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For these reasons I am of opinion that the appeal should be allowed.

Appeal dismissed.

Solicitor for the appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *Allen, Allen & Hemsley.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

HUNGERFORD AND ANOTHER . . . APPELLANTS;

AND

THE INSPECTOR-GENERAL IN BANKRUPTCY RESPONDENT.

IN RE NORMAN AND ANOTHER.

APPEAL FROM THE COURT OF BANKRUPTCY.

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SYDNEY, *April* 13, 14, 29.

Gavan Duffy C.J., Rich, Starke and Dixon JJ.

Bankruptcy—Deed of inspectorship—Inspector's remuneration—Lump sum or commission according to scale prescribed in Bankruptcy Rules—Provision in deed—Amount allowable—Resolution of creditors—Costs—Bankruptcy Act 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *Parts VIII., XI., XII., secs.* 133 (2), 184, 199 (3), 203, 223—*Bankruptcy Rules* 1928 (*S.R.* 1928, *No.* 8), *rr.* 7, 356; *Sched.* 6.

Rule 356 of the *Bankruptcy Rules* 1928, which provides that "where the creditors resolve that the remuneration of the trustee shall be a sum of money, the sum of money shall be fixed in accordance with the scale in the Sixth Schedule," does not apply to the remuneration of inspectors under deeds of inspectorship, or of trustees under deeds of arrangement, because it is inconsistent with the provisions of secs. 184 and 203 of the *Bankruptcy Act* 1924-1930, which, respectively, deal expressly with the matter. Those sections, unlike sec. 133 of the Act, impose no limitations upon the sum of money, as distinguished from the commission, which the creditors may fix.

A clause in a deed of inspectorship provided that the inspectors thereunder should receive "such sums by way of remuneration as the creditors may from time to time authorize not exceeding the rates provided by section 203 of the *Bankruptcy Act* 1924-1928."

Held, that it meant no more than that the creditors might authorize a remuneration, subject to the restrictions imposed by sec. 203, and did not operate to prevent remuneration being paid by way of a lump sum if the creditors so resolved.

Decision of Judge *Lukin* reversed.

APPEAL from the Court of Bankruptcy, District of New South Wales and Territory for the Seat of Government.

Cyril Hungerford and Eric Sydney Spooner, chartered accountants and members of the firm of Hungerford, Spooner & Co., were appointed inspectors under a deed of inspectorship, dated 30th April 1929, for the purpose of supervising, on behalf of creditors, the carrying on of the business of Alfred Harold Norman and Thomas Brown Norman, trading as Norman & Son, storekeepers, Portland. The deed was registered on 22nd May 1929 as a deed of arrangement under Part XII. of the *Bankruptcy Act* 1924-1928. The portion of the deed material to this report was clause 18, which provided that "The inspectors shall pay and apply all such moneys as may be received by them under the foregoing provisions as follows: (a) in payment of all current expenses necessarily incurred in the carrying on of the said business including therein all rents . . . and other necessary outgoings, (b) in payment of all expenses of and incidental to the carrying out of these presents and of the exercise of any of the powers thereof including the out-of-pocket expenses of the inspectors and such sums by way of remuneration as the creditors may from time to time authorize not exceeding the rates provided by section 203 of the *Bankruptcy Act* 1924-1928." On 16th December 1929 and 21st May 1930 the said inspectors, in pursuance of sec. 146 of the Act and rule 380 made thereunder, forwarded to the Registrar in Bankruptcy duplicate copies of their cash-books, containing particulars of accounts relating to the said business, for the two periods of six months ended 31st October 1929 and 30th April 1930 respectively. The accounts showed, *inter alia*, the following entries as payments to Hungerford, Spooner & Co.: 1929, 1st June, fees £31 10s.;

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29th October, fees £52 10s.; 1930, 3rd April, fees £52 10s. Pursuant to sec. 146 (2) of the Act the Registrar caused the accounts to be audited by the prescribed officer, who, in the course of his investigation, called upon the inspectors to state what the above-mentioned items represented. The inspectors stated that the two first-mentioned items, amounting to £84, were in respect of their remuneration and were claimed by them in pursuance of clause 18 (b) of the deed, and were arrived at as lump sums representing a fair remuneration for their services under the deed, and that the last item, namely, £52 10s., represented a sum paid by them to the firm of Hungerford, Spooner & Co. for accountancy work done by that firm under and in pursuance of certain other clauses in the deed. No evidence was produced to the said officer that the first two items were fixed by the creditors as the remuneration of the inspectors in accordance with clause 18 (b) of the deed until after he had referred the matter to the Registrar, when what was stated to be the original of certain resolutions passed at a meeting of the creditors held on 8th August 1930 was received by the Registrar, but no evidence was supplied to him to show that the meeting had been properly convened in accordance with the Act and the First Schedule thereto. The resolutions purported to fix the remuneration of Hungerford and Spooner, as inspectors under the deed, as follows: (1) remuneration for preliminary duties carried out by them in connection with the preparation of the statement of the position of the firm of Norman & Son, holding meeting of creditors, and completing the arrangement between the said firm and its creditors, £31 10s.; (2) remuneration for carrying on the business as inspectors for the period from (a) 30th April 1929 to 31st August 1929, £52 10s.; (b) 1st September 1929 to 28th February 1930, £52 10s.; and (c) 1st March 1930 to 20th March 1930, £15 15s. The Registrar—being in doubt as to whether the three items first referred to should be allowed in view of the fact that if sec. 203 of the Act, in conjunction with rule 356 of the *Bankruptcy Rules* 1928, regulated the amount of remuneration allowable, the maximum sum which could be fixed by the creditors under the Sixth Schedule on the net realizations of £774 3s. 8d. was £40—referred the matter, under rule 7 of the *Bankruptcy Rules*, to the Federal Judge in Bankruptcy for determination.

His Honor Judge *Lukin* held (1) that by virtue of rule 356 the remuneration charged should not exceed the scale of remuneration contained in the Sixth Schedule to the Rules; (2) that a resolution of the creditors fixing an amount in excess thereof could have no operation; and (3) that under clause 18 of the deed the remuneration of the inspectors was limited to a sum not greater than five per cent upon the amount realized by them. His Honor made an order directing the Registrar to disallow the items in question, and ordered Hungerford and Spooner forthwith to refund such sums to the estate, reserving liberty to them to apply to Court for a fixation of remuneration due to them.

From this decision Hungerford and Spooner now appealed to the High Court.

Abrahams, for the appellants. By sec. 190 (2) in Part XII. of the *Bankruptcy Act* 1924-1930 a deed of inspectorship is included in a deed of arrangement. Rule 356 of the *Bankruptcy Rules* 1928 applies only to a bankruptcy and not to a deed of arrangement; if it purports to apply further, it is *ultra vires*. The remuneration of trustees of deeds of arrangement under Part XII. of the Act is governed by sec. 203, and is not in any way affected by rule 356. The remuneration of trustees under Part XI. is dealt with in sec. 184 the language of which is the same as in sec. 203. The Federal Judge in Bankruptcy was wrong in holding that the words "in accordance with the prescribed scale" as appearing in sec. 133 (2) should be read into sec. 203. There is no provision in the Act for a "prescribed scale" so far as Parts XI. and XII. are concerned. Under sec. 133 (2) the creditors can by resolution fix a sum of money as remuneration in accordance with a prescribed scale, but the scale prescribed is prescribed for the purposes of that section only, which is confined to bankruptcy, and has nothing to do with sec. 203. The word "resolve" does not appear in either sec. 184 or sec. 203. The Act has left the matter of the fixing of a "lump sum" remuneration for trustees under a deed of arrangement, in the hands of the creditors absolutely unfettered. The words of rule 356 follow very closely the words of sec. 133. On the face of it, and having regard to the rules which immediately precede it, it

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is obvious that rule 356 was intended to apply to bankruptcy only. If that rule does purport to apply to sec. 203, it is *ultra vires* as being inconsistent with and contrary to it. The provisions of sec. 133 in Part VIII. of the Act are not applicable to Part XII. within the meaning of sec. 199 (3) owing to the express provisions contained in sec. 203.

Loxton K.C. (with him *Badham*), for the respondent. Rule 356 applies whether the remuneration be for a trustee in bankruptcy or for a trustee under a deed of arrangement. On the true construction of the Act there is as much supervision over the one case as the other; that is, even when creditors have the right to fix remuneration, which can be fixed at the expense of the bankrupt. It is important that the Court should have control over the trustees under the Act. Whatever construction the Court puts upon rule 356, regard must be given to the intention of the parties. Clause 18 of the deed of arrangement should be construed in the light of sec. 203. The parties agreed not to exceed the rates provided by that section. "Rates" can only be applicable to commission which, for an estate of this size, would be five per cent. Sec. 203 should not be construed so as to permit the quantum of remuneration being altered from time to time because, in such circumstances, a dissentient minority of creditors would not know the correct position. A "trustee in bankruptcy" includes a trustee under a deed of arrangement (sec. 4). There is nothing in sec. 133 (2) inapplicable to a trustee under a deed of arrangement, and, if that sub-section is applicable, so also is rule 356. By virtue of sec. 199 (3) the provisions of sec. 133 (2) are incorporated in the provisions relating to deeds of arrangement; which makes rule 356 applicable. There is nothing in that rule which indicates that it has reference only to a trustee under a sequestration order. The appellants are unable to show that the amounts were authorized, and the items were properly disallowed by the Court below.

Abrahams, in reply. The concluding words of clause 18 (b) in the deed of arrangement were inserted so as to render the provision as to remuneration *intra vires* sec. 203. Similar provisions are

found in the memorandum of articles of companies. The words "not exceeding the rates" mean where there is a rate fixed. "Rates" is an inappropriate word. The appropriate words would be "sums or rates." Where there is a rate fixed it is not to exceed the rate provided by sec. 203, but where a lump sum is fixed such sum is at large. The provisions of sec. 203 are quite contrary to the provisions of sec. 133 (2). Sec. 203 conflicts with rule 356 as the latter limits the quantum of the sum of money which may be fixed by the creditors whilst the former does not so limit it. The language of the rule is practically identical with that of sec. 133.

[DIXON J. referred to *In re Marsden*; *Ex parte the Board of Trade* (1), as to "from time to time."]

There was no evidence before the Registrar that a properly constituted meeting of creditors was held, and therefore the matter should be referred back to him on this point. Although no appeal was lodged against the order of the Court below that the costs of the Inspector-General in Bankruptcy should be paid by the appellants, all costs should be paid out of the debtors' estate because the appellants had to come to Court owing to a doubt existing in the mind of the Registrar.

Loxton K.C. Having regard to the fact that the appellants abandoned the point in question when they came to this Court, there should be no order as to costs in the event of the appeal being successful.

Cur. adv. vult.

April 29.

The following written judgments were delivered :—

GAVAN DUFFY C.J. For the reasons appearing in the judgment to be delivered by my brother *Dixon*, I agree that the appeal should be allowed.

RICH J. I have read the judgment of my brother *Dixon*, and agree with it.

STARKE J. The question is whether rule 356 of the *Bankruptcy Rules* applies to the remuneration of trustees under deeds of arrangement within Part XII. of the *Bankruptcy Act*. The rule is found

(1) (1892) 9 Mor. 70.

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under Part VIII. of the *Bankruptcy Rules* ("Trustees and Special Managers"), and runs thus: "Where the creditors resolve that the remuneration of the trustee shall be a sum of money, the sum of money shall be fixed in accordance with the scale in the Sixth Schedule." On its face, the rule seems wide enough to cover the remuneration of trustees under deeds of arrangement (compare Act, sec. 199). But the Act itself contains several provisions relating to the remuneration of trustees. Thus sec. 133 deals with the remuneration of the trustee of a bankrupt's estate, and the rule seems specially authorized by sub-sec. 2 of that section. Then sec. 184 deals expressly with the remuneration of a trustee under a deed of assignment pursuant to Part XI. of the Act. And sec. 203 deals expressly with the remuneration of a trustee of a deed of arrangement under Part XII. of the Act. It provides (sub-sec. 1): "The remuneration of a trustee of a deed of arrangement shall from time to time be fixed as determined by the creditors, and shall be such a sum of money *as is fixed by the creditors* or shall be in the nature of a commission, the commission not to exceed five pounds per centum on the amount realized by the trustee after the deduction of the expenses of realization, subject to the creditors, by resolution, fixing a higher commission on the collection of book debts." Now, rule 356 is inconsistent with secs. 184 and 203, which enable the creditors to fix the remuneration, subject, in the case of remuneration by commission, to the rates limited by those sections, and it cannot stand with them. But it is specially authorized in cases within sec. 133. Consequently its provisions do not extend to the remuneration of trustees under deeds of arrangement. On the question whether the rule is *ultra vires* sec. 223 if it extends to deeds of arrangement, perhaps I may refer to *Gibson* v. *Mitchell* (1) without expressing any opinion. Again, the position of Hungerford and Spooner as trustees under the deed of inspectorship was conceded during the argument, and it is unnecessary to say whether that concession was right or wrong, for in neither case could the order below be sustained. Lastly, some reliance was placed upon clause 18 (b) of the deed of arrangement as fixing the remuneration of the trustees or inspectors. But that clause is merely an authority to

(1) (1928) 41 C.L.R. 275.

the trustees to fix remuneration subject to the same restrictions as are contained in sec. 203 of the Act. Those restrictions only apply to remuneration in the nature of commission.

Some reference was made during the argument to the jurisdiction or authority under which the order appealed against was made. The learned Judge in Bankruptcy treated the matter as a reference under rule 7. Counsel pointed to sec. 206 (cf. *In re Ellis* (1)). The combined effect of sec. 199 (3) and sec. 148 is, however, wide enough, I think, to found the jurisdiction of the Court of Bankruptcy.

The appeal should be allowed.

DIXON J. The appellants were appointed inspectors under a deed of inspectorship which was registered as a deed of arrangement under Part XII. of the *Bankruptcy Act* 1924-1930. They now concede that they occupy the position of trustees of the deed of arrangement and, as trustees, they transmitted to the Registrar in Bankruptcy an account of their receipts and payments pursuant to the provisions of sec. 146 as applied to deeds of arrangement by sec. 199 (3). Pursuant to sec. 146 (2) the Registrar caused the account to be audited by the prescribed officer. The account contained three items upon the disbursement side amounting in all to £136 10s. charged for remuneration by the trustees. Upon these items being questioned by or on behalf of the Registrar because, among other reasons, the remuneration of the trustees had not been fixed or determined by the creditors pursuant to sec. 203, a meeting of creditors appears to have been held and the trustees produced to the Registrar minutes of a resolution purporting to fix the remuneration so as to justify these charges. Without determining whether a meeting had been regularly summoned at which such a resolution was duly passed, the Registrar submitted to the Judge in Bankruptcy questions designed to ascertain whether the charges for remuneration were allowable. In adopting this course the Registrar purported to act under rule 7 of the *Bankruptcy Rules* 1928. The Judge in Bankruptcy (Judge *Lukin*) held that because the remuneration charged exceeded the scale of remuneration contained in the Sixth Schedule to the *Bankruptcy Rules*, a resolution

(1) (1925) Ch. 564.

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of the creditors fixing such an amount could have no operation. He appears also to have considered that a provision in the deed, upon its true interpretation, limited the remuneration of the trustees to a sum not greater than five per cent upon the amount realized by the trustees, a sum exceeded by the remuneration charged. His Honor made an order directing the Registrar to disallow in the trustees' account the sums charged and ordering the trustees forthwith to refund such sums to the estate, and reserving liberty to the trustees to apply to the Court for the fixing by the Court of the remuneration due to them. From this order the trustees now appeal to this Court. The provision relied upon by the learned Judge to confine the trustees' remuneration within the limits imposed by the Sixth Schedule is rule 356 of the *Bankruptcy Rules* 1928. It provides that where the creditors resolve that the remuneration of the trustee shall be a sum of money, the sum of money shall be fixed in accordance with the scale in the Sixth Schedule. This rule is clearly directed to sec. 133 (2), which relates to the remuneration of trustees in bankruptcy, and provides that notwithstanding anything contained in sub-sec. 1 which enables the creditors to fix a percentage commission, the remuneration of the trustees shall, if the creditors so resolve, be a sum of money fixed in accordance with the prescribed scale. Sec. 199 (3) enacts that the provisions so far as applicable of Part VIII., in which sec. 133 occurs, shall apply in relation to every trustee of a deed of arrangement, but the enactment composed of sec. 133 (2) and rule 356 is not "applicable" to the case of deeds of arrangement, because sec. 203 deals explicitly with the remuneration of a trustee of a deed of arrangement.

Sec. 203 (1) is as follows: "The remuneration of a trustee of a deed of arrangement shall from time to time be fixed as determined by the creditors, and shall be such a sum of money as is fixed by the creditors or shall be in the nature of a commission, the commission not to exceed five pounds per centum on the amount realized by the trustee after the deduction of the expenses of realization, subject to the creditors, by resolution, fixing a higher commission on the collection of book debts." The terms in which rule 356 is expressed are general enough to apply directly to a trustee under a deed of arrangement as well as to a trustee in bankruptcy; but they cannot receive an interpretation

by which they would directly refer to a trustee of a deed of arrangement because, so construed, the rule would not be authorized by sec. 223, which empowers the Governor-General to make rules. So far as material, sec. 223 provides that the Governor-General may make rules or regulations not inconsistent with this Act for prescribing all matters, forms and things which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to the administration thereof. Sec. 203, unlike sec. 133, imposes no limitations upon the sum of money, as distinguished from the commission, which the creditors may fix. If rule 356 applied to sec. 203 and required that the creditors should fix a sum of money in accordance with its scale, it would attempt to supplement the legislation by a new and additional provision qualifying the discretion given to the creditors by Parliament, and would involve an inconsistency. Such a provision cannot be justified under a power to prescribe matters which are necessary or convenient to be prescribed for giving effect to the Act. It does not give effect to the Act: it makes an additional and different provision upon a subject dealt with by the Act. Nor can it be considered necessary or convenient for the conduct of any business relating to the administration of the Act. For these reasons rule 356 has no application to trustees of deeds of arrangement.

But the deed of arrangement contained an express provision dealing with the remuneration of the trustees, and the learned Judge considered that it imposed a limit which had been exceeded. The provision authorized the trustees to apply moneys they might receive in payment, *inter alia*, of such sums by way of remuneration as the creditors might from time to time authorize, not exceeding the rates provided by sec. 203. This language appears to mean no more than that the creditors may authorize a remuneration, subject to the restrictions imposed by sec. 203. Upon this interpretation the restrictions imposed by the clause are no more and no less than those provided by sec. 203. The construction adopted by the learned Judge is founded upon the view that as the only rates mentioned in the section are percentages, the provision meant to adopt these percentages as limitations not merely upon the commission allowable,

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but upon any lump sum which might be fixed. This interpretation not only ignores the evident purpose of the reference to sec. 203, namely, to avoid collision with its restrictions, but fails to appreciate the meaning of the expression "the rates provided by sec. 203." The expression refers to the provision in sec. 203 of rates limiting the trustees' remuneration. That limitation is confined to remuneration by way of a percentage commission. In the case of remuneration by lump sums there are no "rates provided by sec. 203."

For these reasons the order appealed from cannot be supported and should be discharged.

The question was not raised whether such an order could be made in the exercise of the power given by rule 7, and it is unnecessary to consider the nature and extent of that power. But, having regard to the form the proceedings took and the incompleteness of the facts submitted by the Registrar, no order should be made by this Court in lieu of that of the Court of Bankruptcy, and the matter should be remitted to the Court of Bankruptcy to be dealt with as may be just.

Appeal allowed. Order of Judge Lukin discharged. Matter remitted to the Court of Bankruptcy to be dealt with as may be just. No order as to costs.

Solicitors for the appellants, *Hill, Thomson & Sullivan.*

Solicitor for the respondent, *W. H. Sharwood,* Commonwealth Crown Solicitor.

J. B.