Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Exchange Bank of Yarmouth v. *Blethen, from the Supreme Court of Nova Scotia; delivered 17th February 1885.*

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The action in which the present appeal arises was brought by the Exchange Bank of Yarmouth, the endorsees of two promissory notes, against Mr. Blethen, a prior endorsee. The notes were made, one by Messrs. Dennis and Doane, the other by Mr. Doane alone, payable to the order of the Defendant. The Defendant endorsed them to a firm of "Viels and Dennis," who endorsed them to the Plaintiffs. The defence to the action was that the Plaintiffs had released the makers of the notes, and therefore also the Defendant. It was not disputed that, if the makers were released, so was also the endorsee. The proof of the release was this. After the endorsement to the Plaintiffs, Dennis and Doane executed a deed purporting to be made between themselves, individually and as partners, of the first part, Jacob Bingay, a trustee, of the second part, and certain creditors mentioned in a schedule marked A, and who shall "accede to these presents within four "months from the date hereof," of the third part.

In the deed it is recited (in effect) that Dennis and Doane, being unable to pay their creditors in full, have assigned all their estate and effects to the trustee, for the benefit of their creditors.

The trusts are declared to be, after paying all costs, to pay in full, first, all the claims of such creditors as are inserted in a schedule marked D; then to pay "all other creditors parties hereto "who shall have executed these presents within "four calendar months from the date hereof, "rateably."

Then comes a provision that the creditors shall release all causes of action, debts, and claims of every kind, the widest terms being used, and there follows this proviso:—

"If the creditors of the parties of the first "part, parties to these presents, shall not come "in and execute this indenture, by themselves or "their agents duly authorized, within the time "and space of four calendar months from the day "of the date of these presents," such creditors shall not be entitled to any distribution, benefit, or advantage under the deed.

Their Lordships are unable to give any meaning to the expression in the beginning of the clause, "parties to these presents," inasmuch as no creditor could become a party to them until he had executed the deed. They therefore reject that expression as insensible, and, reading the clause without it, are of opinion that it makes a condition precedent to taking any benefit under it, the execution of it by all creditors, preferred or not preferred.

A further provision should be noticed, to the effect that "if the demand of any creditor in any "schedule shall have been stated as being greater "or smaller than it really is, such creditor shall "be entitled to the benefit of these presents upon "and for, and only upon and for, the amount "which may be found to be justly due to him."

The Plaintiffs were entered in Schedule D (that of the preferential creditors) for $2,000, in Schedule A for $58,309.

The Plaintiffs set their seal to the deed, and appended the following note or memorandum to their execution of it :—" The Exchange Bank of " Yarmouth, Nova Scotia, for and in respect of, " and only for and in respect of, the several " claims, notes, bonds, and securities for money " mentioned and referred to in the schedule " hereunto annexed, and marked, ' Schedule of " ' the Exchange Bank of Yarmouth, Nova " ' Scotia,' said claims amounting, as per said " schedule, to $73,531. 92," which schedule was annexed to the deed.

The $73,531. 92 did not include the promissory notes, the subject of this action.

It was contended in the Court below :—

1st. That the qualification in the note appended to Plaintiff's execution of the deed limited the effect of it.

2nd. That if it did not, the qualified execution amounted, in law, to no execution at all.

The first point was abandoned in the argument before us; the second was insisted on, and the case mainly relied upon in support of this contention was that of Wilkinson *v.* The Anglo-Californian Gold Mining Company, reported in 18, Q.B., p. 728, and more fully in 21 Law Journal, Q.B., 327.

In that case the question arose on demurrer. The declaration stated the incorporation of the Company (Defendant) under 7 & 8 Vict., c. 110, and its formation by a deed of settlement, and averred that the Plaintiff, who was a subscriber for shares, "duly executed the said deed of settlement . . . except as to the herein-before mentioned No. 179 aforesaid" (No. 179 being a material clause in the deed); whereupon the

Plaintiff became entitled to a certificate of the shares he had subscribed for.

The Statute made the execution of the deed of settlement a condition precedent to the right to obtain a certificate.

It was held that the declaration did not aver a due execution of the deed, inasmuch as an execution of a deed in part only was no execution of it in point of law.

It appears to their Lordships that this case, which affirms an undoubted principle of law, does not apply to the present.

The note appended to the Plaintiff's execution of the deed does not, in their judgement, amount to a non-execution or a refusal to execute any part of the deed; it is at least capable of being interpreted as descriptive of the amount of debt which the Plaintiffs intended to claim, being considerably more than that which is set opposite to their name in Schedule A, coupled with an intimation that they did not mean to claim more, and in this view it would not amount to a non-execution of the deed.

It is not every attempt by a form of execution to restrain the full operation of a deed which can be treated as a non-execution of it. An American case (note to 6, Wharton, 266) has been quoted in the judgement appealed against, where a condition being appended to the execution of a deed of release that it should be inoperative unless 25 per cent. of the claim was paid, the condition was held to be void, and the release absolute. Indeed, it has been admitted that an attempt to make the execution of a deed of release operative only on the occurrence of a condition subsequent would amount to an absolute release.

Their Lordships are of opinion that the execution of the deed by the Plaintiff operated in the terms of the release clause as a release of

all debts, among them the debt on the promissory notes, the subject of the action, and that the judgement appealed against was right.

They are further of opinion that the judgement is sustainable on the other ground on which it is placed. They have already intimated their view that the proviso which has been quoted applies to preferential as well as other creditors, and that the Plaintiffs would not have been entitled to receive the $2,000 under the deed unless they had executed it. Having received that sum by virtue of their execution of the deed they cannot be heard to repudiate it, and to deny their execution.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgement appealed against, and dismiss the appeal. The Appellants will pay the costs of the appeal.