Privy Council Appeals Nos. 89 *and* 90 *of* 1934.

Bracia Czeczowiczka	- - - - -	*Appellants*
	v.	
Otto Markus	- - - - - -	*Respondent*
Bracia Czeczowiczka	- - - - -	*Appellants*
	v.	
Rudolf Loy	- - - - - -	*Respondent*
Bracia Czeczowiczka	- - - - -	*Appellants*
	v.	
Otto Markus	- - - - - -	*Respondent*
Bracia Czeczowiczka	- - - - -	*Appellants*
	v.	
Rudolf Loy	- - - - - -	*Respondent*

Consolidated Appeals

FROM

HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MARCH, 1936.

Present at the Hearing:

LORD ATKIN.
LORD ALNESS.
LORD MAUGHAM.

[*Delivered by* LORD ATKIN.]

These are two consolidated appeals from orders of the Court of Appeal for Eastern Africa who reversed orders of the Supreme Court of Kenya and set aside in the first appeal two bankruptcy notices and in the second appeal a receiving order in bankruptcy made against the respondents. The appellants, whom it will be convenient to call the creditors, are a firm of Polish nationals carrying on business as merchants having their head office in Poland and a branch in Vienna. In 1913 they sold to the respondents, hereinafter called the debtors, who were then Austrian nationals and trading in Kenya as the East African Trading Company, a quantity of cotton piece goods in eight shipments for the price of £4,832 5s. 4d. At the outbreak of war the term of credit had not yet expired. The debtors were enemy nationals and were interned, Loy in India, Markus being eventually repatriated. Their business ceased, and their African property was lost to them: but after the war they had a claim against the German Government for damage and destruction of property and also in contract. As the result of the

Treaties of Peace they had become nationals of Czechoslovakia. They returned to East Africa in or about 1924 and resumed trading in Kenya under the style of the old East African Trading Company. In 1924 the creditors sued the debtors in Vienna for £4832 5s. 4d., with interest at 6 per cent. up to 31st July, 1924, and at 12 per cent. from that date, and on 23rd March, 1925, obtained judgment against the debtors for the principal sum and interest. On 13th February, 1925, the debtors obtained an award from the Mixed German Czechoslovak Arbitral Tribunal against the German State for 66,500 shillings, loss of goods deposited in Custom House at Mwemza, with interest at 5 per cent., and for 34,006 gold marks for the price of merchandise and for a sum of money on deposit with the Treasury. There was a further award of a large sum against the German East African Bank: but that proved of no value and is not relevant to this case. Meanwhile on 26th January, 1925, the creditors obtained in Berlin from the Landesgericht, 29th Chamber for Commercial Affairs, an attachment on the " alleged debtors' claim against the Reich Settling Office " to the extent of £4,832 5s. 4d. This prohibited the Reich Settling Office from making payment to the debtors, and the debtors from disposing of the claim and in particular from " encashing " it. It will be noticed from the dates that at the time this attachment was made the debtors had not obtained their award against the German State, and that the creditors had not obtained their judgment in Vienna against the debtors. It does not appear that they ever obtained judgment in the German Courts against the debtors, but possibly there was some system in Germany of extending foreign or at any rate Austrian judgments. But no evidence has been produced as to this.

On 12th December, 1932, the creditors obtained an attachment order in Berlin which appears to be confined to a claim for 12 per cent. interest on £4,832 5s. 4d. The attachment is " of the alleged claims of the debtors against the German State represented by the Reichs Finance Minister in respect to compensation regarding the judgment of the 13th of February, 1925, of the German Czechoslovak Mixed Arbitral Tribunal, as well as further claims of debtors against the German State Reich's Fiscus represented by the Reichs Finance Minister regarding compensation of war losses of the debtors' properties in the African colonies." This order has the words " Simultaneously these mentioned claims are being transferred in favour of the creditors for the purpose of collection."

There has been some controversy as to the legal effect of these German attachments, but this will be discussed later. On 16th November, 1929, the creditors commenced an action in Kenya against the debtors for the price of the goods with interest, together with a claim for money lent in October, 1917. They claimed alternatively on the Viennese judgment. In September, 1932, they obtained a decree in the Supreme Court of Kenya for the amount claimed, which decree was

varied as to amount by an order of the Court of Appeal for Eastern Africa dated 20th June, 1933, under which the creditors obtained a final decree for 210,501 shillings.

On 21st August, 1933, the creditors caused the debtors to be served with two bankruptcy notices in pursuance of Section 3 (1) (*g*) of the Kenya Bankruptcy Ordinance, 1930, which is in similar terms to the English provision. An objection to the form of bankruptcy notices was suggested in the respondents' case. It was not taken in the courts in East Africa, and was in the circumstances very properly not pressed by respondents' counsel on this appeal. Their Lordships therefore pronounce no opinion about it. The debtors however did apply to set aside the bankruptcy notices on the ground that the creditors by their action in obtaining the orders in Germany above referred to had prevented the debtors from complying with the notices. Affidavits were filed on both sides and on 26th October, 1933, Mr. Justice Lucie Smith refused to set aside the notices. On appeal by the debtors to the Court of Appeal for Eastern Africa on 6th November, 1933, that Court allowed the appeal. Applying the principle stated by Lord Esher in *re Sedgwick* 60 L.T. 9, Abraham J. said that the question was, had the respondent done all he reasonably could to obtain from the German Government payment of the sum found due by the Mixed Arbitral Tribunal, which by virtue of the order of 12th December, 1932, he and he only could now claim. He answered the question by saying that he had not resorted to the Berlin Courts, and until those Courts had decided that the two orders issued by them had no validity against the German Government, or until the German Government refused to respect the decision of its own Courts the respondent had not shown that it was not he but the German Government that was preventing payment of the decreetal amount. Sheridan J. expressed similar reasons. This order is the subject of appeal No. 89.

Their Lordships on advising leave to appeal permitted further evidence to be adduced before them as to the German Law, and the acts of the parties in respect of the two orders of attachment. They feel confident that if the facts had been as fully disclosed to the Court of Appeal as they have been to themselves the order in question could never have been made. It is now apparent that at no time were the debtors themselves prevented by the order of attachment obtained in the Berlin Courts from themselves pursuing what remedies they had against the German Government. From 1925 to 1932, indeed, they alone and not the creditors possessed whatever rights of recovery existed. That they understood the legal position is established by the fact that in March, 1927, they applied for execution against the German Government of the Mixed Arbitral Tribunal award. Their application was dismissed by the Registrar of the Landesgericht. They then appealed to the 10th Civil Chamber of the Landesgericht who, in May,

1927, dismissed the appeal. They then appealed to the final Court of Appeal, the Kammergericht, who, in February, 1898, dismissed the appeal. The grounds of the refusal were the same in each case, viz., that they could not get an order for execution without producing a certified copy of the award from the German agent attached to the Mixed Arbitral Tribunal, and this had been refused to them by the agent, though they had been granted a copy for purposes of execution against the German Bank of East Africa. In the opinion of the final Court of Appeal the German Government Agent is " specially in the position of " a custodian of the interests of the German State where " the latter itself is a party to the proceedings. It must be " left to his conscientious discretion to consider the grounds " on which he may refuse to issue the certified translation." There is nothing to indicate that at any material time the German Government Agent ever swerved from his conscientious decision not to permit the means of execution against his Government.

It was suggested by Dr. Brunzlow in his affidavit filed on behalf of the debtors that there was another legal proceeding open to the creditors, viz., to bring an action against the German Government in the German Courts for a declaration that the award was binding. This, it is said, would have shown the invalidity of the plea then put forward by the German Government that the amount of the award was covered by the Dawes or Young Plan, for it could be shown that those plans did not apply to nationals of Czechoslovakia, who was not a party to the plan. Dr. Cohn's affidavit makes it reasonably clear that such an action would not lie. But if it would it is quite plain that up to 1932 the debtors alone could have taken it, and that it never occurred to them to commence any such action. Dr. Brunzlow, himself the legal representative of the debtors, who had acted for them in the abortive attempts to obtain execution, wrote on 20th June, 1928, to Dr. Steiner, representing the creditors, reporting the failure of the final appeal, and saying: " In the meantime I continue to " negotiate with the central authorities and I have taken " all imaginable steps in order to obtain at last a reason- " able settlement of this affair. So far all my endeavours " have been without avail. From a legal point of view we " are powerless." The legal position was not altered by the attachment order obtained in 1932. According to Dr. Cohn it left the debtors still competent to take what proceedings were available against the Government. In any event, there is no indication that after the date of the attachment the prospects of recovering any money from the Government were any better than before.

Mr. Markus indeed was not fettered in his contentions by the legal proceedings. He put forward a case that in 1929 he had arranged with the proper official of the Treasury (unnamed) for payment of the amount of the award if the

attachment decree were withdrawn, and that it was only due to the unreasonable refusal of the creditors to accept this condition that payment failed to be made. The proceedings and correspondence make it quite clear that at no time was any responsible officer of the Government able and willing to pay the claim: and Mr. Markus's statement seems to be quite inconsistent with a statement in his later affidavit that an official had explained that his debt could not be paid without admitting claims for milliards of marks from Roumanian and Polish claimants. The story cannot be accepted.

The debtors have to prove affirmatively that the claim in respect of which the bankruptcy notice was issued could and would have been paid but for some act or omission on the part of the creditor. They have entirely failed to prove any part of such a case. The evidence is that throughout they could have taken any possible proceedings against the German Government: that they did take the only proceedings their lawyers thought available and failed: and there is not any satisfactory evidence that at any time there were any proceedings available which would have resulted in the German Government paying the debt. It would probably be sufficient to say that in any event any proceedings by the creditor would have been attended by considerable expense and considerable chance of failure, and it is difficult to conceive of an equitable plea which is based upon the creditor having to take proceedings at his own expense. Their Lordships have already said that had the full materials been available in East Africa it is unlikely that the Court of Appeal would have accepted the debtors' plea. As the evidence now stands the case made by the debtors on this point is fantastic.

Counsel for the debtors took a further point before their Lordships that does not appear to have been argued before either of the Courts below. It has been decided by a line of cases in England that where execution is proceeding against the debtor, the creditor is not entitled to issue a bankruptcy notice. That would offend against the spirit of the section which only gives permission to issue such a notice on a judgment, execution thereon not having been stayed. Where goods have been seized under a writ of *fi. fa.* another writ of *fi. fa.* will not be issued pending completion of the first. The principle is found asserted in *re Phillipps* (5 Morrell's Bank Cases 40). Applying this principle it was contended that the attachment orders obtained in Berlin were in the nature of execution, that their effect must notionally be transferred to Kenya; and that by analogy there must be deemed to have been an execution pending on the Kenya decree which made it improper to issue a bankruptcy notice against the debtors. From one aspect this is but a repetition of the contention of which their Lordships have just disposed. But as an independent point it fails. *Re Phillipps* is an instance of a rule which turns upon the execution of judgments. It does not apply to attachment of shares, or a garnishee order nisi or to an infructuous garnishee order absolute. In this particular case it is sufficient to say that the attachment orders were not a form of

execution; this first was obtained before any decree had been obtained even in Vienna and the second was merely an extension of the first. In the second place even if they had been forms of execution they were not in execution of a Kenya decree obtained years after the first and a year after the second. In the third place if they had been forms of execution they had proved abortive and there was no reasonable prospect of any money being received under them.

Appeal No. 89 must be allowed the orders made by the Court of Appeal, (appeals Nos. 34 and 35), dated January 10th, 1934, should be set aside, and the order made by Lucie Smith J. dated October 26th, 1933, should be restored.

Appeal No. 90 raises a different point. On 20th June, 1933, the decree in favour of the creditors against the debtors was made in the Court of Appeal for 210,501 shillings, as already stated. In Kenya the procedure in execution follows the Indian Code and not the English, and arrest and imprisonment of the debtor is a normal form of execution. Section 38 of the Kenya Civil Procedure Ordinance, 1924, provides as follows :—

"PROCEDURE IN EXECUTION.

"Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree

"(*a*) by delivery of any property specifically decreed;

"(*b*) by attachment and sale, or by sale without attachment, of any property;

"(*c*) by attachment of debts;

"(*d*) by arrest and detention in prison of any person;

"(*e*) by appointing a Receiver; or

"(*f*) in such other manner as the nature of the relief granted may require."

By Section 40 (1) :—

"ARREST AND DETENTION.

"A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the Court."

The rules made in pursuance of the Code provide O. xix. r. 8 (2)

"Every application for the execution of a decree shall be in writing . . . . shall contain the following particulars, viz., ... (1) The mode in which the assistance of the Court is required whether . . . . (iii) by the arrest and detention in prison of any person."

The rules further provide :—

"Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison."

* * *

"35. Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid."

"37.—(1) Where a judgment-debtor appears before the Court in obedience to a notice issued under Rule 34, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.

"(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder, touching any of the following matters, namely:—

"(*a*) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account;

"(*b*) the transfer, concealment, or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;

"(*c*) any undue preference given by the judgment-debtor to any of his other creditors;

"(*d*) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree, has had, the means of paying it;

"(*e*) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

"(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him to the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.

"(4) A Judgment-debtor, released under this rule, may be re-arrested.

"(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested, if he has not already been arrested, and, subject to the provisions of this Ordinance, commit him to the civil prison."

It is necessary also to refer to s. 99 of the Bankruptcy Act which provides as follows:—

"When application is made by a judgment creditor to the Court for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made, and the provisions of this Ordinance, except Part VIII thereof, shall apply as if for references to the presentation of a petition by or against a person were substituted references to the making of such a receiving order."

In pursuance of the rules the creditors on 18th October, 1933, gave written notice that they would apply for execution by imprisonment of the debtor, and on 7th November the application was heard before Mr. Justice Webb. The debtors

were examined as to their means and disclosed that in May, 1932, they had transferred their assets to a private limited company from whom they were receiving as directors £750 a year. It was contended before Mr. Justice Webb that the Court could only make a receiving order where it could make a committal order and that under O. xix. r. 37 it could not make a committal order where the debtor was unable from poverty or other sufficient cause to pay the judgment debtor. The learned judge pointed out the obvious answer that the power to commit is not given by rule 37, but that on the contrary it is a rule giving a discretion not to commit after taking into account the various considerations mentioned in the rule. He took into account what he found to be the fact, viz., the refusal or neglect on the part of the debtor to pay some part of the decree when he had had the means of paying it, and being in a position to commit if he thought fit, decided to act under the provisions of section 99 of the Bankruptcy Ordinance, 1930, and in lieu of committal made a receiving order. Their Lordships have no doubt that the reference to committal in this section is to committal under the provisions of the Code of Civil Procedure and the rules. On appeal the Court of Appeal set aside the receiving order, but their Lordships have found difficulty in appreciating their reasons. They appear to have thought that imprisonment for debt in Kenya depends upon enactments similar to the English Debtors Act, 1869. It is clearly intended, it is said, that imprisonment for debt is to be treated in the same way as it is under the Debtors Act. The learned Judges thereupon inquired whether there was proved anything in the nature of contempt and coming to the conclusion that there could be no contempt in omitting to pay part of the debt, but that to constitute contempt it must be shown that the debtor having means to pay the whole had omitted to pay the whole, decided that there was no jurisdiction to commit. They have omitted to notice that so far from the provisions in Kenya indicating that imprisonment for debt is to be treated in the same way as it is under the Debtors Act the very opposite is the case. The Debtors Act abolished imprisonment for debt except in special cases: the Kenya Ordinance and rules imposes it as one of the ordinary means of execution. It is true that there are many humane provisions permitting the Court to make more lenient orders than committal. But r. 37 does not purport to give the jurisdiction to commit, it merely gives a discretion not to commit, the jurisdiction having been given by the Civil Procedure Ordinance and rules made thereunder. How the learned Judges came to encumber themselves with the English decisions under the Debtors Act as to when the debtor is in contempt is difficult to understand. The Kenya provisions are part of a different Code to that obtaining in England, and should be construed independently. So construed they afford no ground for disturbing the decision of Mr. Justice Webb. Their Lordships find it unnecessary to pass any opinion upon the views expressed by the members of the

Court of Appeal upon the construction of the English Act. This appeal should be allowed. The orders of the Court of Appeal in appeals Nos. 36 and 37 dated 10th January, 1934, should be set aside and the receiving order made the 8th November, 1933, restored. In the result the bankruptcy notices dated 21st August, 1933, are effective, as is the receiving order dated 8th November, 1933. Presumably bankruptcy proceedings will continue on the receiving order, the non-compliance with the bankruptcy notices constituting antecedent acts of bankruptcy. Their Lordships will humbly advise His Majesty in accordance with the conclusions they have reached above. The creditors should have the costs of the appeals to the Court of Appeal for Eastern Africa and to the Privy Council. Their remedies in respect of such costs will of course depend upon the law of Kenya in respect to orders for costs made against debtors against whom a receiving order has been made.

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