unimproved value of the property was £16,682, and he ordered the assessments to be amended accordingly.]

H. C. OF A. 1919-1920.

KIDDLE v. DEPUTY FEDERAL COMMISSIONER OF LAND TAX.

Appeals allowed. Assessments to be amended accordingly. Respondent to pay costs of appeals.

Solicitors for the appellants, *Metcalfe & Dangar*, for *J. Beacham Kiddle*, Melbourne.

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

CROPLEY'S LIMITED . . . . . APPELLANT;

AND

VICKERY AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1920.

SYDNEY, *March* 29.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Bankruptcy—Act of bankruptcy—Notice to creditor that debtor is about to suspend payment of his debts—Evidence—Bankruptcy Act 1898 (*N.S.W.*) (*No.* 25 *of* 1898), *sec.* 4 (1) (*h*).

Sec. 4 (1) of the *Bankruptcy Act* 1898 (N.S.W.) provides that "A debtor commits an act of bankruptcy . . . (*h*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

A debtor, who was being pressed by one of his creditors for payment in full of his debt partly out of goods bought by the debtor from other creditors and not then paid for, made statements to that creditor to the effect that he thought that if such payment was made it was very probable that he would

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not be able to pay his other creditors, but indicating at the same time that he intended to carry on his business and attempt to pay them.

Held, that the statements did not amount to a notice to the creditor that the debtor was about to suspend payment of his debts within the meaning of sec. 4 (1) (*h*) of the *Bankruptcy Act* 1898.

Decision of the Supreme Court of New South Wales (*Owen* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

On 14th November 1918 Joseph Vickery and Emily Annie Lamplough Vickery, trading as Joseph Vickery & Co., presented a petition in bankruptcy against Austin Bede Chapman, alleging (par. 4) that within six months before the date of the presentation of the petition Chapman "had committed the following act of bankruptcy, namely, that he gave notice to Cropley's Ltd., one of his creditors, that he had suspended or was about to suspend payment of his debts." In support of the petition an affidavit of Chapman was filed, in which he stated that on 14th August 1918 a Mr. Pittendrigh, a representative of Cropley's Ltd., which company was then a creditor of Chapman, came to Chapman and proposed that he should hand over to Cropley's Ltd. stock, at a price 20 per cent. less than cost, sufficient to cover the debt owing to that company, and that Chapman then said to Pittendrigh that he had other creditors and was unable to pay them in full, that he was behind with his creditors and that there would be nothing like twenty shillings in the pound if he gave Cropley's Ltd. the stock. On 2nd December 1918 a sequestration order was made, and 14th August 1918 was determined as the date on which the act of bankruptcy was committed, and Charles Fairfax Waterloo Lloyd was appointed official assignee. On 2nd June 1919 Cropley's Ltd. obtained leave from *Harvey* J. to appeal against the sequestration order on the ground that the act of bankruptcy alleged had not been committed, and it was directed that the petitioning creditors and Cropley's Ltd. should be at liberty to call further evidence.

On the hearing of the appeal before *Owen* J. the following facts appeared:—Chapman was carrying on business at Wagga under an agreement of 7th April 1915 whereby Cropley's Ltd. appointed him its agent for the sale of goods consigned to him as such agent. The agreement also provided that Chapman should open a special

account at a bank at Wagga, and should pay into that account to the credit of Cropley's Ltd. all moneys received on sale of the goods. On 13th August 1918 Cropley's Ltd. sent to Wagga an employee named Pittendrigh with a letter to Chapman in which Pittendrigh was described as representative of Cropley's Ltd. with instructions to take stock, and requesting Chapman to furnish him with all particulars, including those of outstanding accounts and cash in hand. Stock was then taken, when it was found that Chapman was indebted to Cropley's Ltd. to the extent of about £150 in respect of goods belonging to Cropley's Ltd. sold by Chapman and for which he had not accounted. It also appeared that Chapman had used some of the money received on the sale of the goods of Cropley's Ltd. to purchase other goods from other firms and that there were then in the shop in which Chapman carried on business, and which was leased by him, goods which had been supplied to him by other firms and for which he had not paid. A demand was then made by Cropley's Ltd. that Chapman should hand over to Cropley's Ltd. its goods and also goods which he had purchased from other persons of a value which, after deducting a discount of fifteen per cent., would be equal to the amount of Chapman's deficiency, and also that Chapman should transfer to Cropley's Ltd. the lease of the shop. After some demur Chapman finally agreed to these terms on 19th August, and they were then carried into effect. During the course of the negotiations for a settlement Chapman made various statements to Pittendrigh as to his position. He first of all, when stock had been taken, asked for one month's time in which to make up the shortage. He also said that he had no money, that there were other creditors to whom he owed money, and that if he agreed to the demands of Cropley's Ltd. he did not know in what position he would find himself, and that he considered that his position was hopeless. Chapman also wrote a letter to Cropley's Ltd. on 16th August, in which he said :—" I have no money to make the settlement immediately, but I beg to suggest that you take your stock back and allow me a certain time to make a settlement—the time to be suited to your most lenient convenience. As far as my future trade with you is concerned, I desire to assure you that I would like to trade with you on an open account but not as an agent, and

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will still give you the bulk of my business as hitherto if you will allow me." When the arrangement with Cropley's Ltd. was being carried out Chapman, as Pittendrigh knew, removed what goods were left to him to another shop, which he rented.

Owen J. found that Chapman had, on 16th August, informed Pittendrigh that if he was compelled to settle with Cropley's Ltd. he would be unable to meet the claims of other creditors and that his position was hopeless; and he held that Pittendrigh must have understood from that that Chapman, if forced to satisfy the claim made by Cropley's Ltd., intended to suspend payment of his other business debts. The learned Judge therefore dismissed the appeal, but varied the sequestration order by substituting 16th August for 14th August as the date on which the act of bankruptcy was committed.

From that decision Cropley's Ltd. now appealed to the High Court.

Loxton K.C. (with him *Davidson*), for the appellant. On the evidence there was no formal notice by Chapman of his intention to suspend payment of his debts, and there was no statement by him the natural inference from which was that he intended to suspend payment. Whatever else he said, it is clear that he stated and otherwise indicated an intention that he would continue his business. [Counsel referred to *Ex parte Tucker*; *In re Tucker* (1); *Clough* v. *Samuel* (2); *Trustee of Lord Hill* v. *Rowlands* (3); *Crook* v. *Morley* (4).]

Maughan K.C. (with him *D. S. Edwards*), for the respondents. Any statement by a debtor that he does not intend to pay his debts or the natural inference from which is that he does not intend to pay his debts is within sec. 4 (1) (*h*) of the *Bankruptcy Act* 1898. Such an inference should be drawn from a statement by a debtor to a creditor to whom he is about to pay his debt in full that, if he does so, he will be unable to pay his other creditors, and that his position is hopeless. [Counsel referred to *In re Lamb*; *Ex parte Gibson & Bolland* (5); *Moy* v. *Briscoe & Co.* (6).]

(1) 12 Ch. D., 308.
(2) (1905) A.C., 442, at pp. 444, 447.
(3) (1896) 2 Q.B., 124, at p. 128.
(4) (1891) A.C., 316.
(5) 4 Morrell, 25, at p. 31.
(6) 5 C.L.R., 56.

[ISAACS J. referred to *In re Dunhill*; *Ex parte Dunhill* (1).]

KNOX C.J. In this case I am of opinion that the appeal should be allowed. Without going into the cases at length, it is perfectly clear that to constitute this act of bankruptcy two things are requisite: first, an intention residing in the mind of the debtor that he will, in a sense voluntarily, that is, as his own act, refuse to pay his debts as they become due, and, secondly, a communication of that intention to one of his creditors. It is not necessary to go through every word of the evidence because the facts of one case will never, or very rarely, be the same as those of any other case. It is sufficient to say that the impression left on my mind after reading the evidence and hearing the arguments, is that not only did Chapman not communicate such an intention but he did not have it. I think that on the evidence the proper inference to draw as to Chapman's intention is that he realized that the settlement to which he had come with Cropley's Ltd. under compulsion rendered it extremely probable that he would be unable to carry on his business or to pay his other creditors, but that he meant to attempt to do so. That view is borne out by the fact that after the settlement was made with Cropley's Ltd. Chapman took another shop, and transferred to it the goods that were left after he had satisfied the demands of Cropley's Ltd. If he had been intending to suspend payment of his debts, I cannot conceive why on Monday 19th August he did not at once inform his other creditors that he was going to suspend payment of the whole of his debts, and I cannot see why, if he had intended to suspend payment of his debts, he should even under compulsion do such a gratuitously dishonest thing as to hand over to Cropley's Ltd. goods which he had got from other persons, and for which he had never paid. That transaction seems to be absolutely inconsistent with any intention to suspend payment of his debts. For these reasons I think that the debtor did not have or communicate the intention of suspending payment of his debts, and consequently that the act of bankruptcy alleged had not been committed.

KNOX C.J.

(1) (1894) 2 Q.B., 234.

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Isaacs J.

The appeal should be allowed, and the sequestration order should be set aside.

ISAACS J. I agree that the appeal should be allowed. As to the law, I think it is impossible to state it more clearly than it is stated in *Crook* v. *Morley* (1); *Clough* v. *Samuel* (2), and by *Bowen* L.J. in *In re Lamb* (3). Applying that law to the facts of the present case, including in the relevant facts for this purpose all the statements made to Cropley's Ltd. by whomsoever represented, the debtor's statements, in my opinion, fall short of being a notice of suspension of payment of his debts. I look at all the words he is said to have used, and I read them by the light of the circumstances known both to the creditor and to himself, and, so reading them, I cannot find that they amount to a statement which would be understood by the representative of Cropley's Ltd. as a notice that the debtor was about to suspend payment of his debts.

I would only add one thing: it is unnecessary in this case, but it may at some future time be necessary, to consider whether the statement of the alleged act of bankruptcy as it appears in par. 4 of the petition is a sufficient compliance with the requirements of Form No. 46 of the Forms under the *Bankruptcy Act* 1898 (N.S.W.), and whether in the subsequent proceedings the affidavit verifying the petition may be entirely disregarded and a totally different act of bankruptcy be relied on. If ever that comes up for decision, consideration must be given to the cases of *In re Dunhill*; *Ex parte Dunhill* (4); *In re Lorrimar*; *Ex parte Constable* (5), and *Ex parte Coates*; *In re Skelton* (6).

GAVAN DUFFY J. I agree that the appeal should be allowed.

RICH J. I agree that the appeal should be allowed. It is not immaterial to notice that the debtor was not dealing with his creditors collectively: he was trying to come to terms with an individual creditor. A statement to a single creditor is not so

(1) (1891) A.C., 316.
(2) (1905) A.C., 442.
(3) 4 Morrell, at p. 32.
(4) (1894) 2 Q.B., 234.
(5) 7 Morrell, 235.
(6) 5 Ch. D., 979.

readily construed as a notice of suspension as if it had been made to the creditors generally (*Lord Hill's Trustee* v. *Rowlands* (1)).

The facts show, I think, that the debtor stated that the terms imposed by Cropley's Ltd. would make his position precarious. He did not give his creditor to understand that he did not intend to pay his creditors in the course of his trade.

STARKE J. I agree that the appeal should be allowed.

Appeal allowed. Sequestration order discharged. Respondents to pay costs of appellant in the Supreme Court and this Court.

Solicitors for the appellant, *Dawson, Waldron & Glover.*
Solicitors for the respondents, *Sly & Russell.*

B. L.

(1) 3 Mans., 136, at p. 138.

[HIGH COURT OF AUSTRALIA.]

KAY . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

Public Service of Commonwealth—Action against Commonwealth—Cause of action—Salary of officer—Award of Commonwealth Court of Conciliation and Arbitration—Judiciary Act 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 56—*Arbitration* (*Public Service*) *Act* 1911 (*No.* 11 *of* 1911), *sec.* 15 (6).

Held, that an action will lie against the Commonwealth to recover the difference between the salary paid to an officer of the Public Service of the Commonwealth, and that to which he was entitled under an award made by the Commonwealth Court of Conciliation and Arbitration pursuant to the *Arbitration* (*Public Service*) *Act* 1911.