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no suspicion of guilt, then it seems to me that it is his mind that must govern the situation and not the opinion of other tribunals.

The appeal ought to be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *Rollison & Ziesing.*

Solicitor for the respondent, *A. J. Hannan*, Crown Solicitor for South Australia.

C. C. B.

[HIGH COURT OF AUSTRALIA.]

CARSON . . . . . APPELLANT;
RESPONDENT,

AND

HUMPHREYS . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

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SYDNEY, *Mar.* 26; *April* 1.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Rent owing by lessee—Distress levied by head-lessor on goods of sub-lessee on demised premises—No privity between head-lessor and sub-lessee—Deed of arrangement executed by sub-lessee—Distress lawful—Bankruptcy Act 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *secs.* 84, 88, 159, 192 (3), 206.

Sec. 88 of the *Bankruptcy Act* 1924-1930, which provides that no distress shall be levied or proceeded with as against the estate of the bankrupt, is confined to distress for rent owing by the bankrupt and therefore provable against the estate.

Decision of Judge *Lukin* reversed.

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

By memorandum of lease under the *Real Property Act* 1900 (N.S.W.), a certain dwelling-house and premises situate at Liverpool House, Liverpool Street, Sydney, were leased by Wallace John Carson to Thomas Savage for a term of years at a rent reserved. Without the knowledge or consent of Carson, Savage sub-let the dwelling-house and premises in question to Meyer Joffe for a period commencing 1st January 1930 and ending 29th February 1932, at a rental calculated in proportion to the monthly gross sales made by Joffe in the course of his business. Rent in the sum of £2,338 13s. 4d. due by Savage to Carson up to 30th September 1930 remaining unpaid, the latter, on 30th October 1930, by a warrant to distrain authorized a bailiff to distrain on the goods and chattels in the premises in question, which warrant was duly executed on the same day. A further warrant to distrain in respect of rent due by Savage to Carson for the month of October 1930 was acted upon by the bailiff on 3rd November 1930. The goods and chattels so distrained upon consisted in the main of ladies' clothing and other articles of general merchandise, and were the property of Joffe. On 5th November 1930, whilst the bailiff was still in possession, Joffe executed a deed of arrangement under Part XII. of the *Bankruptcy Act* 1924-1930 whereby he conveyed and assigned all his real and personal estate to George Brian Humphreys as trustee for the benefit of his creditors. On the same day *Long Innes* J. made an order, on the application of Humphreys, restraining further proceedings on the warrants to distrain, and a sale of the goods and merchandise in question arranged for that day was not held. By an agreement made subsequently between the parties the said goods and merchandise were sold and the proceeds therefrom were held in trust pending the determination of the question as to whether the distress so levied was lawful or otherwise. *Lukin*, Federal Judge in Bankruptcy, held that Carson was not entitled at law to levy distress for the rent in question upon Joffe's goods, and that moneys arising from the sale of such goods belonged to and were the property of Humphreys as trustee under the deed free from any rights that, but for the effects flowing from the deed, would have been exercisable by Carson.

From this decision Carson now appealed to the High Court.

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Flannery K.C. (with him *R. K. Manning*), for the appellant. The question is: Are the words "no distress for rent," appearing in sec. 88 of the *Bankruptcy Act* 1924-1930, to be construed literally or do they constitute a denial of the right of distress in general terms? General words in a statute should be restricted to the immediate objects of the Act, and should not be extended to collateral matters if injustice would thereby be done (*Railton* v. *Wood* (1)). Secs. 84 to 89 inclusive of the *Bankruptcy Act* deal wholly and solely with the matter of the priority of debts provable in bankruptcy. Sec. 88 is complementary to sec. 84 (1) (*i*) and correlative to it and should be read in a restricted sense. If it were the intention of the Legislature to deal with the matter of distress for rent in the manner suggested in the judgment of the learned Judge in Bankruptcy, there would be no need for the interim protection provided by secs. 159 and 192. The word "rent" in sec. 88 means "rent due from the bankrupt." The principle that should be applied in this matter is shown in *Brocklehurst* v. *Lawe* (2). The Act must be read having regard to the manifest intention thereof (*In re Lundy Granite Co.*; *Ex parte Heavan* (3); *In re Regent United Service Stores* (4); *In re Traders' North Staffordshire Carrying Co.*; *Ex parte North Staffordshire Railway Co.* (5)). The words of the section should be limited to the immediate object and the meaning of the words restricted to rights of those parties dealt with by the section (*In re New City Constitutional Club Co.*; *Ex parte Purssell* (6)). Unless so restricted sec. 88 would be taking away a common law right without compensation. The section is directed to the position of a creditor landlord only.

Loxton K.C. (with him *Moverley*), for the respondent. The Legislature was perfectly competent by clear and explicit terms to take away a common law right. The terms used in sec. 88 are clear and explicit: the word "no" could not be more comprehensive in its terms. The distress now in question was against the estate of the bankrupt. The section is intended as a protection against the

(1) (1890) 15 App. Cas. 363, at p. 366.
(2) (1857) 7 E. & B. 176; 119 E.R. 1213.
(3) (1871) 6 Ch. App. 462.
(4) (1878) 8 Ch. D. 616.
(5) (1874) L.R. 19 Eq. 60.
(6) (1887) 34 Ch. D. 646.

whole estate of a bankrupt. Whether there is privity or not between the landlord and the bankrupt is immaterial. The section is aimed against all distress. The cases of *In re Lundy Granite Co.*; *Ex parte Heavan* (1); *In re Regent United Service Stores* (2); *In re Traders' North Staffordshire Carrying Co.*; *Ex parte North Staffordshire Railway Co.* (3), and *In re New City Constitutional Club Co.*; *Ex parte Pursell* (4), are not applicable, as they refer to entirely different Acts, which relate to companies and to entirely different policies and intentions so far as the property of third persons is concerned. In those cases the Court said distress could go on because the goods distrained upon were not effects of the respective companies and the *Companies Act* aimed at the effects of such companies. The property divisible amongst creditors under a bankruptcy is as set out in sec. 91 of the *Bankruptcy Act*, which is quite different from the position that obtains under the Acts relating to companies; the scope of the former is different from the scope of the latter (*Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (5)). *In re Lundy Granite Co.*; *Ex parte Heavan*, is distinguishable also because the goods in question were left on the property during sequestration and the Act empowered the granting of leave to proceed with distress in such circumstances. Some sections of an Act control other sections, and effect must be given to all sections (*In re Exhall Coal Mining Co.* (6)). There is a fundamental distinction between *Bankruptcy Acts* and *Companies Acts*: the former contemplate the taking away of the rights of third parties. Sec. 84 of the *Bankruptcy Act* 1924-1930 does more than provide for priority as between creditors. Sec. 88 of the Act is designed to protect the estate of the bankrupt, such estate being property possessed by the bankrupt at the time of sequestration and property which people were ordinarily led to believe was possessed by the bankrupt. As to what is meant by distress, see form of warrant in *Bullen* on *Distress*. It is a taking of goods without process of law. "Distrain" is dealt with in *In re Higginshaw Mills and Spinning Co.* (7). Proper regard must be paid to the heading of Part VI. of the *Bankruptcy*

(1) (1871) 6 Ch. App. 462.
(2) (1878) 8 Ch. D. 616.
(3) (1874) L.R. 19 Eq. 60.
(4) (1887) 34 Ch. D. 646.
(5) (1886) 34 Ch. D. 128, at p. 133.
(6) (1864) 4 DeG. J. & S. 377; 46 E.R. 964.
(7) (1896) 2 Ch. 544.

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Act 1924-1930, which shows that such Part, consisting of secs. 81 to 118, deals with administration of property and is an indication of what is meant by the words "estate of the bankrupt." Where there is privity as between landlord and bankrupt for rent, the landlord's right of distraint is taken away with no compensation. Sec. 84 does not deal simply with priorities, but creates interests. The very sections that deal with priorities also provide for deprivation of rights. That being so, why should it not be a proper construction of the Act that it deprives a landlord not in privity with the bankrupt of his common law right of distress? Secs. 159 and 192 (3) are procedure sections, and were introduced because a new system of administration had been introduced into the *Bankruptcy Act*. There is no justification for attacking a right simply because of an alleged ambiguity in the language which seeks to provide the procedure for enforcing such right. Sec. 192 (3) is a culmination after certain things have happened—things which in no way bind the creditors. Sec. 63 of the Act deals with protecting what would ultimately be an estate in bankruptcy, which indicates a scheme on the part of the Legislature creating rights and obligations carrying with them the power of giving effect to such rights and obligations. There is nothing in the division of the Act in which sec. 88 occurs which should impel the Court to construe the language of that section in other than its natural meaning (*Railton* v. *Wood* (1)). This application was not made under sec. 206 of the Act.

R. K. Manning, in reply. The only power the Court in its bankruptcy jurisdiction has of staying distress for rent, whether before or after the signing of a deed, is that conferred by sec. 192 (3) of the Act.

Cur. adv. vult.

April 1. The following judgments were delivered :—

GAVAN DUFFY C.J. In my opinion the appeal should be allowed. I agree with the reasons of my brother *Dixon*.

STARKE J. I concur with the reasons of my brother *Dixon*, and agree that the appeal should be allowed.

(1) (1890) 15 App. Cas. 363.

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Dixon J. delivered the following written judgment:—The question upon this appeal is whether a distress levied on the demised premises by a head-lessor upon the goods of a sub-lessee for rent owing by the lessee, may be proceeded with after the sub-lessee executes a deed of arrangement under Part XII. of the *Bankruptcy Act* 1924-1930. Because the sub-lessee is not in privity with the head-lessor, the rent distrained for does not constitute a debt of the sub-lessee provable against his estate.

Sec. 88 of the *Bankruptcy Act* is as follows:—"88. (1) After sequestration no distress for rent shall be levied or proceeded with as against the estate of the bankrupt. (2) In this section 'sequestration' shall be deemed to include an order under this Act for the administration of the estate of a deceased person and a deed of assignment under Part XI. and a deed of arrangement under Part XII. respectively of this Act." This provision imposes a limitation upon the remedies of a landlord which deprives him of a valuable right. It is therefore to be expected that some compensatory provision will be contained in the Act giving a new right in substitution for the remedy taken away. Such a provision is found in sec. 84 (1) (*i*), which prescribes the order of priority in the application of the estate of the bankrupt. It gives the landlord of the bankrupt a right to seventh place in the order of preference in respect of so much rent for a period not exceeding three months as was due and payable at the date of the sequestration order in respect of which there were goods on the premises liable to distress. The prohibition contained in sec. 88 (1) is in general terms, and it is not expressly limited to distress for rent due to the landlord of the bankrupt. If nothing but its language were considered and the other provisions of the Act were neglected, its unqualified terms upon a literal construction would suffice to prohibit a distress upon goods of the bankrupt left upon demised premises to which the bankrupt was a stranger. The right of preferential proof given by sec. 84 (1) (*i*), on the other hand, is limited to rent due to the landlord of the bankrupt. General words of a statute should not receive a construction, unless the intention is clear, which involves a deprivation of private right without recompense. The landlord's power to distrain upon the goods found upon the demised premises,

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although they are the property of a stranger, enables him to exact the rent from sub-tenants who are not in privity with him, and provides him with a valuable remedy. Doubtless, legislation has tended to diminish the rights of landlords and to curtail their remedies. But in a *Bankruptcy Act* the purpose in hand is not the revision of the privileges of landlords, but the liquidation of existing rights against assets which are insufficient to meet them all. A wide or literal construction of sec. 88 (1) attributes to the Legislature an intention to take out of the possession of a landlord who is not in privity with a bankrupt, goods which otherwise would be available for the satisfaction of the rent owing to the landlord, and to give him no right in the bankruptcy in return; notwithstanding, moreover, that a landlord in privity with the bankrupt is given a qualified priority of proof. Similar considerations were relied upon in support of the conclusion which the Courts have adopted in England that the wide general terms of the provision which now stands as sec. 174 (1) of the *Companies Act* 1929 should be understood to refer only to distress for rent which constitutes a debt provable in the liquidation of the company. (See *In re Lundy Granite Co.*; *Ex parte Heavan* (1); *In re Traders' North Staffordshire Carrying Co.*; *Ex parte North Staffordshire Railway Co.* (2); *In re Regent United Service Stores* (3), and *In re New City Constitutional Club Co.*; *Ex parte Purssell* (4).) Although it is true that in a winding-up under the *Companies Act* the rights of third parties are less often affected than in bankruptcy, these cases proceed, not upon any such consideration, but upon a principle of construction which is equally applicable in bankruptcy. In *In re Traders' North Staffordshire Carrying Co.* (5) Sir *George Jessel* M.R. said that the reason for the decision restraining the general words of the provision appeared to be of considerable cogency, and the reason was this, that the meaning of the Act was to ensure equality amongst the creditors, and the creditor whose proceeding was restrained was to come in and prove with the rest; but in a case where the landlord was not a creditor at all, instead of producing equality, it would have produced inequality by depriving him of

(1) (1871) 6 Ch. App. 462.
(2) (1874) L.R. 19 Eq. 60.
(3) (1878) 8 Ch. D. 616.
(4) (1887) 34 Ch. D. 646.
(5) (1874) L.R. 19 Eq., at p. 66.

his legal right to distress and giving him nothing at all. Again, in *In re Lundy Granite Co.* (1) *Mellish* L.J. said :—" The landlord is, by the law of this country, entitled to take as a security for his rent the goods upon his land, whomsoever they belong to. Then, was it intended to deprive the landlord of that right if the goods happened to belong to a company under liquidation ? It would be very extraordinary if the Legislature had deprived the landlord of that right without clear and express words, and without giving him any compensation. The right to prove debts is confined to creditors of the company, and if this section makes this distress void, I do not see what power the Court would have to say that the landlord has any right to prove for his debt."

The *Bankruptcy Act* 1924-1930 contains provisions which strengthen the conclusion that sec. 88 (1) should be understood as referring only to rent owing by the bankrupt. These provisions are contained in sec. 159, which relates to compositions and assignments, and in sec. 192, which relates to deeds of arrangement. Sec. 159 enables the Court after a meeting of creditors has been summoned to make an order of a provisional character ordering a stay of proceedings in any distress for rent in respect of any debt or liability which would be provable in the bankruptcy. Sec. 192 (3) empowers the Court, after the execution of a deed of arrangement, to order a stay of proceedings in any distress for rent in respect of any debt or liability which would be provable in the bankruptcy if a sequestration order were made. These provisions are evidently ancillary to sub-sec. 1 of sec. 88 as interpreted by sub-sec. 2, and unless sec. 88 was intended to be confined to distress for rent owing by the bankrupt or debtor they would be less extensive in their application than the immunity they were designed to support. Further, it is by no means clear that sec. 206 would extend to empowering the Court to stay a distress, and it may be that sec. 192 (3) is an exhaustive statement of the Court's power to stay proceedings in a case of deed of arrangement. If this be so, it would, in itself, afford a reason, almost conclusive, for construing sec. 88 (1) as confined to distress for rent owing by the bankrupt, but it is unnecessary to decide in this case what are the limits of sec. 206, or of Part XII., because, without

(1) (1871) 6 Ch. App., at pp. 467-468.

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doing so, sufficient grounds appear for limiting the application of sec. 88 (1) to a distress for rent by the landlord of the bankrupt or debtor. For these reasons the distress upon the goods of the debtor did not become unlawful after the making of the deed of arrangement. The appeal should be allowed.

EVATT J. I have already read the judgment prepared by my brother *Dixon*. I agree with it and have nothing to add.

McTIERNAN J. delivered the following written judgment:—Sec. 88 (1) of the *Bankruptcy Act* 1924-1930 is in these terms: "After sequestration no distress for rent shall be levied or proceeded with as against the estate of the bankrupt." It is contended on behalf of the appellant that the word "rent" must be limited to "rent due by the bankrupt." It is contended, on the other hand, on behalf of the respondent that the words "no distress for rent" must be read literally, and should not be confined so as to exclude from the operation of the section any distress which may be levied against the estate of the bankrupt. The result of that construction in this case is that after "sequestration" as defined in sec. 88 (2), the landlord is deprived by the statute of his right to levy or proceed with a distress against the goods of the bankrupt on premises in respect of which rent is owing to the landlord by a tenant who is not the bankrupt. The learned Judge in Bankruptcy held that the section has this effect. If the Legislature has deprived the landlord of the right of distress in these circumstances, it has not given him anything by way of compensation for the loss of that right; e.g., it was not provided that the landlord can prove in any order of priority, or at all, in the sequestrated estate for the rent or any part of it due to him, which he could have recovered by levying or proceeding with the distress which, on that construction, has been prohibited. Speaking with reference to sec. 163 of the *Companies Act* 1862 (25 & 26 Vict. c. 89), which is sec. 211 of the *Companies (Consolidation) Act* 1908 (8 Edw. VII. c. 69), Sir *George Mellish* L.J. said:—"It is a question of general importance whether this section relates only to distress against the company, that is to say, where the company is the debtor, or extends, as has been contended, to all cases of distress.

The landlord is, by the law of this country, entitled to take as a security for the rent the goods upon his land, whomsoever they belong to. Then, was it intended to deprive the landlord of that right if the goods happened to belong to a company under liquidation? It would be very extraordinary if the Legislature had deprived the landlord of that right without clear and express words, and without giving him any compensation. The right to prove debts is confined to creditors of the company, and if this section makes this distress void, I do not see what power the Court would have to say that the landlord has any right to prove for his debt. It would be very extraordinary if, during the whole time of a liquidation, the liquidator might make any agreement with any insolvent tenant, and keep the goods on the land without any risk. The difficulty is not met by saying that the landlord can get leave to proceed under sec. 87, for that section is confined to proceedings against the company" (*In re Lundy Granite Co.*; *Ex parte Heavan* (1)). His Lordship proceeded: "When we look at the place where sec. 163 comes in, it is seen clearly to deal with the rights of creditors under the winding-up." Sec. 163 is in these terms: "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." (See, also, *In re Regent United Service Stores* (2); *In re Traders' North Staffordshire Carrying Co.*; *Ex parte North Staffordshire Railway Co.* (3).)

Adopting the words of Sir *George Mellish* in *In re Lundy Granite Co.*; *Ex parte Heavan* (4), when we look at the place where sec. 88 comes in, it is seen clearly to deal with the rights of creditors under the sequestration. Sec. 81 (1) provides that "all debts and liabilities . . . to which the bankrupt is subject at the date of the sequestration order . . . shall be deemed to be debts provable in bankruptcy." This section obviously includes rent. Sec. 82 is a provision dealing with the case where there have been mutual dealings between a bankrupt and any person proving or claiming to prove a debt in the bankruptcy. Sec. 83 deals with the mode of proving debts in the bankruptcy. Sec. 84 prescribes that in applying

(1) (1871) 6 Ch. App., at pp. 467-468.
(2) (1878) 8 Ch. D. 616.
(3) (1874) L.R. 19 Eq. 60.
(4) (1871) 6 Ch. App., at p. 468.

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McTiernan J.

the estate of the bankrupt in the payment of debts, the trustee shall pay the debts in the order of priority therein set forth. Seventhly in the order of priority is rent, that is to say, " so much rent, for a period not exceeding three months, as was due and payable at the date of the sequestration order, and in respect of which there were, at the date of the sequestration order, goods on the premises, in respect of which rent was payable, liable, but for sequestration, to distress for rent " (sec. 84 (1) (*i*)). The words " liable, but for sequestration, to distress for rent " clearly anticipate sec. 88. Secs. 85, 86 and 87 are *in pari materia*, relating as they do to debts or liabilities, due or deemed to be due from the bankrupt, and to the order in which such debts or liabilities should be satisfied out of the bankrupt's estate.

Notwithstanding that the rules which are applied in a winding-up are different in some important respects from those applied in a bankruptcy, in my opinion the statement I have quoted from the judgment of Sir *George Mellish* L.J. in *In re Lundy Granite Co.*; *Ex parte Heavan* (1), affords guidance in the interpretation of sec. 88. Referring to the decision in that case, Sir *George Jessel* M.R. said :—" The judgment of the Lords Justices, as I understand it, takes this distinction, that where the right of the landlord against his own tenant, not being the company, is not the right of a creditor of the company, but is simply the right to take the goods, whosesoever they happen to be, the 163rd section has no application. Of course there is considerable difficulty in the words, but the meaning that they put upon the section was this, that it must be a distress against the estate or effects of the company as estate or effects of the company—that is, a distress which could not have been validly made in any other character. I do not say that I can find the words in the section, but that is the decision, and a reason is given for it which appears to be of considerable cogency, if I may say so with great respect, and that is this, that the meaning of the Act was to ensure equality amongst the creditors, and the creditor whose proceeding was restrained was to come in and prove with the rest; but in the case before their Lordships the landlord was not a creditor at all, and therefore, instead of producing equality, it would have

(1) (1871) 6 Ch. App., at pp. 467-468.

produced inequality, by depriving him of his legal right to a distress, and giving him nothing at all. . . . I must say, it appears to me, although I do not find the words, that the reason, the spirit, and the meaning of the Act are entirely in accordance with the decision of the present Lords Justices in *In re Lundy Granite Co.* (1). Of course, as I said before, if it were not so, you would destroy the right of the landlord, and you would give him nothing in return" (*In re Traders' North Staffordshire Carrying Co.*; *Ex parte North Staffordshire Railway Co.* (2)). The sections which I have mentioned and a consideration of the principles of the *Bankruptcy Act* lead to the conclusion that when the Legislature used the word "rent" in sec. 88 (1), it had in contemplation a debt which would be provable in bankruptcy. In my opinion, therefore, the words "no distress for rent" mean no distress for rent due by the bankrupt. I do not think that the Legislature intended that those words should mean, no distress for rent due by the bankrupt or any other person. To hold otherwise would be to deprive the appellant of a right which was not in the contemplation of the Legislature (*Forbes* v. *Ecclesiastical Commissioners for England* (3)).

The view which I have taken as to the construction of sec. 88 is strongly supported by the language of sec. 159 (1) and sec. 192 (3) of the Act.

In my opinion the appeal should be allowed.

Appeal allowed. Order of Judge Lukin discharged. In lieu thereof order that the application to the Court of Bankruptcy be dismissed and it be ordered that the money in the bank account in the joint names of the appellant and respondent be paid out to the appellant. Respondent to this appeal to pay the costs of the application including reserved costs and the costs of this appeal out of the estate so far as it extends and if not sufficient by the trustee personally.

Solicitors for the appellant, *Norton, Smith & Co.*

Solicitors for the respondent, *Sly & Russell.*

J.B.

(1) (1871) 6 Ch. App. 462.
(2) (1874) L.R. 19 Eq., at pp. 65-66.
(3) (1872) L.R. 15 Eq. 51, at p. 55.