***Judgment** of the Lords of the Judicial Committee of the Privy Council on the Appeal of Railton* v. *Wood, from the Supreme Court of New South Wales; delivered 28th June* 1890.

Present:

THE EARL OF SELBORNE.
LORD WATSON.
LORD FIELD.
SIR BARNES PEACOCK.

[*Delivered by Lord Field.*]

This appeal is brought before their Lordships from two orders of the Supreme Court of New South Wales, but in both cases the same question, viz., the construction of the 41st section of the Colonial Insolvent Act, 5 Vict., No. 17 of 1841, is raised.

The material facts are not in dispute.

The Appellant, who was the Plaintiff below, is the owner of the Telegraph Hotel, at Inverell, New South Wales.

It was in lease to one Gorman, and at the beginning of August 1887 the sum of 332*l.* 18*s.* 4*d.*, being more than six months' rent, was in arrear.

For that arrear the Appellant, on the 2nd August, distrained upon all the goods in the hotel, and afterwards impounded and made an inventory of them in due course.

Upon the same day a man named Bell, by the authority of the Respondent, also entered and claimed possession of the goods.

62664. 100.—7/90. A

On the 4th August Gorman the tenant having committed an act of insolvency, his estate was placed under sequestration under the Insolvent Act above mentioned, but beyond giving the Appellant notice of the sequestration and of his appointment as official assignee, the latter in no way intervened or interfered with the Appellant's distress.

On the 8th August the Respondent forcibly and against the will of the bailiff (the goods being still impounded) removed them from the premises, and on the 11th August the present action was brought for that pound breach and removal under the Colonial Statute 15 Vict., No. 11, by virtue of Section 18 of which the Appellant claims to be entitled to treble damages.

The case was tried before His Honour the Chief Justice of New South Wales and a jury.

The above facts were given in evidence, and it also appeared that the Respondent claimed to justify what he had done upon the ground that the goods had become his property under a bill of sale executed by the tenant, and dated the 7th May previous to the distress.

By that deed (the validity of which was not disputed) the goods in question were assigned to the Respondent by way of mortgage for securing an advance of 1,800*l.*

The deed also comprised the licenses, goodwill, and lease of the hotel, and contained the usual clauses assuring to the tenant quiet enjoyment until default, and giving to the mortgagee power to seize and sell in that event.

The value of the goods was put by the Appellant at something more than 1,000*l.*, and by the Respondent at 600*l.*

It did not appear what sum was due upon the mortgage, but it seems to their Lordships to have been assumed below and to be in accordance with the probabilities of the case that the sum secured

was far in excess of the value of the security, and that there was therefore no beneficial interest in the goods vested in the tenant, and that the whole property was in the Respondent.

Upon these facts the learned Chief Justice directed a verdict for the Appellant for single damages 355*l.* 15*s.* 4*d.*, but reserved leave to her to move to increase the amount as the Court might direct, and to the Respondent to move to enter the verdict for him.

Under this leave cross rules were obtained, and after argument the Respondent's rule was made absolute and the Appellant's discharged, and it is in both these respects that the Appellant complains.

The argument below and at their Lordships' bar was properly directed to the only material question in the case, which is, whether the Respondent was justified in taking the goods out of the possession of the Appellant's bailiff after the order for sequestration. The 41st section of the Colonial Insolvent Act, 5 Vict., No. 17, is in these words,—"That no distress for rent shall "be made or levied or proceeded in after any "order made or sequestration as aforesaid, but "the landlord or party to whom the rent shall "be due shall be entitled to receive out of the "assets of the estate so much rent as shall be "then due, not exceeding six months' rent in "the whole, and shall be allowed to come in as "a creditor and share rateably with the other "creditors for the overplus."

As to the construction of this section the Respondent's contention was that all further dealing by the Appellant with the distress after the making of the order of the 4th August was prohibited, and that there was therefore no longer any bar to the removal by him of his own goods, whilst the Appellant urged that the prohibition only applied to a distress upon goods which formed part of the insolvent estate to be ad-

ministered as assets, and also that even otherwise the prohibition in question was at the election of the official receiver, and did not justify the pound breach by the Respondent.

Upon this latter contention it is not necessary for their Lordships to express any opinion, they having come to the conclusion that the Appellant's contention upon the construction of the statute is well founded, and that the judgment of the Court below cannot be supported.

The rules of construction are now well settled. The authorities are numerous, but their Lordships cannot find a more appropriate enunciation of the rule applicable to the present case than that expressed in the judgment of one of their Lordships (Earl of Selborne) and of the late Earl Cairns in the case of Hill *v.* E. and W. India Dock Co., 22 Chancery Division, p. 14, and, on appeal to the House of Lords, 9 Appeal Cases, p. 453.

The question which arose in that case was whether the 23rd section of the Imperial Bankruptcy Act of 1869, in the case of a bankrupt who was the assignee of a lease, affected the rights and liability of the lessor and original lessee as between themselves, and this is what Lord Selborne says, at page 23 of 22 Chancery Division,—

"On principle, it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself, and injurious to third parties, with whose interests the statute need not and does not profess to directly deal. In many cases . . . . . the effect of the statute, if it were construed according to the Appellant's argument, would be to do a great deal more harm to third parties outside the administration of bankruptcy than it can do good to anybody else."

On appeal to the House of Lords, Lord Cairns says, at p. 454,—

"It is said that the 23rd section of the Act of 1869 produces this result, and I admit freely that the section seems to me capable of that construction. No doubt, if you read it literally it does seem to provide that, 'when any property 'of the bankrupt acquired by the trustee under 'this Act consists of land of any tenure burdened 'with onerous covenants, the trustee may by 'writing under his hand disclaim such property, 'and upon the execution of such disclaimer the 'property disclaimed shall, if the same is a lease, 'be deemed to have been surrendered.' . . .

"It is possible that that may mean that, to all intents and purposes, as between all persons, persons actually concerned in the bankruptcy and those not so concerned, it shall be a surrendered lease, and shall be altogether out of the case. But, on the other hand, is that the only interpretation? . . . Now, . . . the purpose of this section, and indeed the purpose of the whole statute, is, in the first place, to clear and discharge the bankrupt in cases where it is proper that *he* should be discharged from liability; in the next place, to facilitate as early as possible the distribution of the property which is to be divided among the creditors, and the winding up of the bankruptcy; and, in the third place, to protect the trustee from any liability to which he might be subject, and to which he ought not to be subject beyond what is necessary for the purpose of accomplishing the two prior objects. If, therefore, the statute can admit of any construction limited to these particular objects, we must consider whether that is not a construction preferable to the first to which I have referred."

And a little further on, the Noble Lord says,—

"Where there are two constructions, the one of

" which will do, as it seems to me, great and " unnecessary injustice, and the other of which " will avoid that injustice, and will keep exactly " within the purpose for which the statute was " passed, it is the bounden duty of the Court to " adopt the second and not to adopt the first of " those constructions."

Now, applying these principles to the present case, what do their Lordships find ?

The language of the statute in describing what it is which it is intended to prohibit, " distress for rent," is so general as to require (as indeed was admitted on both sides at the bar) some limitation in order not to lead to consequences apparently absurd or unjust.

What and whose rent ? from and to whom due ? what and whose goods ? All goods on the premises liable to be distrained by the insolvent's landlord, no matter whose property they are, or only those goods which form part of the estate to be administered ?

Both of the latter constructions are within the language of the section, and in order to ascertain which is to be preferred, their Lordships must look at the provisions of the statute, and its purview and policy.

Now it is a statute, as described in the Preamble, for " giving relief to insolvent debtors, " and providing for the due Collection, Adminis- " tration, and Distribution of Insolvent Estates," and it contains all the usual series of provisions apt to carry those objects into effect, amongst them the 41st section finds in that view its appropriate place, and no section was pointed out to their Lordships dealing with the rights and liabilities of third parties, except when they come into competition with and affect the rights of creditors.

The special policy of the statute is also in harmony with the established policy of legislation

in bankruptcy or insolvency, which aims at placing limitations upon the exceptional remedy of the landlord when it comes into competition with the interests of the general body of creditors, and the special language of the section points to that policy in the present instance.

It places a limit upon the undoubted legal right of the Appellant to a preferential hold upon specific property which was amply sufficient to meet her claim, and it substitutes for it a payment of the rent in full for six months, leaving her to her right of proof for the rest, but inasmuch as the payment in full is to come out of the assets of the estate, the reasonable inference is that the remedy taken away was one which was in force as against the estate, and not against the goods of a third party, who, if the Respondent's contention is correct, would take all the benefit of the limitation of the remedy, and contribute nothing to the substitute.

Again, the Respondent's construction would tend to throw upon the insolvent estate a liability to pay six months' rent in full out of assets which would not in any way arise from the abandonment to the estate of any equivalent.

It appears to their Lordships, therefore, that to read the prohibition as affecting a distress of goods the property of a third party, would be extending it beyond the scope of the general object and policy of the Act, and injurious to the landlord's rights.

For what is the Legislature supposed to do in that case?

It is supposed to have interfered with the Appellant's legal right of distress, to have rendered useless to her all the expenses incurred before the order for sequestration, and, whilst showing an intention to give her a substitute, which might not

unreasonably be supposed to be adequate having regard to general policy, viz., payment in full of six months, it has limited that right to payment "out of assets," which in such a case as the present, where a bill of sale holder has swept all tangible property into his security (and they are frequent), would render the substitute absolutely futile.

Of the two possible constructions, therefore, their Lordships prefer that which does not extend the operation of the statute to collateral effects and consequences beyond its general objects and policy, and injurious to the landlord, with whose interests in competition with those of a bill of sale holder the statute has not and does not propose directly to deal.

The view which their Lordships thus take is strongly supported by the decision of the Court of Queen's Bench in this country in the case of Brocklehurst *v.* Lawe, 7 E. & B., 176.

It is true, as pointed out by the Court below in the present case, that in the statute which was in Brocklehurst *v.* Lawe the subject of construction the distress was expressly stated to be one levied "upon the goods or effects of any bankrupt," and that one of the learned Judges who decided that case adverted to that circumstance in the course of the argument.

But the expression of these words does not form the ground of the decision, which rested upon the broad principle of construction to which their Lordships have already adverted.

The judgment of the Court in the present case does not appear to their Lordships to have rested upon any construction put by the Court itself upon the statute. Their judgment appears to rest almost entirely upon the authority of a prior case of Cohen *v.* Slade, cited below, and decided in the Supreme Court, New South Wales, in 1871.

But that case cannot, in their Lordships' view of the true principle of construction to be applied, be regarded as an authority to be followed, and their Lordships are also unable to agree in the view taken by the Court below, that that decision had become so incorporated with the general law and practice of the Colony as to lead to the reasonable belief that it had been acted upon so as to render it desirable to uphold it.

For these reasons their Lordships will humbly advise Her Majesty to reverse the judgments of the Supreme Court of New South Wales, to discharge the Repondent's rule to enter the verdict for him, and to make absolute the Appellant's rule to enter judgment for her, with treble damages, and all costs below.

The Respondent must pay the costs of this appeal.