HILLHOUSE & McHARDY v. GERSOHN.

1909. *May* 1. MAASDORP, C.J.

Insolvency.—Compulsory sequestration.—Sec. 5 *of chap.* 104 *of the Law Book.—Benefit of creditors.*

The Court has no discretion in an application for compulsory sequestration, where there is proof of an act of insolvency, to refuse the final order on the ground that it is not for the benefit of the creditors.

Scott v. *Frame* (17 C.T.R. 1133) followed.

This was an application for a final order of sequestration of the defendant's estate. A provisional order had been granted on the 15th March on the ground of two acts of insolvency, namely, the publication of a notice of intention to surrender on the part of the defendant and an attempt to effect a compromise of 5s. in the £ with the creditors.

Blaine, K.C., for the plaintiffs.

Dickson, for the defendant: I raise an objection *in limine* that the plaintiffs are not creditors for £50, and therefore under sec. 6 of chap. 104 of the Law Book they are not in a position to petition the Court.

The Court found on the facts alleged in the affidavits that the plaintiffs were creditors at all events for an amount of over £62.

Dickson: It is not for the benefit of the creditors generally that the estate should be sequestrated. The Court has a discretion, and may refuse the order. The words "it shall and may be lawful" in sec. 5 of our law give this discretion; and the words "upon petition made in writing against any person having committed any act of insolvency by any creditor or creditors whose debt or debts amount to the value hereinafter provided, and setting forth the amount of the debt of such creditor, and

the cause thereof, and the alleged act of insolvency, and praying that the estate of such person may be sequestrated for the benefit of his creditors," of the same section, show that proof is required that the sequestration will be for the benefit of the creditors.

[MAASDORP, C.J.: The words "for the benefit of the creditors" is merely part of the prayer: you need not prove your prayer.]

The wording of sec. 7 of Law 13 of 1895 of the Transvaal is practically the same as that of our law.

[MAASDORP, C.J.: The wording is different.]

See *Michaelson* v. *Lowenstein* ([1906] T.S. 12); *Macindoe* v. *Goldberg* ([1907] T.H. 226); *Bloxam and Others* v. *Green* ([1905] T.S. 333); *Moller* v. *Height* (4 S.A.R. 101); *Trustee De Vos* v. *Bourhill* (Buch. 1868, p. 1).

Blaine, K.C., in reply: Our law is based on the Cape law. See *Scott* v. *Frame* (17 C.T.R. 1133).

MAASDORP, C.J.: I am inclined to take the same view in this case as Mr. Justice BUCHANAN did of the law in the case quoted by Mr. *Blaine*. The plaintiff in a case of this sort has the right to claim that his debt shall be paid, even though it may not be in the interest of the other creditors. If the sequestration of the estate is not for their benefit they can pay the petitioning creditor out. Sec. 5 of chap. 104 of the Law Book says, if the petitioning creditor proves his debt, "it shall and may be lawful" for the court to order the debtor's estate to be sequestrated. It is presumed that it is for the benefit of the other creditors. I adopt the words of Mr. Justice BUCHANAN in the judgment in the case quoted. Final sequestration of the defendant's estate is therefore granted as prayed.

Plaintiffs' Attorney: *C. J. Reitz;* Defendant's Attorneys: *McIntyre & Watkeys.*