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Re Kathleen Dorothy Bignell, an insolvent:

JUDGMENT - On Motion by insolvent for the annulment of the order adjudging her insolvent:

(delivered by Phillips C.J. on 10th February, 1950).

In this Motion, the insolvent, Kathleen Dorothy Bignell, (who is described in her Notice of Motion as "married woman and planter") seeks the annulment of an order, made by the Supreme Court of the Territory of New Guinea on the 20th December, 1939, adjudging her insolvent.

As the file shows, the Court has had to consider this insolvency on earlier occasions, at the instance of the Official Trustee, (the trustee in this insolvency). He was compelled to apply to the Court for directions as to distribution of the insolvent estate because of difficulties due to the fact that all the records in the possession of his predecessor (the pre-war Official Trustee at Rabaul) concerning this insolvency were lost or destroyed during the Japanese occupation of Rabaul. That occupation occurred in early 1942 - a little over two years after the adjudication of insolvency. The present trustee had, so to speak, to "reconstruct" the history of the insolvency as best he could from such material as he could get. The Court took a realistic view of the position; and ultimately, after its directions (that the trustee should publish notices in the Territory and Australia setting out the order he proposed to move for on a stated date and calling on any objectors to appear on that date) had been complied with, the Court made an order on 4th April, 1949, as to the manner in which the insolvent's estate should be distributed. It would appear, from the affidavit of the Official Trustee, Herbert William Hardy, filed on 25th January last in support of the present application by the insolvent for an annulling order, that the insolvent's estate has been distributed in accordance with the Court's order of 4th April, 1949.

To return to the present application by the insolvent:- In her Notice of Motion, it is simply stated that she applies for an annulling order "pursuant to Section 146 of the Insolvency Ordinance 1912 of the Territory of Papua in its application to the Territory of New Guinea: no express statement of a specific ground for annulment appears in the Notice. But the already-mentioned affidavit of Herbert William Hardy, the trustee of the insolvent's estate, sworn on the 24th and filed on 25th January, 1950, in support of the insolvent's application for annulment, goes to show that he has paid in full, out of the assets of the insolvent estate, all of her debts that have been allowed and are known to him. And Mr. White, learned counsel for the insolvent, has stated during this hearing that the

ground, and the only ground on which his client applies for an annulling order is that the Official Trustee has, on her behalf and out of the insolvent estate, paid in full the debts of all her creditors.

Section 146 of the adopted Papuan Insolvency Ordinance (which has counterparts in S.163 of the Queensland Insolvency Ordinance of 1874 and S.35 of the English Bankruptcy Act 1883) reads as follows:-
"If the insolvent or any person on his behalf pay in full all his creditors or obtain a release of the debts due by the insolvent to such creditors the insolvent may apply to the Court for an order annulling the adjudication and the Court upon being satisfied that all the creditors of the insolvent have been paid in full or have released their debts may make such order upon such terms as to commission or remuneration or charges already incurred as may seem just."

It will be noted that the section gives the Court a discretion, for the section says the Court "may" make an order (not "shall" make an order) if certain conditions are fulfilled. That discretion is, of course, a "judicial discretion", one that is to be exercised in accordance with principle. The discretionary nature of the power given by the section has been noted in a number of cases: e.g. In re Taylor, ex parte Taylor, (1901, I.K.B., 744 at p. 746; in In re Beer, ex parte Beer, (1903, I.K.B., 628, at p. 633; in In re Keet, ex parte Official Receiver (1905, 2 K.B., 666 at p. 677): and compare Delph Sing v. Wood (1918, 25 C.L.R. 497 at p. 499) wherein a judgment of Street J. was approved by the High Court of Australia.

In the present proceedings, the insolvent is not applying for a certificate of discharge but is applying for an annulment of the order that adjudged her insolvent. Applications for annulment are not met with as often as applications for a certificate of discharge and there is an important difference between them. Although both annulment and discharge end a debtor's insolvency, annulment goes much further than discharge, in that, as Stirling L.J. said in Keet's case, already cited, (at p. 676), an annulment operates to "wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication" (of bankruptcy). This of course is subject to S.161 of the Insolvency Ordinance which provides that "whenever any adjudication in insolvency is annulled, all sales and dispositions of property and payments duly made and all acts theretofore done by the trustee or any person acting under his authority or by the Court shall be valid ....." The importance of the erasing effect of an annulling order is manifest when one reflects that, for example, insolvency is a disqualification for appointment to, or tenure of, many public offices, or for example, that insolvency may cause a person to

forfeit property that would otherwise have become his. Annulment considerably betters the position of a debtor as was indicated by Romer L.J. in Beer's case (at p. 634) when he said:- "It must not be forgotten that what the debtor desires is to be able to go out into the world, and when anyone reproaches him with his bankruptcy to be able to say, 'my bankruptcy has been annulled, and annulled by the order of the Court; my conduct cannot therefore have been very reprehensible, or the Court would not have made the order.'"

Obviously, because of the expunging effect of an annulling order, the Court must be shown very good reasons for making an order of that kind.

Although an insolvent, applying for annulment under S.146, is bound to establish that all his creditors have been paid in full (or have released the debts due by the insolvent to them), it would be a mistake to suppose that, when once that had been established, the Court must, as of course, make an annulling order. The Court has to take other aspects of the matter into consideration, as the cases I have cited show. For instance, in Taylor's case the bankrupt, in his statement of affairs and on his public examination, concealed the fact that he had a large sum of money; he afterwards gave the official receiver enough of that money to pay his debts in full, with interest and expenses; and then he applied for an order annulling his adjudication. It was refused. Even if all the insolvent's creditors wish his adjudication to be annulled, this, though certainly something to be taken into consideration, does not of itself compel the Court to make an annulling order, because there are other interests to be considered as well. A study of the cases I have referred to shows that the exercise of the Court's discretion depends on the circumstances of each case and that the Court, in exercising its discretion, will have regard to a number of things, such as:- the fact that the insolvent has paid all his creditors in full; the lapse of time between the adjudication and the application for its annulment; "the character of the bankrupt and how it was that he had come to the ordeal of bankruptcy"; "the bankrupt's statement of affairs and the conduct of the bankrupt, and in particular ..... whether he has been guilty of any misconduct in relation to his affairs"; the interests of the creditors; whether annulment would be contrary to commercial morality and prejudicial to the interests of the public. In In re Flatau (1893, 2 Q.B.D. 219, at page 223) Lord Esher, speaking of passages in his judgment in the earlier case of In re Hester (22 Q.B.D. 632) (a case in which the rescission of a receiving order was sought) observed:- "I went on to say: 'The Court has gone still further, and I think rightly so, and has said, that under the present Bankruptcy Act it will consider, not only whether what is proposed is for the benefit of

the creditors, but also whether it is conducive or detrimental to commercial morality, and to the interests of the public at large, and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger'. The meaning of that is, that if the debtor has behaved in an unbusinesslike way, or worse, even though his present creditors may be quite satisfied, and no harm can come to them, yet, if he has so acted in business that it is likely that he will do again to other creditors what he has done to his present creditors, this Court will not allow the receiving order to be rescinded."

The question now is:- Should the Court, in the light of the principles I have referred to, exercise its discretion under S.146 of the Ordinance in favour of the insolvent and give her an annulling order?

We know, from what is said (and which the Court accepts) in the affidavit of the Official Trustee that has been filed in support of the present application, that he has paid in full, out of the insolvent estate, all known and allowed debts due by the insolvent to her creditors. This satisfies one of the conditions that must be established before the Court may make an annulling order under S. 146. But, mainly no doubt because of the loss of records and general upset following on the Japanese invasion of Rabaul, there are a number of things the Court does not know. The Court has not seen the insolvent's statement of affairs. It does not know what happened at her public examination. It has no knowledge of her conduct prior to or during the insolvency. It appears from affidavits in the file that she owed creditors over £4,000 at the time she was adjudged insolvent; but the Court does not know, and no evidence has been put before it to show, whether this was due to inexperience, recklessness, or worse, in business matters on her part, or due to foreseeable or unforeseeable misfortune, or to what. In short, the insolvent has not put the Court in possession of information and facts that the Court must have before it may rightly make an order annulling her adjudication of insolvency, for the Court, on such an occasion, has to have regard to other interests besides those of the debtor. No doubt, after the ten years that have passed since her adjudication and because of the vicissitudes the Territory and its inhab itants have experienced during that period, it would be very difficult for the insolvent to put before the Court all the material the Court should have and consider before making an annulling order. But that does not alter the fact that the onus is upon her to show, and it is not for the Court to a ssume, that there are good and cogent reasons for the making of the order she has applied for. She has not done this; she has only shown that her debts have been paid in full, and that, as I have said, is not of itself sufficient to warrant an annulling order. For these reasons, I am obliged to reject her application.

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Before concluding, I should say that there is a Queensland case that may be exactly in point, but I cannot be certain of this because a full report of it is not available here. The case is Re Bolton, 1899 9 Q.L.J.(N.C.)63. It was heard by Griffith C.J. A headnote of it appears in Vol.2 of The Australian Digest at column 867, and reads as follows:- "When the estate of an insolvent had been realized, and the debts had been paid in full out of the proceeds, an application to annul the adjudication was refused. The proper procedure in such a case is to apply for a certificate of discharge." Lacking a full report of this case, I do not rest my decision in any way upon it: I have already decided, for the reasons already expressed in this judgment, that the insolvent's application should be refused.