

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Charles Victor Benecke and others v, The  
Hon. James Whittall and another, from  
the Supreme Court of Hong Kong;  
delivered June 29th, 1877.*

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Present :

SIR JAMES W. COLVILLE.  
SIR BARNES PEACOCK.  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.

THIS is an action brought by trustees appointed under the provisions of a deed of the 19th of April 1865, executed by the firm of Augustus Heard and Company, carrying on business in Hong Kong, as well as in other places. The Plaintiffs sue for the purpose of setting aside certain conveyances of real property to the Defendants, merchants in London, on the ground that they were given by way of fraudulent preference.

The first question raised by the Defendants, Appellants, is whether the Plaintiffs have the right to maintain a suit on this ground; and inasmuch as this question, if disposed of in favour of the Appellants, decides the case, their Lordships have thought it desirable to hear the argument upon it in the first instance.

This question depends upon the construction of an ordinance of Hong Kong in 1864 on the subject of bankruptcy, which was passed three years after the well known Bankruptcy Act in this country of 1861, and in a great measure, indeed in a great number of clauses almost *totidem verbis*, follows that enactment.

The material sections of that ordinance for the present purpose are, first, section 163. This comes under the head of "Trust deeds for the benefit of creditors," and enacts as follows: "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, as trustees for the rest, or a trustee on their behalf, relating to the debts or the liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed." Then come several conditions. The first of them is that the deed shall be a conveyance of the estate of the debtor, except a small portion; the next, that a majority in number representing three fourths in value of the creditors shall in writing assent to or approve of such deed. Then come provisions relating to the execution of the trust deed. Then follows a further provision in these terms: "Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left at the office of the Registrar for the purpose of being registered." The next section, 164, provides for a special form and manner of registration of documents of this kind. It requires that "The date, names, and descriptions of the parties to every such deed or instrument, not including the creditors, together with a short statement of the nature and effect thereof, shall be entered by the Registrar in a book to be kept exclusively for the purposes of such registration. Such entry shall be made within forty-eight hours after the deed shall have been left at the

“ office as aforesaid, and a copy of such entry  
“ shall be published in the *Hong Kong Govern-*  
“ *ment Gazette* as soon as reasonably can be  
“ done after, but in no case later than ten days  
“ from, the time of making such entry.”

It is clear that the deed in this case does not fall under the provisions of these sections, inasmuch as it was not proved to have received the requisite assent of creditors. But it was contended, and this in effect was the ruling of the Court below, that this deed being one within the provisions of section 165 fell within those of section 167, and therefore operated to give the Plaintiffs all the rights of action which would have accrued to assignees in bankruptcy. It will be necessary to examine both these sections. Section 165 is in these terms: “ Every deed, instrument, or agreement whatsoever,” and it may be observed that the term “ agreement ” is here inserted, which is not to be found in the previous clause, “ made and executed, by which a debtor not being a bankrupt conveys, or covenants or agrees to convey, his estate and effects, except such portion thereof as aforesaid for the benefit of his creditors.” It may be further observed that this clause contemplates not only a deed conveying the bankrupt’s estate, but an agreement to convey it; the clause proceeds, “ or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court shall allow, be registered in the Court; and in default thereof shall not be received in evidence.”

This section, although it may possibly include

deeds described in the former, embraces a large class of deeds of a very different character, and extends to "agreements" of several kinds. It is wide enough to comprise almost any written agreement, whether under seal or not, which the debtor may execute even without the consent of any of his creditors, appointing an inspector or trustee with a view of winding up or managing his affairs, although it does not convey the whole or any part of his estate, or effect a "*cessio bonorum*." Section 166 is to this effect:—"Every such deed, on being  
 " so registered as aforesaid, shall have a memo-  
 " randum thereof written on the face of such  
 " deed, stating the day and the hour of the  
 " day at which the same was brought into the  
 " office of the Registrar for registration." Their Lordships do not think it necessary to determine whether this last clause refers to the last class of deeds or to the class of deeds before mentioned, or to both. The expression "deed," if taken literally, would not apply to a mere agreement in writing not under seal. But the material question turns on the construction of the 167th section. That section is to this effect: "From and  
 " after the registration of every such deed or in-  
 " strument in manner aforesaid, the debtor and  
 " creditors, and trustees parties to such deed,  
 " or who have assented thereto, or are bound  
 " thereby, shall," &c. This description appears to be applicable to the different classes of persons who are specified in section 163, that is to say, the debtor, the creditors, the trustees, and those who without having assented to the deed are bound thereby; certainly the latter expression would not apply to deeds under clause 163. Then it proceeds,—“shall in all matters  
 “ relating to the estate and effects of such debtor  
 “ be subject to the jurisdiction of the Court,  
 “ and shall respectively have the benefit of and

“ be liable to *all the provisions* of this ordinance  
 “ in the same or like manner as if the debtor had  
 “ been adjudged bankrupt, and the creditors had  
 “ proved, and the trustees had been appointed  
 “ creditors assignees under such bankruptcy.”  
 In the course of the argument it has been admitted that the debtor under such a deed as the present is not entitled to the benefit of all the provisions in the ordinance, and that he cannot avail himself of the two contained in sections 168 and 169. The section proceeds, —“And the existing or future trustees of  
 “ any such deed or instrument, and the  
 “ creditors under the same, shall, as between  
 “ themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and  
 “ remedies with respect to the debtor, and his  
 “ estate and effects, and the collection and  
 “ recovery of the same, as are possessed or  
 “ may be used or exercised by assignees or  
 “ creditors with respect to the bankrupt, or  
 “ his acts, estate, or effects in bankruptcy.”

It appears to their Lordships difficult to suppose that the Legislature could have intended to give this effect to every deed executed under the 165th clause. As before pointed out, a deed might be executed and registered under that clause, which would not pass the estate of the debtor to his trustees. If so, how could they have, with respect to that estate, all the rights to be exercised by assignees in bankruptcy? Further, it appears improbable that the Legislature should have intended that a mere deed, or a mere writing without deed, whereby a debtor has conveyed, or has agreed to convey, any portion of his estate to any person under the name of an inspector or otherwise, without the consent of a single creditor, should have the effect of clothing that person



with all the rights of assignees in bankruptcy. The difficulty of so construing this clause is very much increased by the two clauses which follow it.

The next is section 168, which is to this effect :

“ After the copy of the entry made by the Registrar as aforesaid shall have been published in the *Hong Kong Government Gazette*, no execution or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of the colony, shall be available to any creditor or claimant without leave of the Court; and a certificate of the filing and registration of such deed under the hand of the Registrar, and the seal of the Court, shall be available to the debtor for all purposes as a protection in bankruptcy.” It

has been admitted that this section cannot apply, partly because it refers to an entry in the *Hong Kong Government Gazette* which would apply only to instruments described in section 163, and, further, because it could not have been intended that by merely executing such a deed as has been spoken of under section 165, the debtor should be able to protect his property from process. The next section (169) is as follows :

—“ In case any petition shall be presented for an adjudication against a debtor after his execution of such deed or instrument as is herein-before described, and pending the time allowed for the registration of such deed or instrument, all proceedings under such petition may be stayed if the Court shall think fit, and in case such deed or instrument shall be duly registered as aforesaid, the petition shall be dismissed.” It has been admitted that the words “ deed or instrument ” here must be narrowed in their construction to

deeds or instruments under section 163; and that it is impossible to suppose that this section could apply to deeds under section 165. But if that be so, if these two sections admittedly do not so apply,—as it is clear they cannot apply,—it seems extremely difficult to regard the section immediately before them as applying. Their Lordships are disposed to read these three sections together, to treat sections 168 and 169 as supplementary to section 167, and to hold them all as applying only to deeds coming within the provisions of section 163. Section 165 may be described as an isolated section containing an isolated provision, doubtless a very valuable one, to the effect that if a debtor chooses to execute any deed or agreement relating to the management of his property, or the liquidation of his debts, or his release from liability, he shall not keep it secret, but shall register it for the information of persons whom it shall concern, under the penalty of its not being admissible in evidence unless he does register it.

Such being the view which their Lordships would have been disposed to take of this ordinance if there had been no authority on the subject, they think it right now to refer to some of the cases decided upon the construction of the Act of 1861, the clauses of which, as before observed, are almost identical, in reference to the subject matter now under discussion, with the clauses in the Ordinance of Hong Kong.

The first case to be referred to is the case of *Ex parte Morgan* (1. De Gex, Jones, and Smith, p. 288), which was decided by Lord Westbury, than whom, it will be admitted, no man was more competent to construe the Bankruptcy Act of 1861. The part of the case material to the present inquiry is correctly stated in the first part of the marginal note:—"The registration  
" of trust deeds under the 192nd and under

“ the 194th sections of the Bankruptcy Act,  
 “ 1861, although in practice performed by the  
 “ same officer, are distinct, and have different  
 “ operations; and where, for the want of the  
 “ papers required by the orders, registration  
 “ under the former section had been refused by  
 “ the officer, and the applicant had registered  
 “ the deed under the 194th section: Held, that  
 “ the registration did not prevent the deed,  
 “ which was an assignment of all the debtor’s  
 “ property, from being an Act of bankruptcy.”

It should be here observed that the 192nd, 193rd, and 194th sections of the Act of 1861 correspond respectively with the 163rd, 164th, and 165th sections of the Bankruptcy Ordinance of Hong Kong. In the course of his judgment Lord Westbury observes:—“The protection intended by the statute to be given to a deed under the 192nd section was a protection extending only to such deeds as should be duly registered in the manner and form required by that section and the 193rd, which is consequent thereon. The immediate question which I have to determine is, whether the deed before me is a deed which has been so registered.” Then he says:—“To determine that question it is necessary to observe, that in addition to the registration prescribed by the 192nd and 193rd sections, it appeared to the Legislature expedient to require another form of registration for deeds which did not exactly comply with the requirements of the 192nd section, and accordingly the 194th section gives the power and imposes the obligation of registering any deed of composition or deed for the benefit of creditors, which has not been registered under the 192nd section in the Court of Bankruptcy; and the words are material. A deed under the 192nd section is to be registered by the deed being brought



“ into the office of the Chief Registrar, and the  
“ solemnities attending its registration are clearly  
“ defined. A deed under the 194th section is  
“ directed to be registered simply in the Court  
“ of Bankruptcy. For convenience sake, by a  
“ general order, I have given both forms of  
“ registration to the same officer and to the  
“ same office; but the registration under the  
“ one section is very different from the registra-  
“ tion under the other section. The 194th  
“ section was introduced with a double view.  
“ First, because it was apprehended that many  
“ deeds of composition might still be made  
“ which would not be brought under the 192nd  
“ section, and which might have an injurious  
“ effect by reason of their being secret deeds of  
“ arrangement. The obligation, therefore, was  
“ imposed upon all persons, parties to such a  
“ deed, of bringing it in to be registered within  
“ twenty-eight days after its approval in the  
“ Court of Bankruptcy, and a penalty is attached  
“ in case of default, that the deed shall not be  
“ receivable in evidence. Another object of the  
“ enactment was this,—it was felt that possibly  
“ many a deed of composition might not be  
“ perfected in the manner required by the  
“ 192nd section within the twenty-eight days,  
“ and yet that all the creditors might be willing  
“ to accede to such a deed; and, therefore, power  
“ was given to register, under the 194th section,  
“ a deed which did not exactly comply with the  
“ requirements of the 192nd section.” Then he  
“ goes on to say:—“These two forms of registra-  
“ tion, therefore, being very different, the con-  
“ sequences of the one form do not attach to  
“ the other. The consequence of an observance  
“ in every respect of the terms of the 192nd  
“ section is that the deed is binding on the  
“ minority of the creditors who do not execute  
“ or assent to it. No such consequence is

“ attached to registration under the 194th section.” And accordingly he held that the conveyance there, being a conveyance of all the debtor’s property, and not being registered under the 192nd and 193rd sections, was an act of bankruptcy.

It may be desirable to refer next to the case of *Symons v. George*, (33 *Law Journal (new series)*, *Exch.* 231.) Their Lordships cannot help thinking that the marginal note of that case, to which the learned Judges in Hong Kong appear to have referred, may somewhat have misled them. The marginal note is to this effect: “ A trust deed in the form given in Schedule D. of the Bankruptcy Act, 1861, and registered, &c., according to section 192, though not assented to by the prescribed majority of creditors, is by virtue of the 194th and 197th sections,”—the 197th section corresponding to the 167th section in the ordinance—“ subject to the jurisdiction of the Court of Bankruptcy.” It should be observed, however, that the real point decided in this case was no more than this,—that the debtor having conveyed to certain trustees his effects and property, to be administered for the benefit of his creditors as if in bankruptcy, and that property having been delivered in pursuance of the deed of conveyance, it was held that the operation of the deed at Common Law was to pass the property to the trustees, although, incidentally, no doubt, an opinion such as that indicated in the marginal note is expressed. It was upon the same *ratio decidendi* that the decision was affirmed in the Exchequer Chamber. It should be observed that the case which has been before quoted, decided by Lord Westbury, was not drawn to the attention of the Court.

In the subsequent case of *Pearson v. Pearson* (1 *Law Reports*, Exchequer, 310) the Court of Exchequer had their attention more pointedly

called to the provisions of the Bankruptcy Act, and also to the decision of Lord Westbury. It was there held that the legal right to sue in respect of debts and choses in action of the debtor did not pass to his trustees under a deed which fell within the provisions of section 194, and that section 197 did not apply to such a deed so as to give to the trustees appointed under it the rights to sue of assignees in bankruptcy. That is the very point to be determined in this case. If trustees have not by virtue of the operation of ss. 194 and 197 of the English Act (corresponding to ss. 165 and 167 of the ordinance) the power to sue in respect of a chose in action, it is because they have not the rights of assignees in bankruptcy, and if so, it follows they have not the power of assignees in bankruptcy to sue in respect of a fraudulent preference. This case was dealt with by the same Judges, with Baron Channell in addition, who had decided the case of *Symons v. George*, and they came to the conclusion, expressed by Baron Bramwell, that the provisions of section 197 apply only to deeds entered into in conformity with the provisions of section 192. Their Lordships cannot help observing that the learned Chief Justice, when speaking of what he calls the *dicta* of the Judges in this case, and observing that he could not explain them, appears not to have appreciated the full force and effect of the case itself as a clear decision of the very point now in question.

The only other case to be noticed is a case before Vice-Chancellor Bacon, of *Ex parte Atkinson* (9 L. R., Eq., 736), in which, undoubtedly, the Vice-Chancellor does not seem to have accepted in its full breadth the view of the Court of Exchequer that section 197 did not apply to deeds under section 194. It is to be observed, however, that he does not question the decision in *Pearson v. Pearson*. He

says,—“ With most sincere deference therefore to  
“ the learned Judges by whom that case was  
“ decided, and not presuming to question their  
“ decision upon the subject to which it applies,  
“ I must say that it seems to me to be no  
“ authority for the proposition that because a  
“ deed of assignment registered under section  
“ 194 does not enable the assignee to sue in his  
“ own name for a *chose* in action which was  
“ the property of the assignee before the deed,  
“ therefore the 197th section has no applica-  
“ tion to such a deed, and that all the power  
“ and jurisdiction which by the 197th section is  
“ given to the Court of Bankruptcy over every  
“ such deed after registration is wholly ousted.”

The effect of this decision would appear to be that, although the learned Vice-Chancellor yields to the authority of the case in the Court of Exchequer so far as it holds that the provisions of section 167 do not apply to deeds under section 194, so as to give to trustees under them the powers of assignees in bankruptcy, still he thinks that there is some jurisdiction in the Court of Bankruptcy to administer the property. What he actually decided was that the Judge sitting in bankruptcy had power to summon a person to give evidence as to an alleged transfer of property comprised in such a deed, and to commit the witness for contempt for refusing to be sworn. This decision therefore, whether the Vice-Chancellor be right or wrong in the application which he gave to section 197, as to which their Lordships do not think it necessary to pronounce opinion, is certainly not an overruling of the decision of the Court of Exchequer in *Pearson v. Pearson*, which governs the present case.

Their Lordships have therefore come to the conclusion, both upon the decided cases and upon the construction of the ordinance independently of them, that the Plaintiffs have not a right to



sue for the purpose of setting aside the conveyances on the ground that they are a "fraudulent preference" within the meaning of that term in the bankruptcy law.

It has, however, been further argued that, even assuming this, the transaction now impeached constituted a fraud so much exceeding that of a mere fraudulent preference that, independently of any assistance from the bankruptcy laws, the Plaintiffs, by their mere appointment as trustees on behalf of the other creditors, would be entitled to sue to set it aside. Upon this subject their Lordships think it enough to observe, first, that this point does not appear to have been argued or taken in the Court below, and that they are always reluctant to decide upon points which have not been submitted to the inferior Court; and, secondly, that there does not appear to them any ground whatever for supposing that there was any greater fraud in this case than a fraudulent preference in contemplation of the bankruptcy laws, if indeed there was such a fraudulent preference, which, this part of the Appeal not having been fully argued, they by no means affirm.

On these grounds their Lordships will think it their duty humbly to advise Her Majesty that the decision under appeal should be reversed. There will be the usual order with respect to costs in the appeal, and the Court below.

