[HIGH COURT OF AUSTRALIA.]

BRIDGE . . . . . APPELLANT;
RESPONDENT,

AND

GREAT WESTERN PORTLAND CEMENT AND LIME LIMITED . . . . } RESPONDENT.
PETITIONER,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

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SYDNEY, *Nov.* 17, 18; *Dec.* 8.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Deed of assignment—Bankruptcy petition by non-assenting creditor founded upon execution of deed—Authorizing statutory provision—Inconsistency with other provisions—Subsequent legislation—Cognizance by Court—Deed—Form—Bankruptcy Act 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *secs.* 162 (6), 163 (1) (*a*), (2); *Third Sched., First Part—Bankruptcy Act* 1932 (*No.* 31 *of* 1932), *sec.* 48.

A trustee under a deed of assignment executed under Part XI. of the *Bankruptcy Act* 1924-1930 gave notice, under sec. 162 (6) of the Act, to a creditor, who had not assented to the deed, that he would not after the expiration of one month be entitled to present a bankruptcy petition against the debtor founded on the execution of the deed unless it subsequently became void. Within the month the creditor presented a petition founded on the execution of the deed. Before the hearing of the petition sub-sec. 6 of sec. 162 was repealed. The Court of Bankruptcy held that the petition was well founded, and that the debt was not released under sec. 165, and made a sequestration order.

Held, by *Rich, Dixon* and *McTiernan* JJ. (*Starke* and *Evatt* JJ. dissenting) that the decision of the Court of Bankruptcy was wrong.

Per Rich, Dixon and *McTiernan* JJ.:—Sec. 162 (6) was expressed upon a mistaken supposition that, although the deed was not declared void under sec. 176, a creditor might present a petition based upon its execution or some other act committed by the debtor in the course of taking advantage of Part

XI.; but the sub-section did not express a positive legislative intention to which the remaining provisions of the Act should give way in spite of their clear meaning. For the purpose of interpreting the statute the Court was entitled to take the subsequent legislation into account.

The deed, which, as permitted by sec. 163 (2), followed the form in the First Part of the Third Schedule to the Act, did not provide for the payment, in priority to all other debts, of the debts specified in sec. 84 of the Act.

Held, by the whole Court, that an objection that the deed did not comply with sec. 163 (1) (*a*) was not well founded.

Decision of the Court of Bankruptcy: *Re Bridge*, (1932) 4 A.B.C. 268, reversed.

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

At a duly convened meeting of his creditors held on 21st March 1932, Lionel James Archibald Bridge presented a statement of his affairs showing a deficit of £93,952 11s. 7d., and, in pursuance of a special resolution passed at such meeting, he, on the same day, executed a deed of assignment under Part XI. of the *Bankruptcy Act* 1924-1930, which was registered on 31st March. The respondent, Great Western Portland Cement and Lime Ltd., one of Bridge's creditors, did not assent to the deed. On 27th April 1932 the trustee under the deed, Ernest Remington Shetcliffe, pursuant to sec. 162 (6) of the *Bankruptcy Act* 1924-1930, caused a notice to be served on the respondent, as a creditor, intimating that after the expiration of one month from that date it would not be entitled to present a bankruptcy petition against Bridge founded on the execution by him of the deed. Within the month, on 9th May 1932, the respondent presented a bankruptcy petition against Bridge in respect of the sum of £548 2s. 8d. for unpaid calls on shares together with interest thereon, the acts of bankruptcy alleged being the execution by Bridge of the deed of assignment referred to above, by which, it was alleged, Bridge had made a conveyance or assignment of his property for the benefit of his creditors generally, and also the giving by Bridge, on various specified dates in March 1932, of notice to one or more of his creditors that he had suspended, or was about to suspend, payment of his debts. The petition was opposed by Bridge on the grounds (1) that, because of the execution

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of the deed, all the requirements of the *Bankruptcy Act* having been observed, the respondent was not entitled to have a sequestration order made on its application; and (2) that the execution and validity of such deed constituted sufficient cause within the meaning of sec. 56 (3) (*b*) why no order for sequestration should be made. The trustee under the deed, having obtained leave to intervene, objected to an order for sequestration being made, on the ground that, since the deed had been executed under Part XI. of the Act, Bridge had, under sec. 165, properly interpreted, "been released from all provable debts" and therefore it was not competent for the respondent as a creditor to present a petition, or for the Court to make an order for sequestration thereon. The deed of assignment followed the form in the First Part of the Third Schedule to the Act, which, by the provisions of sec. 163 (2), may be used, and it did not provide in accordance with sec. 163 (1) (*a*), for the payment, in priority to all other debts, of the debts specified in sec. 84 of the Act. By the *Bankruptcy Act* 1932, assented to on 31st May 1932, sec. 162 of the *Bankruptcy Act* 1924-1930 was amended by omitting sub-sec. 6 thereof.

The petition came on for hearing before Judge *Lukin* on 21st June 1932, when his Honor held (1) that the acts of bankruptcy alleged were acts upon which the respondent was entitled to present a petition, (2) that sec. 165 of the Act did not operate to release Bridge from the debt in question, and (3) that the execution of the deed of assignment was not sufficient cause, within the meaning of sec. 56 (3) (*b*), why no order for sequestration should be made. His Honor made a sequestration order: *Re Bridge* (1).

From this decision Bridge now appealed to the High Court.

Abrahams K.C. (with him *Miller*), for the appellant. Upon the making of the deed of assignment under Part XI. of the *Bankruptcy Act* 1924-1930, the various formalities of the Act having been complied with, the appellant was, by virtue of sec. 165, released from all provable debts, and, therefore, it was not competent for the respondent subsequently to present a bankruptcy petition. Parts XI. and XII. are separate and have a different scope and object.

(1) (1932) 4 A.B.C. 268.

Sub-sec. 6 of sec. 162 is inconsistent with the provisions of Part XI.; it is meaningless, of no effect, and should be ignored. The only circumstance under which a deed under Part XI. can be made an act of bankruptcy is as provided in sec. 176. Although the matter may come within the general words of sec. 52, there are many sections in Part XI., e.g., sec. 168, which indicate that a deed made thereunder, which complies with all the formalities of the Act, is not an act of bankruptcy. (See also sec. 52 (*l*).) The fact that the Legislature has since repealed sub-sec. 6 of sec. 162 shows that effect should not be given to it. The mere fact that the trustee caused a notice to be served upon the respondent does not affect the matter. Although creditors have certain rights under the deed, upon the making thereof their personal right in respect of the debt disappears.

Spender, for the respondent. The respondent was not prohibited by the provisions of Part XI. from presenting a bankruptcy petition founded on the execution of the deed and acts by the appellant preliminary thereto, and, therefore, it was entitled to present such petition by virtue of the provisions of sec. 55 (1). A deed of assignment which fails is, under sec. 52 (*a*), an act of bankruptcy which can be availed of within a specified time. The subsequent repeal of sub-sec. 6 of sec. 162 should be disregarded. Sec. 165 should be interpreted, up to the time of such repeal, as if it were introduced by the words "subject to the provisions of this Part." Sub-sec. 6 of sec. 162 was not a mere surplusage, and the Court should give a meaning to it (*Wilson* v. *Federal Commissioner of Land Tax* (1)).

[DIXON J. The Court is entitled to have regard to subsequent legislation on the question of interpretation.]

The repeal of sub-sec. 6 may only indicate a change of policy on the part of the Legislature. In any event, the repeal is, for the purpose of this matter, immaterial. Sec. 165 is a general section and should be read subject to the right of a creditor to present his petition. The implication from sub-sec. 6 of sec. 162, read with sec. 55 (1), is that a creditor in the position of the respondent shall

(1) (1916) 21 C.L.R. 225, at p. 239.

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have the right to present within one month a petition for sequestration, and necessary implications are as much a part of a statute as are its express provisions (*Hirsch* v. *Zinc Corporation Ltd.* (1)). The deed executed by the appellant does not comply with the requirements of sec. 163 (1) (*a*) and is, therefore, bad. Notwithstanding the authority contained in sec. 163 (2), it is incumbent upon persons concerned to ensure that the particular form used complies with the requirements of the Act (*Dean* v. *Green* (2)).

Miller, for the trustee, submitted to any order the Court might make.

Abrahams K.C., in reply. Where words in a statute, as sec. 162 (6) here, operate against the obvious intention of the Legislature, and their presence is due to the draftsman's unskilfulness or ignorance of the law, they should be ignored (*Salmon* v. *Duncombe* (3)).

Cur. adv. vult.

Dec. 8.

The following written judgments were delivered :—

RICH, DIXON AND MCTIERNAN JJ. This appeal is from an order made by the Federal Court of Bankruptcy sequestrating the estate of the appellant, who had executed a deed of assignment under Part XI. of the *Bankruptcy Act* 1924-1930 pursuant to a special resolution passed at a meeting of his creditors under sec. 162. The respondent, the petitioning creditor, did not assent to the deed. When the proceedings were commenced, Act No. 31 of 1932, which repeals sub-sec. 6 of sec. 162, had not come into force, and, because of the provisions contained in this sub-section, Judge *Lukin* was of opinion that such a creditor might present a petition founded upon the execution of the deed of assignment as an act of bankruptcy and that his debt was not released under sec. 165.

Apart from the provisions of sub-sec. 6 of sec. 162, we think that it would be clear that the provisions of Part XI. mean that, upon the debtor complying with a special resolution under sec. 162 (1)

(1) (1917) 24 C.L.R. 34, at p. 61. (2) (1882) 8 P.D. 79, at p. 89.
(3) (1886) 11 App. Cas. 627.

and executing a deed which fulfils the requirements of sec. 163, the liquidation of his debts is to proceed under that Part without a sequestration unless and until the Court in the exercise of the powers given by sec. 176 declares the deed to be void.

The claims of the creditors upon the debtor personally are converted into rights of proof against the assets assigned by the deed (see secs. 165, 166 and 169). By sec. 168 the execution of the deed by the debtor is to be deemed to be equivalent to an act of bankruptcy as on the date of the meeting of the creditors, and to a sequestration order. This means that the administration may proceed as in bankruptcy, with relation back to the meeting. Accordingly it would be quite plain, but for sec. 162 (6), that, except by the invocation of sec. 176, a creditor could not found a petition upon the deed as an act of bankruptcy; there would be no subsisting personal debt. This is fully borne out by sec. 52 (*l*), which deals with acts of bankruptcy arising from proceedings begun by a meeting of creditors under Part XI., and, in the case of a deed of assignment, is limited to the event of the assignment being declared void in pursuance of sec. 176. If it were otherwise, when a debtor called a meeting of his creditors and they resolved on a deed, he would commit an act of bankruptcy by failing to comply with the resolution and would commit another by complying with it. This would be a strange consequence of resorting to statutory provisions bearing the title "Compositions and Assignments without Sequestration," with which that Part is headed. But sec. 162 (6) provides: "If the trustee under the deed serves, in the prescribed manner, on any creditor, notice in writing of the execution of the deed and that the assents required for the validity of the deed have been obtained with an intimation that the creditor will not after the expiration of one month from the service of the notice be entitled to present a bankruptcy petition against the debtor founded on the execution of the deed or on any other act committed by the debtor in the course or for the purpose of the proceedings preliminary to the execution of the deed as an act of bankruptcy, that creditor shall not, after the expiration of that period, unless the deed becomes void, be entitled to present a bankruptcy petition against the debtor founded on the execution of the deed or any act

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Rich J. Dixon J. McTiernan J.

so committed by the debtor as an act of bankruptcy." There can be no doubt that this provision is expressed upon the supposition that, although the deed is not declared void, a creditor may present a petition based upon its execution or some other act committed by the debtor in the course of taking advantage of Part XI. Further, the same supposition is carried into sec. 55 (1), although, but for the existence of sec. 162 (6), this would not be clear. But the question is whether this legislative supposition requires that an interpretation should be placed on the provisions of the Part which they would not otherwise receive. Such an interpretation would be in opposition to the language and to the natural meaning of these provisions, and would defeat the policy which is not only disclosed by them but is stated in the heading to the Part. A supposition of the Legislature appearing in a statutory provision is not the same as a declaration of legislative intention, although, of course, usually the latter is inferred from it. In this case, however, the provision does no more than show that the draftsman thought a petition might possibly be presented in circumstances which could not arise if the other provisions received their natural interpretation. Sec. 162 (6) has since been repealed, and in the circumstances this may be regarded as a recognition by the Legislature of its futility. We are entitled to take into account subsequent legislation upon such a question of interpretation as is involved in this case. The true conclusion, therefore, appears to be that sec. 162 (6) was expressed upon a mistaken supposition and did not express a positive legislative intention to which the remaining provisions should give way in spite of their clear meaning. For these reasons we think that the decision of Judge *Lukin* was wrong.

The further point mentioned, but not decided, by the learned Judge, that the deed did not comply with sec. 163 (1) (*a*), is not in our opinion, well founded. The deed was in the form given in the First Part of the Third Schedule and, by sec. 163 (2), must have the same effect as if in the form in the Second Part. The latter Part expressly requires the trustee to hold subject to the provisions of Part XI., and this must be taken, as it is a form prescribed by the statute, to incorporate the requirements of sec. 163 (1) (*a*).

The appeal should be allowed with costs; the order of sequestration should be set aside and the matter remitted to the Federal Court of Bankruptcy to be dealt with consistently with the judgment of this Court.

STARKE J. This appeal is from an order of sequestration of the estate of Lionel James Archibald Bridge, a debtor, based upon a conveyance or assignment of his property to trustees for the benefit of his creditors generally (*Bankruptcy Act* 1924-1930, sec. 52 (*a*)). But the conveyance or assignment was made pursuant to sec. 162, which is included in Part XI. of the Act, providing for assignments without sequestration. It is, by sec. 168 (*c*), deemed for all purposes equivalent to a sequestration order against the debtor, and, by sec. 165, releases him from all provable debts and vests in the trustee all his property upon the trusts and for the purposes of the deed. And, by sec. 166, all parties to the assignment and all persons bound thereby are, in all matters relating to property conveyed and assigned by the deed or belonging to or vested in the debtor, subject to the jurisdiction of the Bankruptcy Court and liable to all the provisions of the Act as if a sequestration order had been made against the debtor and the creditors had proved and the trustee had been appointed a trustee in bankruptcy. Despite these enactments, there is found in sec. 162 (6) the following provision: "If the trustee under the deed serves, in the prescribed manner, on any creditor, notice in writing of the execution of the deed and that the assents required for the validity of the deed have been obtained with an intimation that the creditor will not after the expiration of one month from the service of the notice be entitled to present a bankruptcy petition against the debtor founded on the execution of the deed or on any other act committed by the debtor in the course or for the purpose of the proceedings preliminary to the execution of the deed as an act of bankruptcy, that creditor shall not, after the expiration of that period, unless the deed becomes void, be entitled to present a bankruptcy petition against the debtor founded on the execution of the deed or any act so committed by the debtor as an act of bankruptcy." It may be compared with sec. 198. The Act No. 31 of 1932, sec. 48, assented to on 31st May

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Starke J.

1932, repealed sec. 162 (6), but the petition in bankruptcy was presented on 9th May 1932, before the passing of this later Act, though the order for sequestration was not made until 21st June 1932. (See *Acts Interpretation Act* 1901, secs. 8 and 9.) But it was very forcibly contended that the provisions of sec. 162 (6) are insensible, and wholly inconsistent with the objects and the other provisions of Part XI. of the Act. And the argument was reinforced by reference to the provisions of sec. 52 (*l*). Nothing can justify the argument except necessity, and, though sec. 162 (6) seems inconvenient, and possibly due to some mistake, that necessity is not apparent to me. The sub-section seems no more than a declaration that a creditor may, within a month of the service of the prescribed notice, notwithstanding the provisions of Part XI., present a petition in bankruptcy founded on the execution of the deed of assignment, which, it should be observed, would, apart from the provisions of Part XI., be an act of bankruptcy under sec. 52 (*a*). It enables a creditor to supersede administration of the debtor's property under the deed of assignment by administration under sequestration by the Court, which is not quite so senseless, useless or futile a proceeding as the argument suggested. Further, in my opinion, the contention that the deed did not comply with sec. 163 (1) (*a*) is untenable.

The appeal, I think, should be dismissed.

EVATT J. In this case I have come to the conclusion that the appeal should not be allowed. I was, at first, impressed with the courageous argument of Mr. *Abrahams* that the provision contained in sec. 162 (6) of the *Bankruptcy Act* must be ignored, inasmuch as it could not be obeyed without nullifying the other provisions of Part XI. dealing with "Compositions and Assignments without Sequestration." But there is no escape from the plain fact that the sub-section enables a creditor to present a bankruptcy petition within the prescribed period.

This provision undoubtedly created an anomalous position, and it has recently been cured by the amending Commonwealth *Bankruptcy Act*. That Act was not, however, made retroactive, and I

do not see how we can reverse the decision of Judge *Lukin* without taking it upon ourselves to perform a legislative function.

I should add that I have had the opportunity of reading the opinion of my brother *Starke* and I agree with it.

The appeal should be dismissed.

Appeal allowed with costs. Order of sequestration set aside. Matter remitted to Federal Court of Bankruptcy to be dealt with consistently with the judgment of the High Court.

Solicitors for the appellant, *McDonell & Moffitt.*

Solicitors for the trustee, *J. J. Carroll & Son.*

Solicitors for the respondent, *Fred. C. Emanuel & Pearce.*

J. B.