sum of 400*l.* Towards the end of December they came to hear that Rees owed a Mr. Boettcher 1,600*l.* which had been concealed from them. They then took possession under the bill of sale of the 2nd of December which they duly registered. Rees' credit was destroyed, and shortly afterwards proceedings in bankruptcy were taken against him by an unsecured creditor. It was then discovered that Rees' statements were not true, and that he was hopelessly embarrassed at the time when he entered into the contract of the 4th of June.

There is no question as to the good faith of the Respondents. Mr. Justice Nathan, who tried the case in the first instance and saw the witnesses including Mr. De Mercado and Mr. Farquharson, found as a fact that "the "assignment was taken, and the payment of "500*l.* and the conditional promise to pay "further sums from time to time were made by "Mr. De Mercado, in good faith and in the "belief that Rees was solvent."

If this finding be correct, as it undoubtedly is, it is difficult to see upon what ground the bill of

sale of the 2nd of December can be impeached. It is obvious, as the learned Chief Justice points out in his very able and exhaustive judgment, that the contemporaneous advance was made and the promise of further assistance was given “in order to enable Rees to carry on his business, and in the reasonable belief that he would thereby be enabled to do so.”

It was objected indeed that Rees was not carrying on a business properly so called, and that the advances which the respondents made to him were not properly speaking advances at all. In the Court of first instance Nathan, J., relied on both these objections. In the Full Court, in deference to the view expressed by the Chief Justice, he forbore to press the former, though he still insisted on the latter. It is not very easy to understand either objection. A man who traffics in logwood carries on a business, whether he buys the logwood in which he deals or digs it up or cuts it, and the occupation in which he is engaged is not the less a business because he finds it for a time more profitable to consign all his produce to one customer than to offer his wares to the public generally. Nathan, J., came to the conclusion that the payment of the £500, and the further *143 payment to Rees, were not properly speaking advances, but were repayments of part of the value of logwood previously delivered by him under the agreement of the 4th of June. But, as the Chief Justice observes, the respondents were under no obligation to make any repayments at all to Rees. The moneys they paid him—the £500 and the £400—were their own moneys, and came out of their own pocket.

Their Lordships cannot help thinking that the fallacy in the judgment of Nathan, J., is in some measure due to his having taken an erroneous view of the agreement of the 4th of June. He

deals with that agreement as bearing on the questions whether there was a business and whether these were advances, and he considers its effect to be that "the whole of the future "production of Mr. Rees' logwood trade was "validly prospectively assigned." He uses those words, he says, "advisedly, having reference to "the decision of the House of Lords in *Holroyd* "v. *Marshall* (10 H.L. 191); the result being that "as each parcel of logwood reached Rees' hands "it became the property of Mr. De Mercado." Their Lordships are unable to agree with this view, nor do they think that the case of *Holroyd* v. *Marshall* has any application to the agreement in question.

In the result their Lordships will humbly advise Her Majesty that the appeal must be dismissed.

The Appellant will pay the costs of the Appeal, including the costs of the application for leave to add certain documents to the Record.