

"terms agreed on prior to the 4th of March, and ultimately embodied in the deed of that date."

In all these circumstances it may well be that the testatrix and her solicitor both desired that the deed should at once operate as an immediate assurance of her interest in the intestate's estate, and relied upon the pre-existing arrangement as ensuring that the consideration promised would not fail. At any rate, the inference that an unconditional delivery of the deed was made by the testatrix is fairly open upon the evidence. In these circumstances, the Commissioner has failed to show upon this appeal that, because of its incomplete execution, the deed did not pass the deceased's interest before her death.

But upon the footing that the interest of the testatrix had passed from her before her death, the Commissioner next claimed that it came within sub-sec. (4) (a) of sec. 8, and was "property which passed from the deceased person by a gift *inter vivos* . . . within one year before her decease." By the definition of "gift *inter vivos*" contained in sec. 3, dispositions made in favour of *bonâ fide* purchasers for valuable consideration are excluded. The deed expresses a valuable consideration, namely, the covenant to pay the annuities. An objection that because some of the children did not execute the deed until after the death, this consideration was not, in their cases, given in time or at all, may, perhaps, be open to the answer that it is enough that the grant was not voluntary but made for a consideration, and that it is not material that the consideration was not actually received before death. Be this as it may, the objection must fail here because the deed was executed in pursuance of an arrangement made and for a consideration already promised by the children.

Mr. Gregory conceded that *bonâ fide* meant no more than real or genuine, being, perhaps, deterred from contending that it referred to an intention to avoid the operation of the Statute by such cases as *Simms v. Registrar of Probates*, (1900) A.C. 323, and such observations as those of Lord Macnaghten in *Attorney-General v. Duke of Richmond*, (1909) A.C. at p. 472. At the trial the Commissioner did not challenge the honesty of the testimony given for the taxpayer, and the learned Judge expressed his conclusion in the language already quoted. There is ample evidence contained in the testimony given at the trial to support such a finding, which is quite inconsistent with the conclusion that the transaction was unreal or colourable. It follows that the appeal should be dismissed.

The executors of the testatrix appealed in an informal manner against the learned Judge's order in respect of costs, but were unable to adduce any sufficient reason for interfering with his exercise of the discretion reposed in him.

Rich, J., desires to add for himself that, whilst concurring in this judgment, he does not wish to con-

ceal his misgivings upon the correctness of the interpretation of the words "*bonâ fide*" in the definition of "gift *inter vivos*" in sec. 3, which the parties both adopted, and upon the reality of the covenants in the deed, performance of which might well have involved a greater expenditure in income tax than would be saved in death duties.

Appeal dismissed.

[Solicitors—For the Commissioner appellant, W. H. Sharwood, Commonwealth Crown Solicitor; for the executors respondents, Blake and Riggall, for Simmons, Wolfhagen, Simmons and Walsh, Hobart.]

E. H. C.

FULL COURT—(Isaacs, Gavan Duffy and Starke, JJ.) } April 11, 29.
(Sydney.)

CHENEY, Appellant v. SPOONER, Respondent.

Company — Winding-up — Examination — Summons — Service — "Trial or proceeding" — "Evidence" — "Companies Act 1899" (N.S.W.), secs. 123 and 124; "Service and Execution of Process Act 1901-1924," sec. 16.

The respondent, the liquidator of a company in voluntary liquidation, obtained, in pursuance of the "Companies Act 1899" (N.S.W.), a summons requiring the appellant to appear before the Master-in-Equity to be examined on the part of the respondent, and to produce to the Master-in-Equity all books, papers, deeds, writings and other documents in his custody or power in anywise relating to the said company. The respondent then obtained an order of the Chief Judge in Equity granting leave to serve the summons on the appellant in the State of Victoria. The appellant applied to the Chief Judge in Equity to set aside the order, on the ground that it was made without jurisdiction. The application having been dismissed,—

Held, that the Chief Judge in Equity had jurisdiction to make the order. An examination under the "Companies Act 1899" (N.S.W.), sections 123 and 124, is a "proceeding" within the meaning of the "Service and Execution of Process Act 1901-1924" (Federal), section 16, and the facts elicited in the course of such proceedings constitute "evidence" within the meaning of that Act.

APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

This was an appeal by way of special leave against an order made by Harvey, C.J. in Equity, on 7th December, 1928.

The facts are conveniently set forth in the judgment of Isaacs and Gavan Duffy, JJ., hereunder.

The following were the grounds of appeal:—

1. That His Honour should have held that the said order made on the twenty-second day of November last was made without jurisdiction.

2. That His Honour should have held that there was no jurisdiction under the "Federal Service and Execution of Process Act 1901-1924" to make the said

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last-mentioned order, upon the grounds (*inter alia*) that—

- (a) That the summons referred to in the said order made on the twenty-second day of November last was not issued by a Court or Judge within the meaning of the said Act.
- (b) The said summons did not require any person to appear and give evidence within the meaning of the said Act.
- (c) At the respective times of the issue of the said summons and the making of the said last-mentioned order, there was not pending any civil trial or proceeding in which the said summons was made or to which it related.

3. That His Honour should have set aside the said last-mentioned order, with costs.

Jordan, K.C. (with him *Weston*), for the appellant.—The order of 22nd November was not properly made in regard to persons outside the State of New South Wales. The summons of 20th November was a summons to attend for examination and produce documents. It was not a summons to appear and give evidence within the meaning of the "Service and Execution of Process Act 1901-1924." The process of answering questions on an examination of this nature is not the process of giving evidence in a civil proceeding. An examination under the "Companies Act 1899" is not a trial or proceeding as contemplated by the "Service and Execution of Process Act 1901-1924," sec. 16. He referred to—*In re Norwich Equitable Fire Insurance Company*, (1884) 27 Ch. D. 515 at pp. 521, 522; *In re Standard Gold Mining Company*, (1895) 2 Ch. 545; *Burchard and Others v. Macfarlane and Others*, (1891) 2 Q.B. 241; and *Dyson v. Attorney-General*, (1911) 1 K.B. 410 at pp. 423, 421.

Bonney, K.C. (with him *Abrahams*), for the respondent.—The Court had jurisdiction to make the order. In *Re Auto Import Co. (Australasia) Ltd.*, 25 S.R. (N.S.W.) 587, the Court, in applying *In re Standard Gold Mining Company*, (1895) 2 Ch. 545, and *In re Appleton*, (1905) 1 Ch. 749, held that an examination under the "Companies Act 1899" (N.S.W.), secs. 123 and 124, is a civil proceeding. The definition of "evidence" given in *Stephens's Digest of Evidence*, art. 1, absolutely covers an examination of this kind. The "Service and Execution of Process Act 1901-1924" uses the word evidence in the sense of testimony.

Cur. adv. vult.

The following judgments were given:—

ISAACS and GAVAN DUFFY, JJ.—The Company called *Williams Bros. Limited* went into voluntary liquidation in New South Wales. On 5th November, 1928, *Harvey, J.*, made an order giving leave to the liquidator to issue a summons to each of a number of persons—among whom the appellant was included by name—to attend and give evidence before the Master-in-Equity respecting the affairs of the Com-

pany, and to produce books and documents. On 20th November, 1928, in pursuance of that leave, the liquidator obtained a summons from the Master-in-Equity summoning the appellant (*inter alios*) to attend on 3rd December, 1928, to be examined for the purpose of proceedings directed by the Chief Judge in Equity to be taken before the Master in the matter of the liquidation, and to produce books, &c. So far the statutory authority was secs. 123 and 124 of the New South Wales "Companies Act 1899." On 22nd November, 1928, *Harvey, J.*, on the *ex parte* application of the liquidator, made an order giving him leave to serve the summons of 20th November on the appellant (*inter alios*) in Victoria. This was made as under the authority of sec. 16 of the Federal "Service and Execution of Process Act." On 17th December, 1928, the same learned Judge dismissed an application on behalf of the appellant to set aside His Honour's order of 22nd November. Against this dismissal the present appeal is brought.

For the appellant, the contention is that the order of 22nd November was made without jurisdiction, because—(1) There was no "trial or proceeding" in which the appellant could be lawfully required to give evidence or produce books, &c. (2) Sections 123 and 124 do not require a person to give "evidence," but merely information. (3) The production of books and documents required by these sections is ancillary to giving "evidence," and not an independent subject.

As to the first point, sec. 16 uses the words "any civil or criminal trial or proceeding." The argument is that sec. 123, and therefore also sec. 124, of the New South Wales "Companies Act 1899," do not give rise to a "proceeding" in any legal sense, and do not contemplate evidence; that they contemplate mere gathering of information which may result in nothing or may result in the subsequent initiation of some proceeding. A "proceeding" used broadly, as it is used in sec. 16 of the Federal Act, is merely some method permitted by law for moving a Court or judicial officer to some authorised act, or some act of the Court or judicial officer. In the case of a compulsory winding-up no doubt could exist. The application by petition under sec. 89 would initiate the necessary "proceeding," which would comprehensively cover also all subsequent steps in the winding-up. In the case of a voluntary winding-up, sec. 137 makes express provision for an "application" to the Court in any matter, as if the winding-up were compulsory. The "application" is necessarily made in the equitable jurisdiction, and presumably made and heard in the regular method followed in that jurisdiction. The Court is to be satisfied that granting the application in whole or in part will be "just and beneficial." So there is a distinct judicial proceeding. The application of 5th November, 1928, instituted a proceeding which did not end with a refusal, but continued by the order of the same date, and the summons of 20th November. The required

evidence would therefore be given in a civil proceeding within the meaning of sec. 16 of the Federal Act, constituted by the application, summons and examination. The case of *In re Appleton French and Scafton Ltd.*, (1905) 1 Ch. 749, is a clear authority that the examination takes place in a "proceeding."

2. As to the second point, it seems to rest on the view that the term "evidence" is appropriate only where some issue of fact is raised for judicial or quasi-judicial determination. That is too narrow a limitation of the term. "Evidence," says *Best*, practically repeating *Bentham*, is "any matter of fact the effect, tendency or design of which is to produce in the mind a persuasion affirmative or disaffirmative or the existence of some other matter of fact." In this case the law places on the liquidator, in a voluntary winding-up, the responsibility of working out the affairs of the Company. It affords him the means of obtaining information, that is evidentiary facts, enabling him to come to a conclusion as to ultimate facts. The information obtained, as prescribed through the instrumentality of the Court and on oath, is properly described as "evidence." It is "evidence" for the purpose intended by the law. The effect of the evidence on the mind of the liquidator, whether it brings him to an affirmative or a disaffirmative opinion, or to none, is immaterial. If the law, for its own purposes, provides a Court with compelling power to obtain the disclosure of facts that may or may not prove persuasive, then following the legal method to obtain them is a proceeding, and the facts when elicited are evidence within the meaning of the section.

As to the third point, it becomes unnecessary.

The appeal should be dismissed, with costs.

STARKE, J.—An appeal, by special leave, has been brought to this Court against an order made by the Supreme Court of New South Wales (Harvey, C.J. in Equity), giving leave to serve, in the State of Victoria, a summons issued out of that Court, and also against an order refusing to set that leave aside. The order giving leave was made pursuant to the powers conferred by the "Service and Execution of Process Act 1901-1924," sec. 16 (Federal), which enacts—"When a . . . summons has been issued by any Court "or Judge . . . in any State . . . requiring any person "to appear and give evidence . . . or to produce books "or documents in any civil . . . trial or proceeding "such . . . summons may upon proof that the testimony of such person or the production of such "books or documents is necessary in the interests of "justice by leave of such Court Judge . . . on such "terms as the Court Judge . . . may impose be served "on such person in any other State. . ."

The summons was issued under the powers conferred upon the Supreme Court of New South Wales by the "Companies Act 1899," secs. 123, 124 and 137. It is what is known as an examination summons—

that is, the persons named therein are summoned for examination concerning the affairs, dealings, estate, or effects of Williams Bros. Limited, a Company formed under the "Companies Act," but in voluntary liquidation, and also to produce any books and papers in their custody or power relating to the Company.

This summons, it was argued, was not issued in any civil proceeding, as required by the "Service and Execution of Process Act." A civil proceeding, I apprehend, includes any application by a suitor to a Court in its civil jurisdiction for its intervention or action. The application for the issue of a summons in this case was such a proceeding: the cases of *Re Beall*, (1894) 2 Q.B. 135 C.A., and *In re Appleton French and Scafton Ltd.*, (1905) 1 Ch. 749, are decisive in favour of this view.

Next, it was argued that the appellant was not required "to appear and give evidence" within the meaning of the section. It is true enough, no doubt, that the examination is of an inquisitorial nature: that the facts or statements elicited are not offered to any legal tribunal for the purpose of any judicial determination or decision. Indeed, the depositions are only admissible in evidence in other legal proceedings against the deponent, and not against third parties—see *R. v. Coote*, L.R. 4 P.C. 599; Palmer, *Company Precedents*, Part II. (13th ed.), p. 665. Still, in my opinion, a person who is summoned to appear in Court and testify as to matters of fact under inquiry is required to appear and give evidence within the meaning of the "Service and Execution of Process Act"—(*cf.* Stephen, *Digest of Evidence* (9th ed.), pp. 1-2.

The appeal ought to be dismissed.

Appeal dismissed, with costs.

[Solicitors—For the appellant, Allen, Allen and Helmsley; for the respondent, Minter, Simpson and Co.] T. F. W.

Supreme Court.

Before Irvine, C.J.

March 27.

FINDLAY v. GOOD.

Factories and shops — Employer and employee—Deficiency in wages paid—Wages fixed by Wages Board — Employer, becoming bankrupt—Effect of bankruptcy—Amount of deficiency a debt provable in bankruptcy — "Factories and Shops Act 1915" (No. 2650), secs. 199, 225, 232; "Factories and Shops Act 1927" (No. 3573), sec. 32; "Bankruptcy Act 1924-1928," sec. 60 (2).

An employer who had paid his employee less wages than those to which the employee was entitled by virtue of the Factories and Shops Acts, became bankrupt, and after sequestration a Court of Petty Sessions made an order, under section 232 of the "Factories and Shops Act 1915," for payment of the amount of the deficiency.—