

BUCKLEY *In re* LONDON AND GLOBE FINANCE CORPORATION,
J. LIMITED.

1903

March 4, 5, 10.

[00418 and 00419 of 1901.]

Company—Winding-up—Director—Prosecution—Payment of Costs out of Assets—Refusal of Public Prosecutor to prosecute—Discretion—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 167.

In order to determine whether leave ought to be given to institute criminal proceedings against the director of a company which is being wound up, and whether the costs of the prosecution ought to be paid out of the assets of the company, the Court will look at the question from the point of view of an individual, and will consider whether it would be the duty of a good citizen even at a loss to himself to institute and carry on proceedings to punish the criminal. It is not necessary to find that the facts are so plain that a conviction must ensue. The proportion of creditors who support and oppose the application, and the effect which will be produced upon the estate by payment of costs, will be taken into consideration, but not the personal advantage of the individual, nor motives of vengeance against the offender, nor pecuniary benefits to be obtained for the creditors or shareholders. The fact that the law officers of the Crown have refused to allow the public prosecutor to undertake the prosecution is not necessarily irrelevant.

THE London and Globe Finance Corporation, Limited, was registered on March 1, 1897, with a nominal capital of 2,000,000*l.* in shares of 1*l.* each, its object being to acquire the undertakings of the West Australian Exploring and Finance Corporation, Limited, and of the old London and Globe Finance Corporation, Limited, and to carry on financial operations of all kinds.

Mr. Whitaker Wright was managing director of the London and Globe Finance Corporation.

On January 14, 1901, resolutions were passed for the voluntary winding-up of the corporation. On the 19th of the same month the Court made an order continuing the voluntary winding-up under the supervision of the Court. On October 30, 1901, upon the petition of a creditor, the Court made an order for the compulsory winding-up of the corporation, and the official receiver became the provisional liquidator. On Decem-

ber 16, 1901, the statutory meetings of creditors and shareholders were held, when it was resolved that the official receiver should remain liquidator of the corporation with a committee of inspection consisting of eight persons, five of whom (including the official assignee of the Stock Exchange) were nominated by creditors and three by shareholders.

Mr. Whitaker Wright and other directors and officials of the company were publicly examined, and a state of affairs was disclosed which gave rise to a suggestion that proceedings ought to be taken against Mr. Whitaker Wright on account of his alleged conduct as managing director. The official receiver, at the instance of the committee of inspection, requested the public prosecutor to take the requisite steps; but he, acting upon the advice of the law officers of the Crown, refused to institute a prosecution.

Funds were subscribed to enable a prosecution to be undertaken; an offer was made to pay at least 1250*l.* into court; and it was desired that such further sums as might be necessary for that purpose should be paid by the official receiver out of the assets of the company. A dividend of 1*s.* in the pound had been paid, and it was hoped that another of the same amount might be distributed.

On January 20, 1903, Mr. John Flower, a creditor of the company and member of the committee of inspection, took out a summons for an order that the official receiver might be directed to institute and conduct a prosecution of Mr. Whitaker Wright for certain offences alleged to have been committed by him in relation to the company and the members and creditors thereof, and that all costs and expenses incurred in such proceedings should be paid out of the assets of the company. The summons was supported by creditors to the amount of about 650,000*l.*; creditors for about 100,000*l.* were neutral.

The Nickel Corporation, who opposed the application so far as it related to payment out of the assets, were creditors for about 175,000*l.*

Counsel for the summons asked that the application should be heard in *camera*, but Buckley J. declined to accede to this suggestion.

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Avory, K.C., and Clavell Salter, for the summons. We ask the Court, under s. 167 of the Companies Act, 1862, to direct the official receiver to take proceedings against Mr. Whitaker Wright for such offences, under ss. 83 and 84 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and s. 166 of the Companies Act, 1862, as he may be advised. On the facts a strong *prima facie* case is shewn against Mr. Whitaker Wright; and the question remains whether the prosecution, if directed, should be paid for out of the assets of the corporation. The shareholders can never receive anything, so they have no interest in the question. The interest of the creditors is very slight. It is not expected that they will get more than another 1s. in the pound, and the costs of the prosecution, estimated at 3500*l.* besides the subscribed fund, will only reduce that dividend by about a halfpenny in the pound. Under s. 167 the Court will direct payment to be made out of the assets, even on its own motion, unless the great majority of the creditors object to it. Here the opposition comes only from a small number of creditors, and the application is supported by a great majority, and also by people who have no private feelings on the subject, such as the official assignee of the Stock Exchange.

Astbury, K.C., and T. L. Wilkinson, for the Nickel Corporation. We do not object to the prosecution, but we say that the costs ought not to come out of the assets. There has never been a case in which leave to prosecute has been given after it has been refused by the law officers of the Crown.

[BUCKLEY J. I do not know what materials were before them, and I must decide the question of law for myself. Ought not the Court to consider it from the point of view of an individual who has to determine whether as a good citizen it is his duty to prosecute even at his own loss?]

That may be so; but it cannot be the duty of an individual to prosecute another man's servant; and Mr. Whitaker Wright was not in our service. He has not defrauded us in that capacity. Our only interest is to save something out of the wreck, and most of our shareholders are Americans and have no wish to punish anybody. It cannot be the duty of an individual to take proceedings in order to obtain some benefit

for himself, or to take vengeance on Mr. Whitaker Wright. Leave will not be given against the wishes of a substantial minority: *In re Eupion Fuel and Gas Co.* (1) The Court is not obliged to give leave; the word "may" in s. 167 does not mean "must": *In re Northern Counties Bank, Limited.* (2) An order was made in *In re Charles Denham & Co., Ltd.* (3); but that was chiefly on the ground that justice might have been defeated, if instead of at once commencing proceedings the public prosecutor were communicated with. Here that has already been done, and in vain. There is no case which lays down any general principle on which the discretion of the Court under this section should be exercised.

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Rufus Isaacs, K.C., and *G. F. Hart*, for the official receiver, did not support either party.

Avory, K.C., in reply.

Cur. adv. vult.

March 10. BUCKLEY J. The questions which arise upon this application are of the largest general importance. Their importance lies, not only nor even principally in the fact that the application is made in the winding-up of a corporation whose affairs have become matter of great public notoriety, and in which grave and grievous frauds are said to have been committed, but rather because for the proper decision of the matter it is necessary to investigate the general principles upon which a criminal prosecution at the expense of the estate ought to be directed under s. 167 of the Companies Act, 1862. The statutes relating to limited liability have probably done more than any legislation of the last fifty years to further the commercial prosperity of the country. They have, to the advantage as well of the investor as of the public, allowed and encouraged the aggregation of small or comparatively small sums into large capitals which have been employed in undertakings of great public utility, largely increasing the wealth of the country. But at the same time in this branch of the law the apathy of the public in setting the law in motion has, I

(1) W. N. (1875) 10.

(2) (1883) 31 W. R. 546.

(3) (1884) 32 W. R. 920.

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will not say encouraged, but has at least failed to repress, grievous frauds which have been committed and too often have gone unpunished. Relatively, I think, compared with the advantages which have accrued from the law of limited liability, the mischief of such frauds has been small, but when regarded, not relatively, but absolutely, the frauds which have been committed under cover of these Acts have no doubt been great. Recourse has seldom been had to s. 167 of the Act of 1862, or to other remedies which the law provides. The Act of 1890, by ss. 7 and 8, gives machinery by which light must in every case of compulsory liquidation be let in upon the dealings of the company, resulting, in case the official receiver finds that fraud has been committed, in the public examination of promoters or directors. In the case before me that machinery has been employed, fraud has been found, a public examination has taken place. The question I have to determine is whether in the result the power given by s. 167 of the Act of 1862 ought to be exercised, and a direction given to the official receiver to institute a criminal prosecution at the expense of the estate.

The applicant, Mr. John Flower, is a creditor of the London and Globe Finance Corporation and a member of the committee of inspection. He asks for an order directing the official receiver to prosecute at the expense of the estate Whitaker Wright, who was the managing director of the corporation. The prosecution which it is sought to institute would be under ss. 83 and 84 of the Larceny Act, 1861, and s. 166 of the Companies Act, 1862, or one of those sections. The transactions impeached took place before the Companies Act, 1900, came into operation. Sect. 28 of that Act is therefore not applicable.

In both ss. 83 and 84 of the Larceny Act of 1861, and s. 166 of the Companies Act, 1862, the offence is that of making or publishing a false statement or account, or a false or fraudulent entry with intent to deceive or defraud. To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by

deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action. The first question I have to determine is whether there is here shewn a case of doing some or one of the acts mentioned in the sections to which I have referred with intent to deceive or defraud. It is not in my opinion necessary that I should find that the facts are so plain as that a conviction must ensue. Until the accused has been heard in his defence, no man can or ought to say that he must be or ought to be convicted. I must look to see whether such facts are made out as that, if they are not shewn to be erroneous or displaced by other facts, a conviction ought to ensue. I must look to see whether there is a *primâ facie* case. For obvious reasons I do not here analyze and examine the facts upon which I arrive at the conclusion that such a case has been shewn. Upon a full consideration of the facts brought before me, I am of opinion that a case has been shewn.

I have next to consider upon what principles I ought to exercise the power given me by s. 167 of the Companies Act, 1862, to direct the official receiver to institute and conduct a prosecution at the expense of the assets. It is obvious that no one legitimately can or ought to institute a criminal prosecution with a view to his personal profit. Neither should a prosecution be instituted from motives of vengeance against the offender. The motive of every prosecution ought to be to inflict punishment upon the criminal for the proper enforcement of the law and for the advantage of the State, and with a view to deter others from doing the like. From the prosecution no doubt there may arise benefit to the prosecutor in the sense that, if he be a person interested in commerce, it may be to his advantage to enforce commercial morality. But except in this sense the personal advantage of the prosecutor is not to be regarded. The principle upon which I am to apply s. 167, therefore, cannot be that I ought to regard the pecuniary benefit or advantage of the class at whose expense the prosecution would be conducted.

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Again, the general scheme of the Acts with reference to the liquidation of a company no doubt is that the assets are to be realized to the best advantage for the benefit of those who are entitled to share in their distribution. But indications are not wanting that the assets may under the Acts be applied for some purposes other than these. Sect. 167 of the Act of 1862 is, having regard to the reasons which I have just given, one example of this, and in the Companies (Winding-up) Act, 1890, the same intent may be traced in ss. 7 and 8 of that Act. These are sections which require the preparation of a statement of the company's affairs at the expense of the assets leading to a preliminary report, which is to shew whether further inquiry is desirable as to matters relating to the promotion and the like, and, if necessary, to a public examination of parties incriminated, with the purpose, of course, of enforcing commercial morality. It is, therefore, in my judgment plain that the principle upon which I am to apply, or refuse to apply, s. 167 is not measured or limited or even concerned with pecuniary benefit to be obtained for the shareholders or creditors.

So far I have addressed myself negatively to the considerations which, in my judgment, cannot govern the matter. Next, affirmatively, what are the considerations which ought to govern it? The principle lies, I think, in the answer to the following question. If the persons at whose expense the prosecution would be instituted were not a class, but were a single person, and that person were an honest and upright man desirous as a good citizen of doing his duty by the State, are the circumstances such as that in discharge of that duty he would feel that he ought at his own expense and to his own loss to institute a prosecution? Not in every case in which a criminal offence has been committed would such an one think it his duty to prosecute. The question to be answered is, Would he in this case think his duty to the State required him to prosecute? If that question be answered in the affirmative, then, upon principle, I think that the Court ought to direct a prosecution. Further, I think that the Court

can, and in a proper case ought to, direct a prosecution without the assent, and even notwithstanding the dissent, of the class or many of the class at whose expense the prosecution would be instituted. It is noticeable that the section provides that the Court may act "of its own motion." No principle suggests itself to me upon which the Court ought "of its own motion" to direct a prosecution other than that above indicated. The first question, therefore, which I ask myself is, Would a good citizen, in the discharge of his duty to the State, think that in this case he ought to prosecute and bear the expense? I answer the question in the affirmative.

The above is, in my judgment, the dominant and guiding principle. But there are other considerations to which due weight, no doubt, ought to be given. One of them deserving of consideration, although in my judgment much less than that which precedes, is the question of the proportion of the class affected who respectively approve and disapprove the institution of a prosecution.

Upon this head the facts in the present case stand thus. There is a committee of inspection under the Act of Parliament consisting of eight persons, who ought to have, and I have no doubt have, an intimate knowledge of the affairs of this company. At a meeting of the committee held on February 13 last four members (of whom the applicant is one) were present. They were unanimous in desiring a prosecution at the expense of the assets. A fifth member states that had he been present he would have voted with them. A sixth writes that it is difficult for him to say how he would have voted after a discussion at which he was not present, but that if counsel had advised that a prosecution if instituted would succeed, he would have considered it his duty to vote for the resolution. A seventh is travelling in South America and is not accessible. The eighth, Mr. Brigstock, states that he would have voted against it. Mr. Brigstock is a member of the firm of Read & Brigstock, who were the private stock-brokers of Whitaker Wright, the accused, and are stated to be at the present time acting as his brokers. So much for

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the committee of inspection. As regards the creditors themselves, creditors to the amount of about 650,000*l.* desire a prosecution, while others to the amount of about 100,000*l.* have expressed themselves as neutral. The Nickel Corporation, creditors for about 175,000*l.*, oppose actively. The total amount of the admitted claims is about 1,665,000*l.* A substantial majority of the creditors who have expressed any view, therefore, are in favour of a prosecution; but those who oppose are, no doubt, creditors to a large amount. I say nothing about any questions personal to the latter in the matter of their opposition. I do not find anything in the above facts which would induce me to abstain from making an order.

A second subsidiary question deserving of consideration is whether the expense of a prosecution would bear hardly upon the creditors. The expense is put roughly at 5000*l.* The applicant is prepared to pay not less than 1250*l.* into court towards the amount required. The admitted claims of 1,665,000*l.* have received a dividend of 1*s.* in the pound, requiring, say, 83,250*l.* There are further possible claims of substantial amount. Allowing for the fact that possibly some of these may be admitted hereafter, the remaining assets, which are, approximately, 100,000*l.*, may probably pay another 1*s.* in the pound. If 3750*l.* were wanted for the prosecution, the dividend may be diminished by about a halfpenny in the pound.

In this state of things it is, I think, impossible to say that, as against the considerations to which I have already pointed, an order ought to be refused because it would bear hardly upon the creditors.

There remains the fact to which I undoubtedly ought to give, and desire to give, all due weight, namely, that the Attorney-General has in this case declined to set the public prosecutor in motion. The first observation I have to make upon this is that the question which the Attorney-General had to consider is, to my mind, a different question to that which I have to consider. The conclusion at which he arrived may, for aught I know, be no guide at all for the purpose of

determining the question before me. In arriving at his decision the Attorney-General may have gone upon any one of the following grounds, either (1.) that the Prosecution of Offences Act, 1879, does not apply to every case in which a criminal prosecution will lie. The Attorney-General may have thought that, having regard to s. 2 of that Act, this case did not fall within it; or (2.) he may have thought that the public prosecutor ought not to be set in motion unless there was more than a probability, unless there was a reasonable certainty, that a conviction would ensue, and that he did not think there was such a certainty; or (3.) he may have thought that, inasmuch as s. 7 of that Act leaves it open to any person to prosecute, there was, under this very s. 167 of the Act of 1862, a remedy available, and that there were funds, and that under those circumstances the matter ought to be left to the very remedy which I am now asked to apply, and that a prosecution ought not to be instituted at the public expense.

If his decision rested on any of the above grounds, it is irrelevant to anything which I have to decide, except that if it was on the third ground it would be not adverse to, but in favour of, my making this order.

If, however, his decision rested on the ground that in his judgment a *prima facie* case for a prosecution was not shewn, no doubt that is a matter which would weigh with me very much. But, even if this last were the reason, still I do not know whether the materials before him extended to all those which are before me. The result therefore is that (1.) I do not know whether the conclusion at which the Attorney-General arrived was based upon considerations relevant to anything which I have to determine; and (2.) that even if it was arrived at upon a ground which renders it relevant, I do not know whether he was acting on the same materials. Under these circumstances it seems to me that I ought not to allow my judgment to be influenced even by the fact that the highest authority at the bar, and the first law officer of the Crown, has thought proper to decline to put the public prosecutor in motion. I must accept the responsibility of determining the question before me for myself.

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The conclusion at which I arrive is that, upon the facts as they at present appear, a grave case of criminal offence committed is shewn, and that, upon the principles which I have endeavoured to explain, I ought to use my power under s. 167 of the Act of 1862. I direct the official receiver to institute and conduct against Whitaker Wright a criminal prosecution for such offences under ss. 83 and 84 of the Larceny Act, 1861, and s. 166 of the Companies Act, 1862, or any of those sections as he may be advised, and I order the costs and expenses of the prosecution to be paid out of the assets of the company, as far as funds be required, in aid of the 1250*l.* or other larger sum which the applicant will pay into court. The 1250*l.* or other larger sum should be paid into court before the order is drawn up, and its payment stated in the order.

Solicitors: *Simmons & Simmons; A. J. Greenop & Co.; Michael Abrahams, Sons & Co.*

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121	15	122	222.
174	22, 23	debtor, debtors	creditor, creditors.
393	foot-note (2)	6 Mac. & G.	1 Mac. & G.
728	head-note, last line	irrelevant	relevant.
751	10	possible	impossible.