[HIGH COURT OF AUSTRALIA.]

IN RE BURLEY.

ON APPEAL FROM THE COURT OF BANKRUPTCY.

Bankruptcy—Offence—Summary trial—Limitation of time—Bankruptcy Act 1924-1928 (*No.* 37 *of* 1924—*No.* 39 *of* 1928), *secs.* 210-212, 217—*Crimes Act* 1914-1926 (*No.* 12 *of* 1914—*No.* 9 *of* 1926), *sec.* 21 (1).

An offence against the *Bankruptcy Act* 1924-1928, the maximum penalty for which is one year's imprisonment, does not, by reason of its being charged and tried summarily under sec. 217 of that Act, become an offence "the maximum term of imprisonment in respect of" which "does not exceed six months," within the meaning of sec. 21 (1) (*b*) of the *Crimes Act* 1914-1926; and, accordingly, the prosecution need not be commenced within twelve months from the commission of the offence.

Decision of the Court of Bankruptcy affirmed.

H. C. OF A. 1932.

MELBOURNE, *March* 14.

SYDNEY, *April* 13.

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

APPEAL from the Court of Bankruptcy (District of Victoria).

The appellant, Gordon Harry Burley, a bankrupt, was charged with various offences under secs. 210 (1) (*d*) and (3) (*d*), 211 (*a*) and 212 (1) (*a*) of the *Bankruptcy Act* 1924-1928. The bankrupt was tried summarily on these charges under sec. 217 (2) of the *Bankruptcy Act*, and, having been found guilty, was sentenced to three months' imprisonment on each charge, the terms to be concurrent. At the trial counsel for the bankrupt raised the point that each of the charges was laid too late, namely, more than twelve months after the commission of the offence charged. He contended that, as on a summary trial under sec. 217 (2) of the *Bankruptcy Act* the maximum term of imprisonment was six months, the prosecution should have been commenced according to sec. 21 (1) (*b*) of the *Crimes Act* 1914-1926 within one year from the commission of the

H. C. OF A. 1932.

IN RE BURLEY.

offence. The bankrupt's estate was sequestrated on 3rd April 1930, and on 2nd September 1931 upon an application for his discharge the bankrupt was charged by the Judge in Bankruptcy with the offences mentioned.

From the order of the Court of Bankruptcy (Judge *Lukin*) the bankrupt now appealed to the High Court, and joined as respondents the Court of Bankruptcy (District of Victoria), his Honor Judge Lukin, Judge of the said Court, and W. Merrell, Registrar of the said Court.

Appellant in person.

O'Bryan, for the respondents. Admittedly all the offences were committed more than twelve months before the prosecution was commenced, but the Bankruptcy Court is not limited to the period of a year from the date when the act of bankruptcy was committed, for the trial of offences against the *Bankruptcy Act*.

Cur. adv. vult.

April 13. The following written judgments were delivered :—

GAVAN DUFFY C.J., STARKE AND EVATT JJ. The bankrupt, Burley, was charged with various offences under secs. 210 (1) (*d*) and (3) (*d*), and 211 (*a*) and 212 (1) (*a*) of the *Bankruptcy Act* 1924-1928, for each of which the Act prescribes "Penalty: one year's imprisonment." The *Acts Interpretation Act* 1904, sec. 3, provides that the penalty set out at the foot of any section or sub-section of an Act indicates that the offence is punishable upon conviction by a penalty not exceeding the penalty mentioned. Further, the *Crimes Act* 1914-1926 provides in sec. 21 (1) :—"A prosecution in respect of an offence against any law of the Commonwealth may be commenced as follows: (*a*) where the maximum term of imprisonment in respect of the offence in the case of a first conviction exceeds six months—at any time after the commission of the offence; (*b*) where the maximum term of imprisonment in respect of the offence in the case of a first conviction does not exceed

six months—at any time within one year after the commission of the offence." Finally, the *Bankruptcy Act*, sec. 217, provides: (1) "If the Court, in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against this Act punishable by imprisonment, it may . . . charge him with the offence and try him summarily . . . (2) . . . if after trial the Court finds that the bankrupt is guilty of the offence, the Court may sentence him to imprisonment for any period not exceeding six months."

The Court of Bankruptcy, acting under these provisions, tried the bankrupt Burley summarily, convicted him of each of the offences with which he was charged, and sentenced him to three months' imprisonment in respect of each offence. Admittedly, the convictions are in respect "of a first conviction" and the prosecution was not commenced within one year after the commission of any of the offences. The argument on the part of the bankrupt is that the maximum term of imprisonment in respect of the offences of which he was convicted did not exceed six months because the Court of Bankruptcy on a summary trial had no power to impose a sentence exceeding a period of six months (see *Bankruptcy Act*, sec. 217 (2)), and consequently that the prosecution should have been commenced within one year after the commission of the offences (*Crimes Act*, sec. 21 (1) (*b*)). The provisions of sec. 217 of the *Bankruptcy Act*, however, relate to "*an offence against this Act punishable by imprisonment*," and that necessarily refers us back to the various sections creating the offences and the penalties imposed in respect of them. In the present case they are offences against secs. 210, 211 and 212, and are punishable by a penalty of one year's imprisonment. Sec. 217, however, does not confide to a Court of summary jurisdiction the infliction of this maximum punishment: that is reserved for other Courts pursuant to sec. 217. The limitation is upon the power of the Court of summary jurisdiction to inflict the maximum punishment attached to the offence, and not an alteration in the character of the offence, or of the sanction attached to it by the statute.

The appeal should be dismissed.

H. C. OF A. 1932.

IN RE BURLEY.

Rich J. McTiernan J.

RICH AND MCTIERNAN JJ. This is an appeal from an order made by Judge *Lukin* by which a sentence of imprisonment was imposed on the appellant. His estate was sequestrated on 3rd April 1930. On 2nd September 1931, upon an application for discharge, the learned Judge, acting under the provisions of sec. 217 of the *Bankruptcy Act* charged the appellant with offences under secs. 210 (1) (*d*), (3) (*d*), 211 (*a*) and 212 (1) (*a*). His Honor proceeded to try the bankrupt summarily under sec. 217 (2) and, having found him guilty, sentenced him to three months' imprisonment on each charge, the terms to be concurrent. Sec. 217, so far as material, is in these terms :—" (1) If the Court, in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against this Act punishable by imprisonment, it may—(*a*) charge him with the offence and try him summarily ; or (*b*) commit him for trial before any Court of competent jurisdiction. (2) Where the Court tries the bankrupt summarily it shall serve him with a copy of the charge and appoint a day for him to answer it. On the day so appointed, the Court shall require the bankrupt to plead to the charge, and if the bankrupt admits the charge, or if after trial the Court finds that the bankrupt is guilty of the offence, the Court may sentence him to imprisonment for any period not exceeding six months."

At the trial counsel for the bankrupt raised the point that each of the charges was laid too late—more than twelve months after the commission of the offence charged. He contended that, as on a summary trial under sec. 217 (2) of the *Bankruptcy Act* the maximum term of imprisonment was six months, the prosecution should have been commenced, according to sec. 21 (1) (*b*) of the *Crimes Act* 1914-1926, within one year from the commission of the offence. We think that the order made by Judge *Lukin* is correct. In the first place, the application of sec. 21 of the *Crimes Act* 1914-1926 to proceedings under sec. 217 of the *Bankruptcy Act* is more than doubtful. So far as material, sec. 21 of the *Crimes Act* is in these terms :—" (1) A prosecution in respect of an offence against any law of the Commonwealth may be commenced as follows: (*a*) where the maximum term of imprisonment in respect of the

offence in the case of a first conviction exceeds six months—at any time after the commission of the offence; (*b*) where the maximum term of imprisonment in respect of the offence in the case of a first conviction does not exceed six months—at any time within one year after the commission of the offence." This section is framed with obvious reference to secs. 4 and 5 of the *Acts Interpretation Act* 1904-1930. They are as follows:—"4. Offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless the contrary intention appears in the Act, be indictable offences. 5. Offences against any Act which—(*a*) are punishable by imprisonment, but not for a period exceeding six months; or (*b*) not being punishable by imprisonment, are not declared to be indictable offences, shall, unless the contrary intention appears in the Act, be punishable on summary conviction."

Sec. 21 contemplates a definite maximum penalty which affords a certain criterion for the calculation of the period of limitation. It does not contemplate provisions which make the amount of the penalty depend upon the mode of trial or prosecution which a Court in the exercise of a statutory discretion may direct. The result which would be produced by applying sec. 21 of the *Crimes Act* to sec. 217 of the *Bankruptcy Act*, and by reckoning the six months' limitation prescribed by sec. 217 (2) of the *Bankruptcy Act* for the period of imprisonment for the purpose of ascertaining the maximum term referred to by sec. 21, would, to say the least, be curious. In many offences where the punishment affixed by the section of the *Bankruptcy Act* which creates the offence is more than six months the Bankruptcy Court would, by virtue of sec. 217, be given an option which, if exercised in favour of a summary charge, would result in the immediate acquittal of the accused on the ground that more than six months had elapsed since the commission of the offence, although, if the option were exercised in favour of a charge on indictment, lapse of time would afford no answer to the charge. But, assuming that sec. 21 (1) of the *Crimes Act* does apply to sec. 217 of the *Bankruptcy Act*, we cannot think that the limitation imposed by sub-sec. 2 of sec. 217 of the *Bankruptcy Act* upon the term of imprisonment should be reckoned for the purpose of ascertaining the maximum term referred to by sec. 21 of the

H. C. OF A. 1932.

IN RE BURLEY.

Rich J. McTiernan J.

Crimes Act. That section is referring to the maximum term to which the offender exposes himself when he commits the offence. It is distinguishing crimes according to their gravity and adopting a period of punishment as the test of their seriousness. It is not concerned with the powers of one Court or another, but with the nature of the crime. The fact that one Court is made incompetent to inflict the full period of imprisonment assigned to the offence by the provision creating it ought not, we think, to be taken into consideration in determining within which of the three categories made by sec. 21 of the *Crimes Act* the offence falls.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Coy & England*.

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

H. D. W.

[HIGH COURT OF AUSTRALIA.]

IN RE THE STATE OF NEW SOUTH WALES; EX PARTE THE ATTORNEY-GENERAL FOR THE COMMONWEALTH.

H. C. OF A. 1932.

SYDNEY, *May* 4.

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

Constitutional Law—Financial Agreements—Money "due and payable and unpaid" thereunder by a State to the Commonwealth—Amount—Certificate of the Auditor-General—Right of set-off by State—Declaration by High Court—Financial Agreements Enforcement Act 1932 (*No.* 3 *of* 1932), *secs.* 5 (1), 6, 7, 13 (2), 18—*Financial Agreement Act* 1928 (*No.* 5 *of* 1928), *Sched.*

In an application by the Commonwealth for a declaration, under sec. 6 (3) of the *Financial Agreements Enforcement Act* 1932, that an amount stated in a resolution passed by both Houses of the Commonwealth Parliament, or any part thereof, is "due and payable and unpaid" by a State to the Commonwealth, the State is not permitted by the Act to claim a set-off.