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In re DUNCAN ANDERSON & Co. (In Liquidation.)

Ex parte, BISHOP *et al.*

D. C., Colombo, 3.

Patnership—Liquidation of firm in London under Bankruptcy Act, 1869 —Same members trading in Ceylon under different style and going into liquidation in Ceylon—Application of English creditors of London firm to set aside deed of arrangement entered into by Ceylon firm with Ceylon creditors—Unity of London and Colombo firms—Evidence of unity—Effect of commission of bankruptcy in England upon movable property of bankrupt in Ceylon—Non-conformity of deed of arrangement—Cancellation of District Judge's certificate granted under s. 135 of Ordinance No. 7 of 1853.

Where a partnership business was carried on in England under the style and firm of John Anderson & Co., and another business was carried on in Ceylon under the style and firm of Duncan, Anderson & Co., and it was found that the partners in both concerns were the same, the business of the same nature, the capital one, and the ratio of profits of the partners in either place the same,—

Held, that the two ventures were branches of one and the same partnership.

"John Anderson & Co." filed on the 29th July, 1875, a petition for liquidation in the London Bankruptcy Court, and on the 19th August following a trustee was appointed under the Bankruptcy Act, 1869. On the 18th August "Duncan, Anderson & Co." entered into a deed of arrangement with their Ceylon creditors, which purported to be signed by 6–7ths in number and value of such creditors, and a certificate was passed by the District Court in terms of section 135 of the Ordinance No. 7 of 1853.

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The trustee of the English creditors appeared in the District Court of Colombo and moved for and obtained a rule on Duncan and on Macgregor (the Ceylon trustee and liquidator) to show cause why the deed of arrangement of 18th August and the proceedings founded thereon should not be quashed as irregular.

Held, that according to the Law of Holland (which is our law) and the English Law, an assignment and proceedings under the Bankrupt Laws of one country operate, as a general rule, against the property of the bankrupt and its distribution wherever the property may be found and whenever it can be reached;

That the filing of a petition for liquidation is an act of bankruptcy available for adjudication, and the title of the trustee in bankruptcy relates back to the time of the filing of the petition whether adjudication ensue or not;

That, though the English trustee under the English liquidation was appointed on the 19th August, 1869, and the Ceylon deed of arrangement for liquidation was made on the 18th August, yet the English trustee is entitled to preference and not the Ceylon trustee, because the trusteeship of the former, relating back to the 29th July, 1869, when John Anderson & Co. filed their petition for liquidation in the London Bankruptcy Court, commenced from that day;

That this priority in date vested the property of both firms (the Ceylon firm having only movable effects) preferentially in the English trustee;

That the jurisdiction exercised by the Colombo District Court in signing a certificate under section 135 of the Ordinance No. 7 of 1853 was ineffectual, not only because the jurisdiction exercised by the London Court of Bankruptcy was preferential, but also because the deed of arrangement signed by the Ceylon creditors did not in fact bear the signature of 6–7ths of the creditors of the conjoint firms forming the one partnership;

And that the District Court has power to cancel the certificate it issued in error under a misconception of facts.

THE questions of fact and law raised in this case are fully set forth in the following judgment (dated 7th February, 1876) of BERWICK, D.J.:—*

In this case certain merchants trading in Ceylon under the style and firm of Duncan, Anderson & Co. also traded in London under the style and firm of John Anderson & Co.,—the constituent members of the partnership being the same in both cases. Duncan, Anderson & Co. have gone into liquidation here, the proceedings having been taking in this Court under the Insolvency Ordinance, No. 7 of 1853. John Anderson & Co. have gone into liquidation in London under the Bankruptcy Act of 1869; and the matter on which I have now to give judgment

* In *Ramanathan*, 1876, pages 277–281, published in 1890, the judgment of the Supreme Court only appears. As the record of the case is not now forthcoming, Mr. Justice BROWNE has favoured the Editor with a printed copy of the elaborate judgment of the District Judge, which he had in his private file, and suggests its publication in the *New Law Reports*, in view of its usefulness to the Bench and Bar.

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comes before me in the form of a proceeding wherein the English creditors of these merchants seek to have the Ceylon deed of arrangement and the proceedings and orders of this Court pursuant thereon quashed as irregular : the object being to procure the whole estate of these merchants to be administered in England; but more especially in order that the assets of the two firms may be administered as one joint and single estate on which the Ceylon and the English creditors may equally rank. The grounds on which the application to quash the Ceylon proceedings are founded are—

(1) The pendency of the English liquidation proceedings already mentioned.

(2) That the Ceylon deed has not been signed by six-sevenths of the creditors.

(3) That John Duncan had no authority to bind his other partners by the Ceylon deed.

On the other hand, the "Ceylon creditors" (represented by the Liquidator, Mr. MacGregor), who oppose this application, have for their object the administration of the assets of these merchants as two distinct estates of two distinct firms; and the payment of what they call the debts of the two distinct firms out of the distinct estates, severally; and thus to exclude those who are for convenience called the "English creditors" from participation in the assets of the Ceylon firm. It has been stated to the Court that if the Ceylon and the English firms respectively be considered distinct partnerships, having distinct estates to be separately administered, the creditors of the Ceylon firm will obtain a dividend of 9*s*. 6*d*. to 11*s*. in the pound, while the estate of the English firm will only pay its creditors 1*s*. 6*d*. in the pound.

2. It is important to observe at the outset that there is no question here of claims amongst partners or firms *inter se*, but only of the rights of *extrinsic creditors* upon the estate or estates of these merchants. I make this observation because a great deal of stress has been laid upon arguments drawn from cases which have been decided on the other class of claims, and therefore on questions which do not arise here. I refer to *Ex parte Sillitoe*, *Curtis v. Perry*, *Shakeshaft's Case*, &c.

3. The following facts are material to be attended to in considering both the contention of the Ceylon creditors that there are two firms, two partnerships, and two distinct estates to be administered, and the validity of the grounds advanced by the English creditors for setting aside the Ceylon proceedings.

The constituent and the only partners of each of those firms were John Anderson, John Duncan, and George Gray Anderson.

These gentlemen traded, as already observed, as merchants in London under the style and firm of John Anderson & Co. and in Colombo (in this Island), also as merchants under the style and firm of Duncan, Anderson & Co., the partners in each being identical in number and in individuality. On the 28th July, 1875, the debtors (all of them) signed, and on the 29th of the same month filed in the London Bankruptcy Court, a petition under the liquidation and composition clauses of the Bankruptcy Act of 1869. In pursuance thereof a meeting of creditors was held at London on the 19th August following, at which a liquidation by arrangement was resolved upon and a London Actuary, Mr. Bishop, who now moves in the present cause, was appointed trustee. The certificate by the Registrar of the appointment of trustee bears date 15th September, 1875. On the 18th August, 1875 (subsequent to the filing of the petition in the London Bankruptcy Court, but one day prior to the resolution of the English creditors and the appointment of their trustee), a deed of arrangement for liquidation was entered into in Colombo purporting to be signed by all the debtors, styling themselves as "carrying on "business in the said Island under the style or firm of Duncan, "Anderson & Co." with certain creditors here. It was in fact signed by John Duncan for himself and as attorney for the other two partners. The validity of the execution on behalf of one of these is however contested. This was filed and a certificate passed by this Court in terms of section 135 of our Insolvency Ordinance of 1853 on the 21st September, 1875, that is to say, two days after the appointment of the trustee in London under the English proceedings. Thereupon followed the present application to quash the proceedings in this Court.

4. It is important also to observe the following further facts as bearing on the disputed questions of the identity of partnership and the unity of estate and interest of the two firms. In all the English liquidation proceedings, to wit, the petition for liquidation, the resolution of creditors, and the certificate of the Registrar, these gentlemen are described and describe themselves as "of 17, Philpot Lane, in the city of London, merchants, "trading under the style or firm of John Anderson & Co., and of "Colombo in the Island of Ceylon, merchants trading under the "style or firm of Duncan, Anderson & Co."—the only exception in the papers before me being the heading to the notice to creditors of general meeting, signed by the debtors' attorneys, which appears to contain a clerical omission, and to which at all events I attach no importance. The power of attorney by the individual partners resident in Colombo authorizing their partner

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in London to take steps to wind up in bankruptcy, describes also the partners as carrying on business "jointly in London under the "style or firm of John Anderson & Co." and in the said Island (of Ceylon) under the style or firm of "Duncan, Anderson & Co." On the starting of the Ceylon business John Anderson & Co. (not the separate individuals, but the partnership company as a partnership company) issued this circular :—

Colombo, 1st January, 1873, We have established ourselves as Merchants and Commission Agents at this port under the firm and style of Duncan, Anderson & Co. We remain, your obedient servants, John Anderson & Co.

Here John Anderson & Co. announce as plainly as words can put it that *they* in their collective partnership capacity will do their business in Colombo under the *other name.* It has indeed been said that very few of those circulars were issued, and that they were issued under a mistake, but in point of fact copies were sent to all the banks in Colombo, and it is of little consequence whether their further issue was stopped or not; because, what we have to do with here is to ascertain what were the *facts* of the case in respect to the identity of trade and partnership, rather than the mere representations of parties; and it is not alleged that anything whatever was ever done to cancel the circular or to correct the supposed mistake when discovered; and it was one which could not possibly have been overlooked, and must therefore be considered as having been definitely homologated by Mr. Duncan. Again, a notarial copy has been put in of the profit and loss account for 1874 of the firm of John Anderson & Co. It is not denied that this is copied from their own books (see Mr. Duncan's affidavit of March, 1875), and the very last item in the accounts is in these significant words :— "By nett profits of *Colombo Branch*, £8,932. 14*s*. 6*d*.

Much more evidence to the same effect might be cited if necessary. The result is that it is very clear to my mind that "Duncan, Anderson & Co." and "John Anderson & Co." formed but one and the same partnership company, carrying on business in two places under distinct "trade-signs," "signatures," or "firms," and that the businesses were mere branches of one and the same concern; and I feel quite justified in applying the very words of one of the Judges of the Court of Session in the case of the *Royal Bank v. Cuthbert* (Rose 477), "there were the same "partners in both houses, the same trade, the same capital, and "they were truly one and the same company to all intents and "purposes whatever." It makes no difference that Mr. Duncan alone or any other individual partner may have actually found

the capital for the Ceylon branch in the first instance, that is to say, advanced it; for by such advance it became the capital of the partnership, subject to accounting merely between the partners *inter se.*

5. And here I would observe that there has been in this case some confusion of ideas (as I think) in respect to the meaning of the word "firm," which should be cleared away. The term "firm" has been improperly confounded and identified with the term "partnership" or "company," as if they meant the same thing. A "firm" is however not a partnership or company, but is merely the "title," "designation," "sign," or "confirming signature" under which a partnership-company or an individual chooses to transact business, and there is nothing to prevent a company or individual, for their or his own convenience, transacting business under two or more "firms," that is to say, "signs" or "trade signatures," and he or they will not the less remain the same individual or the same association. Suppose an individual or company of persons in the public house or any other line carrying on a trade in two different towns, and hanging out a different signboard in each town—the "Red Lion" in the one and the "Cross Keys" in the other—then I think we have a physical illustration of the meaning of the word "firm" or trade sign. Similarly, a man or a company might use two seals or stamps, one for one set of purposes and the other for another set, but a man cannot divide either his identity or responsibilities by hanging out two different signboards, or using two different signatures, nor can he say that his property of the "Cross Keys" shall not be liable for the debts he incurred to creditors in carrying on business at the "Red Lion" or *vice versâ*. These are only illustrations, but that will be no fault if they help to remove any confusion of ideas which entangled and embarassed the case. In any other sense the word "firm" is a merely ideal, though convenient, abstraction to distinguish a trading concern from the individual or individuals interested in it, but by no possibility in point of law, any more than in physics, can a name alter a thing or any of its qualities, capacities, or liabilities; nor can any person or association of persons, by assuming two names or firms, divide himself as if it were, in his personal liablity to his creditors, unless they have consented to look to some special fund only. Suppose that Mr. Duncan had been a sole trader and had no partners, and that for obvious reasons of convenience he kept the accounts of, say, his Colombo and his Kandy business separate, and in order further to facilitate this traded in the one place by the simple designation of "John Duncan" and in the other as "John Duncan & Co.";

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—and suppose there was a dead loss in the one place and a great profit in the other, could it be suggested that he could refuse to satisfy his Kandy creditors in full on the ground that he had traded under two distinct "firms," and that although he had made money elsewhere his Kandy business had been a loss? But there is no difference in principle from the position now advanced for the Ceylon creditors against the English ones, though there happens to be several partners, and not only one person concerned. It would only be carrying the matter a fair step further to put the case of an "individual" or a "company" who has two adjoining coffee estates, the accounts and working of which are for convenience kept distinct, refusing to pay in full the debts incurred in respect to the one, on the plea that this property had turned out a failure, and that the profits derived from the other formed a separate fund. If I have been prolix in these illustrations it is because I see and regret the grievous disappointment founded on a popular vagueness of appreciation of the legal import and value of adopting for business purposes a special "designation" or "firm"; and would desire therefore to present it to the parties concernod, as far as I can, in the light of plain common sense and reason, to which, after all, most of the sound principles of our law resolve themselves when cleared of adventitious excrescences. I have only to add on this point, with reference to the highly respectable cross affidavits read in support of the view of two distinct partnership companies without unity of interest or estate or liability, that these, though fully entitled to the greatest consideration, only show that the deponents and possibly the general mercantile public here were not aware of the existence of what however turns out to have been the actual fact, viz, that the two firms were merely different designations of the different branches of one identical house, trading in two places under two distinct signboards (so to speak), that is to say, two firms or names. We have a case identical in principle in *Ex parte Wilson* in *re Douglas* (*7 L. Rep. Ch., App., p. 490*), where one person carried on trade at Liverpool under the firm of Douglas & Co., and in Brazil under the firm of Douglas, Latham & Co. having business in the two places, and having assets in the two places connected with the two businesses. Sir W. James, L.J., said: "The estate is "in my judgment one estate," and "I quite agree with the learned "Judge (of Bankruptcy) that there are not here two distinct "estates to be wound up in bankruptcy;" and Sir G. Mellish, L.J.: "It is not a case where there are distinct estates, but it is a case "in which the same estate is being distributed partly in Brazil and "partly in England." In *Ex parte St. Barbe* (*11 Vesy, Jun., 413*),

the same principle is recognized, though it happened that the facts in that case showed the concerns to be distinct, and the marginal note to it is therefore quite accurate.

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6. I was pressed at the hearing by the learned counsel for the Ceylon creditors with the words "in whole or in part" in section 37 of the English Act of 1869 and in section 152 of the English Act of 1861. But in the first place, I do not think that those sections have any application to the question I have to decide. They lay down a rule in a case in which a debtor is liable to a creditor on *distinct* contracts incurred by him in different capacities in *different trades*, and due from distinct estates, and they regulate the question of what is called "double proof." The learned counsel, before he can apply these clauses, must assume that there are distinct estates; but that is the very question of fact which is at issue in this case, and which, on the evidence, I am constrained to decide against him. As already said, it appears to me that the case I have to deal with is precisely that of *Ex parte Wilson* in re *Douglas* (*7 L. Rep., Ch. App. p. 490*). Secondly, the provision referred to forms no part, by statutory law at all events, of our Bankruptcy system. It was first introduced into the English Act of 1861, and had no place in the Act of 1849 on which our Ordinance of 1853 is based; and therefore I apprehend that if the question arose in our Courts and were to be governed by English law, we should have to ignore those sections and follow the decisions in *Goldsmid v. Cazenove*, House of Lords (29 *L. J. Rep. N. S. Bankruptcy, 17*), and the doctrines laid down in the notes to *Ex parte Rowlandson* in Tudor's *Mercantile Cases, p. 407*. But I think the whole of this line of argument is really irrelevant, for it touches the question of "double proof"—one which might possibly arise if the firms are to be wound up in two liquidations, in London and Colombo respectively, but which certainly has not yet arisen, and which it is premature to consider. But remarks very worthy of attention have been made on these very clauses in the later English Acts in discussing what constitutes distinct trades and estates, which strongly tend to confirm the accuracy of the view I have already expressed. I refer to the remarks of Mr. Griffith in his book on Bankruptcy at page 675, where, commenting on the use of these terms under and within the meaning of the Act of 1861, he says as follows: "It is extremely difficult to "say what are separate and distinct trades; it may be held to "mean dealing in different sorts of goods or manufactures; it may be "keeping separate and distinct accounts in which the profit and loss "are separately balanced, and division of profits made separately; "and we cannot undertake even to suggest what precise view the

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"Courts may take of the meaning of the words in many cases. *In "the case where all the members of one firm are also members of the "other, and there are no members of the one except the members of "the other, it is presumed, if the accounts are common, and there is "a common balance sheet, that the English Law would probably "hold the houses not distinct.*" He adds (adverting to the fact that in such a case the laws of foreign countries would sometimes consider them distinct) that "where one firm is abroad and the other at "home, as often happens, further complication is thus introduced. "If there be, however, a partner or partners in one firm who is or "are not members of the other, it will probably be held that the "trades are separate and distinct, though the opinion is advanced "with diffidence, for, if so, why the further limitation of having "distinct estates to be wound up in bankruptcy."

7. There is, however, another view in which the case may be viewed, even from the standpoint of distinct partnerships and estates, which will be equally favourable to the English creditors. It is quite clear from the balance sheet or profit and loss account put in, that the whole trade and adventures of Duncan, Anderson & Co., were *joint ventures* with the firm of John Anderson & Co.; and according to the marginal note to *Ex parte Nolte and others* (*Glyn & Jameson, 295*) "where different firms [or partnerships] "are engaged in a joint adventure, the creditors of the adventure "may prove against the joint estates of the minor partnerships." The question there, as stated by the Lord Chancellor, was whether the debt could be proved against the joint estate of Crowder, Clough & Co., or whether it must be proved against the separate estate of Clough; but, on principle, Clough might as well have been a distinct partnership of two or more persons as one individual; and the marginal note cited gives the very case we would have to deal with, even if Duncan, Anderson & Co. and John Anderson & Co. had been distinct partnerships, and would give the English creditors of the joint venture (for every adventure here is proved to have been a joint one) a right to prove against the estate of Duncan, Anderson & Co., the so-called Ceylon firm. Whether in the event of a "double proof" they would (supposing the concerns distinct) be required to collate in the one what they recovered in the other liquidation, is not at present in question.

8. The facts of the case, however, have led me to the conclusion that the estate of Duncan, Anderson & Co. and of John Anderson & Co. is one estate in point of fact, and liable as such to all creditors of the two businesses, and must be administered as such in bankruptcy or any analogous proceedings in this

Colony; and that, as the so-called English creditors are therefore entitled to rank upon this estate, the deed of arrangement should have been signed by six-sevenths of the creditors, inclusive of these English creditors, or at all events (for this admits of less room for doubt in my mind) that the account appended to the certificate should have included the debts due to the English creditors. It is of course a fair question for discussion whether the word "creditors" in our Ordinance includes foreign creditors. The reason I adopt for holding that it does, is that every person must be deemed a creditor in this Court who has a right to come to it and be heard and to sue for judgment against his debtor, alleging rightfully that the law of this country gives the Court jurisdiction in his case, either on the ground of the defendant's residence or the *locus contractus*, or on any other ground of jurisdiction; and that the debtor is bound to take notice of the Court's jurisdiction over the cause when he seeks the protection or aid of the Court in a matter in which he is required to set out fully the names of his debtors.

9. I will now glance at the question of conflict of jurisdiction and law arising from the circumstance of proceedings in liquidation having taken place both in England and here. I do not think that section 74 of the English Bankruptcy Act of 1869, or any other section of that Acts meets the case, whatever construction may be put on the words "British Court" in section 74 as contrasted with the expression "Her Majesty's Dominions" in section 76. Although England and Ceylon owe allegiance to the same sovereign, they are, in respect to each other, foreign countries governed by their own separate systems of laws. The question has to be asked, What effect an adjudication of bankruptcy in one country has on the rights of creditors abroad and on the estate which the bankrupt has in that foreign country in which the question has to be decided? In the present case, a very large general question is very much simplified and condensed by the fact of the identity of the partners comprising the partnership trading in the two countries; and by their already having submitted (so far at least as two of them are concerned) to the jurisdiction of the Bankruptcy Courts both there and here, and joining in liquidation proceedings in both places; and further, by the identity, as I think, of the English and Ceylon Law on the point. For (dealing in this case only with movable property) it seems to me that there is no room for doubt that the old law of Holland—that is to say, our law—coincides with the English Law in holding that as a general rule an assignment and proceedings under the Bankrupt laws of one country operate against the

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property of the bankrupt, and its distribution, wherever the property may be found, and whenever it can be reached in fact: see particularly Story's *Conflict of Laws, section 417*, where the Dutch Law is especially referred to.

10. I think it is also a sound statement of the law to hold that where there are two bankruptcies in different countries the question which is to govern the distribution of the estate is to be regulated by the priority of the judicial vesting of the estate under the bankruptcy proceedings. Indeed, this seems to follow as a corollary from the first position; because all property which can vest does vest in the assignee or trustee for creditors, on his appointment, and as *mobilia non habent sequelam*, the vesting in the assignee at once divests the debtor domiciled of all property (movable) he may have in any part of the world, and consequently none is left for the latter bankruptcy to work upon. And if this vesting in law be sometimes inoperative in fact, as against a creditor attaching property in a foreign country, unless and until it has been either brought within the jurisdiction of the Court of the country where the prior bankruptcy issued, or has been reduced into the assignee's possession, this possible failure of result need not be considered just now in the present case, and can indeed hardly occur in it, for obvious reasons. Enough to note in passing, independently of any statutory provision, that the "comity of nations," and *multo magis* of the several countries of our common empire, will facilitate the Courts of the respective countries in being auxiliary to each other in matters of bankruptcy, and more especially auxiliary in aiding that *just and equal distribution of the bankrupt's effects* which is the object of bankruptcy laws everywhere, and has been well said to be "the common concern of the whole commercial world." For the application of the foregoing principles of the law of "bankruptcy" to the present case of "liquidation by arrangement" in respect to the effect of priority of proceedings, I would refer to the decision of Lord Gifford in the Scotch case of *Causland & Company* reported in Roche and Hazlitt's *Law of Bankruptcy, 2nd edition, p. 2.*

11. Now, applying this rule to the case before me, Mr. Bishop's appointment as trustee by the English creditors under the English liquidation was made on August 19, 1869; and under section 125 of the English Act all the bankrupts' property vested in him from that date; that is to say, if there was any property then belonging to the bankrupts, and of which they had not already been divested. But Mr. Macgregor had been appointed trustee of the Ceylon liquidation on the previous day; and if, as I think, that deed divested the debtors, or some of them, of all their

property, I see no reason why the title of the trustee appointed by it to the property of the debtors so divested by it should not be deemed preferent to the title of the English trustee who is later in date, so far that is to say, as concerns any reason merely dependent on the English liquidation proceedings, and not dependent on some other grounds of invalidity or objection such as that which I will presently have to consider and decide upon.

Plainly, this Court can have no desire that the tribunals of this country should arrogate the jurisdiction rather than the English Court (indeed, looking to the schedule of debts, it would seem to me that the bulk of these being in England, it would be of more general convenience that the estate should be administered there). But I find, as I think, certain principles equally recognized by the laws of England and of Ceylon, and which the Courts of either country will, I am sure, desire reciprocally to give effect to. The application of these principles to the question of jurisdiction turns on the accident of the priority of a date; and that priority happens to be with the Ceylon liquidation. I therefore am of opinion that the liquidation is with, and should remain with, the Ceylon jurisdiction and the Ceylon trustee, unless it be voided on some ground quite independent of the mere existence of the English liquidation. If I have taken a right view of the principles which should decide this question, and no conflict of opinion arises between the English Bankruptcy Court and this Court (which would be very regrettable in the interests of the creditors), then the title of the trustee here would practically override the English liquidation on grounds both of comity and law, unless the creditors on both sides of the water come to some mutual understanding—an understanding, I may remark, which will be the more desirable in the interests of all the creditors, even though the Ceylon proceedings be elsewhere held valid—if I am right in considering that the English creditors have an equal claim to the distribution of the Ceylon assets as the Ceylon creditors, and *vice versâ*, wherever the estate be administered.

12. To sum up what has been already said. I am of opinion—

(1) That the assets of these merchants, although trading in two distinct countries, nominally under two distinct firms, are liable to be treated and administered in bankruptcy or analogous proceedings in either country as one estate for the benefit equally of the English and the Ceylon creditors, whichever country may happen to have preferent jurisdiction. I think that, putting any questions of bankruptcy aside, the partners of the English firm are liable to be sued here for a debt contracted by the members of the *one* partnership, and *vice versâ*. It is a corollary that there is

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a unity of estate, the *universitas* of which in bankruptcy (as regards movable) will be liable to distribution under the proceedings in the Courts of either country. This opinion, if sound, will practically dispose of the main object of contention between the parties ; but—

(2) I am of opinion that there is a preferent jurisdiction in the Courts of that country which has priority of time, and which in contemplation of law—(by assignment in trust for creditors, judicial sequestration, or other like proceedings)—has the possession of the estate (movable at least), so far as the Court can reach it ; and that the Courts of the respective countries would, to avoid the confusion and unseemly conflict which would otherwise arise, act upon this principle in remitting creditors to their proper *forum ;* and I am of opinion that in this particular case, on the ground of priority of proceedings, the proper *forum* would be Ceylon, saving, as I have said, the question of the validity of the Ceyon proceedings under our own law, of which *this* Court must judge ; and, if these are tainted with any fatal irregularity under our own law, that then the English Bankruptcy Court will succeed to the same position that this Court held ; and, without saying that every foreign creditor must be bound against his will by a bankrupt's discharge under the law of this country, in proceedings to which he has not been a party, I think he is entitled to the benefit of our law if he chooses to seek it, and that I should be bound to admit the proof (subject to all questions of collation) on the same principle that I am bound by our law to entertain an action by a foreign plaintiff for a debt contracted abroad against a defendant who is within my jurisdiction by residence or otherwise. I need hardly add that I would concede the same preference of administration to the Bankruptcy Court in England, supposing the proceedings there to have been prior in point of time to the proceedings here, and consider that it would equally be for that Court, guided by the recognition given, or not, by the law of England to foreign claims, to determine whether or not they will admit Ceylon claims to proof.

13. The next point for consideration is the validity of the Ceylon proceedings in respect of their conformity with our own Ordinance. I have already held as a matter of fact that the Ceylon deed of liquidation has not been signed by six-sevenths of the creditors (the English ones having been overlooked) as required by sections 134 to 138 of the Ordinance : wherefore the questions arise,—Is the deed and whatever has followed on it either wholly null and void, *ipso jure*, or voidable, or simply not

obligatory on creditors who have not signed it, but valid otherwise? Or is it, on the other hand, capable of amendment? I confess I have had much difficulty in arriving at the intention and meaning of the English clauses of the Act of 1849 (sections 224, &c.) which our Ordinance has copied. The plain meaning of section 224 of the English Act (section 134, Ceylon Act) if it stood alone would be, not that the proceedings would be either wholly null or voidable, but simply that the deed would be not obligatory on a creditor who had not signed it. There would, I imagine, be no need for proceedings like the present to quash it, but simply it and the debtor's discharge under it would be no bar to an action by such a creditor, or to execution at his instance against property in the possession of the liquidating trustee. The document is only *primâ facie* evidence of six-sevenths having signed, and therefore evidence which might be rebutted on the fact being traversed in an action. But section 225 of the English Act (section 135, Ceylon Act) gives creditors a right to notice, and therefore, by implication, a right to object to the certificate of due signature being granted. Another difficulty arises from section 227 of the English Act (section 137, Ceylon Act), which while it provides that any omission with intent to defraud shall deprive the debtor of the benefit of the statute and of any discharge proposed in the deed, adds that any omission not made through culpable negligence or fraud " shall not defeat or otherwise affect " such deed or memorandum of arrangement "—a proviso which seems somewhat inconsistent with section 224 of the English Act (section 134, Ceylon Act). There are cases, however (see *Ex parte Lawrence, 14 Jur. 144 ; 19 Law Journal, Bank. 6 ;* and *Ex parte Mortimer, 3 de G.* and *S. 649*), in which the Vice-Chancellor has discharged the certificate of signature granted by the Bankruptcy District Court, where it appeared that it ought not to have been granted, or, what is the same thing, where the Registrar had improperly declined to hear a creditor against the granting of it; and the opinion I have formed is that, although there was neither fraud nor culpable negligence, but a mere mistake of law on Mr. Duncan's part in omitting the English creditors from the list, still the deed and certificate are not obligatory upon them, notwithstanding the proviso in the 227th section (section 137, Ceylon Act): and, further, that as the Ordinance expressly makes the certificate only *primâ facie* evidence of the deed having been signed by six-sevenths, which evidence has now been rebutted; and as it has been held in *Ex parte Lawrence* (*14 Jur. 144*) that the function of the Bankruptcy Court in giving the certificate is not purely ministerial; and as I would certainly have refused the

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certificate had it been shown to me at the time by any one entitled to be heard that the statutory six-sevenths had not joined ; and the Court was therefore deceived or surprised into granting it (though neither negligence nor fraud is imputable) ; for these reasons I think I shall do rightly and save the expense to the parties of a needless series of actions by discharging the certificate and order of this Court dated 21st September, 1875. I am confirmed in this course by the exemplar (though it can be no more) afforded by section 309 of the General Rules of the new Bankruptcy Act of 1869, which expressly provides for the case of a foreign creditor who has not received notice to attend in time to enable him to show cause against the resolution for liquidation, who may nevertheless oppose its being proceeded with, on proving that had he been present and dissented from the resolution the same could not have been carried by the statutory majority, and that it is unjust or inequitable that the resolution should be binding on him. I am further confirmed in the propriety of my proposed course by the principle of the decision in *Ex parte Imbert* (*3 Jur. N. S. 801*), where the Court of Appeal held that they had jurisdiction notwithstanding the 12th section of the Consolidation Act of 1849 (on which our Ordinance is framed), which limited the time of bringing an appeal in view of the *foreign domicile* of the appellants. In the present case the foreign creditors have come forward as promptly as could be to object to the certificate of due execution of the Ceylon deed of liquidation.

14. The last ground urged by the English creditors was that John Duncan had no authority to bind his other partners by the Ceylon deed. It is scarcely necessary to enter into this point, if the foregoing decision be correct. I may, however, observe that he certainly had a power of attorney, which I think sufficient, from *George Grey Anderson.* No express power, however, appears from *John Anderson,* and without this I think the latter cannot be bound by the assignment in trust (*Harper v. Goodsell, 18, Weekly Reporter 954*), and neither of course could creditors claim in his right ; but I do not think this affects the validity of the assignment as respects the property of the other partners (who did sign) and their interests in the joint partnership. It may therefore perhaps be that Mr. MacGregor, as trustee of *two* of the partners under the Ceylon deed, and Mr. Bishop as trustee of *one* of them under the English Bankruptcy Act, are joint tenants of this joint partnership estate—a most complicated and inconvenient result if it be so ; but as respects the *certificate* granted by the Court, it simply makes the Court set out what is not the fact in saying that the deed has been entered into with *John Anderson ;*

and on that ground also I think the *certificate* should be discharged whatever may remain as the operation of the *deed* considered as a transfer by two of the three partners under the common law of the Island.

The order will be that the certificate and proceedings of this Court dated 21st September, 1875, will be discharged, on the grounds : (1) that the deed therein referred to has not been signed by six-sevenths in number and value of the creditors of the parties therein designated " debtors ;" and (2) that the deed has not been signed by *John Anderson,* as erroneously stated in the said deed, certificate, and proceedings, nor by any one duly authorized to execute it on his behalf. This order only applies to its own certificate and proceedings, and is not intended to affect the *deed* considered by itself.

The English Trustee, Mr. Bishop, appealed against this judgment, as also Duncan, Anderson & Co.

Layard (*Browne* with him), for trustee, appellant.

Grenier (*Ferdinands* with him), for insolvents, appellants.

Cur. adv. vult.

6th July, 1876. The judgment of the Supreme Court was delivered as follows by STEWART, J.—

The facts of this case are clearly set out in the able and elaborate judgment of the learned District Judge.

The first proceeding before the District Court of Colombo was on the 21st September, 1875, when upon a certificate presented by George Macgregor, dated the 1st of that month, certifying that a deed of arrangement or composition produced therewith, dated 18th August preceding, had been entered into between John Duncan, John Anderson, and George Grey Anderson, carrying on business in Colombo under the style or firm of Duncan, Anderson & Co., and their creditors, signed by and on behalf of 6-7ths in number and value of the said creditors whose debts amounts to ten pounds and upwards, and that he, the said George Macgregor, had been appointed trustee and liquidator under the said deed, " the District Court declared that such deed of arrangement " dated the said 18th day of August, 1875, has been duly signed by " or on behalf of such majority of creditors as required by the " Insolvency Ordinance No. 7 of 1853." On the 8th day of November, 1875, a motion was made on behalf of Mr. H. Bishop, trustee under liquidation by arrangement in London of the affairs of John Anderson, John Duncan, and George Grey Anderson, of

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Philpot lane, in the city of London, merchants, trading under the style or firm of John Anderson & Co., and of Colombo trading under the style or firm of Duncan, Anderson & Co., and on behalf of several English creditors, for a rule on John Duncan and George Macgregor to show cause why the deed of arrangement of the 18th August and the proceedings founded on the said deed should not be quashed as irregular for reasons stated in the affidavits filed with the motions.

The rule was allowed, and the parties having duly appeared and been heard by counsel, the learned District Judge decreed as follows :—" That the certificate and proceedings of this Court, " dated the 21st September, 1875, will be discharged on the " grounds (1) that the deed therein referred to has not been signed " by 6-7ths in number and value of the creditors of the parties " designated debtors ; (2) that the deed has not been signed by " John Anderson, as erroneously stated in the said deed, certificate. " and proceedings, nor by any one duly authorized to execute it on " his behalf. This order only applies to its own certificate and " proceedings, and is not intended to affect the deed considered " by itself."

From this judgment Mr. Duncan has appealed, and so have Mr. Bishop and the English creditors. No appeal has been taken by Mr. Macgregor, the Ceylon liquidator.

(1) The first and main issue for determination on the argument before us is as to the unity or otherwise of the London and Colombo firms.

(2) Supposing the unity to be established, what effects have the proceedings in London on the partnership in Colombo.

(3) Ought the District Judge to have cancelled the Ceylon deed of arrangement, assuming it not to be in conformity with our Insolvency Ordinance.

(1) With respect to the first point, we are of opinion that it has been clearly established that the Colombo firm was only a branch of the London house of John Anderson & Co. The partners in both were the same, the business of the same nature, the capital one, and the ratio of profits of the partners in either place the same.

On the 1st January, 1873, we find the London firm notifying by the letter the admission of Mr. John Duncan as a partner in this firm, thus making its constituents to consist of John Anderson, John Duncan, and George Grey Anderson. Simultaneously with this notice another circular is issued by John Anderson & Co., dated at Colombo, announcing as follows :—" We have established " ourselves as merchants and commission agents at this port under

"the firm and style of Duncan, Anderson & Co." It is manifest therefore that from the very outset it was the London firm that established itself here, though under a modified designation, the partners in both places being identical. Further, we have the profit and loss account of what is styled the new firm (consisting of members as above) for the years ending 31st December, 1873 and 1874, in both of which the Colombo firm is described as the "Colombo branch." The power of attorney dated 22nd June, 1875, to which we shall have occasion to refer hereafter, also confirms the conclusion that there was in fact but one partnership. In this document we find Messrs. Duncan and G. G. Anderson, when appointing their London partner John Anderson their attorney for the purpose of liquidating the two firms, expressly stating that they were "lately carrying on business jointly with John "Anderson of .... in London, under the style or firm of "John Anderson & Co., and in the said Island of Ceylon under "the style or firm of Duncan, Anderson & Co."

(2) We agree with the views of the learned District Judge as to the effect of a commission of bankruptcy in one country upon the movable property of the bankrupt in another. In addition to the authorities cited in judgment, see *Knapp's Priv. C. Rep. p. 259.*

In considering whether the London or Colombo liquidator (supposing the appointment of the latter to be valid) should have priority, it is essential to have regard to the dates of the several steps in the proceedings.

The first act in priority of time is the power of attorney of 22nd June, 1875, already alluded to, by which Messrs. Duncan and G. G. Anderson appointed Mr. John Anderson their attorney "to "appear before the Court of Bankruptcy in London or any other "Court ...., and in their respective names to sign and deliver "any and every petition, declaration .... for the purpose of "winding up their business in bankruptcy," &c.

In pursuance of this power a liquidation of both firms was presented to the London Court of Bankruptcy on the 29th July, 1875, by John Anderson, for himself and on behalf of John Duncan, and by George Grey Anderson, who had by that time returned to England. Subsequently, agreeable to the provisions made in that respect, a meeting was held in London on the 19th August, and Mr. Bishop appointed liquidator, the certificate of such appointment being registered on the 11th September, 1875.

These proceedings were all consecutive and in due order, and must in our opinion be taken to have relation one to the other;

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and consequently to be looked upon as originating (as respects two of the partners), if not on the 22nd June, the date of the Ceylon power of attorney, at any rate as regards all on the 29th July, when the petition for liquidation of both firms was filed in the London Court of Bankruptcy. See 6th and 11th sections of the English Bankruptcy Act, 1869, and *Ex parte Duignan re Bissel, 19, W. Rep., p. 711*, where it was held that the filing of a petition for liquidation is an act of bankruptcy available for adjudication, and the title of the trustee in bankruptcy relates back to the time of the filing of the petition, whether adjudication ensue or not.

The Ceylon deed of arrangement was only signed on the 18th August, at which time an act of bankruptcy had already been committed incapacitating Mr. Duncan, whether for himself or as attorney of his partners, from entering into any valid engagement.

Accordingly, if we have to decide on the bare point of priority, it appears to us that the London and not the Ceylon trustee would be entitled to preference, such priority vesting in the former the property (the Colombo firm has only movable effects) of both firms from considerably before the 18th August. We also think that the jurisdiction thus first exercised by the London Court of Bankruptcy should, in the interest of all concerned, be exclusive, so as to prevent confusion and possibly conflict of decisions between Courts of different countries. (See *Bank of Scotland v. Cuthbert* and *Rose, pp. 47–8.*) In view, however, of the opinion we have formed on the 3rd point, it was scarcely necessary, except on general grounds, to enter upon the above questions, there being in fact no insolvency proceedings whatever now pending in the District Court of Colombo affecting the bankrupts.

(3) It is not disputed that the deed of arrangement of 18th August does not bear the signature of 6-7ths of the creditors of the conjoined firms, which, as already stated, we consider to be one partnership. And it also appears that, though purporting to be signed by all the three partners, Mr. Duncan had no legal authority to sign the deed on behalf of John Anderson, the power of attorney under which Mr. Duncan acted being insufficient. We have therefore no hesitation in holding, independently of the steps taken in London, that this deed is ineffectual for the purpose mentioned in the 134th section of the Ordinance No. 7 of 1853, and that the learned District Judge was right in cancelling his certificate of 21st September, 1875, containing a declaration obviously made in error under a misconception of facts. It is difficult to perceive, if the deed be invalid for attaining the objects with which it was entered into, viz., the liquidation by

arrangement of the Colombo firm, how it can be of avail for any other purpose. But we are not prepared to say that the learned District Judge was wrong in confining his decree to only what was strictly pending before him, and not on a mere motion without notice to the creditors, who are parties to the deed, summarily quashing the document. He under a mistaken conclusion made an order, and that order he has cancelled.

Judgment affirmed, parties bearing their own costs in appeal.