

AUSTRALIA / JUDGMENT

Phillips, T.S. v Aboriginal Development Commission [1987] FCA 170

COURT
IN THE FEDERAL COURT OF AUSTRALIA

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CATCHWORDS

BANKRUPTCY - Creditor's petition - Debtor an Aboriginal -
Acquisition by British Crown of colony of New South Wales -
Whether by settlement or conquest - Concept of "terra nullius" -
Whether debtor bound by Bankruptcy Act 1966 (Cth).

ABORIGINES - Whether bound by Bankruptcy Act 1966 (Cth) -
Acquisition by British Crown of colony of New South Wales -
Whether by settlement or conquest - Concept of "terra nullius".

Re THOMAS STEVEN PHILLIPS

Ex parte ABORIGINAL DEVELOPMENT COMMISSION

No. P 2035 of 1986

Neaves J.

13 April 1987

Canberra

IN THE FEDERAL COURT OF AUSTRALIA

GENERAL DIVISION

No. P 2035 of 1986

BANKRUPTCY DISTRICT OF THE STATE
OF NEW SOUTH WALES AND THE
AUSTRALIAN CAPITAL TERRITORY

we ES

RE: THOMAS STEVEN PHILLIPS

Debtor

EX PARTE: ABORIGINAL DEVELOPMENT
COMMISSION

Creditor

MINUTE OF ORDER

JUDGE MAKING ORDER

Neaves d.

DATE OF ORDER 13 April 1987

oo

WHERE MADE : Canberra

o

THE COURT ORDERS
THAT:

1. .A sequestration order be made against the estate of the debtor, Thomas Steven Phillips.
2. The creditor's costs, including any reserved costs, be taxed and paid according to the Bankruptcy Act 1966 (Cth).
Note: Settlement and entry of orders is dealt with in rule 124 of the Bankruptcy Rules.
IN THE FEDERAL COURT OF AUSTRALIA
GENERAL DIVISION
No. P 2035 of 1986
BANKRUPTCY DISTRICT OF THE STATE
OF NEW SOUTH WALES AND THE
AUSTRALIAN CAPITAL TERRITORY
wee we ES
RE: THOMAS STEVEN PHILLIPS
Debtor
EX PARTE: ABORIGINAL DEVELOPMENT.
COMMISSION
Creditor
CORAM: Neaves Jd.
DATE: 13 April 1987

REASONS FOR JUDGMENT

I have before me a creditor's petition presented on 12 November 1986 by the Aboriginal Development Commission against Thomas Steven Phillips. The creditor claims that the debtor is justly and truly indebted to it in the sum of \$7,876.06, together with interest, in respect of moneys advanced to the debtor by the creditor.

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The act of bankruptcy relied upon is that the debtor, within six months before the presentation of the petition, failed to comply with the requirements of a bankruptcy notice within fourteen days after the service of the notice upon him. The notice was duly served on the debtor on Saturday, 24 May

1986. The petition alleges, incorrectly, that the debtor committed the act of bankruptcy on 7 June 1986. The correct

2.

date, upon the facts alleged, is 10 June 1986 and I gave leave to the creditor to amend the petition in that regard. I dispensed with the necessity to verify and serve the petition

as so amended.

The bankruptcy notice, which was issued on 23 December 1985, was based on a final judgment obtained by the creditor

against the debtor in the Court of Petty Sessions at Canberra on 8 February 1985 in the sum of \$7,254.87. The difference, namely \$612.19, between that amount and the amount specified in the petition represents interest on the judgment debt at the

rate of 10 per centum per annum from 8 February 1985 to 13

December 1985.

Subject to the question discussed below, I am satisfied, on the evidence, that the debtor has committed the act of bankruptcy alleged in the petition as amended and of the other matters of which s.52(1) of the Bankruptcy Act 1966 (Cth)

("the Act") requires proof.

The debtor opposes the making of a sequestration order on the ground that, being an Aboriginal, he is not subject to the jurisdiction of the Court nor is he bound by the provisions of the Act.

Initially, the debtor requested that the hearing of the petition be deferred so that steps could be taken to have the issue determined by the High Court. I declined to accede to that request and proceeded to hear argument on the

matter.

3.

In strictness, there is no evidence before the Court to establish that the debtor is an Aboriginal but the matter

proceeded on the understanding that he is.

In support of his opposition, the debtor asserts that Captain James Cook in 1770 and Captain Arthur Phillip in 1788

claimed possession of the eastern part of Australia on the basis, contrary to the fact, that Australia was terra nullius.

In a written submission to the Court the debtor says:

"Doctrine Terra Nullius in its application means the British acquired 'No Mans Land' or land not inhabited by an erect biped placental mammal known commonly throughout the world as a human being, when Captain James Cook claimed Australia as a British possession in year 1770 or thereabouts.

While Doctrine Terra Nullius remains a valid document, the question must arise as to whether or not Australian aborigines who are non-human if Terra Nullius is valid can be subjected to laws designed to be understood and observed by human beings who in acquiring Australia applied Terra Nullius and Australian Law and the Australian Constitution. I think not.

If however Doctrine Terra Nullius is found to be an invalid legal process illegally applied in the British acquisition of Australia. Then it naturally follows that the introduction of British "Law to Australia is retrospectively illegal and invalid as a natural progression of Doctrine Terra Nullius' illegal and invalid application in the first place."

A concise explanation of the concept "terra nullius" is to be found in the advisory opinion of the International Court of Justice in the Western Sahara Case,

I.C.J. Reports 1975 p.3 at pp.38-9:

4.

"79. the expression 'terra nullius' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be terra nullius - a territory belonging to no-one - at the time of the act alleged to constitute the 'occupation' (cf. Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No.53, pp.44 £. and 63 £.). In the view of the Court, therefore, a determination that Western Sahara was a 'terra nullius' at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'.

80. Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes of peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of terra nullius by original title but through agreements concluded with local rulers. On occasion, it is true, the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an 'occupation' of a 'terra nullius' in the proper sense of these terms. On the

contrary, such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained

by occupation of *terrae nullius*." In the passage cited the International Court of Justice was, of course, speaking of the legal methods of acquiring sovereignty over territory which are recognised by the rules of international law. The term "terra nullius" has a place in that area of discourse. It is not a term

which has significance in the municipal law either of the United Kingdom or of Australia.

In the light of what was said by the High Court in *Coe v. The Commonwealth* (1978) 18 A.L.R. 592; (1979) 24 A.L.R. 118, any claim that sovereignty in or over Australia is vested in the Aboriginal people can have no foundation.

Of such a claim, Mason J. said ((1979) 18 A.L.R. 592 at p.596):

"It is inconsistent with the accepted legal foundations of Australia deriving from British occupation and settlement and the exercise of legislative authority over Australia by the Parliament of the United Kingdom, involving the establishment by statutes of that Parliament of the colonial legislatures and subsequently the establishment of the Commonwealth of Australia and the States as constituent elements in the Federation. The plaintiff's counsel sought to derive support for the proposition that Australia was not terra nullius at the date of British Occupation and settlement from the decision of the International Court in the Western Sahara case [1975] ICJ 12. Whatever that decision may say it has no relevance to the domestic or municipal law of Australia based on the Constitution which this Court is bound to apply."

Gibbs J., in whose judgment Aickin J. concurred, put the matter thus ((1979) 24 A.L.R. 118 at p.128):

"The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged: see *New South Wales v. Commonwealth*

(1975) 135 C.L.R. 377 at 388; 8 A.L.R. 1 at 28, and cases there cited. If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported. "

See also per Jacobs J. (1979) 24 A.L.R. 118 at pp.132-3.

Perhaps in recognition of this, the debtor's submission appears to accept that sovereignty over Australia is vested in the Crown and that the Commonwealth Parliament may legislate within the powers conferred upon it by the Constitution. What is said, however, is that legislation passed in exercise of those powers cannot validly apply to the Aboriginal people. Implicit in the argument is the proposition that the acquisition of sovereignty over

Australia by the British Crown was achieved not by settlement but by conquest.

The argument is, I think, sufficiently answered by referring to the absence from the Constitution of any express limitation, such as the argument suggests, upon the powers of the Commonwealth Parliament to legislate upon the subjects committed to it and the statement of Gibbs J. in the passage cited above that an argument that the powers of the Parliament are more limited than is provided in the Constitution cannot be supported. His Honour went on to

say:

"The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories

in which they respectively reside."

7.

There is nothing in the judgments of the other members of the Court who participated in that case which casts any

doubt upon the correctness of that statement.

In *Coe v. The Commonwealth* (supra) Gibbs J., with

the concurrence to Aickin J., also expressed the firm view ((1979) 24 A.L.R. 118 at p.129) that it is fundamental to

Australia's legal system that the Australian colonies became

British possessions by settlement and not by conquest. His Honour regarded that question as settled and he referred to

Cooper v. Stuart ((1889) 14 App. Cas. 286 at p.291): see

also the passage cited above from the judgment of Mason J.

It is true that in that case, Jacobs and Murphy JJ., contrary to the views of the other members of the Court, considered it appropriate to permit the plaintiff, Coe, to pursue a claim that the colony of New South Wales

was acquired by conquest. Jacobs J. said ((1979) 24 A.L.R. 118 at p.136:

"The view has generally been taken that the Australian colonies were settled colonies; but, although that view was expressed in *Cooper v. Stuart* (1889) 14 App. Cas. 286 and in *Randwick Municipal Council v. Rutledge* (1959) 102 C.L.R. 54, there is no actual decision of this court or of the Privy Council to that effect."

This was said not in the context of an argument which sought

to limit the legislative powers of the Commonwealth

Parliament but in the context of a claim that the Aboriginal inhabitants of Australia had and have rights in land. Murphy J. noted (at p.137) that the view expressed in *Cooper*

v. Stuart (supra) was not binding on the High Court. Neither of their Honours expressed any view upon the

validity or otherwise of the claim that the colony of New

South Wales was not acquired by settlement.

The question whether the colony of New South Wales was acquired by settlement or by conquest would have significance in determining whether the common law was introduced into the newly acquired territory. But, in my opinion, the distinction has no significance in determining whether in 1987, descendants of those who in 1770 or 1788 were inhabitants of what became the colony of New South Wales (assuming the debtor to be such a descendant) are subject to laws enacted by the Commonwealth Parliament in exercise of the powers conferred upon it by the Constitution. I am unable to perceive any legal foundation

for the argument presented by the debtor.

I, therefore, make a sequestration order against the debtor's estate. I note that, no consent by a registered trustee to act as trustee of the debtor's estate having been filed with the Registrar, the Official Trustee

in Bankruptcy is, by force of s.160 of the Act, the trustee

of the debtor's estate. I order that the creditor's costs, including any reserved costs, be taxed and paid according to

the Act.

I certify that this and the preceding 88 pages are a true copy of the Reasons for Judgment herein of the

Honourable Mr Justice Neaves. Vicki Bou Associate

Dated: 13 April 1987

Counsel for the creditor Mr B.A. Meagher Solicitors for the creditor +: Lur & Robb

Debtor in person

Date of hearing : 3 April 1987

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