

Ex parte JAMES. *In re* CONDON.

L. J.J.

Bankruptcy—Execution Creditor—Notice to Sheriff of Petition for Liquidation—Neglect of Creditors to pass Resolution—Subsequent Petition and Adjudication of Bankruptcy—Bankruptcy Act, 1869, ss. 87, 125, sub-s. 12—Bankruptcy Rules, 1870, r. 267—Mistake of Law, Relief against.

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July 10.

A creditor levied execution on his debtor's goods for a debt exceeding £50, and the sheriff seized and sold them. The debtor filed a petition for liquidation, and served notice of it on the sheriff before the sale. Before the expiration of fourteen days after the sale the first meeting of the creditors was held, but no resolution was passed. The sheriff then, after the expiration of the fourteen days, paid the proceeds of the sale to the execution creditor. Afterwards a bankruptcy petition was filed by another creditor, which stated the filing of the petition for liquidation and the failure of the proceedings, and the debtor was adjudicated bankrupt under this petition. The trustee demanded the proceeds of the sale from the execution creditor, who paid them to him, believing that he was legally entitled to them:—

Held, that the liquidation proceedings entirely came to an end on the failure of the meeting to pass a resolution, and that the debtor was not adjudged a bankrupt on the liquidation petition within the meaning of the 87th section of the *Bankruptcy Act, 1869*; and the sheriff was therefore justified in paying the proceeds of the sale to the execution creditor:

Held, also, that the Court had jurisdiction to relieve against the mistake of law, and to order the money to be repaid by the trustee to the execution creditor.

Proceedings under Rule 267 of the *Bankruptcy Rules, 1870*, for adjudication of bankruptcy based upon the neglect of the first meeting of creditors to pass a resolution for liquidation or composition, must be commenced by petition.

THIS was an appeal from a decision of Mr. Registrar *Roche*, sitting as Chief Judge in Bankruptcy.

In the month of October, 1873, *H. Bradshaw* commenced an action in the Court of Queen's Bench against *John Condon*, in which he obtained judgment for his debt and costs, amounting to £274 3s. 5d.

On the 15th of November, 1873, *Bradshaw* sued out a writ of *fieri facias* against *Condon*, and on the 17th of November the Sheriff of *Middlesex* took possession under it of certain goods of the Defendant's at *Millwall*.

On the 18th of November, *Condon* filed a petition for liquidation by arrangement, notice of which was served on the sheriff on the 22nd of November.

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On the same day the sheriff sold the goods, which produced a net sum of £142 15s. 6d.

On the 5th of December the first general meeting of creditors was held, but no resolution was passed except that the meeting should be adjourned till the 16th of December.

On the 16th of December neither the debtor nor his solicitor was present at the adjourned meeting, and no resolution was passed by the creditors. No further proceedings were taken in the liquidation.

On the 17th of December the sheriff paid *Bradshaw* the sum of £142 15s. 6d., which he had retained to await the result of the petition for liquidation.

On the 19th of December a petition for adjudication in bankruptcy was filed by another of *Condon's* creditors. This petition was filed under Rule 267 of the *Bankruptcy Rules*, 1870, and stated the filing of the petition for liquidation by arrangement, and that no resolution had been passed at the meeting of creditors, and that no other proceedings had taken place under the petition for liquidation.

On the 10th of January, 1874, *Condon* was adjudicated bankrupt, and Mr. *J. E. James* was appointed trustee of his estate.

Soon after the appointment of the said trustee the solicitors for the trustee threatened *Bradshaw* with proceedings if the money received by him from the sheriff was not paid over to the trustee, and on the 23rd of February, 1874, *Bradshaw*, being advised that, according to the law as then laid down, he would have no defence against such proceedings, paid the sum of £142 15s. 6d. to the trustee.

After the decision of the case of *Ex parte Villars* by the full Court of Appeal (1), *Bradshaw* applied to the trustee to refund the money, and the matter having been brought before the Registrar, on the 26th of June he made an order to that effect. From this decision the trustee appealed.

Mr. *Thesiger*, Q.C., and Mr. *Cooper Willis*, for the Appellant:—

The question in this case really turns upon the construction of

(1) *Ante*, p. 432.

the clause in the 87th section of the *Bankruptcy Act*, 1869 (1), which provides that in cases where notice of a bankruptcy petition has been served on the sheriff, if "the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer, has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him." Under the 125th section a petition for liquidation is for this purpose equivalent to a bankruptcy petition; and we contend that, according to the true construction of this section, the debtor has in this case been adjudged a bankrupt on the petition which was served on the sheriff, and that the proceeds ought, therefore, not to have been paid over to the execution creditor. The proceedings in the liquidation were still pending: *Ex parte Jeffery* (2); and it was the duty of the sheriff to keep the proceeds beyond the fourteen days until he was able to see, not only that the liquidation would not proceed, but that no bankruptcy would arise out of it. In the present case bankruptcy has resulted from the liquidation, for the Court made the order for adjudication under Rule 267 of the *Bankruptcy Rules*, 1870 (3), based upon the neglect of the creditors to pass any resolution; and

(1) 32 & 33 Vict. c. 71, s. 87: "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding fifty pounds, and sold, the sheriff, or in case of a sale under the direction of the County Court, the high bailiff, or other officer of the County Court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if such notice having been served the trader against whom

the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

(2) Law Rep. 17 Eq. 61.

(3) *Bankruptcy Rules*, 1870, r. 267: "In the event of any neglect on the part of the creditors to pass such resolution, the Court may on the application of any of the creditors, and after notice to the debtor, make an order of adjudication against the debtor, or direct the bankruptcy to be proceeded with, as the case may be."

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it had also power to make the order under the *Bankruptcy Act*, 1869, s. 125, sub-s. 12 (1). For this purpose, no petition in bankruptcy was necessary; it would have been sufficient to give the Court notice of the failure of the liquidation proceedings: *Ex parte Page* (2); *Ex parte Mylne* (3).

We also contend, even if the Court should be against us on the construction of the Act, that the money having been paid to the trustee voluntarily, under a mistake of law, cannot now be recovered from him. The trustee is not an officer of the Court, but the representative of the general body of the creditors, and he did not receive the money from the execution creditor *virtute officii*, but simply as such representative: *Brisbane v. Dacres* (4); *Steele v. Williams* (5).

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the execution creditor:—

The debtor cannot be said, in any sense, to have been adjudged a bankrupt on the liquidation petition. The proceedings in liquidation were entirely at an end. The meeting had come to a conclusion without passing any resolution, and there could be no fresh first meeting, *Ex parte Cobb* (6), and it was impossible that anything further could be done under it. The petition in bankruptcy was a totally new proceeding; it is true that the petition recited the petition for liquidation, but that was because the filing of the petition was the act of bankruptcy on which the bankruptcy petition was founded: *In re Jones* (before C. J. *Bacon*, Feb. 25, 1870); *Ex parte Duignan* (7). It could never have been intended by the Legislature that after the sheriff knew that the liquidation proceedings had failed he should keep the money for six months to see whether a bankruptcy petition would be

(1) 32 & 33 Vict. c. 71, s. 125, sub-s. 12: "If it appear to the Court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge

the debtor a bankrupt, and proceedings may be had accordingly."

(2) 25 L. T. (N.S.) 716.

(3) *Roche and Hazlitt's Law and Practice of Bankruptcy*, 2nd Ed. p. 493.

(4) 5 Taunt. 143, 151.

(5) 8 Ex. 625.

(6) Law Rep. 8 Ch. 727.

(7) 40 L. J. (Bkey.) 68.

founded upon the act of bankruptcy committed by filing the petition for liquidation. The *Bankruptcy Act*, 1869, s. 125, sub-s. 12, has no application to a case where no resolution at all has been come to, and where therefore the liquidation proceedings are at an end. The sheriff was therefore justified in paying the money to the execution creditor: *Ex parte Villars* (1).

Then with respect to the second point, we contend that the trustee is an officer of the Court, and is bound to administer the money in his hands according to the principles of the law of bankruptcy. By the 20th section of the *Bankruptcy Act*, 1869, he is placed in the same position as a receiver of the Court of Chancery. But independently of the nature of the office of the trustee, the rule that relief cannot be given for a mistake of law has never been considered by the Court of Chancery an inflexible rule, and has been departed from in cases where manifest injustice would result from it: *Re Saxon Life Assurance Society* (2); *Stone v. Godfrey* (3).

Mr. *Thesiger*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Registrar must be affirmed. I adhere to the opinion which I expressed in *Ex parte Villars*, that the rights of an execution creditor ought to be respected except so far as the Act of Parliament has expressly interfered with them. In levying his execution, he has only done what he had a right to do, and he is entitled to enjoy the proceeds of it unless he is restrained from so doing by the Act. The onus of proof is thrown on those who desire to shew that he ought not to reap the fruits of his execution.

In this case it is impossible to say that the adjudication of bankruptcy was made on any petition of which the sheriff had notice before he paid the money to the execution creditor. If before the proceedings in liquidation had failed another petition had been presented before the money had been paid over by the sheriff, it would have been a different case. But the result of what took

(1) *Ante*, p. 432.

(2) 2 J. & H. 408.

(3) 5 D. M. & G. 76.

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place at the meeting of the 16th of December was, that the proceedings under the petition for liquidation came hopelessly to an end. There was nothing in the nature of a resolution, nothing that could result in the appointment of a trustee. Any creditor might, if he had chosen to do so, have presented a petition for adjudication within the fourteen days, and thus have intercepted the right of the execution creditor; but this was not done, and I think therefore that the sheriff was justified in paying over the money, and that the execution creditor was entitled to keep the proceeds of the sale.

With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people. The appeal must be dismissed, but without costs.

SIR G. MELLISH, L.J. :—

I am of the same opinion. This case cannot, in principle, be distinguished from *Ex parte Villars* (1) as to the construction of the 87th section. Although a petition for adjudication is alone mentioned in it, it must be understood, under sect. 125, to apply equally to a petition for liquidation by arrangement, and therefore it must be read as if a petition for liquidation had been mentioned in it. When, therefore, the sheriff has received notice of a liquidation petition having been filed, he is bound to keep the proceeds of the sale beyond the fourteen days, until he knows

(1) *Ante*, p. 432.

whether the proceedings under the petition have come to an end or not. The question is, therefore, what in the case of proceedings in liquidation corresponds to an adjudication in bankruptcy? The 87th section says in effect that the sheriff is to keep the proceeds of the sale until he has ascertained whether the debtor against whom the bankruptcy petition has been presented is or is not adjudicated bankrupt on that petition or any other petition of which the sheriff has notice; and, by the 125th section, the appointment of a trustee under a liquidation petition is made equivalent to an adjudication in bankruptcy. I am of opinion that when, on the 16th of December, the creditors dispersed without coming to any resolution, all proceedings under the liquidation came to an end, and it became impossible, under that petition, that a trustee should be appointed. But it is contended that, although it was impossible that a trustee should be appointed, it was possible for the debtor to be adjudicated bankrupt on the declaration of insolvency contained in the petition for liquidation, and that the sheriff ought to have kept the proceeds of the sale until he had seen whether this would be done or not. In my opinion it would be a very inconvenient construction to put upon the 87th section. The effect would be, that the sheriff would have to keep the money for six months, because, at any time within that period, a bankruptcy petition founded on the liquidation petition might be presented against the debtor. It was argued that the 267th rule only requires that notice shall be given to the Court, and not that a petition shall be filed in the event of neglect on the part of the creditors to pass a resolution for liquidation. But I think that it is not competent to the Court to apply the General Rules in such a way as to take away from an execution creditor the rights given him by the Act of Parliament, and that, according to the true construction of the 125th section, it was not contemplated that a debtor who has filed a liquidation petition should be adjudicated bankrupt on the petition for liquidation without a petition in bankruptcy, unless the case came within the 12th sub-section of that section. Whether, under that sub-section, the debtor could be adjudicated bankrupt without a petition in bankruptcy, it is not necessary now to decide, because it appears to me that that sub-

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section only applies to cases in which the creditors have passed a resolution and made some progress in the liquidation. The Chief Judge has very properly decided that an application under the 167th rule must be made by petition. At any rate, in my opinion, an execution creditor cannot have his rights taken away by the Rules.

I am therefore of opinion, consistently with *Ex parte Villars* (1), that as soon as the prosecution of the proceedings in liquidation became impossible, the sheriff, having no notice of any other petition, was justified in paying over the money to the execution creditor, and that it cannot be recovered from him.

With respect to the second point, namely, the payment of the money to the trustee under a mistake of law, I entirely agree with the observations of the Lord Justice.

I also agree that the appeal should be dismissed without costs.

Mr. *Thesiger* asked that the costs of the trustee might be paid out of the estate.

SIR W. M. JAMES, L.J. :—

You must make that application to the Registrar. It appears to me a suitable case for the trustee to have his costs out of the estate, but it is not our practice to make such an order.

Solicitors for the Appellant: Messrs. *Chorley & Crawford*.

Solicitors for the Respondent: Messrs. *Ravenscroft & Hills*.

(1) *Ante*, p. 432.