

It was further contended that the contract does not warrant a suit for thirty claims, or in the alternative for £30,000 but as there is a claim for a declaration that the plaintiff is entitled to an undivided interest with the defendant company in sixty claims on the farm, the fact that he has put in an alternative claim for less cannot, in my opinion, vitiate his declaration.

The exception must be overruled with costs.

Plaintiff's Attorneys: *Steytler, Grimmer & Murray*; Defendant's Attorneys: *Webber & Wentzel*.

[Reported by *F. B. Adler, Esq., Advocate.*]

WOLPERT v. ABOLSKY.

1913. June 26; July 1. WARD, J.

Insolvency.—Act of.—Nulla Bona Return.—Subsequent Agreement to Pay.—Not a Ground for Sequestration.

Respondent made a return of *nulla bona* to a writ upon a judgment, and then with the knowledge of applicant arranged with the judgment creditor to pay off the debt in instalments. Thereafter respondent became indebted to applicant who, relying solely upon the above return of *nulla bona* now applied to sequester respondent's estate, *Held*, dismissing the application, that in the circumstances the return was not one of which the applicant could take advantage.

Hornabrook v. Bright (17 C.T.R. 805) discussed.

Application for the sequestration of respondent's estate. The facts appear from the judgment.

L. Greenberg, for the applicant: The denial of the debt is not *bona fide*; see *Kleinenberg v. Dupreez* (1910, T.S.559). As there is a *nulla bona* return, the *onus* is on respondent to prove his solvency.

L. Blackwell, for the respondent: There has been no act of insolvency, the debt on which the return was made has been satisfied by the arrangement for liquidation by instalments; see *Hornabrook v. Bright* (17 C.T.R. 805) *per* HOPLEY, J.; *in re Harpur* (2 E.D.C. 103) *per* SHIPPARD, J., at p. 106.

But assuming an act of insolvency, this is not a case in which the Court will sequester, *Bloxam v. Green* (1905, T.S. 333):

Greenberg, in reply: The reasoning in *Hornabrook's* case (*supra*) is difficult to follow.

Cur. adv. vult.

Postea (July 1st).

WARD, J.: The applicant petitions for the sequestration of respondent's estate. The respondent denies the debt and the act of insolvency alleged.

The applicant claims by virtue of a debt for £50 contracted under an agreement entered into on the 28th April last and accrued due on the 15th June, and by virtue of a debt under the same agreement not yet due. On the 31st March the respondent, it is alleged, failed to satisfy a judgment of the R.M. Court, Johannesburg, for the sum of £7 2s. 6d., plus 12s. 6d. costs of writ, or to point out sufficient disposable property wherewith to satisfy the same, making a return of *nulla bona* in respect thereof. The respondent admits the return of *nulla bona*, but says that immediately thereafter, with the full knowledge of the applicant and his attorneys, he entered into arrangements with the judgment creditor to liquidate the amount by instalments of £1 per month, and has paid £3 already on account.

It is urged upon these facts that there is no act of insolvency.

Hornabrook's case, quoted by Mr. *Blackwell*, is a decision directly in point, and is an authority for holding that the respondent has satisfied the judgment, and that there is therefore no act of insolvency. But it is not necessary to go so far as the learned judge in that case, for in the present case the respondent settled his difference with the judgment creditor by agreeing to pay in instalments prior to the agreement between himself and the applicant, upon which the applicant's claim arises. It would be strange if the Court were to hold that the applicant could take advantage of a return of *nulla bona* made to his knowledge before he contracted at all with the respondent, and which was followed by a compromise with his judgment creditor, who clearly could not take advantage of the return thereafter to sequester the estate.

As this act of insolvency was the only ground upon which the applicant relied, judgment must be for respondent with costs.

Applicant's Attorneys: *Kaplan & Cooper*; Respondent's Attorneys: *Israel & Duuring*.

[Reported by *G. Hartog*, Esq., Advocate.]