[HIGH COURT OF AUSTRALIA.]

NEWMARCH . . . . . APPELLANT;

AND

ATKINSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1918.

MELBOURNE, *Sept.* 5, 6, 9, 26.

Barton, Isaacs and Rich JJ.

Imprisonment of Fraudulent Debtors—Nature of proceedings—Punishment for offence—Process to enforce payment—Jurisdiction—Discretion—Inability of debtor to pay—Motive of creditor—Fraud in incurring part of debt—Imprisonment of Fraudulent Debtors Act 1915 (*Vict.*) (*No.* 2667), *secs.* 3, 4, 5, 8, 10.*

Held, that by the *Imprisonment of Fraudulent Debtors Act* 1915 (Vict.) coercion of the body of a judgment debtor, by way of execution in order to obtain payment of a debt, is absolutely abolished, and punishment by imprisonment is provided for certain specified cases of dishonest or unjust conduct in relation to that debt.

Held, also, that under sec. 5 of the Act, when the necessary conditions specified by the Act have been established, the Judge has no discretion as to exercising the jurisdiction of determining judicially whether the order should be made, but has a discretion to determine whether, upon the whole of the

* Sec. 3 of the *Imprisonment of Fraudulent Debtors Act* 1915 (Vict.) provides that "No person shall be arrested or imprisoned or detained in prison upon any writ of *capias ad satisfaciendum* issued out of the Supreme Court after or before the passing of this Act, any law or practice of such Court to the contrary notwithstanding." Sec. 4 provides that "Whenever any sum of money recoverable under any judgment of the Supreme Court remains unsatisfied in the whole or in part, it shall be lawful for the person entitled to recover such money (whether or not any execution has issued upon or under such judgment) to obtain from time to time from the prothonotary a summons . . . directed to the person liable to pay such money; . . . and if he appears in pursuance of such summons, he may be examined upon oath by any Judge of the Supreme Court touching his estate and effects and as to the property and means he has or has had of paying satisfying and discharging such sum of money or such part thereof as remains unsatisfied . . . and as to the mode in which the liability the subject of such judgment was incurred." Sec. 5 (3) provides that "If it appears to the satisfaction of such Judge by oral testimony or affidavit or both that such person if a defendant incurring the liability which is the subject of the action or proceeding in which judgment has been obtained—(*a*) Obtained

H. C. OF A. 1918.

NEWMARCH v. ATKINSON.

circumstances proved, the occasion is or is not a proper one for the exercise of the power of ordering imprisonment, and that the judgment creditor's vindictive motive in obtaining the summons and, in a case of fraudulent representation as to ability to pay, the inability of the judgment debtor to pay the debt are not circumstances which should lead the Judge to determine that the occasion is not a proper one for the exercise of the power.

Held, further, that it is not necessary that the debt or liability upon which the judgment is founded should be indivisible, and, therefore, that it is sufficient to sustain an order under sec. 5 that part of the debt was incurred by fraud.

R. v. *Wallace*; *Ex parte O'Keefe*, (1918) V.L.R., 285; 39 A.L.T., 199, approved.

Decision of the Supreme Court of Victoria (*Irvine* C.J.) affirmed.

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court by Evelyn John Rupert Atkinson against Roy Wentworth Fitzwilliam Newmarch for money lent by the plaintiff to the defendant and money paid by the plaintiff at the request of the defendant, the plaintiff recovered judgment for £561 14s. 10d. and costs. No part of that sum having been paid, the plaintiff obtained a summons under the *Imprisonment of Fraudulent Debtors Act* 1915 requiring the defendant to appear before a Judge of the Supreme Court for examination. The examination was held before *Irvine* C.J., who made an order reciting that it appeared to his satisfaction that the defendant had incurred the liability which was the subject of the judgment under false pretences and by means of fraud, and ordering that, unless the defendant paid into Court within thirty days the sum of £561 14s. 10d., together with £38 14s. 1d. for interest at the rate of five per cent. per annum and £21 for the costs of the summons and examination, he should be imprisoned for three months or until he should have paid or satisfied the judgment and the sums ordered to be paid for interest

credit or contracted such liability under false pretences or by means of fraud or breach of trust . . . , it shall be lawful for such Judge, if he thinks fit, to make an order . . . that unless such person pays into such Court either forthwith or within the time limited in such order . . . the money so unsatisfied . . . he shall be committed to prison for a term of not more than six months." Sec. 10 provides that "Any person imprisoned by virtue of any warrant under this Part, who pays or satisfies the sum or sums mentioned in the order for commitment shall be discharged out of custody . . . . Notwithstanding the provisions hereinbefore contained, it shall be lawful for any Judge of the Supreme Court at any time by order under his hand (if in the special circumstances of the case he thinks fit so to do) to direct that any person in gaol or custody under any such order shall be forthwith discharged and such person shall be forthwith discharged accordingly."

and costs or until he should be otherwise discharged by due course of law. The learned Chief Justice in his judgment held that the plaintiff's motive in obtaining the summons and the probability or improbability of the proceedings resulting in the payment of the debt were only material to the credibility of the plaintiff.

From that decision the defendant now, by special leave, appealed to the High Court.

Starke and *Eager*, for the appellant. The effect of the *Imprisonment of Fraudulent Debtors Act* 1915 is to afford a form of civil process for the enforcement of payment of a judgment debt by means of punitive proceedings. That was the view taken by *Hodges* J. and *Cussen* J. in *R.* v. *Wallace*; *Ex parte O'Keefe* (1), although *Cussen* J. felt himself bound by prior decisions to hold the contrary. The Act does not abolish imprisonment for debt and create a new public offence for which it provides the punishment.

[ISAACS J. referred to *Atkinson* v. *Newmarch* (2).]

If the proceeding is a form of civil process for the enforcement of a debt, then the Judge in exercising the discretion which he is given under sec. 5 must look at all the surrounding circumstances, including the vindictive motive of the plaintiff and the fact that the defendant has no means. The power given by sec. 5 is only to be exercised when the whole of the unsatisfied judgment debt has been incurred by fraud. That is shown by the use of the words "any sum of money recoverable under any judgment" in sec. 4 and "incurring the liability which is the subject of the action or proceeding" in sec. 5, and by the fact that the defendant is imprisoned until the whole debt is satisfied. [Counsel also referred to *In re Ogle* (3).]

J. R. Macfarlan, for the respondent. If the imprisonment which may be awarded under sec. 5 of the Act is punitive, *Irvine* C.J. was justified in refusing to consider the motive of the plaintiff or the fact that sending the defendant to prison was not likely to bring about payment of the debt. Whether the proceeding is or is not

(1) (1918) V.L.R., 285; 39 A.L.T., 199. (2) (1918) V.L.R., 265; 39 A.L.T., 191.
(3) 13 V.L.R., 330; 9 A.L.T., 14.

H. C. OF A. 1918.

NEWMARCH v. ATKINSON.

also a mode of execution cannot affect the question of the amount of punishment that should be awarded. Under similar provisions in the English *Debtors Act* 1869 (32 & 33 Vict. c. 62), secs. 4, 5, it has been held in numerous cases that the imprisonment is a punishment for past dishonesty (*In re Smith*; *Hands* v. *Andrews* (1); *Stonor* v. *Fowle* (2); *In re Edgcome*; *Ex parte Edgcome* (3); *Middleton* v. *Chichester* (4); *Marris* v. *Ingram* (5); *Church's Trustee* v. *Hibbard* (6); *Haydon* v. *Haydon* (7); *In re Norris* (8); *In re Bourne*; *Davey* v. *Bourne* (9)).

[ISAACS J. referred to *In re Gent*; *Gent-Davis* v. *Harris* (10); *In re Thomas*; *Sutton, Carden & Co. Ltd.* v. *Thomas* (11).]

In *Bailey* v. *Plant* (12), although it was held that the real purpose of the Act was to compel payment of the debt, it was admitted that it was to some extent punitive, and there was no appearance for the respondent. In *In re Ogle* (13) it was determined that under the *Imprisonment for Debt Act* 1865 the imprisonment was a punishment of an offence. The language of the Victorian Act is stronger than that of the English Act in favour of the imprisonment being a punishment, for by sec. 4 of the English Act it is provided that imprisonment for debt is abolished except in certain cases. If the penalty is not a punishment for an offence but only a mode of enforcing payment, there is no reason why a judgment debtor should not be imprisoned a second time if his first imprisonment did not have the effect of making him pay the debt, for execution can be put in as often as the creditor chooses. The representation upon which the money was advanced was a continuing one, and all the payments were made on the faith of it.

Starke, in reply. The decisions under the English Act cannot be relied on for the construction of the Victorian *Imprisonment of Fraudulent Debtors Act* 1915, for the history of the legislation was quite different in each case, and the original legislation was earlier

(1) (1893) 2 Ch., 1.
(2) 13 App. Cas., 20, at p. 24.
(3) (1902) 2 K.B., 403.
(4) L.R. 6 Ch., 152.
(5) 13 Ch. D., 338.
(6) (1902) 2 Ch., 784.
(7) (1911) 2 K.B., 191, at p. 194.
(8) 33 T.L.R., 309.
(9) (1906) 1 Ch., 697.
(10) 40 Ch. D., 190.
(11) (1912) 2 Ch., 348, at p. 353.
(12) (1901) 1 K.B., 31.
(13) 13 V.L.R., 330; 9 A.L.T., 14.

in Victoria than in England. The history of the Victorian legislation from sec. 336 of the *Common Law Procedure Act* 1865 onwards shows that the law as to imprisonment for debt was amended by providing that in certain classes of cases the old law for enforcing payment of debts should still exist in a new form and by taking away the satisfaction of debt by imprisonment. The fact that under the Victorian Act a debtor is entitled to his release from prison immediately he pays the debt shows that the proceeding is one for enforcing payment. Sec 8 is very strong to show that the essential character of the proceeding is a process of execution. Where Parliament has wished to make the incurring a debt by fraud an offence it has done so, as in sec. 275 of the *Insolvency Act* 1915 and sec. 181 (*b*) of the *Crimes Act* 1915. [He also referred to *Barrett* v. *Hammond* (1); *Re Mackenzie* (2); *Caldecott* v. *Cunningham* (3).]

Cur. adv. vult.

Sept. 26.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

On careful consideration of the *Imprisonment of Fraudulent Debtors Act* 1915, and of the numerous decisions both in Victoria and in England that have been cited in argument or referred to in some of the judgments quoted, we are led to the conclusion that this appeal should be dismissed.

It is not necessary to enter upon a detailed examination of the authorities and enactments referred to in the recent case of *R.* v. *Wallace*; *Ex parte O'Keefe* (4). We agree in the result with the opinions arrived at by the late Chief Justice (Sir *John Madden*) and *Hood* J., and, upon the authorities, concurred in by *Cussen* J. We read the Act in the following manner : Coercion of the body of a judgment debtor, by way of execution in order to obtain payment of a debt, is entirely and absolutely abolished ; but where a debt is established by judgment, then for certain cases of dishonest or unjust conduct in relation to that debt, expressed in the Statute,

(1) 10 Ch. D., 285.
(2) 44 L.T., 618.
(3) (1908) V.L.R., 38, at p. 44; 29 A.L.T., 94.
(4) (1918) V.L.R., 285; 39 A.L.T., 199.

H. C. OF A. 1918.

NEWMARCH v. ATKINSON.

punishment by imprisonment is provided. That the imprisonment is not intended as a means of execution for debt is shown by three circumstances. The first is that the period of imprisonment is limited to six months, whatever the amount unsatisfied at the end of that time may be. The old writ of *ca. sa.* was not so limited, and if the Act meant merely that dishonest non-payment was excluded from its benefits, such a case would in all probability have simply been left to the operation of the old law. In *Tidd's Practice*, 9th ed., vol. II., p. 1028, it is said: "The defendant being taken upon a *capias ad satisfaciendum*, either satisfies the plaintiff's demand, or remains in custody." The second circumstance is that the period of six months as a maximum seems intended as a period within which the length of imprisonment ordered may be proportioned to the conduct which calls for its infliction. The third circumstance is that the imprisonment is not a satisfaction or discharge of the debt, even though it lasts the full maximum period. There again we see a departure from the common law effect of a *capias ad satisfaciendum*. The old law was that "the execution is considered, *quoad* him, as a satisfaction of the debt" (*Tidd*, p. 1029). If the law as to execution were merely mitigated by substituting six months for indefinite detention, there would be no fair reason for depriving the debtor entirely of the benefit of imprisonment he is compelled to endure.

It is true that by sec. 10 the debtor is entitled to be discharged on payment or satisfaction of the sum or sums mentioned in the order for commitment, but that does not alter the nature of the proceeding. If there be in any given case the particular reprehensible conduct in the Statute, the debtor may expiate it, either by undergoing his punishment in full or by purging his misconduct by at last acting justly in paying the debt which he either dishonestly incurred or dishonestly failed to pay or unjustly endeavours to escape paying. That is a gate of repentance and mercy open to him, enabling him to escape punishment or further punishment by making the necessary amends if in his power to do so.

The provisions for an *ex parte* order without notice, found in sec. 8, were relied on as indicating that the proceeding was rather in the nature of civil than of criminal process, because, as contended,

it could not be supposed that punishment would be inflicted without giving an opportunity of being heard. But the answer is that the specified conduct which justifies imprisonment includes: (1) being about to leave Victoria without paying the debt, which would elude the jurisdiction of the Victorian Courts, and (2) being about to depart elsewhere within Victoria with intent to evade payment, an attempt probably to elude the jurisdiction of some local Court—the par. (*c*) of sec. 5 (2) being a relic of the Act No. 284, which included County Courts and justices. Unless some provision were made as in sec. 8 for prompt and preventive action, the provisions of sub-secs. 2 (*b*) and 2 (*c*) of sec. 5 might be rendered futile. That is met by sec. 8, and any possible injustice is guarded against by requiring proof by affidavit in the first instance, and by the discharge provisions of sec. 10.

The underlying principle of the enactment is that execution of the body for a judgment debt is no longer part of the law, being repugnant to the more humane spirit of the time. But lest the relaxation of the ancient severity should invite or encourage injustice or dishonesty on the part of the debtor, a deterrent against such reprehensible conduct in relation to that debt is provided within stated limits. And even within those limits encouragement is offered for amends by affording opportunity of payment whereupon the deterrent punishment terminates.

That being the general nature of the enactment, the next question is the nature of the duty imposed upon the Judge.

If specific facts are established, then says the Act "it shall be lawful" to make an order. Those words by themselves are primarily permissive only, but the nature of the subject matter and of the donee of the power shows that they are in this case mandatory. The extent of that mandate is the next consideration. The words quoted are followed by the further words "if he thinks fit," and effect must be given to them. Their proper effect in our opinion is that as soon as the necessary conditions specified in the Act are established the Judge has no discretion whatever as to exercising the jurisdiction of determining judicially whether the order should be made, but he still has a discretion to determine whether, upon the whole circumstances proved, the occasion is a proper one for

H. C. OF A. 1918.

NEWMARCH v. ATKINSON.

exercising the power. That discretion must not be influenced by any extraneous or irrelevant consideration—as, for instance, that imprisonment for such reasons is objectionable.

On the other hand, it must be remembered that sec. 10 provides expressly that the Judge may direct, if "in the special circumstances of the case he thinks fit so to do," that any person imprisoned under an order shall be discharged. It is clear, therefore, that the Judge when asked to make the order need not act circuitously by first imprisoning and then discharging, but may, under the same words, "if he thinks fit," in sec. 5, take "the special circumstances of the case" into consideration, and either reduce the period to a minimum or refrain altogether from directing imprisonment.

The only circumstances which the appellant suggests should have been and were not taken into consideration are (1) the plaintiff's vindictive motive and (2) the defendant's actual inability to pay. As to the first, the plaintiff's motive is not in itself any ground for refusing the order. It is not unnatural that a defrauded man should be vindictive as a result of the fraud practised upon him, but in any event it is immaterial. His vindictiveness may, of course, inspire the tribunal with caution as to his evidence; but, once the facts are ascertained, the plaintiff's motive is no obstacle. See *Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (1).

As to the defendant's inability to pay the debt, where as here the fraud consists in a false representation of ability to pay, the inability is really part of the offence, and to regard it as an exculpation would be absurd. We do not say there may not be cases where it could well be taken into consideration—that is very possible; but in the present case the omission to do so cannot be regarded as unwarranted.

It was suggested that the debt or liability must be single, and the conduct charged must apply to the whole of it. Even if that were an accurate reading of the Act, the facts show that the fraud of the appellant covered the whole of the liability. But having considered the matter we shall state our conclusions. It is not necessary that the debt or liability on which the judgment is founded should be indivisible. The Legislature were well aware that an action

(1) 20 C.L.R., 509.

was frequently brought for different causes of action, and did not seek to drive plaintiffs to a multiplicity of suits. Sec. 6 speaks of "any action in the Supreme Court in respect of any cause or causes of action." The words "the liability the subject of such judgment" mean to confine the consideration of the defendant's conduct to liability which has passed into the judgment, and not to imprison him with reference to a debt under a judgment because of reprehensible conduct in relation to some other liability. When the cause or causes of action have passed into a judgment, then it may be said the debt, now one of record, is indivisible from the date of judgment.

The judgment appealed against should therefore be affirmed, and the appeal dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *McLaughlin, Eaves & Johnston.*

Solicitors for the respondent, *Rigby & Fielding.*

B. L.

[HIGH COURT OF AUSTRALIA.]

STONE . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

Income Tax—Assessment—Appeal—Burden of proof—Effect of Commissioner's decision—Income Tax Assessment Act 1915-1916 (*No.* 34 *of* 1915—*No.* 39 *of* 1916), *sec.* 32.

On an appeal from an assessment of income made by the Federal Commissioner of Taxation under the *Income Tax Assessment Act* 1915-1916, it is assumed that the Commissioner has made the assessment after careful