[HOUSE OF LORDS.]

GEORGE HARDY AND ANOTHER . . . . APPELLANTS;

AND

RICHARD FOTHERGILL . . . . . RESPONDENT.

H. L. (E.)
1888
June 12.

Bankruptcy — Order of Discharge — Future and contingent Liabilities — Valuation—Debt provable—Covenant to indemnify against non-repair— "Liability incapable of being estimated" whether barred by Bankruptcy, where not submitted to Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 49.

The assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenants with the lessors to repair and yield up the demised premises in repair at the end of the term. Eight years before the term expired, the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act 1869, and obtained an order of discharge. The lessees were not scheduled in the debtor's statement of affairs, no notices were sent to them, and they tendered no proof in the liquidation in respect of the assignee's possible liability at the end of the term upon his covenant to indemnify. After the term expired the lessors having recovered damages against the lessees upon the covenants for repair, the lessees claimed an indemnity from the assignee in respect of his covenant to indemnify:—

Held, affirming the decision of the Court of Appeal (*Morgan* v. *Hardy* 18 Q. B. D. 646), that the claim of the lessees was barred, under sect. 49 of the Bankruptcy Act 1869 by the order of discharge, the effect of sect. 31 being to make the assignee's future and contingent liability on his covenant to indemnify a debt provable in the liquidation, unless an order of the Court declared it to be a liability incapable of being fairly estimated.

APPEAL from a decision of the Court of Appeal, reported as *Morgan* v. *Hardy* (1).

The pleadings and facts are set out in the report of the decision below. Briefly they were as follows:—

By indenture of the 9th of January 1833 the plaintiffs' predecessor in title demised to the defendants' predecessors in title certain messuages and hereditaments for a term of fifty years, seven months and twenty-two days, and the lessees covenanted from time to time and at all times during the term well and sufficiently to repair and keep in repair all the buildings, &c., and

(1) 18 Q. B. D. 646.

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also at the end or other sooner determination of the term to yield up the same well and sufficiently repaired and kept in repair. By indenture of the 19th of July 1873 the defendants assigned to Richard Fothergill and Ernest Thomas Hankey the premises comprised in the lease of 1833 for the residue of the term, and the assignees covenanted jointly and severally to perform all the covenants in the lease and to indemnify the assignors in respect of any breach of those covenants.

On the 5th of June 1875 Fothergill and Hankey filed a petition in bankruptcy. Their affairs were liquidated by arrangement, and on the 25th of October 1875 Fothergill obtained his discharge under the liquidation. The assignors were not scheduled in the statement of affairs, and during the liquidation proceedings no notices were sent to them, nor any claim made or proof tendered by them in respect of Fothergill's liability under the covenant of indemnity.

In February 1885 the lessor's representatives (Morgan and another) brought an action against the lessees' representatives (Hardy and another) for damages for breach of the covenants to repair and yield up in repair. The defendants brought in Fothergill as a third party, claiming an indemnity against him. He defended on the ground (inter alia) that he had obtained his discharge in the liquidation as above stated. At the trial Denman J. gave judgment for the plaintiffs against the defendants for £1680 (an amount determined by an arbitrator), and judgment for the defendants against Fothergill for the same amount.

Fothergill having appealed, the Court of Appeal (Bowen and Fry L.JJ., Lord Esher M.R. dissenting) set aside the judgment for the defendants against Fothergill and entered judgment for him against the defendants (1).

Against this decision the defendants now appealed.

April 23. Sir *H. James* Q.C. and *Lumley Smith* Q.C. (*Thomas Terrell* with them) for the appellants:—

The question is whether the liability of Fothergill to indemnify the original lessees was provable in Fothergill's bankruptcy. That depends on whether it was a liability capable of being

(1) 18 Q. B. D. 646.

estimated. If it was not, it was not provable. How could such a liability be ascertained? It is like a contract to marry. If there were a breach at the time of the bankruptcy, the liability would be provable because an estimate could be made, otherwise not. Here there was no breach, and the premises being in repair it must be presumed that they would be kept in repair. From the nature of the case it would be impossible to ascertain the amount: there is no guide: one window might be broken, or the whole premises might be tumbling down: the claim might be for £10,000 or one farthing.

[LORD HERSCHELL:—Would the covenant to indemnify the lessees against the rent be provable?]

That might be: but it is not this case. Even in that case there might be a difficulty. Who could say whether the trustee would assign to a solvent and substantial tenant or to a man of straw?

The Act of 1869 no doubt greatly enlarged the scope of provable claims, but there was no intention to include cases which in their nature were not capable of estimation. The definition of "liability" in sect. 31 is certainly very wide, but it must be read subject to the final clause "as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." None of those three modes of valuation is applicable to such a liability as the present.

But it is said by Bowen and Fry L.JJ., Granted that this liability is not capable of being proved, the creditor must go to the Court and get an adjudication to that effect, otherwise a discharge in bankruptcy bars the claim. But there is nothing in sect. 31 which compels this construction. It says "an estimate shall be made of the value of any debt or liability provable as aforesaid," and any person aggrieved by any such estimate may appeal to the Court and the Court may, if it think the value of the debt is capable of being fairly estimated, make an order to that effect, and in that case such debt or liability shall be deemed to be a debt not provable in bankruptcy. This provision for appealing to the Court is only given in cases where the trustee makes an estimate by which the creditor is aggrieved. But in practice the trustee always rejects the proof where he

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considers the debt not provable. Suppose (as in this case) the creditor thinks so too, he is not aggrieved. Why should he appeal against a decision with which he agrees? Moreover, that would not be a case of a person "aggrieved by any estimate," for there is by the hypothesis no estimate. The arguments against the view taken by the majority of the Court of Appeal are forcibly put in the judgment of Lord Esher M.R.

As to the authorities, the hardship of the old law is illustrated by *Mudge* v. *Rowan* (1) decided under the Act of 1849. But wide as the words of the Act of 1869 are, it is not every contract that is put an end to by bankruptcy. In *Breslauer* v. *Brown* (2) Lord Hatherley limits the provability of contingent debts to such as are "capable of estimation." The expressions of James and Mellish L.JJ. in *Ex parte Llynvi Coal and Iron Co.* (3) in describing provable liabilities are no doubt very wide, but they must be read in the light of *Ex parte Waters* (4), where Mellish L.J. put this very case—the liability of a lessee who had assigned his lease—and says it would not be put an end to by the bankruptcy, no one could properly estimate it. In *Linton* v. *Linton* (5), an order for alimony was held not provable because not capable of valuation, under sect. 37 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), the words being similar. See also per Jessel M.R. in *Collyer* v. *Isaacs* (6). In *Robinson* v. *Ommaney* (7) a covenant not to revoke a will was held a contingent liability incapable of proof under the Act of 1849. The cases of *Ex parte Blakemore* (8) and *Ex parte Neal* (9) are clearly distinguishable: a liability to pay an annuity to a widow dum sola (as in the earlier case), or to a wife dum casta or during separation (as in the later), is capable of estimation on the same principle as the value of a life—by statistical tables.

[LORD HERSCHELL referred to *Williams* v. *Earle* (10).]

McIntyre Q.C. and *Clement Higgins* Q.C. (Sir *R. Webster* A.G. with them) for the respondent, contended that the judgments of Bowen and Fry L.JJ. were right and for the reasons there given.

(1) Law Rep. 3 Ex. 85.
(2) 3 App. Cas. 672, 681.
(3) Law Rep. 7 Ch. 28, 31, 33.
(4) Law Rep. 8 Ch. 562, 568.
(5) 15 Q. B. D. 239.
(6) 19 Ch. D. 342, 351, 352.
(7) 23 Ch. D. 285.
(8) 5 Ch. D. 372.
(9) 14 Ch. D. 579.
(10) Law Rep. 3 Q. B. 739.

[LORD HALSBURY L.C. referred to *Ex parte Jackson* (1).]

[THE EARL OF SELBORNE:—Suppose a covenant by a tradesman not to do a particular thing: e.g. carry on a business within a certain distance, and the tradesman becomes bankrupt. Could the covenantee prove in the bankruptcy? If so it would be a hard case: the assets would be diminished to the detriment of the other creditors, and the bankrupt would be free after his discharge to go and set up the business.]

Perhaps such a liability would not be provable, but that is not the present case: a negative covenant differs in principle from a positive.

Lumley Smith Q.C. replied.

The House took time for consideration.

June 12. LORD HALSBURY L.C.:—

My Lords, the question in this case seems to me to depend entirely upon the true construction of the 31st section of the Bankruptcy Act of 1869, but before proceeding to discuss the particular words now under construction it is not unimportant to notice the gradual steps taken by the legislature to extend the application of the bankruptcy law to future and contingent debts. Mr. Eden in a treatise published in 1826 points out that one of the most important and valuable alterations effected by the 6 Geo. 4 c. 16 was the provision which it contained with respect to proof of contingent debts. Prior to that Act contingent demands could not be proved under a commission taken out before the contingencies upon which they were made payable had taken effect. Nearly eighty years before that time Lord Hardwicke expressed a wish (2) in which Lord Eldon afterwards concurred (3) "that some gentleman might think of a clause which might remedy and settle the matter for the future." My Lords, from that time till the year 1869 I think the legislature has been engaged in the effort to exhaust every conceivable possibility of liability under which a bankrupt might be, to make it provable

(1) 27 L. T. (N.S.) 696.
(2) 1 Atk. 120.
(3) 9 Ves. 112.

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in bankruptcy against his estate and relieve the bankrupt for the future from any liability in respect thereof.

The question arose in respect of a lease and of a stipulation in the lease to leave certain premises at the end of the lease in good and tenantable repair, and the question is whether the liability of Mr. Fothergill, whose liquidation took place eight years before the lease had come to an end, continued notwithstanding that liquidation—equivalent in this respect to bankruptcy—and makes him liable to be sued for a breach of the covenant to which I have referred. That question in turn depends upon whether it is a liability which, in the language of the statute, can be fairly estimated. Now, with all respect to the Master of the Rolls I think the principle running through his judgment goes much further than the decision of this particular case and rather suggests that no contingent liability is assessable at all. It is true that there are many contingencies which are practically as matters of business valued every day. The risk of a voyage, the duration of a life, by calculation of the averages are fixed by actuaries and others; but if you were to take a single life, or the contingency of a single voyage, I think it might as reasonably be said that you could not fairly estimate the value of a contract dependent upon a life or voyage. It is also true that such liabilities as are now in question are not sufficiently common, or perhaps I should say are not so much in the habit of being estimated; but what is there in the nature of the thing which renders it less capable of being estimated? The word "value" itself is one upon which subtle distinctions might be taken, but the moment you introduce contingency as one of the elements which is to enter into the question of value it is apparent that you introduce the element of conjecture and opinion and get out of the region of actual fact. I do not therefore see why if any contingent liability can be valued this cannot be valued, and the introduction of the adverb "fairly" giving a jurisdiction to the Court to decide whether in particular cases a liability could not be *fairly* valued, seems to me to involve the principle that all liabilities subject to the express exceptions enacted by the statute were intended to be included, but that in the one case where the Court should adjudicate that the liability was such that at that time it could

not be fairly estimated, then and then only should the liability continue.

It seems to me that the construction contended for by the appellants strikes this provision out of the statute, which could only be necessary if the legislature had thought that the previous words had comprehended all conceivable liabilities. For these reasons I am of opinion that the judgment of the Court of Appeal ought to be affirmed and I move your Lordships accordingly.

EARL OF SELBORNE:—

My Lords, the question on this appeal is, whether the liability of Mr. Fothergill, the respondent, upon a certain covenant of indemnity contained in an indenture dated the 19th of July 1873, was discharged by his statutory liquidation under the Bankruptcy Act of 1869. The appellants, being lessees of mineral and other property under a lease for fifty years and upwards, which continued in force till 1883, assigned the lease, by that indenture, to Mr. Fothergill, taking from him the usual covenants; one of which was to indemnify them from all the covenants in the lease, and from all claims and demands for or on account of their non-observance or non-performance. One of the covenants in the lease was to deliver up the demised premises, at the end of the term, "well and sufficiently repaired." That covenant was broken; and the lessors have recovered against the appellants 1680*l.*, damages for the breach. The breach did not occur till 1883, and the respondent had, eight years before, on the 25th of October, 1875, obtained his discharge under the liquidation. If his contingent liability under the covenant in question was proveable in the liquidation (as it was, if it would have been proveable in bankruptcy), it was put an end to by the discharge; if not, it is still subsisting, and the appellants are entitled to recover over from the respondent in this action the 1680*l.* damages which they have been adjudged to pay.

Denman J. before whom the action was tried, and the Master of the Rolls, in the Court of Appeal, held that the liability in question was not proveable in bankruptcy under the Act of 1869. But the majority of the learned judges in the Court of Appeal thought otherwise, and gave judgment for the respondent.

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The question is one of general importance, and it is singular that it is not covered by authority. Some authorities were cited at your Lordships' bar, and some were mentioned in the judgments of Bowen and Fry L.JJ. as supporting the conclusion at which they arrived. But all those authorities are, in my opinion, distinguishable from the present case; and the force of the general language of James and Mellish L.JJ. in *Ex parte Llynvi Coal and Iron Company* (1), on which Bowen L.J. placed considerable reliance, is (as it seems to me) neutralized by the concluding observations of Mellish L.J. himself in *Ex parte Waters* (*In re Hoyle*) (2). Before saying more about these authorities, I think it right to consider the question as it would stand independently of them.

It is not, I conceive, for your Lordships or for any other Court to decide such a question as this under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the legislature in the statute or statutes upon which the question depends. For the principle of the old bankrupt laws, which did not admit to proof any claims for liabilities contingent at the time of bankruptcy, much might perhaps be said. It might be a hardship upon the creditors, to whom debts were then due, that a merely possible future liability, which might never have matured into a debt at all, should be valued and admitted to proof, and to participation in dividends. In most cases, if any substantial dividend were paid, this would be a benefit to the person interested in the performance of the contract under which such liability would arise if the contingency happened; but there might also be cases in which it would be a hardship upon him to be compelled to prove such a claim, so valued, at a time when the estate of the bankrupt might be inadequate to pay any substantial dividend, instead of waiting for the occurrence of the contingency (if it ever should occur), and then taking his legal remedies against such property as the debtor might at that time possess, whether previously bankrupt or not. But the legislature, for whatever reason, has gone at least far enough to exclude from the consideration of the present question à priori arguments of

(1) Law Rep. 7 Ch. 28. (2) Law Rep. 8 Ch. 568.

that kind. And, in interpreting the statute of 1869 it is important to bear in mind the progressive steps taken in that direction.

The Act of 1849 (sect. 177) made "debts payable upon a contingency which should not have happened" at the date of the bankruptcy proveable, at a value to be set upon them by the Court, with a right to participation in dividends upon the amount so proved. By another section (178) it dealt differently with a "*liability* to pay money upon a contingency which should not have happened"; making this the subject of a claim, convertible into a proof in the event of the contingency happening before the claim was expunged (as it might be after the lapse of six months, on the application of the assignees, if the Court should so think fit); and in that event only.

The Act of 1861, besides making "demands in the nature of damages," to which the bankrupt was liable under any contract or promise at the time of adjudication, provable (though then unliquidated) authorized the person entitled to the benefit of any contract or promise by the bankrupt "to pay premiums upon any policy of insurance, or any other sums of money, yearly or otherwise, *or to repay to or indemnify any person against any such payments*," to apply to the Court to set a value upon his interest in the bankrupt's liability under such contract or promise, and to prove for such value, and receive dividends on the proof. Here it is to be observed, that in the case of a contract to repay or indemnify, if the burden were cast upon the party to be indemnified by reason of the failure of some third person primarily liable to make future payments (nothing being due at the time of proof), exactly the same difficulties which Mellish L.J. in *Ex parte Waters* (1) pointed out as standing in the way of valuation in a case more nearly resembling the present would occur. "No one" (said his Lordship) "could properly estimate whether an assignee would at any future period commit a breach, or, if he did, whether he would pay for it himself." Nevertheless the legislature thought fit to enact, by the 154th section of the Act of 1861, that such a contingent liability, under a mere contract to indemnify, not only might be, but should be, valued and admitted to proof.

(1) Law Rep. 8 Ch. 562.

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The proof clauses of the Act of 1869, under which the present question arises, are not confined (as those of the former Acts were) to certain specified kinds of contingent debts and liabilities, but they are expressed in general and comprehensive terms, so as (in the language quoted by Bowen L.J. from the judgment of the Lords Justices in *Ex parte Llynvi Coal and Iron Company* (1)) to indicate, primâ facie at all events, that "it was the object of the legislature to discharge the bankrupt from every possible liability."

With a saving, not material for the present purpose, "all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication" are to be deemed debts provable in bankruptcy; and the word "liability" is for the purposes of the Act defined as including "any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury or as matter of opinion."

There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, &c.; which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy.

But the present is not a case of that kind. A contract to

(1) Law Rep. 7 Ch. 28.

indemnify against the non-performance of covenants in a lease, such as covenants to pay rent, or to keep the demised premises in repair, or to deliver them up in a proper state at the end of the term is, to all intents and purposes, "an obligation or possibility of an obligation to pay money or money's worth" on the breach of any such covenant: it is "an engagement to pay, or capable of resulting in the payment of, money or money's worth," if the contingency against which the indemnity is provided should occur. Unless excluded (according to the view of the Master of the Rolls) on the ground that the statute contemplates those liabilities only which are capable of being fairly valued, and that this particular liability is not capable of being fairly valued, it is, and must be included in those words.

What, then, are the provisions of the statute as to valuation? It has been seen that liabilities of which the value is not capable of being ascertained by fixed rules, but which are "assessable only by a jury, or as matter of opinion," are expressly included. I cannot but think that it would be possible for a jury, or for an arbitrator, to set some value upon a contract of indemnity of this nature; which, beyond all doubt, is valuable to the person entitled to the benefit of it. Suppose, for example, that no bankruptcy had occurred; and that the assignee of the lease wishing to get rid of it, negotiated with the assignor for a release from this covenant of indemnity: and that the assignor agreed to grant such a release, for a price to be fixed by arbitration. I cannot myself doubt that an arbitrator, looking into the nature and actual condition of the demised premises, and other material circumstances, might have set some estimated value upon the covenant of indemnity. If an arbitrator might have done so, why not the trustee, or the Court, or a jury, under the provisions for that purpose contained in the 31st section of the Act? Why should the difficulty be more insuperable in this case than under such a contract of indemnity as that already mentioned, for which provision was expressly made by the 154th section of the Act of 1861?

The provisions of the Act of 1869, as to the mode of estimating value, are, that it is to be done (1) according to the rules of the Court, as far as applicable; (2) when those rules are not

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applicable, according to the discretion of the trustee, subject to appeal; and (3) in case of appeal, by the judge (with consent) or a jury; unless the Court thinks that "the value of the debt or liability is incapable of being fairly estimated;" in which case the Court may "make an order to that effect;" and, "*upon such order being made*, such debt or liability shall, for the purposes of the Act, *be deemed to be* a debt or liability not proveable in bankruptcy." The word "fairly," and the mention of *debt* (i.e., a debt "not bearing a certain value"), in this context, are important. I cannot but think that the language of the section would have been different if the legislature had not intended all debts and liabilities coming within the terms of the general definition of the word "liability" to be proveable, unless, on consideration of the nature and circumstances of any particular case, the Court should think it "unfair," either to the other creditors or to the claimant, to attempt to place any value upon them for the purpose of proof. A substantial value might be unfair (if objected to and appealed against) to other creditors; a nominal or very low value might be unfair (if objected to and appealed against) to the claimant. If nobody objected, it might, in either case, pass. According to what seems to be the sound interpretation of the whole clause, the legislature intended that question, in all disputed cases, to be determined in the course of the proceedings in bankruptcy, and not left open for the determination of other Courts after the bankrupt's discharge; and in undisputed cases, or where no claim might be made to prove, all liabilities within the general definition were to be, and to remain, in the category of proveable debts.

The authorities (except the dictum of Mellish L.J. in *Ex parte Waters* (1)) are all in this direction; though I cannot say that I think the present case strictly governed by them. If, in *Ex parte Waters* (1), Mellish L.J. meant to intimate an opinion that the liability of a lessee who had assigned his lease, remaining bound to the lessor under his covenants in the lease, would never, under the Act of 1869, be proveable in bankruptcy, or put an end to by the discharge of the bankrupt, I can only say that such an expression of opinion was extra-judicial; and that I am not

(1) Law Rep. 8 Ch. 562.

able, myself, to find sufficient ground for it in the words of the statute. It is, indeed, possible that in such a case as the present, or in other cases to which fixed rules of valuation may be inapplicable, it might be proper for the Court having jurisdiction in bankruptcy, after considering the material facts and circumstances known or capable of being ascertained, and weighing the magnitude of the interest, on the one side, against the difficulty, on the other, of measuring those elements of contingency on which the liability might depend by any calculation of probabilities, to make an order to the effect that the liability was "incapable of being fairly valued." But in the present case this has not been done. My conclusion is that the order appealed from ought to be affirmed.

LORD FITZGERALD:—

My Lords, I entirely agree with the noble and learned Earl in his conclusions, and my excuse for adding anything is the great importance of the principle involved in the decision.

The question arises on the construction of certain provisions of the Act of 1869, and seems to me to be whether the contingent liability of Mr. Fothergill to the appellants constituted a claim capable of proof under the liquidation. That is the only question. The bankruptcy law, as it now exists, seems to depend on the great principle of equity—the doctrine of equality—that is to say equality amongst the creditors in the common shipwreck, and justice and humanity to the debtor if he gives up all his property —everything that he has—for equal distribution amongst his creditors, and has conformed to and has not violated the provisions of the bankruptcy law.

The present condition of this branch of our law was not accomplished all at once. It proceeded tentatively and struggled by slow degrees from the time at which it was a code to repress and punish those whom the law considered to be criminals and delinquents, until it threw off its barbarisms and became a code of equity and of justice. Lord Hardwicke, who expounded and advanced the true principles of the bankrupt law is reported more than a century and a half ago to have stated a principle which may be aptly referred to on the present occasion. In

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Ex parte Groome (1), he states, "The privileges of creditors to come in under a bankruptcy, and of bankrupts to be discharged, are co-extensive and commensurate."

That great Chancellor, who did so much in the illustration of equitable principles, was not happy in the reporters who have transmitted to us his judicial decisions. Atkyns' Reports have been styled "the flimsy notes of Mr. Atkyns;" but in the modern editions of his reports the cases have been examined into and verified by the records. The words which I have quoted probably are Lord Hardwicke's, and state with substantial correctness two of the main objects of the bankrupt laws—that *all* creditors should be entitled to come in and prove, and that the bankrupt should emerge from the bankruptcy freed from all his liabilities.

The progressive advance of the law as applicable to the question before the House, and its adaptation to existing requirements, is well illustrated by the sections of the Act of 1849 referred to by the noble Earl. Sect. 177 of that Act, which permits a claimant on the ground of a debt payable on a contingency which has not happened to apply, if he thinks fit, to the Court, and authorizes the Court to set a value on such debt and permit the creditor to prove for the amount, is taken from a prior Act, 6 Geo. 4, c. 16 (2); but the 178th section of the Act of 1849, which deals with a liability to pay money on a contingency which shall not have happened, was, I think, new.

Under the Act of 1869 *all* the property of the bankrupt then vested in or belonging to him, of every nature and kind (save property held by him in trust and certain excepted articles), and such property as he may acquire or may devolve on him during the continuance of the bankruptcy, is transferred to the trustee to be divided amongst the creditors in proportion to their proved debts; and when the statute comes to provide for debts and claims provable it would be difficult to string together words more comprehensive than are found in sect. 31, "all debts and *liabilities*, present or future, certain or contingent."

If it had been rested on these words alone I should hold that the contingent liability of the bankrupt to the appellants came within the language and the intention of the statute; but when

(1) 1 Atk. 115. (2) Sect. 56.

we reach the definition of "liability" in the 5th paragraph of sect. 31, the interpretation seems to me clear from all doubt.

There is then a provision for an estimate by the trustee "of the value of any liability *proveable as aforesaid*, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value."

Having reached the conclusion that the contingent liability of the bankrupt under his covenant with the appellants was the foundation of a claim which might be estimated in the bankruptcy and its estimated value proved as a debt, then the order of discharge under the 49th section operates as a release to the bankrupt from that contingent liability. There are circumstances in the case which make the result an apparent hardship on the appellants, but either from ignorance of the law or want of foresight or of proper advice they did not take the course pointed out by the 31st section, under which they might have obtained a proper estimate of the value of the liability, or on appeal have obtained the order of the Court declaring the liability incapable of being fairly estimated. Your Lordships cannot, however, relieve them from the consequences of this oversight. The progressive character of the bankruptcy statute law in reference to such a case as is before your Lordships is well illustrated by the provisions of the Act of 1883. That statute deals with the whole Act of 1869, and its definition of the "property" which is made available for creditors includes "money, goods, things in action, land, and every description of property whether real or personal, and whether situate in England or elsewhere, also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising or incident to property as so defined."

The language is stronger but not more comprehensive than that of the Act of 1869. The Act of 1883 in dealing with the proof of claims in respect of contingent liabilities adopts the provisions of the Act of 1869, though possibly in more vigorous language, simplifies the procedure and adds as to contingent claims "capable of resulting in the payment of money, or money's worth, whether the payment is as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent

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on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, *or as matter of opinion.*"

My Lords, I have been unable to adopt the ratio decidendi to be deduced from the judgment of the Master of the Rolls, or to accept his conclusion that the claim in question was incapable of being fairly estimated. My Lords, it seems to me that proceeding on fixed principles the only decision to be arrived at is to affirm the judgment of the Court of Appeal.

LORD HERSCHELL :—

My Lords, having had an opportunity of reading in print the opinion of the noble and learned Earl opposite, I do not think it necessary to state at length the reasons which have led me to the same conclusion. I entirely agree in the view of the statute which has been expressed by my noble and learned friend. I think he has put the correct construction upon it, and that when thus construed the conclusion is inevitable that the judgment of the Court below must be affirmed.

LORD MAGNAGHTEN :—

My Lords, the Act of 1869 was not the first attempt to release bankrupts from liability arising from contract. But for some reason or other the legislature had never succeeded before in hitting the mark.

Contrasting the material sections of the Act of 1869 with previous efforts in the same direction Mellish L.J. says: "It is quite plain that the object of these sections is, that the bankrupt shall be absolutely relieved from any liability under any contract he has ever entered into" (*Ex parte Llynvi Coal and Iron Company* (1)).

With one qualification that statement is, I think, perfectly correct as regards any liability capable of resulting in payment of money or money's worth. Sect. 31 of the Bankruptcy Act 1869 contains one exception, and one exception only. It excepts any case in which the Court on appeal thinks the value of the liability

(1) Law Rep. 7 Ch. 28.

incapable of being fairly estimated, and makes an order to that effect. Such a case is conceivable, but it is one, I think, very unlikely to occur.

It seems to me that according to the true construction of the section, unless a judicial declaration has actually been made in the terms of that provision, the liability of the bankrupt under a contract, however extreme the difficulty of valuing that liability may be, must be deemed to be a debt provable in bankruptcy, and therefore a debt from which the bankrupt is released by the order of discharge. It will not do to say that if there had been an appeal the Court would have made such an order, and therefore the liability is not a debt provable in bankruptcy. To put that gloss on the Act would defeat the object of the legislature. It would induce persons having claims against bankrupts to stand outside the bankruptcy and take their chance. It would open the door to litigation, and compel the Court to decide questions under conditions wholly different from those under which they ought to have been presented for decision. It would leave the bankrupt with unknown liabilities hanging over his head. Neither the bankrupt himself, nor his friends, who might be disposed to help him, could tell whether he was really a free man and in a position to make a fresh start in life.

But, then, it was contended that such a case as the present was not within the section at all. It was said with confidence that the liability was incapable of being fairly estimated. It was argued that the word "liability," as used in the section, must be understood with some large qualification. It was pointed out that the Act speaks of an "estimate" and of a "valuation"; could it have been meant, it was asked, that you are to estimate and value that which everybody knows to be incapable of estimation or valuation? Some stress, too, was laid on the concluding sentence in the section, which speaks of liabilities in regard to the mode of valuation as being "capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." It was said that the expression "assessable by a jury," meant assessable on some known principle; and that the words "matter of opinion" did not mean any random opinion—mere chance and

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guesswork—but an opinion founded on some trustworthy data, though reasonable men might differ within certain limits as to the conclusion to be drawn from those data.

It is not very easy, I think, to deal with an argument presented in this form. It begins with assuming that the liability in the present case was incapable of being fairly estimated. The meaning of that expression, however, was not defined, nor was any attempt made to explain in what respects this liability differs from liabilities which the Act contemplates as capable of being estimated, though they may be affected by more than one contingency. The argument then proceeds to cut down or qualify the language of the Act, so as to make it square with the hypothesis from which the argument started. I should have thought the better course would have been to endeavour to ascertain the meaning of the legislature from the language of the Act, and then to apply the Act to the facts of the case under consideration. The Act, no doubt, uses the terms "estimate" and "valuation." But, at the same time, it recognises as capable of being estimated or valued liabilities which depend on any number of contingencies, and may result in payment of money unliquidated in amount. Moreover, the Act seems to treat every liability arising from contract, which may result in payment of money, or money's worth, as capable, at least primâ facie, of being estimated. This, I think, is plain from the circumstance that the power of determining whether any particular liability is capable of being fairly estimated or not is not given to the trustee in bankruptcy; it is given only to the Court on Appeal. And I am inclined to agree with what I understand to have been Lord Bramwell's view, that this provision is introduced rather ex majori cautela to meet a possible case of unforeseen difficulty, than as part or parcel of the ordinary administration of bankruptcy law. (See *Ex parte Neal, In re Batey* (1).)

The concluding paragraph of the section does not purport to define the meaning of the word "liability." By way of explanation, it deals with cases which had occurred under the earlier Acts and with decisions which had limited the operation of those

(1) 14 Ch. D. 584.

Acts, in accordance, no doubt, with their true construction. But for that paragraph the reported cases might have given rise to many arguments tending to narrow the construction of the Act. The last sentence in the paragraph, referring to the mode of valuation, reflects, I think, the language of Montague Smith J. in *Brett* v. *Jackson* (1), a case which was decided in February, 1869, and which must have been brought to the attention of the framers of the Act. It was there held that an annuity, the continuance of which depended on a variety of contingencies and the observance of a multitude of indefinite stipulations, was not provable under the Bankruptcy law then in force. "Here," says the learned judge, "there are no definite materials for making anything like a valuation. An actuary might form a loose opinion as to the probable continuance of the annuity; or a jury might form a rough estimate of its value. But that is a very different sort of computation from that which the statute means when it says that 'the Court shall ascertain the value.' It clearly points to a case where there shall be no difficulty or speculation; a sum to be worked out in figures from some definite and precise data." The two sorts of estimate, both in substance falling under the head of opinion, which were there held inadmissible, are expressly recognised and adopted by the Act of 1869, though the uncomplimentary epithets have disappeared.

Turning now to the assumption which lies at the foundation of the appellants' argument, I must say that I cannot see anything so very exceptional about Mr. Fothergill's liability. It was said that the trustee would have done a foolish thing if he had tried to estimate it, and that if he had put a value upon it, the Court on appeal must have set the estimate aside. I cannot agree in this view. A covenant such as that which has given rise to the liability as between the lessor and the lessee is not uncommon. It is not an uncommon thing for leases to be assigned, and for the assignee to undertake the assignor's liability. I cannot think that a person of practical experience in dealing with leasehold property would have any great difficulty in making a fair estimate of the value of such a liability when he was once made acquainted with the circumstances of the particular case. Nor do I think

(1) Law Rep. 4 C. P. 259.

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that the Court would set aside, as a matter of course, an estimate founded on reasonable probability and practical experience. Why should it be assumed that the Courts now-a-days are more wise or more incompetent than their predecessors? The Court of Chancery used to be very much in the habit of dealing with estimates of this sort of liability. It was a common thing formerly in the administration of the estates of deceased persons for a fund to be set apart out of the general assets to provide for the possible event of a future breach of any of the covenants contained in a lease held by the deceased. As to the generality of the practice before Lord St. Leonards' Act, I may quote Kindersley V.C. whose experience as master makes his testimony particularly valuable. "For a long time," he says, "it has been the practice of the Court, where the property comprised in the lease did not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach" (1). There he is speaking of liability under a covenant for payment of rent. But the practice, of course, extended to liability under any covenant in a lease. The practice was open to serious objections, but I am not aware that in any case like the present the master or the judge in chambers found any insuperable difficulty in arriving at a reasonable sum for the purpose in view. If it were possible to make a reasonable estimate for that purpose, I cannot see that there would be any great difficulty in valuing the liability for the purpose of the Act of 1869, or, in other words, in assessing the amount of compensation which under all the circumstances of the case ought to be paid for the privilege of having the liability cancelled altogether.

It appears to me, therefore, that the appellants' case entirely fails. They have not brought themselves within the exception mentioned in sect. 31. There is no judicial declaration that this liability was incapable of being fairly estimated. But I should be sorry if it were supposed that the appellants have failed on technical grounds only. I think the liability in question was, according to the true construction of sect. 31, a liability

(1) *Dodson* v. *Sammell*, 1 Dr. & S. 577.

proveable in bankruptcy, and therefore a liability from which Mr. Fothergill was released by the liquidation proceedings.

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Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 12th June 1888.

Solicitors for appellants: *Kingsford, Dorman & Co.*
Solicitors for respondent: *Field, Roscoe & Co.*

[HOUSE OF LORDS.]

(APPEAL COMMITTEE.)

JAMES BOWIE . . . . . APPELLANT;

AND

THE MARQUIS OF AILSA . . . . . RESPONDENT.

H. L. (Sc.) 1887 *Nov.* 18.

Practice—Petition to appeal in formâ pauperis—Question respecting alleged Public Right.

Upon a petition for leave to prosecute an appeal in formâ pauperis it appeared that the petitioner sought as one of the public to establish a right of fishing in a tidal river adjoining land belonging to the defender, and that subscriptions had been collected to assist the petitioner in the litigation:—

Held, that in the circumstances the application could not be granted.

PETITION that the appellant, James Bowie, be allowed to sue in formâ pauperis. It appears that while the appellant was temporarily residing in Ayrshire he was arrested in August, 1884, by the water-bailiff of the Marquis of Ailsa, the respondent, for poaching in the River Doon. He thereupon brought actions in the Sheriff Court and in the Court of Session against the Marquis, in which he prayed the Court "to find and declare that the pursuer as a member of the public" has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and all other fish which are not salmon, sea-trout, and whitling, or the young of salmon, sea-trout, and whitling, in the River Doon, at least in that part of it within the tidal influence of the sea.

Lord Trayner (Lord Ordinary) decided in favour of the