

Compared Saffron, A.G. (No. 1) 39 ACrimR 353	Appl DCT v Swain 20 FCR 507	Foll R v Kardogeros 49 ACrimR 352	Cons R v Kardogeros [1991] 1 VR 269	Appl Palos Verdes Estates Pty Ltd v Carbon (1991) 72 LGRA 414	Appl Public Prosecutions, Director of v Brauer [1991] 2 QdR 261	Foll Chew v R (1992) 64 ACrimR 82	Appl DPP, Reference (No. of 1992) & (No. of 1993) (1993) 9 WAR 281
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[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

ADAMS.

Bankruptcy—Offerces—Debtor assigning estate—Whether subject to penal provisions of Act as a “bankrupt” or “person against whom a sequestration order is made” —Bankruptcy Act 1924-1930 (No. 37 of 1924—No. 17 of 1930), secs. 4, 166, 168, 210, 212.

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ADELAIDE,
Sept. 11, 18.

A was arraigned on an information containing two counts charging offences under the *Bankruptcy Act 1924-1930*. The first count charged an offence under sec. 210 and the second count an offence under sec. 212. The information did not allege that A was a bankrupt or that an order of sequestration had been made against him, but did allege that he had executed a deed of assignment pursuant to Part XI. of the Act and so was deemed to be a bankrupt and a person against whom a sequestration order had been made.

Rich, Starke,
Dixon, Evatt
and McTiernan
J.J.

Held that the liability to the penal sanctions imposed by secs. 210 and 212 depended on the status of bankruptcy, that the Act (in particular, sec. 168) did not give A that status, and that the information therefore disclosed no offence.

QUESTIONS OF LAW RESERVED.

The Attorney-General for the Commonwealth filed an information against George Adams in the Supreme Court of South Australia. Before the defendant pleaded to the information his counsel moved to quash it on the ground that it disclosed no offence. After hearing argument *Murray C.J.*, the presiding Judge, intimated that he would reserve questions of law for the decision of the Full Court of the High Court. The questions were reserved substantially as follows:—

1. On 7th December 1934 George Adams was committed for trial at the Criminal Sittings of the Supreme Court of South Australia.

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2. Subsequently the following information was filed in the Supreme Court of South Australia :—Information of the Attorney-General for the Commonwealth of Australia—George Adams is charged with the following offences :—1st Count—Statement of Offence—Making material omissions in a statement under the *Bankruptcy Act* (*Bankruptcy Act* 1924-1930 (Commonwealth), sec. 210 (1) (d)). Particulars of Offence—George Adams being a person who on the 1st day of April 1931 executed a deed of assignment pursuant to Part XI. of the *Bankruptcy Act* 1924-1930 to Leslie William Ferres as trustee for his creditors and being deemed to be a bankrupt within the meaning of sec. 210 (1) of the said Act at Adelaide on the said 1st day of April 1931 made material omissions in a statement relating to his affairs to wit the first schedule required by sec. 163 (1) (b) of the said Act in that the said George Adams omitted from such statement any reference to certain of his property namely :—[here followed particulars]. 2nd Count—Statement of Offence—Transferring property with intent to defraud creditors (*Bankruptcy Act* 1924-1930 (Commonwealth), sec. 212 (1) (b)). Particulars of Offence—George Adams being a person who at Adelaide on the 1st day of April 1931 executed a deed of assignment pursuant to Part XI. of the *Bankruptcy Act* 1924-1930 to Leslie William Ferres as trustee for his creditors and being deemed to be a person against whom a sequestration order was made within the meaning of sec. 212 (1) of the said Act in or about the month of March 1931 with intent to defraud his creditors or some of them had at Kaniva in the State of Victoria made a transfer to one Stanley Lewis Goodwin of part of his property namely :—[here followed particulars].

3. Before Adams pleaded to either count of the information his counsel :—I. Moved to quash the information upon the ground that it did not disclose any offence against the provisions of the *Bankruptcy Act*. The grounds taken were :—(a) As to the first count, that the execution of a deed of assignment pursuant to Part XI. of the Act did not make the person executing the same a bankrupt for the purposes of sec. 210 (1) (d) nor did such section apply to a person merely deemed to be a bankrupt. (b) As to the second count, that the execution of a deed of assignment pursuant

to Part XI. did not make the person executing the same a person against whom a sequestration order had been made for the purposes of sec. 212 (1) (b) nor did such section apply to a person merely deemed to be a person against whom a sequestration order was made. II. Objected to the Court trying the second count on the ground that the offence charged is alleged in the information to have been committed in Victoria and the Supreme Court of South Australia has no jurisdiction to try such offence.

The following questions of law were submitted for the consideration of the Full Court of the High Court :—

- (1) Does the first count of the said information disclose an offence against sec. 210 (1) (d) of the *Bankruptcy Act* 1924-1930 ?
- (2) Does the second count of the said information disclose an offence against sec. 212 (1) (b) of the *Bankruptcy Act* 1924-1930 ?
- (3) Has the Supreme Court of South Australia jurisdiction to try the defendant upon the second count of such information ?

Stevens, for the accused. The penal sections in Part XIV. of the Act are designed to cover only actual bankrupts. They do not apply in a fictitious bankruptcy. The defendant is not a bankrupt nor a person against whom a sequestration order has been made. Secs. 162 (7), (8), 165, 166, 167 and 169, all of which are in Part XI., expressly apply to a deed under that Part various bankruptcy provisions, but nowhere are the penal sections so applied. A person is not subjected to penal provisions unless the intention of the Legislature so to subject him is clearly expressed. There is no such clear intention shown here.

Brebner, for the Crown. Sec. 168, by providing that the execution by the debtor of a deed of assignment shall be deemed for all purposes equivalent to a sequestration order against him, coupled with the definition of "bankrupt" in sec. 4, makes the defendant a "bankrupt" within sec. 210 and a "person against whom a sequestration order is made" within sec. 212. (See also sec. 166 and sec. 218, the latter of which occurs in Part XIV.

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and refers to a "debtor" who has committed an offence.) It has been held that Part XIV. applies, generally speaking, to a debtor who has executed a deed of assignment under Part XI. (*In re Smyth* (1)). The intention and effect of Part XI. are to put a bankrupt and a debtor assigning his estate in the same position and subject to the same control, except in so far as Part XI. otherwise provides. [Counsel also referred to *Ex parte Dempsey*; *In re Dempsey* (2).]

Stevens, in reply.

Cur. adv. vult.

Sept. 18.

The following written judgments were delivered:—

RICH, DIXON, EVATT AND McTIERNAN JJ. The defendant was arraigned before the Supreme Court of South Australia upon an information containing two counts charging offences under the *Bankruptcy Act* 1924-1930.

The first count charged an offence under sec. 210 (1) (d), which provides that any bankrupt who makes any material omission in any statement relating to his affairs shall be guilty of an offence and that he shall be liable to one year's imprisonment.

The second count charged an offence under sec. 212 (1) (b), which provides that any person against whom a sequestration order is made, who has, with intent to defraud his creditors or any of them, made or caused to be made any gift, delivery or transfer of, or any charge on, his property, shall be guilty of an offence, and that he shall be liable to one year's imprisonment.

It was not alleged in either count that the defendant was a bankrupt, or that an order of sequestration had been made against him; but it was alleged that he had executed a deed of assignment pursuant to Part XI. of the *Bankruptcy Act* 1924-1930, and so was deemed to be a bankrupt and a person against whom a sequestration order had been made. Before the defendant pleaded his counsel moved to quash the information upon the ground that it disclosed no offence. The question of the validity of the counts was then

(1) (1931) Unreported. [Court of Bankruptcy, District of South Australia; 9th October.]

(2) (1873) L.R. 8 Ch. 676.

reserved for the consideration of this Court by the presiding Judge, who, we think, had authority to do so under sec. 18 of the *Judiciary Act* 1903-1934, if not under sec. 72.

The provision upon which the Crown relies in support of the information is sec. 168 of the *Bankruptcy Act* 1924-1930. That section is as follows:—"As long as the deed remains in force, its execution by the debtor shall, so far as is consistent with the other provisions of this Part, be deemed for all purposes equivalent to—
(a) an act of bankruptcy committed by the debtor on the date of the meeting of creditors at which the deed was resolved upon;
(b) the filing of a bankruptcy petition against him; and (c) a sequestration order against him." Unless par. (c) operates to make the defendant a "bankrupt" within the meaning of sec. 210, or a "person against whom a sequestration order is made" within the meaning of sec. 212, it is plain that the information discloses no offence. In our opinion the section has not this operation.

Secs. 210 and 212 are quite explicit in limiting the class of persons to whom they apply. The word "bankrupt," which sec. 210 employs, is equivalent to the expression used in sec. 212, "any person against whom a sequestration order is made." Sec. 4 defines the word "bankrupt" to mean "any person in respect of whose estate a sequestration order has been made." Thus liability to the penal sanctions imposed by the sections is expressly made to depend upon the status of bankruptcy. If another provision of the statute is to be interpreted as extending the operation of the sections to persons who do not possess that status, its intention to do so must be clearly expressed. "The law of England does not allow of offences by construction, and no case shall be holden to be reached by penal laws, but such as are within both the spirit and the letter of such laws" (*Blackstone's Commentaries*, vol. 1., *Hargrave's* ed., p. 88, n. 37), a principle which remains part of the law (cf., per *Brett J.*, *Dickenson v. Fletcher* (1)) notwithstanding the modification in the ancient strictness of its application which has occurred in the course of the modern search after the true nature of some actual legislative intention. No doubt, in determining whether an offence has been created or

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(1) (1873) L.R. 9 C.P. 1, at p. 7.

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enlarged, the Court must be guided, as in other questions of interpretation, by the fair meaning of the language of the enactment, but when that language is capable of more than one meaning, or is vague or cloudy so that its denotation is uncertain and no sure conclusion can be reached by a consideration of the provisions and subject matter of the legislation, then it ought not to be construed as extending any penal category.

In the present instance this rule of construction is reinforced by the circumstance that the provision relied upon as extending the ambit of the offence occurs in the very statute which creates the offence and places an express limitation upon its ambit. We do not think sec. 168 operates to give the debtor who executes a deed in pursuance of Part XI. the status of a bankrupt. The very object of the Part, as stated in its heading, is to provide for compositions and assignments without sequestration. When a debtor in compliance with a special resolution under sec. 162 (1) executes a deed which conforms to sec. 163, the liquidation of his affairs goes on according to the rules of bankruptcy, but, unless the Court declares the deed void, he avoids bankruptcy. The construction claimed by the Crown for sec. 168 would reduce this right of the debtor to nothing but a matter of nomenclature. While not a "bankrupt" in name, he would, if that construction were given to the section, be deemed to be a bankrupt for all purposes. His position would differ from that of a bankrupt to the extent only that Part XI. by express provision varied the rights and obligations arising from the bankruptcy. It is not possible to specify all the consequences which flow from sec. 168, but we do not think that this is one of them. The affairs of the debtor are to be administered as in bankruptcy, and, no doubt, the primary purpose of sec. 168 was to substitute, in the application of the provisions of the Act to that administration, the execution of the deed for the act of bankruptcy, the filing of the petition and the sequestration order, events upon which the operation of many of those provisions depends. Thus, under sec. 168 (a), relation back is to the meeting of creditors at which the deed was resolved upon. Whatever may be the full consequences of sec. 168, more than one section of Part XIV., which relates to offences, illustrates the inapplicability of those provisions

of that Part which are confined expressly to bankrupts. For instance, sec. 211 refers to an "undischarged bankrupt"; secs. 209 (f) and 213 expressly distinguish between a person who has been made a bankrupt and one who has made a composition or arrangement with his creditors; secs. 214 and 215 obviously relate to actual bankruptcy; and sec. 217, which relates to the Court's powers of committal and of summary trial for offences, is restricted to the occasion of the bankrupt's applying for an order of discharge. Sec. 218, which was relied upon on behalf of the Crown, is a general precautionary provision relating to all offences under the Act and raises no presumption that the Legislature intended to include within the offences which are limited to bankrupts debtors executing deeds under Part XI.

For these reasons we think that neither count of the information discloses any offence.

In this view it is unnecessary for us to deal with the third question reserved, which relates to the Supreme Court's jurisdiction to try the defendant on the second count.

The first and second questions reserved should be answered: No.

STARKE J. Questions of law reserved for the consideration of this Court.

"Any bankrupt who . . . makes any material omission in any statement relating to his affairs . . . shall be guilty of an offence" (*Bankruptcy Act* 1924-1930, sec. 210 (1) (d)). And "any person against whom a sequestration order is made who . . . has, with intent to defraud his creditors . . . made . . . any . . . transfer of . . . his property" is also guilty of an offence (sec. 212 (1) (b)).

Adams was charged upon information filed in the Supreme Court of South Australia with offences against these sections. The information does not allege any order for sequestration of his estate, or that he is a bankrupt in the technical sense of that word (sec. 4). But it is alleged that he executed a deed of assignment, pursuant to Part XI. of the *Bankruptcy Act* 1924-1930, and it is contended that, by force of the provisions of secs. 166 and 168, he is brought within the prohibition contained in secs. 210 (1) (d) and 212 (1) (b).

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The 166th section provides that all parties to such a deed and all persons bound thereby shall, in all matters relating to the property conveyed and assigned by the deed, be subject to the jurisdiction of the Court, and shall have the benefit of and be 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 trustee in the bankruptcy. This section only operates "in all matters relating to the property conveyed and assigned by the deed" and "subject to the jurisdiction of the" Bankruptcy "Court." But prosecutions for offences against sec. 210 and sec. 212 cannot, in my opinion, be described as matters relating to the property conveyed by the deed subject to the jurisdiction of the Bankruptcy Court. (See secs. 217 et seq.)

The 168th section provides: "As long as the deed remains in force, its execution by the debtor shall, so far as consistent with the other provisions of this Part, be deemed for all purposes equivalent to—(a) an act of bankruptcy committed by the debtor on the date of the meeting of creditors at which the deed was resolved upon; (b) the filing of a bankruptcy petition against him; and (c) a sequestration order against him." It should be observed that Part XI. of the Act, pursuant to which the deed of assignment in the present case was executed, refers to assignments without sequestration; it is a method whereby the property of the debtor is distributed amongst creditors without bankruptcy. Sec. 168 does not prescribe that the deed shall be deemed a sequestration order, for that would be in direct opposition to the scheme of distributing the debtor's property without bankruptcy: it is only equivalent to a sequestration order, and that, in my opinion, for the purpose of administering the trusts and provisions of the deed. The section does not convert the debtor into a bankrupt for the purposes of sec. 210, or make the deed a sequestration order for the purposes of sec. 212.

Questions 1 and 2 of the case should therefore be answered in the negative.

A third question is whether the Supreme Court of South Australia has jurisdiction to try the defendant upon the second count of such

information. The question involves a consideration of the Constitution, sec. 77, and the provisions of the *Bankruptcy Act*, secs. 18 and 20, but it is unnecessary, in the view I have taken of the former questions, to decide this third question.

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Questions 1 and 2 answered : No. Question 3 not answered. No order as to costs.

Solicitor for the Crown, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Fisher, Powers, Jeffries & Brebner*.

Solicitors for the accused, *Browne, Rymill & Stevens*.

C. C. B.

[HIGH COURT OF AUSTRALIA.]

PEARSON APPELLANT ;
DEFENDANT,

AND

THE ARCADIA STORES, GUYRA, LIMITED RESPONDENT.
PLAINTIFF,

[No. 1.]

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Trade and Commerce—Restraint of trade—Sale of business—Covenant by vendor that during a specified period and within a defined area he would not carry on a similar business—Separate agreement between vendor and purchaser—Employment of vendor for specified period at specified salary—Salary not paid in full—Business transferred to another purchaser—Termination of employment—Breach of covenant—Injunction—Defensive equity—Permission—Laches—Acquiescence.

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SYDNEY,
May 29, 30 ;
June 13.
Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

In 1927 the appellant, as vendor, entered into a covenant with a company, the purchaser of his business of produce merchant, that he would not within a period of ten years carry on a similar business within a defined area,