[HIGH COURT OF AUSTRALIA.]

GOURLAY . . . . . APPELLANT;

AND

CASEY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1927.

MELBOURNE, *Mar.* 22, 23.

Isaacs, Gavan Duffy and Powers JJ.

Insolvency—Certificate of discharge—Offence against Insolvency Act—Duty of Court to refuse certificate—Special reasons for not refusing—Insolvency Act 1915 (*Vict.*) (*No.* 2671), *secs.* 232-235*.

Held, that the words "unless otherwise expressly provided" in sec. 232 of the *Insolvency Act* 1915 (Vict.) mean unless some inconsistent provision is expressly made; that the provisions of sec. 235 are not inconsistent with those of sec. 232, and therefore that when an insolvent has committed one of the offences mentioned in sec. 235 the Court of Insolvency must refuse his application for a certificate of discharge unless special reasons are shown for otherwise determining.

The estate of the respondent had been sequestrated in 1914 on the petition of a creditor in respect of an unsatisfied judgment in an action for breach of

* Sec. 232 of the *Insolvency Act* 1915 (Vict.) provides that on an application for a certificate of discharge the Court of Insolvency "unless otherwise expressly provided may as it thinks just (*a*) grant or refuse an immediate absolute certificate of discharge; or (*b*) suspend the certificate from taking effect for such time as the Court thinks fit not exceeding two years; or (*c*) suspend the certificate until such dividend as the Court fixes but not exceeding seven shillings in the pound has been paid to the creditors; or until security for the payment of such dividend has been given to the satisfaction of the Court . . . Provided that the Court shall refuse to grant the certificate in all cases where the insolvent has been guilty of any offence under this Act unless for special reasons the Court otherwise determines." Sec. 235 provides that "If the insolvent has been guilty of any of the offences following (that is to say):— . . . (2) If there is an unsatisfied judgment against the insolvent in any action for assault breach of promise or seduction . . . the Court shall refuse or suspend the certificate for such period not exceeding two years as it deems just, and may also if it sees fit sentence the insolvent to imprisonment with or without hard labour for a term of not more than six months."

promise of marriage. No assets were realized in the estate, and the judgment still remained unsatisfied. The respondent had told the appellant that she would get nothing; he made no endeavour to pay his debt to her; and he transacted his business affairs through a banking account in the name of his brother in such a way as to raise a suspicion that the moneys in the account were really his own and not his brother's. On the application of the respondent for a certificate of discharge,

Held, (1) that the facts that long examinations of the respondent and others had been made to ascertain whether the respondent had any assets, that those examinations were futile and that there was no reason for supposing that any further investigation would result in benefit to the estate, that an application had already been made by the respondent for a certificate which had been refused, and that a long time had elapsed since the sequestration, did not constitute special reasons for not refusing the certificate; (2) that in the circumstances the certificate ought to be refused.

Decision of the Supreme Court of Victoria (Full Court): *Gourlay* v. *Casey*, (1926) V.L.R. 162; 47 A.L.T. 159, reversed.

APPEAL from the Supreme Court of Victoria.

By an order nisi dated 16th April 1914, which was made absolute on 30th April 1914, the estate of Vere Herbert Casey was sequestrated by the Supreme Court of Victoria on the petition of May Cecily Gourlay, who was a creditor in respect of an unsatisfied judgment in an action by her against the insolvent for breach of promise of marriage. The only creditor who proved a debt was Miss Gourlay. No assets were ever realized in the estate.

In June 1924 an application was made by the insolvent to the Court of Insolvency for a certificate of discharge under the *Insolvency Act* 1915 (Vict.), and the application was opposed by Miss Gourlay. The application was granted by that Court, but on an appeal to the Supreme Court by Miss Gourlay, which was heard in May 1925, the Full Court set aside the order of the Court of Insolvency on the ground that, there being an unsatisfied judgment for breach of promise of marriage against the insolvent, under sec. 232 of the Act the Court of Insolvency was bound to refuse a certificate in the absence of special reasons.

On 21st August 1925 the respondent again applied to the Court of Insolvency for a certificate of discharge, and the application was again opposed by Miss Gourlay. On that application the Court made an order by which it was recited that it had been proved to

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the satisfaction of the Court that the failure of the insolvent's estate to pay seven shillings in the pound had arisen from circumstances for which the insolvent could not justly be held responsible, and that it had been proved that the insolvent had committed an offence under the Act in that there was an unsatisfied judgment against the insolvent in an action for breach of promise of marriage. It was then ordered that the condition mentioned in sec. 233 of the Act be dispensed with. It was further recited that although the insolvent had been proved to be guilty of an offence the Court had not refused the certificate but had otherwise determined for special reasons, including the nature of the offence, the great delay in prosecuting the former appeal and the fact that a certificate application had already been refused upon the same ground by the decision of the Full Court in the former appeal. The Court then ordered (*inter alia*) that in lieu of refusal the certificate should be suspended for a period of one month. From that decision Miss Gourlay appealed to the Supreme Court, and the Full Court dismissed the appeal with costs. The Court held that the proviso to sec. 232 of the Act applied to offences under sec. 235, but it held that there were special reasons for granting a certificate, and it stated those reasons as follows :—" In the first place, it is to be noticed that the insolvent has been subjected to long examinations, and other examinations have been held for the purpose of ascertaining whether he had any assets. All those investigations have proved futile, and we see no reason for supposing that any further investigation would result in benefit to the estate. We have also the fact that the insolvent has already made one application some time since, which was refused, and, further, we are of opinion that the long lapse of time in connection with this matter is a very important matter for consideration. The insolvent's estate was sequestrated about twelve years ago, and, although we should hesitate to say that any particular delay or lapse of time should operate as a special reason, we think the long lapse in this case does so operate ": *Gourlay* v. *Casey* (1).

From that decision Miss Gourlay now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

(1) (1926) V.L.R. 162; 47 A.L.T. 159.

Owen Dixon K.C. (with him *Hogan*), for the appellant. There was no ground shown for dispensing with the condition of payment of seven shillings in the pound under sec. 233 of the *Insolvency Act* 1915. The certificate should have been refused under the proviso to sec. 232. That proviso applies to the offences specified in sec. 235. The provisions of sec. 235 only come into operation if the Court determines under sec. 232 that for special reasons a certificate ought to be granted. The reasons given by the Court of Insolvency and by the Supreme Court for determining to grant the certificate were not " special reasons " within the meaning of the proviso.

Little, for the respondent. Sec. 233 is for the protection of the public. If the Court, on a consideration of the depositions of the insolvent on any examination and of the reports of the trustee, is satisfied that the failure to pay seven shillings in the pound is not due to the insolvent's fault, it may dispense with the condition (*Re Harding* (1)). The conduct of the respondent in not carrying out his promise of marriage should not be taken into account under sec. 233. The evidence was such as entitled the Judge of the Court of Insolvency to dispense with the condition (see *In re Fleming* (2) ; *In re Shackleton* ; *Ex parte Shackleton* (3)). The proviso to sec. 232 does not apply to the offences created by sec. 235. Before the enactment of the provisions of sec. 232 in 1897, the provisions in sec. 235 were in force, and the two sections are intended to have entirely independent operation. Even if it was necessary to show special reasons for not refusing a certificate, the circumstances of this case are such as to justify the Court of Insolvency and the Supreme Court in holding that special reasons did exist. [Counsel referred to *In re Friezer* (4) ; *In re Solomons* (5) ; *Board of Trade* v. *Block* (6) ; *In re Cheeseman* (7).]

Owen Dixon K.C., in reply.

(1) (1903) 29 V.L.R. 586 ; 25 A.L.T. 143.
(2) (1886) 12 V.L.R. 719, at p. 722 ; 8 A.L.T. 58.
(3) (1889) 6 Morr. Bky. 304.
(4) (1901) 27 V.L.R. 335 ; 23 A.L.T. 67.
(5) (1904) 1 K.B. 106, at p. 113.
(6) (1888) 13 App. Cas. 570.
(7) (1891) 2 Ch. 289.

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PER CURIAM. The first requisite is to construe the proviso to sec. 232 of the *Insolvency Act* 1915. For the appellant it is said that that proviso extends to all offences under the Act. For the respondent it is urged that it does not apply to the offences enumerated in sec. 235. The main reliance of the respondent is placed on the words " unless otherwise expressly provided " found in sec. 232, and introduced for the first time in 1915 and therefore since the decision in *Friezer's Case* (1).

The view put by the appellant appears to be correct. The words referred to, which mean " unless some inconsistent provision is expressly made " are enacted in relation to the general powers, described in pars. (*a*), (*b*) and (*c*) (see *In re Tarn* (2)). Under those general powers, which primarily extend to every application for a certificate of discharge or compulsory appearance under sec. 230, the Court may, as it thinks just, do any one of four things, namely, (1) grant an immediate absolute certificate of discharge ; (2) refuse the certificate ; (3) suspend the certificate for a period not exceeding two years, or (4) suspend the certificate until a dividend is paid or secured. To those general and primarily universal powers a proviso is enacted. It is that the Court's power is limited to refusal in all cases of statutory offences, " unless for special reasons the Court otherwise determines." The words are " shall refuse to grant the certificate "—that is a total refusal to grant the certificate whether of immediate or later operation. If, however, for special reasons the Court determines that refusal is not just, the embargo of the provision is removed and the other general powers operate, which include the immediate grant of an absolute certificate. Sec. 233, however, is an instance where it is " otherwise expressly provided." Similarly as to sec. 234. Sec. 235 is certainly an express provision " otherwise," but the question is to what extent. The respondent appears to treat the words " otherwise expressly provided " as if they meant " other provision expressly made "; so that wherever another provision was made, that was to cover the field. That would be disastrous to many sections. But, if we inquire as to the extent of the inconsistency between secs. 232 and 235, we find that sec. 235 expressly cuts down the general power of the Court by

(1) (1901) 27 V.L.R. 335 ; 23 A.L.T. 67. (2) (1893) 2 Ch. 280, at p. 284

excluding the immediate absolute grant. It, however, leaves sec. 232 to operate otherwise, and adds a further power of imprisonment which is not inconsistent with anything in sec. 232. As to any argument founded on implication, it is excluded by the word "expressly." The proviso to sec. 232 therefore applies to the present case.

The words "special reasons" are to be construed. As *Vaughan Williams* L.J. pointed out in *In re Solomons* (1), the words of the statute leave much to the discretion of the learned Judge. Further, that case shows that among those special reasons may be circumstances connected with the offence and mitigating it, or conduct over a sufficient period of time showing that the insolvent is not likely to be a trading danger to the community (2). But, as *Romer* L.J. says, the conduct of the insolvent that is especially to be regarded is his conduct with reference to the particular offence in question. Doubtless the discretion of the Court is very large, and necessarily so; but it must have as its basis some circumstances which it can reasonably regard as "special reasons" for lifting the particular offence out of the penalty of refusal. If nothing more appears than the offence of having "an unsatisfied judgment against the insolvent in any action for . . . breach of promise" of marriage, the Court must refuse the certificate.

In the present case, the position of the insolvent is less favourable to him. It appears that in addition to the bare fact mentioned, he has told the creditor that she would get nothing; he has never endeavoured to pay the debt, and he has acted in a way that begets suspicion by transacting his business affairs through a banking account in his brother's name on which he, by general or special directions, operated as if it were his own; he produces no reliable evidence to support his story that the considerable sums of money he dealt with by receiving them, paying them into the bank and afterwards, to some extent at all events, drawing them out were not really his own money. In addition, the original circumstances of his indebtedness for money lent, though not part of the offence, are not without importance in judging of the propriety of relieving him from his insolvent status.

(1) (1904) 1 K.B., at p. 113. (2) (1904) 1 K.B., at pp. 114-116.

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On the whole, it appears that the conditions on which the discretion permitted under the proviso to sec. 232 do not exist. We have carefully considered what are regarded by the Supreme Court and the learned Judge of the Insolvency Court as special reasons, but we are unable so to regard them. The appeal should therefore be allowed. The attitude of the insolvent during this appeal in refusing to consider any proposal to secure any part of the judgment debt renders it unnecessary to consider what mitigation of this course should be adopted, as in *In re Stevens*; *Ex parte Board of Trade* (1).

Appeal allowed. Orders of the Supreme Court and the Court of Insolvency discharged. Certificate refused. Appellant to have costs in all Courts.

Solicitor for the appellant, *J. Woolf.*

Solicitors for the respondent, *Croft & Rhoden.*

B. L.

(1) (1898) 2 Q.B. 495, at p. 499.