EXHIBIT 34

THE IRISH REPORTS

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CONTAINING

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,
BARRISTER-AT-LAW.

1917.

VOL. I.

CHANCERY DIVISION AND LAND COMMISSION.

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(1905. No. 125.)

COX *v.* DUBLIN CITY DISTILLERY COMPANY, LTD. (No. 3.)

Barton J.
1916.
June 16.
July 10.

Appeal.
1917.
Jan. 17, 18.
Feb. 27.

Company—Debentures—Validity of—Estoppel—Res Judicata—Test Action, Order XVI, R. 8.

By a deed executed in 1895, property of a distillery company was conveyed to trustees for the holders of second debentures to be thereafter issued. The articles of association of the company provided that no director should vote in respect of any matter in which he was individually interested, the quorum of directors being fixed at two.

D., a director of the company, advanced moneys to the company on the security of manufactured whiskey of the company stored in a warehouse, and also upon second debentures issued to him by the company in 1903, but forming part of the series secured by the trust deed of 1895. There was admittedly no quorum of independent directors present at the meeting which purported to authorize the issue of these debentures to D.

The present action was instituted in 1905 by the plaintiff on behalf of himself and all other holders of first debentures claiming a declaration that certain first mortgage debentures were well charged on the property of the company, and a liquidator was subsequently appointed (*Cox* v. *Dublin City Distillery*, [1906] 1 I. R. 446; [1915] 1 I. R. 345).

In 1909 D. instituted an action for a declaration as to his rights against the company in liquidation and the trustees for the second debenture-holders. The latter defendants delivered no defence, and D. obtained judgment against them by default. The company impeached D.'s right to claim a lien on the second debentures, on the ground that these were not registered under the Companies Act, 1900, but no point as to the absence of a proper quorum at the meeting which purported to authorize the issue of D.'s debentures was either pleaded or specifically relied upon in argument. D.'s action subsequently resulted in a declaration by the House of Lords that D. was not entitled to a valid pledge of the whiskey, but was entitled to a valid lien on the debentures for the amount of his advances to the extent of the property comprised in the trust deed.

On the hearing of a memorandum from the Chief Clerk in the present action:

Held, by the Court of Appeal (1), reversing the order of Barton J., that C. R. and G., as representing the holders of valid second debentures issued by

(1) Before SIR I. J. O'BRIEN L.C., and RONAN and MOLONY L.JJ.

Barton J. 1916.

Cox v. Dublin City Distillery.

the company in 1895, were sufficiently represented by the trustees for the second debenture-holders in the action brought by D. against the company and the said trustees, and that the order of the House of Lords in the latter action operated as an estoppel so as to preclude C., R., and G. from relying in the present action on the invalidity in the creation of D.'s debentures.

MEMORANDUM from Chief Clerk submitting for the consideration of Barton J. the following question:—

Whether, having regard to the decision of this Honourable Court on the 24th February, and of the Court of Appeal in Ireland on the 28th June, 1915, that the resolutions of the directors of the company, passed on the 12th and 16th May, 1903, and 20th January, 1904, are invalid, the debentures mentioned in the schedule hereto are invalid as against the holders of valid second debentures of the company.

And whether Edward Doherty (or Frederick Hans Kennedy on his behalf) should be allowed to prove on foot of the said debentures mentioned in the schedule hereto in competition with the holders of such valid second debentures in respect of advances made to the company by Edward Doherty; or

Whether William Carroll, George Richardson, and Patrick Gaynor, on behalf of themselves and the other second debenture-holders, whom they were appointed to represent by order herein, dated the 25th July, 1915, are in anywise precluded from relying upon the invalidity of the said resolutions and the debentures issued thereunder as against them by the orders of this Honourable Court, dated the 8th June, 1911, made in an action in which the said Edward Doherty was plaintiff, Frederick Hans Kennedy, William Findlater, and the above-named company defendants, whereby it was declared: "that the plaintiff is entitled to a good and valid lien on the debentures mentioned in the 26th paragraph of the statement of claim, being the debentures mentioned in the schedule hereto, so far as the same affect the freehold and leasehold premises comprised in the trust deed dated the 9th day of November, 1905, for the amount of his advances," which said order was affirmed by the Court of Appeal in Ireland by order dated the 17th May, 1912, and by the House of Lords by order dated the 17th July, 1914.

SCHEDULE.

Name of present holder.	No. of debentures and amount.	Debenture No. both inclusive.	Amount of Principal.
Frederick Hans	3 of £100	241 to 243	£300
Kennedy as	4 of £100	262 to 265	£400
Trustee for	3 of £10	305 to 307	£30
Edward Doherty	17 of £100	214 to 230	£1700

The facts referred to before Barton J. are fully reported in *Cox* v. *Dublin City Distillery* (*No.* 2) (1), and appear in his judgment.

Serjeant Sullivan K.C., and Overend, for William Carroll, George Richardson, and Patrick Gaynor.

Herbert Wilson K.C., Garrett W. Walker K.C., and James Andrews, for Edward Doherty.

The arguments were similar to those in the Court of Appeal, reported infra, p. 208.

BARTON J.:—

July 10.

By order dated July 28th, 1915, the applicants William Carroll, George Richardson, and Patrick J. Gaynor, holders of second debentures of the Dublin City Distillery, were appointed to represent the class of second debenture-holders, other than certain specified debenture-holders one of whom is Edward Doherty. These representative parties have instituted this proceeding by way of memorandum for the purpose of having it decided whether twenty-seven debentures issued by way of security for advances to the company to Frederick Hans Kennedy as trustee for Edward Doherty are invalid as against the holders of valid second debentures of the company. Twenty-four of these debentures were for the amount of £100 and three for the amount

(1) [1915] 1 I. R. 345.

Barton J. 1916. Cox v. Dublin City Distillery.

of £10, in all £2430. They are impeached upon the ground that the meetings at which the resolutions were passed authorizing their issue were not properly constituted. Their invalidity is admitted, and the only question for decision is whether the applicants are precluded from averring their invalidity by an order of the Court, dated 8th June, 1911, affirmed on this point by an order of the Court of Appeal and the House of Lords in an action in which Edward Doherty was plaintiff, the company and the trustees for the second debenture-holders were the defendants. The applicants were not parties to that action, but it is said that they were privies through their trustees, who were defendants.

That action was brought mainly to establish the plaintiff's claim as pledgee of whiskey in casks against the company in priority to the second debenture-holders. That was the only contentious question in the action, but the plaintiff also stated in paragraph 26 of the Statement of Claim that these twenty-seven debentures had been issued to Frederick Hans Kennedy as trustee for him as a security for money advanced and claimed, in paragraph 5 of the prayer of the Statement of Claim, a good and valid lien on them for the amount of such advance and interest thereon, and by the order of the Court he obtained a declaration that he was entitled to a good and valid lien upon the debentures mentioned in paragraph 26 of the Statement of Claim, and an account of the moneys available to meet such lien, and of the sum due to him on foot thereof. That order was made so far as the trustees of the second debenture-holders were concerned in default of defence.

In my opinion the applicants are not precluded by that judgment from averring the invalidity of these debentures. On their behalf reliance was placed upon the principle which was referred to the old case of *Hamond* v. *Walker* (1), that trustees are not deemed to represent the interest of absent cestuis que trust in a contention between cestuis que trust inter se, although it may be otherwise in a contention between a stranger and all the cestuis que trust. It was suggested in reply that this was an obsolete doctrine which is superseded by Rule 8 of Order 16 of the rules of the Supreme Court. That rule enables trustees, executors, and administrators

(1) 3 Jur. N. S. 686.

to sue and be sued as representing the estate of which they are trustees without joining beneficiaries, and provides that they shall be considered as representing such beneficiaries, but goes on to provide that the Court or judge may, at any stage of the proceedings, order beneficiaries to be added or substituted as parties. That useful rule does not in my opinion affect the principle to which I have referred. It recognizes that in certain proceedings trustees and personal representatives would not adequately or properly represent beneficiaries.

The principle referred to in *Hamond* v. *Walker* (1) was discussed in *De Mora* v. *Concha* (2), reported in the Court of Appeal and in the House of Lords under the name of *Concha* v. *Concha* (3). Although the ground of that decision does not affect the present case, the principle to which I have just referred was incidentally alluded to both in the arguments and in the judgments in the Court of Appeal. In the arguments it was recognized that the executor does not represent beneficiaries in internal disputes; and Fry L.J., in the course of observations made on behalf of Baggally L.J. and himself, remarked, at p. 305, that "where the litigants both claim under a third person, it seems that such third person can never be a legitimus contradictor on behalf of one of them against the other of them."

In *Doherty* v. *Kennedy* (4), and others, which is relied upon as working an estoppel in the present case, Mr. Doherty did not claim adversely to the trust estate in respect of these debentures, but as a cestui que trust he claimed the benefit of the trust deed. That being so, the trustees for the second debenture-holders cannot be regarded as having constituted a legitimus contradictor on behalf of the applicants so as to preclude them from challenging the validity of these debentures.

I must add that there is another serious difficulty in the way of this plea of estoppel. What Mr. Doherty, in the action of *Doherty* v. *Kennedy* (4), sought to obtain, and succeeded in obtaining, was not a declaration as to the validity of the debentures, but as to the validity of his lien on them for his advances, and an inquiry as to the amount of those advances, and the sums available

(1) 3 Jur. N. S. 686.
(2) 29 Ch. D. 268.
(3) 11 A. C. 541.
(4) [1914] A. C. 823.

Barton J.
1916.

Cox
v
Dublin City Distillery.

for discharging them. That declaration is not inconsistent with the present application. The validity of the debentures was never in dispute. It was not raised, argued, or decided in that suit. Indeed the trustees do not appear to have been under any obligation to raise it. Their duty under the terms of clause 6 of the trust deed was to apply any moneys arising from the sale under the trust for conversion contained in the deed towards payment pari passu without preference or priority of arrears of interest and principal to the holders of second debentures according to the tenor of their debentures.

Other objections were raised to this alleged estoppel which I need not discuss. There will be a declaration that the debentures mentioned in the schedule to the memorandum are invalid as against the holders of valid second debentures of the company, and that the applicants William Carroll, George Richardson, and Patrick Gaynor, are not precluded from so averring by the order of the Court, dated the 8th June, 1911, made in the action in which Edward Doherty was plaintiff, and Frederick Hans Kennedy, William Findlater, and the above-named company were defendants.

D. M. S.

Mr. Edward Doherty appealed to the Court of Appeal.

1917.
Jan. 17, 18.
Feb. 27.

H. Wilson K.C. and *G. W. Walker K.C.* (*J. Andrews* with them), for the appellants:—

We contend that the respondents are bound by the decree of the House of Lords in *Dublin City Distillery, Ltd.*, v. *Doherty* (1), under which Doherty was declared entitled to a good and valid lien on the debentures in question so far as the same affected the freehold and leasehold premises comprised in the trust deed. Barton J. has placed too narrow a construction on this decree, namely, that Doherty was entitled to a lien on the debentures, in so far as there were valid debentures in existence. This would render the decree of the House of Lords entirely nugatory. It

(1) [1914] A. C. 823.

was never intended to decide that Doherty had a good charge upon invalid debentures. The judgment of Lord Parker is specific to the effect that Doherty was a cestui que trust under the trust deed, and was entitled to the benefit of the trust deed with the other holders of second debentures. The debentures were voidable only, and not void, until assailed. The company got the cash from Doherty, and could have ratified the invalidity in the creation of the debentures. Neither the company nor the trustees for the holders of second debentures raised this particular question of invalidity in Doherty's action, although the validity of the debentures was specifically raised on the pleadings, and was in issue in the action. It cannot be said that Doherty's action was wrongly constituted as to parties. Under Order 16, Rule 8, the trustees for the second debenture-holders represented the latter, who are as much bound by the decision as if they had been made individual defendants. In *Cox* v. *Dublin City Distillery (No. 2)* (1), Palles C.B., speaking of this action, said: "The second debenture-holders as a class were represented in that action by their trustees, and therefore the second debenture-holders are estopped from raising, *as against the plaintiff in that suit*, not only any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein." This disposes of the present contention. See also *Howlett* v. *Tarte* (2), and *Humphries* v. *Humphries* (3).

[Ronan L.J. referred to *In re Lart*; *Wilkinson* v. *Blades* (4).]

Assuming that, as laid down in *Hamond* v. *Walker* (5), trustees will not be deemed to represent the interests of absent cestuis que trust on any contention amongst the latter inter se, the contest in Doherty's action was not one amongst the cestuis que trust; in addition to his claim to a pledge of the whisky he sought to establish his claim as a cestui que trust under the trust deed.

In *Concha* v. *Concha* (6) the finding of the Probate Court on the question of domicil was, as pointed out in the judgments, irrelevant, and could not operate as an estoppel. *The Irish Land*

(1) [1915] 1 I. R. 345, at p. 372.
(2) 10 C. B. N. S. 813, at p. 826.
(3) [1910] 1 K. B. 796; [1910] 2 K. B. 531.
(4) [1896] 2 Ch. 788.
(5) 3 Jur. N. S. 686.
(6) 11 A. C. 541.

Appeal. 1917. Cox v. Dublin City Distillery.

Commission v. *Ryan* (1) is clearly distinguishable. There the original judgment was obtained in default of appearance, and there was no record which could operate as an estoppel. Here we rely on the words of the decree in the House of Lords.

[They also relied on the affidavit of Mr. R. Dickie, cited infra in the judgment of the Lord Chancellor, to show that the appeal to the House of Lords in Doherty's action was in fact brought on behalf of the holders of valid second debentures.]

The following cases were also referred to:—*Francis* v. *Harrison* (2); *Commissioners of Sewers of the City of London* v. *Gellatly* (3) *In re New London and Suburban Omnibus Co., Appleyard* v. *the same Co.* (4); *In re Cooper* (5); *Wilkins* v. *Reeves* (6); *In re Bowden, Andrew* v. *Cooper* (7).

Serjeant Sullivan K.C., and *Overend*, for the respondents:—

The resolutions for the issue of the second debentures in question are void. There was no quorum: *Re Greymouth*; *Point Elizabeth Railway and Coal Co., Ltd.* (8); and the decision in *Cox* v. *Dublin City Distillery* (9) in this effect is a binding authority that the resolutions are invalid.

The only question is whether respondents are prevented from raising the point by the decision in *Doherty* v. *Kennedy* (10). The respondents are second debenture-holders of the original issue to the amount of £13,570 in 1895. They were not parties to *Doherty* v. *Kennedy* (10). The trustees for second debenture-holders who were parties represented the whole 25,000 second debentures, and could not represent one portion of their cestuis que trust in a dispute inter se. *Hamond* v. *Walker* (11), supra; see also judgment of Molony L.J. in *Cox* v. *Dublin City Distillery* (9). If the trustees for second debenture-holders did represent the respondents, the latter are nevertheless not estopped from now alleging the invalidity of the debentures in question.

(1) [1900] 2 I. R. 565.
(2) 43 Ch. D. 183.
(3) 3 Ch. D. 610.
(4) [1908] 1 Ch. 621.
(5) 20 Ch. D. 611.
(6) 3 W. R. 305.
(7) 45 Ch. D. 444.
(8) [1904] 1 Ch. 32.
(9) [1915] 1 I. R. 345.
(10) [1914] A. C. 823.
(11) 3 Jur. N. S. 686.

That action was in effect one to establish Doherty's right to a pledge on the whisky, and no importance was attached to the question of the validity of the debentures, save so far as regards the question of non-registration.

Estoppel by record is confined to matters appearing on the record, and the record only declares Mr. Doherty entitled to a valid lien on the debentures, and does not decide on the validity of those debentures on the ground in question.

Further, the trustees could not raise the point against their own cestui que trust. Once a debenture, regular on its face, was issued, the trustees became trustees for the holder (see judgment of Lord Parker in *Doherty* v. *Kennedy* (1)). If the trustees could have raised this point, it was one raisable only by special defence, and not by a mere traverse, and the trustees delivered no defence, and judgment went by default: *Howlett* v. *Tarte* (2), supra; *Humphries* v. *Humphries* (3), supra; *Irish Land Commission* v. *Ryan* (4), supra.

The appellants are not entitled to use the affidavit of R. Dickie, filed on the petition of competency; it is not in evidence; the respondents have had no opportunity of giving evidence to show, as the fact is, that the persons whom they represent were no parties to any such arrangement as is there suggested. But if the affidavit were in evidence, it only states that "certain" second debenture-holders agreed to indemnify the liquidator, and this could not bind the class.

The following cases were also referred to:—*De Mora* v. *Concha* (5); *Concha* v. *Concha* (6), supra; *Worman* v. *Worman* (7).

H. Wilson K.C., in reply.

(1) [1914] A. C. 823.
(2) 10 C. B. N. S. 813, at p. 826.
(3) [1910] 1 K. B. 796; [1910] 2 K. B. 531.
(4) [1900] 2 I. R. 565.
(5) 29 Ch. D. 268.
(6) 11 A. C. 541.
(7) 43 Ch. D. 296.

Appeal.
1917.

Cox
v.
Dublin City Distillery.

Sir Ignatius J. O'Brien C.:—

In this case it is our duty carefully to consider the judgment of Mr. Justice Barton, by which he has held that the previous proceedings, in which Mr. Doherty was plaintiff, and the company and the trustees for the second debenture-holders were defendants—proceedings which ultimately came before the House of Lords, and were decided to a certain extent in Mr. Doherty's favour—were of no effect whatsoever as between Mr. Doherty and certain other of the second debenture-holders in this company, whose interest it was to have it determined that Mr. Doherty's claim in respect of certain debentures was wholly bad. It is not that the result arrived at by Mr. Justice Barton would enhance the value of the general assets of the company available for unsecured creditors, but the exclusion of one debenture-holder would, in the circumstances here existing, enhance the value of what was left available for the remaining debenture-holders.

It is absolutely essential, in order to arrive at a definite view of the facts and of the law, to consider carefully the nature of the different stages of this action of *Doherty* v. *Kennedy* (1). Mr. Doherty had a double claim against the assets of the company. In the first place, he claimed to have a prior right against these assets in respect of certain pledges made to him of whisky, part of the stock-in-trade of the company; and, secondly, he claimed that, even if he had not got an effective lien on this whisky, in so far as there was property comprised in a certain deed of trust, of which Mr. Hans Kennedy was trustee, he had, through certain debentures, which he owned or controlled, a limited claim against the assets of the company pari passu with other holders of second debentures.

The action was brought for the purpose of determining whether or not, 1, there was a lien created on the whisky, and, 2, whether Mr. Doherty had a valid charge on the assets of the company comprised in this deed of trust. It was decided ultimately by the House of Lords that, owing to certain defects, which I need not specifically refer to, the issue of the warrants,

(1) [1912] 1 I. R. 346, 363.

which were supposed to create a lien on the whisky, was ineffective; but the House of Lords, on the other hand, decided to a limited extent in Mr. Doherty's favour, holding that he was entitled to a good and valid lien on the property comprised in the trust deed. [His Lordship referred to the order of the House of Lords of the 17th July 1914 (1), and continued.]

The result was that the other debenture-holders were placed in a better position with regard to the assets of the company than they would have been in if Mr. Doherty had succeeded in his claim based upon a pledge; but, of course, in so far as his claim was declared to be a valid one in respect of the premises in the deed of trust, it placed him in an advantageous position in respect of his claim, not, of course, to the same extent as if he had succeeded in sustaining his claim as pledgee. But the decree of the House of Lords gave him a substantial advantage, which it is now sought to take away from him.

The first matter which has to be determined before coming to the question of estoppel is, what is the meaning of the former order in connexion with the same subject-matter, which Barton J. made, and whether or not the present declaration which has been made by Barton J. is, as he considers, consistent with his own decree and that of the House of Lords. The order made originally by Barton J. in *Doherty* v. *Kennedy* (2) on the 8th June, 1911, directed, amongst other things, an account of the proceeds of the sale of the whiskies, which, as the learned judge held, were pledged to Mr. Doherty, and "an account of what charges for first debenture-holders, costs, charges, and expenses of realization and receiver are payable out of said proceeds in priority to said pledge . . .," and the plaintiff was declared "entitled to a good and valid lien on the debentures mentioned in the twenty-sixth paragraph of plaintiff's statement of claim so far as the same affect the freehold and leasehold premises comprised in the trust deed dated the 9th day of November, 1895, for the amount of his advances." That was the order made by Barton J. and affirmed by the House of Lords in so far as the latter part dealing with the trust deed is concerned, and it can bear no meaning other than this—that Mr. Doherty had a good charge

(1) [1914] A. C. 823, at p. 868. (2) [1912] 1 I. R. 346, 363.

Appeal. 1917.

Cox v. Dublin City Distillery.

Sir Ignatius J. O'Brien C.

on certain assets of the company. Lord Parker, in giving judgment in the House of Lords (1), places the matter beyond all doubt.

"By this deed," he said, "certain freeholds and leaseholds belonging to the company were conveyed or demised to the trustees therein named, upon trust in certain events therein specified to sell the same and hold the proceeds subject to the payment of costs in trust for the holders of such second debentures as the company might thereafter issue. Clearly neither the trust deed itself nor any second debentures issued prior to the passing of the Companies Act, 1900, required registration under that Act. But the company, after the passing of that Act, issued certain second debentures to the respondent, these debentures containing 1, a clause entitling him to the benefit of the trust deed, and 2, a floating charge over all the assets of the company. So far as this floating charge is concerned, it is admitted to be void as against the liquidator of the company for want of registration under the 14th section of the Act, but the question arises whether, notwithstanding such want of registration, the respondent is not entitled to the benefit of the trust deed pari passu with the other holders of second debentures. I have come to the conclusion that he is so entitled. As a holder of second debentures he is a cestui que trust under the trust deed, which itself is good as against the liquidator, though unregistered. His debentures are not entirely avoided by the 14th section, even against the liquidator, but avoided only so far as any security on the company's property or undertaking is thereby conferred. In my opinion the security to which the respondent claims title is, so far as the property comprised in the trust deed is concerned, conferred by such deed and not by the debentures. Even if the debentures had not referred to the trust deed, the respondent would have been a cestui que trust thereunder. . . . In my opinion, on this point the appeal fails."

I am quite unable to accept the view of Mr. Justice Barton as to the consistency of his present order with his own former order and the decision of the House of Lords. He says in the judgment now under review, "I must add that there is another

(1) *Dublin City Distillery, Ltd.*, v. *Doherty*, [1914] A. C. 823, at p. 859.

serious difficulty in the way of this plea of estoppel. What Mr. Doherty, in the action of *Doherty* v. *Kennedy* (1), sought to obtain, and succeeded in obtaining, was not a declaration as to the validity of the debentures, but as to the validity of his lien on them for his advances, and an inquiry as to the amount of those advances and the sums available for discharging them. That declaration is not inconsistent with the present application. The validity of the debentures was never in dispute. It was not raised, argued, or decided in that suit. Indeed, the trustees do not appear to have been under any obligation to raise it."

I am absolutely unable to agree in the view that the declaration now made, namely, that the debentures in question are invalid as against the holders of valid second debentures of the company, is consistent with the former decision of the House of Lords. That, however, does not dispose of the case. There is no doubt that the entire claim of Mr. Doherty might have been effectively assailed in the former proceeding before the House of Lords by reason of a defect in the resolution forming the first step towards the creation of a valid charge, there not having been a majority of technically independent directors present when the right was sought to be conferred on Mr. Doherty. So far as the company is concerned it is admitted that the order made by the House of Lords is a complete estoppel as to this matter, and it is necessary to see whether or not it is equally binding on the other debenture-holders. It has been suggested in the argument before us that a document to which I shall refer ought not to be referred to for the purpose of ascertaining what the real position of the trustees of this trust deed was, but I cannot agree in this. The original action was brought in this way. It was evident that the position of Mr. Doherty, claiming as he did to be a pledgee of the whiskies, was one hostile to the other persons who held second debentures, and, it being a hostile claim, it was necessary that Mr. Doherty should pursue it in a hostile manner, bringing before the Court all parties interested in resisting his claim, which was intrinsically of a twofold character. He applied to the Court for leave to take proceedings. He was joined originally with a Mr. Kennedy (not the gentleman who was

(1) [1912] 1 I. R. 346, 363.

Appeal. 1917. Cox v. Dublin City Distillery. Sir Ignatius J. O'Brien C.

a trustee under the trust deed); but, after a short time, this Mr. Kennedy, whose position would have been the same as that of Mr. Doherty, elected to withdraw from the proceedings, and Mr. Doherty alone carried on the further proceedings, which were constituted in this way. In the first place, the company were made defendants. The company were, owing to the illegality which had taken place, bound to resist the claim of Mr. Doherty in every way permitted to them by the law, either by seeking to destroy the pledge, or by denying the validity of the claim based upon the trust deed; and, accordingly, we find that not only the company but also the trustees of the trust deed were made defendants. There was no other practicable way in which Mr. Doherty could have constituted his suit so as to have represented before the Court all parties interested in its subject-matter so that they might be bound, and it is not suggested that the suit was improperly constituted by reason of the omission of the debenture-holders by name, or that one, or ten, or all of the other debenture-holders should have been named as defendants. Indeed, some of these debenture-holders might have adopted a view consistent possibly with fair play towards Mr. Doherty, and might not have cared to raise the question of the validity of his claim. Others might have taken a different view. Mr. Doherty, however, was under no obligation to speculate as to the views held by the different debenture-holders, so long as all were represented in the action before the Court, and provided that there was a person before the Court interested in attacking the validity of the debentures as a charge upon the assets of the company. The plaintiff's statement of claim specifically asked for a declaration that he was entitled to "a good and valid lien on the said debentures, mentioned in the 26th paragraph hereof" . . . (these being the debentures we are now dealing with) "for the amount of his said advances and interest"; and the defendants by their defence, in addition to traversing the issue of these debentures, pleaded that if the issue was made "such issue was ultra vires and void."

It is true that the exact position afterwards taken up in the argument before Mr. Justice Barton, and which formed the substratum of the judgment of the House of Lords, may not, perhaps, have been pleaded in great detail; but the point was

clearly raised that, whether the pledges were good or bad, Mr. Doherty had an unquestionable right to claim through the trust deed. The Court of Appeal was of opinion that the pledges were good, and that Mr. Doherty's claim was valid in its entirety. There then arose a question whether or not the liquidator could of his own motion, and without the leave of the Court below, appeal to the House of Lords. It appears that the liquidator was refused leave to appeal, and when a petition of appeal to the House of Lords was subsequently presented by the company and the liquidator Mr. Doherty presented an interlocutory appeal praying that the former petition of appeal was incompetent. Now, in order to meet that application an affidavit was filed by Mr. Robert Dickie on the 13th June, 1913, in which he sets out the history of the proceedings. I shall read portion of this affidavit:—"Mr. Smyth applied to Mr. Justice Barton for liberty to defend the proceedings on behalf of the second debenture-holders and creditors. The said trustees for the second debenture-holders also applied for leave to defend, but Mr. Justice Barton refused to allow the trustees to defend at the expense of the estate, and appointed Mr. Smyth to defend the action in the name of the distillery company, and I beg to refer to this order dated the 14th December, 1909, which was made in the debenture-holders' action. No further step was taken by the trustees, and the action was defended by Mr. Smyth in the name of the company as provided by the said order. Mr. Justice Barton gave judgment in favour of Mr. Doherty as far as his pledge on the whisky was concerned, but decided that the second debentures which he held as collateral security, and which were issued to him by the company after the commencement of the Companies Act, 1900, were void as against the whisky, inasmuch as they had not been registered pursuant to the provisions of said Act, but held that they were good as regards the leasehold premises, the trust deed securing them having been executed prior to 1900. From this decision the receiver and liquidator appealed to the Court of Appeal, save in so far as the decision was in his favour, and the Court of Appeal (Lord Justice Cherry dissenting) affirmed Mr. Justice Barton on the question of the pledges of the whisky, but gave no decision as regards the validity of the second

Appeal.
1917.

COX
v.
DUBLIN CITY DISTILLERY.

Sir Ignatius J. O'Brien C.

debentures which Mr. Doherty held. The result of the decision in this action of Mr. Doherty's is that the pledgees, who were either directors of the company or banks which had been collaterally secured by the personal guarantee of the directors, take almost the entire remaining assets of the company, so that there will practically be nothing available for the ordinary second debenture-holders who paid the full price for their debentures, and certainly nothing for the ordinary creditors of the company. The receiver and liquidator having been advised by eminent counsel both at the English and the Irish Bar that the judgment of Lord Justice Cherry was, in their opinion, the true view of the law, he applied, in the debenture action, to Mr. Justice Barton to allow him to carry the case to the House of Lords. Mr. Doherty's counsel appeared on this application, and opposed same on the grounds that this would be allowing the receiver to fight the pledgees out of money which had been decided was theirs. Mr. Justice Barton took this view, and refused the liberty, *but stated that he would give every facility to the receiver to take the case to the House of Lords, provided that the second debenture-holders, and the creditors for whom he was appearing, provided him with the funds.* The receiver having conveyed this intimation of Mr. Justice Barton to certain of the second debenture-holders who are not pledgees, and to creditors, he was instructed by them to proceed with the appeal at their expense, and he accordingly brought same, and has lodged the £200 security, and has entered personally into a recognizance of £500."

The House of Lords held in favour of the competency of the appeal, and the decision was in favour of Mr. Smyth and the general creditors of the company so far as the question of pledge was concerned, but was against the company and the other debenture-holders, who might desire to defeat Mr. Doherty's claim with regard to the property comprised in the trust deed. The point has now been raised that the Court is not at liberty to look at this statement of Mr. Dickie's for the purpose of ascertaining whether the position now taken up in this memorandum by some of the second debenture-holders is one which entitles them to say they are not bound. I have considered this objection very carefully, but, in my opinion, it would not be in accordance with

natural justice that these other debenture-holders, who now allege that they were pure strangers to these proceedings, could not be confronted with documents showing that they were active litigants, and not strangers. The position technically was that all the second debenture-holders through the trustees were represented on the record, and prima facie the judgment would seem to me to bind all the debenture-holders through those who represented them. I say prima facie, because it has been argued that it is not so. Now, it is most material to see what the trustees did. They were, of course, in the position—to a certain extent an awkward one for them—that they were reluctant to determine whether any particular individual was or was not a cestui que trust of theirs. If what had been done did not give Mr. Doherty a charge, he would not have been one of the cestuis que trust of these trustees; but it would have been a difficult task for the trustees to determine which of the debenture-holders they ought to attack, and which they ought to defend. They accordingly took this course. They entered an appearance in the action, but did not deliver a defence. This would seem to have been the natural course to take. Why? because the issue, so far as the dissentient debenture-holders were concerned, was the same whether Mr. Smyth was the litigant or any other person.

What would have been the position if one of these debenture-holders had applied for leave to be added under Order 16 as a defendant to litigate some point independently? I think that Mr. Justice Barton would have decided as he did, namely, that to avoid further expense, leave to add them should not be given; that the interest of the debenture-holders was amply protected by the person whose interest it must be to destroy the plaintiff's security in toto. The company having put in no defence, the case came on for judgment on admissions as against them, and for trial in the ordinary way so far as the liquidator was concerned. The liquidator raised every objection to the debentures which he could possibly raise, both at the hearing of the action and in the House of Lords, except the point raised in the *Greymouth case* (1). The result was an important success for the

(1) [1904] 1 Ch. 32.

Appeal. 1917.

Cox v. Dublin City Distillery.

Sir Ignatius J. O'Brien C.

second debenture-holders who had guaranteed the costs, although Mr. Doherty succeeded in part.

The matter now comes before the Court in the awkward form of a memorandum. I am entitled to assume that the persons who were anxious to oppose the debentures in toto, and who were unquestionably, as it seems to me, having regard to the cause of the proceedings, represented by the liquidator in the appeal before the House of Lords, must be to some extent the same persons who now claim that they are not bound by the decision of the House of Lords at all, and who say that (although they obtained a substantial advantage by that decision, and succeeded in defeating Mr. Doherty's claim, in so far as it was based on the existence of a pledge of the whisky), there was an omission in not raising the point decided in the *Greymouth case* (1), and that they are now entitled to start afresh, so to speak, in their attack upon these debentures.

A great deal has been said about the question of estoppel, the principle of which has often been made the subject of disapproval from the time of Coke to that of Lord Justice FitzGibbon. For myself I fail to see why this should be so, because it appears to me to afford a convenient means, and sometimes the only means, of defending a position which may be just and fair as between man and man. It appears to me that this whole question was really litigated in the interests of the debenture-holders, though in form by the liquidator, and it would be an unfortunate state of our law if the debenture-holders could escape from the result of these proceedings, and now commence other proceedings de novo. Mr. Justice Barton, however, has acceded to the contention of these debenture-holders, which he considered to be in accordance with the decision in *Hamond* v. *Walker* (2), and the passage which he has cited from the judgment of Fry L.J. in *De Mora* v. *Concha* (3). To say that the second debenture-holders hostile to Mr. Doherty could not be bound unless he made each one a defendant to the action, is a far-reaching proposition, and one which would introduce a great deal of uncertainty into cases like the present. How Mr. Doherty was to discover and select as defendants those who might be

(1) [1904] 1 Ch. 32.
(2) 3 Jur. N. S. 686.
(3) 29 Ch. D. 268, at p. 305.

hostile to him I do not quite know. The contention, however, is that as between them and Mr. Doherty they are entitled to say that they are not bound, because they were not parties to the original proceedings, although the trustees were, and although they could have applied to be added as parties to the proceedings, and did not do so. Why should Mr. Doherty have ignored the provisions of Order 16, rule 8, and have added each of these gentlemen as a defendant to see whether or not he would dispute his claim? I do not say that there may not be cases in which the fact that trustees are parties may not prevent litigation of rights between cestuis que trust themselves; trustees may be added solely for the purpose of technically representing the estate, and there may be room for the operation of this suggested principle in such a case, but the present case is not one of that class, and I do not understand the dictum of Fry L.J. in *De Mora* v. *Concha* (1) as deciding any such unfortunate proposition as that in such a case as the present all the debenture-holders should have been made defendants. The suit was, in my judgment, properly constituted, the trustees being named as defendants, and if any particular debenture-holder wished to be separately represented he should have applied to the Court for liberty to defend.

The appeal to the House of Lords was one promoted in the interests of the second debenture holders other than Mr. Doherty—those who were not holders of pledges. The general assets of the company could not have been, as I understand the figures, enhanced to the extent of one penny by the success of the appeal. The appeal was brought in substance for the benefit of these other debenture-holders, and I consider that I am entitled in the interests of justice to look at the documents filed in that matter to see that this was not the fact.

The case of *Concha* v. *Concha* (2) has been strongly pressed upon us as a binding authority in favour of the respondents, but I cannot accede to this contention. The question that arose in that case was as to whether a certain decree of the Probate Court in 1860 was conclusive in rem on a question of domicil. [His Lordship referred to the facts of the case, and continued.] It was there

(1) 29 Ch. D. 268. (2) 11 A. C. 541.

Appeal. 1917. Cox v. Dublin City Distillery. Sir Ignatius J. O'Brien C.

carefully pointed out in the judgments of the Court that this question of domicil was one not necessary to be determined in the application made to the Probate Court, and it was also pointed out by Lord Blackburn (p. 561) as a matter of importance in considering the effect to be given to the judgment of Sir Cresswell Cresswell, that by the Probate Act of 1857 the jurisdiction of the judge of the Probate Court was altered, the former jurisdiction over suits for distribution being taken away, and vested from that time solely in the Court of Chancery.

In the present case the Court had not only jurisdiction to entertain the question whether Mr. Doherty had a valid charge on the property comprised in the trust deed, but was bound to exercise that jurisdiction, and the resulting judgment was, to my mind, a judgment binding on all parties who were made amenable to the procedure.

The case of *Concha* v. *Concha* (1) to my mind has no application.

The case of the *Irish Land Commission* v. *Ryan* (2) has also been relied on by the respondents, but appears to me to be clearly distinguishable. Lord Justice Holmes in that case points out clearly the essential difference between a case like the *Irish Land Commission* v. *Ryan* (2), where there was a default of appearance to the writ, and judgment was entered in the office, and a suit like that which we are now considering, where we have a specific claim of Mr. Doherty clearly pleaded in the statement of claim, an appearance entered by the trustees, a hearing in Court, and a judgment entered which is a matter of record. It appears to me a startling proposition that a plaintiff who has delivered a statement of claim setting forth his cause of action is in a worse position when the defendant fails to file a defence than he would be in if a mere bogus defence were put on the file of the Court which the defendant could not subsequently substantiate. The defendant who does not file a defence admits the averments in the statement of claim, but the plaintiff cannot by reason of this obtain judgment in the office; he must apply to the Court, and the Court determines what judgment is proper to be entered.

(1) 11 A. C. 541. (2) [1900] 2 I. R. 565.

In the present case the Court had before it a perfectly clear statement of claim, claiming a right against the property comprised in the trust deed, the trustees being before the Court. The Court determines what the effect is of the failure to deliver a defence, and says that there is an admission that the plaintiff's claim is a valid one against the property comprised in the deed. What more could the plaintiff do? If the argument based on the supposed effect of the decision in the *Irish Land Commission* v. *Ryan* (1) is sound, it appears to me that the entire procedure in Mr. Doherty's action is rendered futile. I do not consider that the *Irish Land Commission* v. *Ryan* (1) is an authority in favour of the respondents. At p. 572, Lord Justice FitzGibbon said:—"That a judgment by default has an operation by estoppel cannot be denied; but the ground and extent of that estoppel must, in my opinion, be found on the face of the judgment itself, and cannot be inferred or deduced from the pleading of the party who has obtained the judgment, when the defendant has said nothing, and done nothing, and has merely allowed the judgment to go by default." Athough this passage is relied on by the respondent, the learned Lord Justice clearly recognizes that a judgment by default may operate as an estoppel, and when, as in the present case, we find, on looking at the record, a complete statement of the plaintiff's claim, and a judgment entered in open Court based on admission of that claim by the defendants in not delivering a defence, that judgment must, in my opinion, operate as an estoppel.

In conclusion I shall refer to the judgment of Palles C.B. in *Cox* v. *Dublin City Distillery* (*No. 2*) (2). At p. 372 the learned Chief Baron says:—"This brings me to the third question, viz., whether the judgment in *Doherty* v. *Kennedy* (3), a decision between a second debenture-holder and the company, estops the valid second debenture-holders from alleging that certain of those second debentures not specially represented in that suit are invalid. Now, I do not wish to be misunderstood. I hold that as between Doherty, the plaintiff in that suit, and the company and the second debenture-holders, the whole matter as to the validity

(1) [1900] 2 I. R. 565.
(2) [1915] 1 I. R. 345.
(3) [1912] 1 I. R. 346, 363; [1914] A. C. 823.

Appeal. 1917. Cox v. Dublin City Distillery. Sir Ignatius J. O'Brien C.

of Doherty's claim is res judicata. The second debenture-holders as a class were represented in that action by their trustees, and therefore the second debenture-holders are estopped from raising, *as against the plaintiff in that suit*, not only any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein." This to my mind is an accurate statement of the effect of the decision in the former case in regard to the question argued before us in this appeal.

I am of opinion that the order appealed against was wrong, and that the appeal must be allowed.

Ronan L.J.:—

It appears to me that there are really three questions in the case:—

1. Did the House of Lords decide in *Doherty's Case* (1) that Doherty was a cestui que trust under the trust deed?

2. Did they succeed by that order in giving effect to their decision?

3. If questions 1 and 2 are answered in the affirmative, are the respondents estopped by the decision and order of the House of Lords from asserting that Doherty is not a cestui que trust under the deed, and entitled to the benefit thereof as a security for his advances to the company?

The third question is mainly a question as to whether Doherty's action was properly constituted as to parties. It does not arise if either 1 or 2 is answered in the negative. I shall, therefore, in the first instance consider 1 and 2 entirely apart from the question of parties or estoppel.

This is a proceeding in the winding-up of the Company, the object of which is to ascertain whether Doherty is entitled to prove in the winding-up as a secured creditor on foot of the security created by the deed. The debentures gave a security as a floating charge on the property of the company other than that comprised in the deed. The deed is an ordinary mortgage of land to a trustee upon trust for persons described in it. In my opinion it is clear that in *Dublin City Distillery, Ltd.*, v. *Doherty* (1) the House of Lords at all events intended to decide—1, that the

(1) [1914] A. C. 823.

trust deed was good against the liquidator; 2, that Doherty was a cestui que trust under the trust deed. At p. 859 Lord Parker says:—"The question arises whether, notwithstanding such want of registration, the respondent is not entitled to the benefit of the trust deed pari passu with the other holders of second debentures. I have come to the conclusion that he is so entitled. As a holder of second debentures he is a cestui que trust under the trust deed, which itself is good as against the liquidator though unregistered. His debentures are not entirely avoided by the 14th section, even against the liquidator, but avoided only so far as any security on the company's property or undertaking is thereby conferred. In my opinion the security to which the respondent claims title is, so far as the property comprised in the trust deed is concerned, conferred by such deed and not by the debentures. Even if the debentures had not referred to the trust deed, the respondent would have been a cestui que trust thereunder."

The above portion of this judgment is expressly adopted by Lord Sumner at p. 868. Lord Atkinson at p. 851 gives judgment to the same effect. The judgment does not decide the amount due to Doherty on foot of the security created by the deed. It only decides that the deed is good, and that he is a cestui que trust under it. This seems to me to dispose of question No. 1, which must be answered "yes."

As to question No. 2, the order of the Court of Appeal affirmed the judgment of Barton J. That judgment declared "that the plaintiff is entitled to a good and valid lien on the debentures mentioned in the 26th paragraph of the statement of claim so far as the same affect the freehold and leasehold premises comprised in the trust deed, dated the 9th November, 1895, for the amount of his advances." The order of the House of Lords (1) is as follows:—"Order of the Court of Appeal in Ireland reversed, save so far as it affirmed that portion of the order of Barton J., which declared." [And then the above declaration is set out in terms.]

There can be no doubt as to the meaning of the words "so far as the same affect"; they mean "so far as the debentures affect," not so far as "the lien affects." I mention this because

(1) [1914] A. C. 868.

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

in his judgment in *Cox* v. *Dublin City Distillery* (*No.* 2) (1), Barton J. reads "affects" for "affect," which would make the words "the same" refer to the lien and not to the debentures. The debentures were issued to Kennedy as trustee for Doherty. Kennedy was a defendant. The debentures were in his name, but he held them as trustee to secure Doherty's advances. The holders of debentures were cestuis que trust of the trust deed. The plain meaning of the declaration was that Doherty was entitled to rank as a cestui que trust of the deed, and to have the benefit thereof as a security for his advances. If the declaration did not mean that, it was meaningless. I have referred to this at an early stage, as I am by no means sure that Mr. Justice Barton's judgment in the present case does not involve the proposition that Doherty's case really decided nothing. If it did not decide what Lord Parker purported to decide, I am unable to discover what it did decide. This is quite distinct from the question on whom the decision is binding. This latter question assumes that something was decided. Questions 1 and 2 would equally arise if all the second debenture-holders had been defendants in *Doherty's Case* (2). As to questions 1 and 2, the result of *Doherty's Case* (2) is stated with great precision by Barton J. in his judgment in *Cox* v. *Dublin Distillery* (1), thus:—"In paragraph 26 of the statement of claim and clause 5 of the prayer the plaintiff alleged the material facts upon which his claim to a charge on these debentures was based, and prayed for a declaration of his right to a good and valid lien on the debentures. The defendants in paragraph 15 of the statement of defence pleaded that the issue of these debentures was void. That is what this Court is asked to decide to-day. The question which is raised upon this memorandum was open under that plea. No contentious question of fact was raised; and it was held that a valid charge was created upon the premises comprised in the debenture trust deed, and a declaration was made in this Court to that effect. The company appealed upon that point unsuccessfully to the Court of Appeal and to the House of Lords. The order in the House of Lords expressly affirmed, and protected the plaintiff as regards the costs of, that portion of the order of

(1) [1915] 1 I. R., at p. 356. (2) [1914] A. C. 823.

this Court which declares that the 'respondent (Doherty) is entitled to a good and valid lien on the debentures mentioned in the 26th paragraph of the statement of claim, so far as the same affects (error for 'affect') the freehold and leasehold premises described in the trust deed.'"

In favour of whom was this valid charge upon the premises created? Beyond all possible doubt, in favour of Doherty.

This statement of Barton J. in my opinion shows plainly, 1, that the effect of the decision in his opinion was that Doherty had a valid charge on the premises comprised in the trust deed, and 2, that the effect of this was what he intended by his declaration. The House of Lords adopted both the substance of the decision and the form of the declaration. If the allegations as to the issue of the debentures in paragraph 26 had not been proved or admitted, Doherty's action must have been dismissed. A judgment in his favour necessarily involved that he was the lawful holder of valid debentures. The valid charge could only be created in favour of Doherty if he was the holder of valid debentures either personally or through his trustee. In the next paragraph of this judgment (1), however, Barton J. substitutes for "a valid charge upon the premises comprised in the debenture trust deed" "a chargeant on the debentures," and then says that he expresses no opinion on the validity of Mr. Doherty's debentures, as their validity was not open upon the memorandum. Does he mean by this that all that he, the Court of Appeal, and the House of Lords decided was that Doherty had a charge on certain pieces of paper, but that there never was any decision that he had any charge on the trust premises, or that he was a cestui que trust under the deed? This seems an extraordinary proposition to impute to the learned judge; but, after the most careful consideration, I can put no other meaning on his judgment in the present case. He says (2): "I must add that there is another serious difficulty in the way of this plea of estoppel. What Mr. Doherty, in the action of *Doherty* v. *Kennedy* (3), sought to obtain, and succeeded in obtaining, was not a declaration as to the validity of the debentures, but as to

(1) pp. 356, 357.
(2) Ante, p. 207.
(3) [1912] 1 I. R. 349, 363.

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

validity of his lien on them for his advances, and an inquiry as the amount of those advances and the sums available for discharging them. That declaration is not inconsistent with the present application. The validity of the debentures was never in dispute. It was not raised, argued, or decided in that suit." This certainly is a startling statement. It follows from it that Doherty's action, which was instituted (so far as the present matter is concerned) to determine his right to prove as a secured creditor on foot of the debentures and the trust deed, did not raise that question at all; it really decided nothing, though the three tribunals apparently thought it did.

Further, what was *Cox* v. *Dublin City Distillery* (*No. 2*) (1) all about? "A test action," which decided nothing, except perhaps that Kennedy held some papers as trustee for Doherty.

It is strange that in his judgment Barton J. does not even mention this case of *Cox* v. *Dublin Distillery* (*No. 2*) (1), before himself and the Court of Appeal. In that case Churton, Trower, and Kennedy contended that they were entitled to prove as secured creditors under the trust deed. Their case was that the judgment in Doherty's action established his right to do so, and that it was a test action, and that they were entitled to the benefit of the judgment. The case occupied apparently two days at argument before Barton J., and three days before the Court of Appeal. Judgment was reserved in both Courts. Barton J. held that the judgment in *Doherty's Case* (2) could be relied on by way of estoppel by Kennedy, but not by Churton or Trower. The Court of Appeal held that neither Kennedy, Churton, nor Trower could so rely on it. It is obvious that if Doherty's judgment did not establish his right, the entire proceeding in the case was futile. In such a case it would be absurd to discuss whether third parties could take advantage of a decision without first ascertaining what the decision was. Accordingly, in the Court of Appeal it is clear that the Court held and decided two propositions, viz.: 1, that *Doherty's Case* (2) did establish Doherty's title as a cestui que trust of the trust deed; and 2, that *Doherty's Case* (2) was not a test action, and that no one else could avail himself of it as such. The Lord Chief Baron and the Lord Chief Justice expressly say

(1) [1915] 1 I. R. 345. (2) [1914] A. C. 823.

so. I think that the same propositions are involved in the judgment of Molony L.J., and he tells me that he intended his judgment to have this effect. I accept the decision of the Court of Appeal as a binding authority on the effect of the decision and order in *Doherty's Case* (1), but for the present apart from the question of estoppel and that of parties. This brings me to my third question.

The main point as to this third question is, whether it is now open to the second debenture-holders to dispute Doherty's right to be dealt with as a cestui que trust under the deed. In my opinion *Cox* v. *Distillery (No. 2)* (2) is a clear authority on this as well as on the other two questions in the case. At p. 372 the Lord Chief Baron states what he decides in the case in the following words. [His Lordship read the passage from the judgment of the Lord Chief Baron, quoted by the Lord Chancellor, ante, p. 223.] This short paragraph, in the most accurate and precise legal language, states not only his decision, but the grounds of his decision, and, in my opinion, it rules the present case on every point. At p. 367 the Lord Chief Justice says that "the House of Lords have adjudicated upon Doherty's claim, and Doherty's claim only." He suggests, no doubt, that it was a complete and final adjudication on the validity of Doherty's claim as a secured creditor under the deed.

I can find nothing in the judgment of Molony L.J. expressing any dissent from what had been said by the Lord Chief Justice and the Lord Chief Baron. He says, at p. 378: "The decision in Doherty's action is, of course, binding and conclusive on the parties to the record" (the liquidator and the trustees of the deed); "but the debentures *here*" (that is, not Doherty's debentures, but those of Kennedy, Trower, and Churton—see per Palles C.B., at p. 372) "are impugned by other debenture-holders of the same class, and they are entitled to show that the debentures" (again those of Kennedy, Trower, and Churton) "were not validly issued." This is entirely in accord with the judgments of the Lord Chief Justice and the Lord Chief Baron.

The following paragraph (3) in the judgment of Molony L.J. has been strongly relied on:—

"It has been pointed out that the trustees for the second

(1) [1915] 1 I. R. 345. (2) [1914] A. C. 823. (3) [1915] 1 I. R. 378.

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

debenture-holders were parties in the action; but it is clear that trustees will not be deemed to represent the interest of absent cestuis que trust on any contention amongst the cestuis que trust inter se, but only where the contention is between a stranger and all the cestuis que trust: *Hamond* v. *Walker*" (1).

I presume there was considerable argument on the extent to which trustees represent their cestuis que trust, but the paragraph is expressly confined to contentions amongst the cestuis que trust inter se. This can have no application to a case where the only claim is a claim to be a cestui que trust. Until that claim had been decided in favour of the claimant, the paragraph can have no application to him. Molony L.J. intimates no doubt as to the correctness of the view of the Lord Chief Baron that in this case the trustees represented all the second debenture-holders, and that they are bound by the decision. I, therefore, accept the judgments as deciding the reverse of what Barton J. has held in the present case.

Frederick Hans Kennedy and William Findlater were trustees for the debenture-holders only to a limited extent. So far as regards the floating charge created by the debentures they were not such trustees; they had really no duties to perform in respect of the debentures. If a debenture holder released the lands comprised in the deed from his charge, and confined it to the other assets of the company, they would no longer be trustees for him. They were in fact trustees for the persons who were "entitled to the benefit of the trust deed, and it was their duty not to give the benefit of that deed to parties who were not cestuis que trust under it." The judgment in the case only dealt with the rights of Doherty under the trust deed.

If he is a cestui que trust under a valid mortgage of the company's land, he is entitled to prove as a secured creditor. The judgment decides that he is a cestui que trust. It decides no question between the cestuis que trust under the deed. It only decides that he is *one* of them.

There are two classes—1, those who are cestui que trust under the deed; 2, those who are not. There is no third class. The trustees are trustees for 1 and for all of them, and not for 2.

(1) 3 Jur. N. S. 686.

It is the duty of the trustees to confine the benefit of the deed to 1, and not to permit 2 to take any part of it.

If the cestuis que trust dispute inter se as to their respective rights to the benefits of the deed, the trustees are not arbitrators to decide between them. They should not take sides with one set of cestuis que trust against the others. If A is trustee of a fund for B, C, D, and E, and they dispute among each other as to their rights to the trust fund, it would be absurd to suggest that B in an action against the common trustee A alone, should be allowed to obtain a decision as against C, D, and E. In such a case the Court would, of course, insist on their being separately represented. Barton J. refers to the provision in Order 16, Rule 8, enabling this to be done; but he seems to overlook the fact that neither he nor the Court of Appeal nor the House of Lords thought it necessary to have the parties separately represented in *Doherty's Case* (1). But before this state of things can arise there must be a common trustee, and the dispute must be among his cestuis que trust. If F, a fifth person, claims to be a cestui que trust, and his right is disputed, a wholly different state of things arises. If his claim is admitted or established, it diminishes the fund divisible among B, C, D, and E just as much as if a stranger appropriated an amount equal to the share which F proved he was entitled to. Once F had established that he was a cestui que trust, any question between him and his co-cestuis que trust as to their respective shares would be what Molony L.J., in *Cox's Case* (*No.* 2) (2), calls "a contention among the cestuis que trust inter se." But until it was settled that he was a cestui que trust this position could not arise as to him. It was the duty of the trustees to hold the entire trust fund for persons who were cestuis que trust, and not to allow anyone else to participate in it. I have already pointed out that Doherty's action, so far as regards the present matter, was an action to establish his right as a cestui que trust under the deed, and to prove as such in the liquidation, and that the judgment in the action only established that right. It did not decide any question between him and his co-cestuis que trust, except that he also was a cestui que trust.

(1) [1914] A. C. 823.

(2) [1915] 1 I. R. 345, at p. 356.

Appeal. 1917.

Cox v. Dublin City Distillery.

Ronan L.J.

Reading this judgment one would think that there never was any dispute that Doherty was a cestui que trust under the trust deed, or, indeed, any dispute as to the full claim in paragraph 26 of the statement of claim, and paragraph 5 of the prayer.

Barton J. says (1) that the question of the pledge "was the only contentious question in the action. He" (Doherty) "did not claim adversely to the trust estate in respect of these debentures, but as a cestui que trust he claimed the benefit of the trust deed. That being so, the trustees for the second debenture-holders cannot be regarded as having constituted a legitimus contradictor on behalf of the applicants, so as to preclude them from challenging the validity of these debentures. . . . The validity of the debentures was never in dispute. It was not raised, argued, or decided in that suit." I confess I cannot understand this. The Judge refers to paragraph 26 of the statement of claim as containing the plaintiff's claim in respect of the present matter. But this is all specifically traversed by paragraph 15 of the company's defence, as pointed out by himself in his judgment in *Cox* v. *Dublin City Distillery (No. 2)* (2). He himself decided that the debentures in question were invalid so far as they purported to give a floating charge, and he cut down the plaintiff's claim to that under the trust deed; but as to this, held that they had still the effect of entitling the plaintiff to the benefit of the trust deed. Paragraph 3 of the argument for the appellant in *Dublin City Distillery, Ltd.*, v. *Doherty* (3), at page 831 of the report, and paragraph 3 of that for the respondent at page 834, show that this was fully argued in the House of Lords. And, lastly, the careful judgment of Lord Parker, quoted above, and the concurrence of the other lords, show that this was treated as a grave question in the action. Barton J., in his judgment in this action, says: "Doherty . . . as a cestui que trust claimed the benefit of the trust deed. That being so," (1) etc. Prior to the decree, Doherty claimed to have it decided that he was a cestui que trust under the deed. Until that was decided he could not claim as a cestui que trust. The question in the case was in fact, Was he such a cestui que trust? When it was decided that he was, then, but not before, could he claim as a cestui que trust, who

(1) Ante, pp. 207, 208. (2) [1915] 1 I. R. 345, at p. 356. (3) [1914] A.C. 823.

must be recognized as such by the trustees and the liquidator. Once the validity of the trust deed was established, in my opinion it is plain that the only question in dispute in the action, as regards this branch of the case, was whether Doherty was a cestui que trust under that deed, and the judgment of Lord Parker, in so many words, decides that he was.

As to the question whether a person is a cestui que trust under the deed or not, Barton J. seems to suggest that the trustees are not under any obligation to consider this. His judgment proceeds :—"Indeed the trustees do not appear to have been under any obligation to raise it. Their duty under the terms of clause 6 of the trust deed was to apply any moneys arising from the sale under the trust for conversion contained in the deed towards payment pari passu without preference or priority of arrears of interest and principal to the holders of second debentures according to the tenor of their debentures." Now, I presume that this means that their duty is simply to pay according to the tenor of the debentures, and that there is no duty cast on them except to regard the tenor of the debentures ; they are not bound to consider whether the persons they pay are holders of valid debentures. This is an entire misreading of the clause. The trusts are—(1) to pay to the holders of debentures pari passu, in proportion to the amount due, the arrears of interest remaining unpaid; and (2) the principal. The clause then provides that this shall be done "*whether the said principal moneys shall or shall not be payable according to the tenor of the said debentures.*"

So far from the payment being directed to be according to the tenor of the debentures, the clause provides that the tenor of the debentures is not to regulate the payment. Now, it is quite true that the point showing that the debentures were issued by persons who were not authorized to do so was not relied on at the trial before Barton J. or in the Court of Appeal. The point appears to have been discovered by the present Mr. Justice Younger, who was counsel for the appellants in the House of Lords.

Even if the House of Lords intended to decide that Doherty was a cestui que trust under the deed, and entitled to prove as a secured creditor, and their order gave effect to this decision, still if Barton J. is right on the question of estoppel, this decision had

Appeal. 1917.

Cox v. Dublin City Distillery.

Ronan L.J.

really no operative effect on the assets of the company or the trust premises in the trust deed of which he was decided to be a cestui que trust. It certainly is a most extraordinary situation. When Mr. Justice Younger called the attention of the House of Lords to the facts as to the issue of the debentures, it never occurred to him, or any of the Lords, or anyone else, that it was a pure waste of time to argue the case, as, having regard to the frame of the action, their judgment would be wholly inoperative. Mr. Younger said that if this point had been taken in time it would have put an end to this part of the case; but that he could not rely on it because it had not been raised in either of the Courts below, *not* because it was not open on the pleadings in the action. It was a defence to the entire action, so far as this case is concerned, open on the traverse in the pleadings, but not taken at the trial.

The first ground on which Barton J. decided the case was that the trustees of the deed did not represent their cestuis que trust in *Doherty's Case* (1) so as to make the judgment bind the latter. If they did not so represent them, I asked counsel for the respondent whether the judgment had any effect at all by reason of the trustees being defendants. I pointed out that it clearly did not bind the trustees' own property, and they practically had to admit that it had no operation whatever beyond what it would have had if the trustees had not been parties. This is rather startling, having regard to Order 16, Rule 8 (following sect. 42, sub-s. 9, of the English Chancery Regulation Act of 1852 and sect. 66 of the Chancery (Ireland) Act, 1867).

It will be observed that the mandatory words "shall be considered as representing" are not to be found in rule 9. When rule 8 provides that trustees who sue or are sued as representing the estate of which they are trustees without the joinder of the persons beneficially interested "shall be considered as representing such persons," it means that the trustees shall be considered as representing these persons. If there be a conflict of interest amongst the cestuis que trust, provision is made for this. The rule proceeds:—"But the Court or a judge may at any stage of the proceedings order any of such persons to be made parties either in addition to or in lieu of the previously existing parties."

(1) [1914] A. C. 823.

The Law Lords had before them all the facts as to this point which is sought to be raised here; they knew what was involved in the case; and that the point, if taken in time, would have been fatal in this respect. They did not, however, think it necessary to interfere with the ordinary operation of Order 16, Rule 8, as to the trustees representing the persons beneficially entitled.

The case of *Concha* v. *Concha* (1), which was pressed upon us by the respondents, and which the Lord Chancellor has already referred to, is clearly distinguishable. Lord Herschel there said (at p. 553):—"It cannot be questioned that for certain purposes the executors do represent the legatees and the residuary legatee; and it may, perhaps, be admitted (at all events for the purposes of this case) that so far as regards all matters necessarily decided in a suit to which the executors are parties, the residuary legatee and the other legatees may be bound by the decision. But I think that must be limited to the matters necessarily decided in the litigation to which the executors are parties, and that if the executors choose, as it is said here they have chosen, to obtain a decision of the Court upon a point which is immaterial for the purpose of determining the rights in question between the parties, they cannot, by tendering for decision an issue which is unnecessary for the determination of the case, bind all parties claiming under the will, legatees of whatever description, because that finding has been obtained in such a suit under such circumstances by the executors. That really is the present case. If the residuary legatee is bound here at all, he is bound by a finding of the learned judge, which was quite unnecessary for the determination of what he had to decide, and by a finding of the learned judge which therefore could not be successfully appealed against." The finding of the Probate Court on the question of domicil was accordingly held to be not conclusive in that case, it having been an irrelevant finding. Here, however, the question as to Doherty's rights as a cestui que trust under the trust deed was one which, in the words of Lord Herschel, was "necessarily decided in the litigation," and was, indeed, the vital question in the case.

We have not been referred to any case in which, in an action brought against trustees for a class by a person claiming to be a

(1) 11 A. C. 541.

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

member of that class, it was held that the trustees did not represent the class. Here the trustees represented all the second debenture-holders. Doherty was claiming as an outsider until his right was established. If he was a cestui que trust, the trustees represented him; if he was not a cestui que trust, they did not.

The remaining question is as to the effect of the decision in the *Irish Land Commission* v. *Ryan* (1), with which the Lord Chancellor has already dealt. The dictum of FitzGibbon L.J. in that case, which appears in the head note (paragraph 5) as if it were the judgment of the Court and the basis of the decision, and which the Lord Chancellor has read, does not seem consistent with the judgment of Holmes L.J. I do not, however, think it necessary to discuss the matter in detail, as in the present case "the ground and extent of the estoppel" are clearly and fully to "be found on the face of the judgment itself."

If the judgment in this case be compared with the facts set out on p. 566 of the report in [1900] 2 Irish Reports, it will be seen that the *Irish Land Commission* v. *Ryan* (1) has really no bearing on the present case.

In conclusion, I may say that the decision of this Court in *Cox* v. *Dublin City Distillery* (*No. 2*) (2) is, in my opinion, a clear and binding authority, and the specific statement of the Lord Chief Baron, to which I have already referred, appears to me to cover every question in the present case.

Molony L.J.:—

The appellant, Edward Doherty, on 6th December, 1909, commenced an action against Frederick Hans Kennedy, William Findlater, and the Dublin City Distillery, Limited, to have it declared that he was entitled to a good and valid pledge of the whiskies contained in certain casks therein referred to, and also that he be declared entitled to a good and valid lien on certain second mortgage debentures of the said company, for the amount of his advances to the company, with interest. The defendants Kennedy and Findlater were sued as trustees for the said deben-

(1) [1900] 2 I. R. 565. (2) [1915] 1 I. R. 345.

ture-holders under an indenture of 9th November, 1895, whereby certain hereditaments and premises the property of the company were assigned to them as such trustees. A defence was filed by Samuel Smith, the receiver and liquidator of the company, who defended the action in the name of the company pursuant to an order of Mr. Justice Barton of the 14th December, 1909, and, amongst other defences, he pleaded that if such issue of second debentures was made as alleged, such issue was ultra vires and void, and in a notice served subsequent to the claim he further stated that the defendant company, in support of the plea that the said second debentures were ultra vires and void, would rely on the fact that the said issues of second debentures were made after the Companies Act, 1900, came into operation, and were not registered pursuant to that Act. Messrs. Kennedy and Findlater, the trustees, did not put in any separate defence, but it appeared in the course of the proceedings, and was in fact admitted, that the action was defended by the liquidator in the interests of the second debenture-holders, and, so far as the subsequent appeal to the House of Lords was concerned, with their active co-operation and financial support. On the 27th January, 1911, Mr. Justice Barton gave judgment, holding that there was a good and valid pledge of the whisky comprised in the warrants, and also holding that Doherty was entitled to a valid lien on the debentures for the amount of his advances, to the extent of the property comprised in the trust deed. The judgment was affirmed by this Court, and on an appeal being taken to the House of Lords it was decided that there was no valid pledge of the whisky, but that there was a valid lien. The trustees for the second debenture-holders had a two-fold duty to perform. They were bound to assert the validity of the deed and enforce its provisions as against the company; but they were equally bound to see that no person came to share in the trust property who was not legally authorized to share in it. When they were sued as trustees by a person claiming to have a valid lien in respect of certain debentures issued to him by the company, the trustees, as representing all the debentures of that class, were entitled to require the existence and validity of the debentures to be proved in the proceedings. The trustees cannot be placed in a better position by reason of not having in fact

Appeal. 1917. Cox v. Dublin City Distillery. Molony L.J.

delivered a defence, and the question of estoppel does not depend on whether the question was actually raised, but on whether it could have been properly raised in the proceedings. The company did raise the issue that the debentures were void. In *Doherty's Case* (1) it was perfectly open to the trustees to question the validity of the issue of the debentures; but having allowed the case to be carried to the House of Lords on the assumption that they were validly issued, although subsequently avoided as regards the floating security by reason of the provisions of the Companies Act, 1900, not having been complied with, it is impossible, I think, for the second debenture-holders now to claim that they are not bound by the proceedings in the action or by the judgment of the House of Lords.

After the decision of the House of Lords the second debenture-holders took proceedings in the present action to have certain debentures issued to Frederick Hans Kennedy (as trustee for Frederick Kennedy), Percy Bence Trower, Percy Vardon Churton, Adam S. Findlater, and William Findlater declared invalid on the ground that the resolution authorizing the issue was invalid, having been passed at a meeting at which there was no quorum competent to vote on the resolution. Mr. Justice Barton held that the debentures to Trower and Churton were void, but that the debentures to Frederick Kennedy, Adam S. Findlater, and William Findlater were valid, and this Court varied his order by declaring that the debentures to Frederick Kennedy were also void. It was argued that the action of *Doherty* v. *Kennedy* (1) was a test action brought on behalf of all the holders of the second debentures, and that they were entitled to rely upon the judgment in that case. This Court, however, was clearly of opinion that the action was not a test action, and that it only dealt with the validity of Doherty's debentures. In the course of my judgment I pointed out that while the decision in *Doherty's Case* (1) was, of course, binding and conclusive on the parties to the record, the debentures which were the subject of that appeal were impugned by other debenture-holders of the same class, and that they were entitled to show that the debentures were not validly issued. The reference which

(1) [1914] A. C. 823.

I made to the case of *Hamond* v. *Walker* (1) seems to have been misunderstood. I pointed out that it would appear from that case that trustees will not be deemed to represent the interests of absent cestuis que trust on any contention between the cestuis que trust inter se, but only where the contention is between a stranger and all the cestuis que trust. It seemed to me that the statement of V.-C. Page-Wood in *Hamond* v. *Walker* (1) was correct, but I was not in any way differing from the judgment of the Lord Chief Baron, or his conclusions of law, with which I respectfully concur. There was not in *Doherty's Case* (2) any contention amongst the cestuis que trust inter se; but there was a contention between persons who were admitted to be valid debenture-holders and certain persons, the validity of whose debentures was impeached; and it was perfectly within Order 16, Rule 8, that the trustees should represent all the valid cestuis que trust, as it was their interest to prevent any person who was not properly entitled from claiming the benefit of the trust deed; and there was no contention between valid cestuis que trust inter se. I am of opinion, therefore, that, having regard to the proceedings in *Doherty* v. *Kennedy* (2), and the judgment of the House of Lords, the order appealed from should be discharged, and that we should declare that the applicants are precluded from now averring the invalidity of the debentures held by Frederick Hans Kennedy as trustee for Edward Doherty.

Solicitor for the appellant: *H. W. Franck.*
Solicitors for the respondents: *G. D. Fottrell & Sons.*

R. ST. J. C.

(1) 3 Jur. N. S. 686.

(2) [1914] A. C. 823.