[HIGH COURT OF AUSTRALIA.]

MARKS . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF BANKRUPTCY.

H. C. OF A. 1937.

SYDNEY, *May* 14.

Latham C.J., Dixon, Evatt and McTiernan JJ.

Bankruptcy—Failure to keep proper books of account—Summary proceedings—Commencement—Limitation of period—Bankruptcy brought about or contributed to by gambling—Proof—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 209 (*g*), 214, 217, 219 (2).

A bankrupt was convicted, in summary proceedings instituted in December 1936, on a charge laid under sec. 209 (*g*) of the *Bankruptcy Act* 1924-1933, that during the period between 1st June 1932 and 18th November 1935, the date of his bankruptcy, he omitted to keep such books of account as were usual and proper in his business and as sufficiently disclosed his business transactions and financial position during that period, being a period within five years immediately preceding the date of his bankruptcy.

Held that as the charge related to a period which commenced more than three years prior to the institution of the summary proceedings it was bad under sec. 219 (2) of the Act; therefore the conviction must be quashed.

A charge laid against a bankrupt, under sec. 214 of the *Bankruptcy Act* 1924-1933, of contributing to his bankruptcy by gambling is not established merely by evidence of gambling on the part of the bankrupt preceding the bankruptcy. The charge is not proved unless, upon an examination of the circumstances leading up to the bankruptcy, it is found that the bankrupt's gambling materially contributed to the bankruptcy.

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

The estate of William Henry John Marks who, in partnership with another person as from 1931, and on his own account as from

September 1932, carried on the business of a motor-car dealer at Phillip Street, Sydney, was sequestrated on 18th November 1935 on the petition of a creditor, Ernest Ferdinand Lind, filed on 30th October 1935. In his statement of affairs the bankrupt stated his liabilities to be £9,163, his assets, £1,616 (which included an interest under a will valued by him at £1,000), and his deficiency, £7,547. Upon a compulsory application made by the bankrupt under sec. 119 of the *Bankruptcy Act* 1924-1933 for a certificate of discharge, Judge *Lukin*, on 30th November 1936, after taking into consideration, *inter alia*, reports made pursuant to sec. 15 of the Act, had " reason to believe that the said bankrupt has been guilty of offences against the *Bankruptcy Act* 1924-1933 punishable by imprisonment " and ordered and directed that the bankrupt be charged and tried summarily for offences against secs. 209 (*g*) and 214 (1) of the Act. He, accordingly, was charged before Judge *Lukin* on 16th December 1936, upon charges prepared and served upon him on 10th December, as follows: Under sec. 209 (*g*), " that during the period between the first day of June 1932 and the eighteenth day of November 1935 at Sydney . . . you being a bankrupt did omit to keep such books of account as are usual and proper in the business to wit, that of a motor car dealer, carried on by you and as sufficiently disclose your business transactions and financial position during the said period being a period within the five years immediately preceding the date of your bankruptcy to wit the eighteenth day of November 1935," and, under sec. 214 (1), " that during the period between the thirtieth day of June 1934 and the twenty-eighth day of August 1935, at Sydney . . . you being a bankrupt did contribute to your bankruptcy by gambling." The bankrupt pleaded not guilty to both charges. Notes of evidence, or depositions, taken at his public examination under sec. 68 of the Act were produced on behalf of the prosecution to the bankrupt, who identified his signature thereon, whereupon they were tendered and admitted in evidence and extracts therefrom, which counsel for the prosecutor stated were relevant, were read from time to time during the course of the trial. Two " questionnaires," in which, as required by the official receiver, the bankrupt had, on 20th December 1935, answered approximately one hundred questions relating in much

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detail to his business and private affairs, were admitted in evidence, the judge overruling objections made on behalf of the bankrupt that they were irrelevant and not voluntary statements. A qualified accountant, who occupied the position of realization officer on the staff of the official receiver, stated that there had been received, either directly or indirectly, from the bankrupt, as being the books of account relating to his business, a cash book which covered the period from December 1932 to August 1933, two ledgers which covered the period from May 1932 to September 1933, and bank pass-books, invoices and various documents but no other books of account; that these books did not disclose the financial position of the bankrupt at any period during five years immediately preceding the date of his bankruptcy, and that it would not be possible to prepare therefrom a balance-sheet or any satisfactory trading account or profit and loss account. In the opinion of the witness the books required in the business of a motor-car dealer were a cash book, a ledger containing particulars of car purchases and car sales, a general or private ledger containing particulars summarizing the whole of the business transactions, and a creditors' ledger, but it would be regarded as satisfactory and sufficient if the financial position could be established from such books of account as had been kept.

A chartered accountant employed by the bankrupt after the bankruptcy stated in evidence that cheques drawn by the bankrupt during the months of March, April, May, June and July 1935 for betting purposes amounted to £1,857 10s. During the period July 1934 to July 1935 cheques drawn for purposes not shown amounted to £3,134 ; proceeds of gambling, shown as such, amounted to £386 ; and unallocated cash paid in amounted to £3,489. The bankrupt said that of this unallocated cash the sum of £2,168 10s. represented the proceeds of some twenty successful betting transactions, of which he gave particulars, that between September 1934 and July 1935, he won by gambling the sum of £3,139, and that in addition to other betting successes he won over £1,000 in respect of one named horse. He said that of the " cheques drawn for purposes not shown " amounts totalling £1,952 were paid to various payees in the course of his business and that the balance definitely was not used for purposes of gambling. The bankrupt stated that he had

always been interested in racing and that from 1932 he had attended race-meetings each Saturday afternoon and occasionally on Wednesdays. This practice, he said, had never interfered with his ordinary business, and his racing losses had never delayed payment of his business debts.

Judge *Lukin* found both charges proved and sentenced the bankrupt to four months' imprisonment on each charge, the sentences to be concurrent.

The bankrupt appealed to the High Court against the conviction and sentences.

Badham, for the appellant. The procedure prescribed in sec. 217 (3) of the *Bankruptcy Act* was not followed in the court below. The notes of evidence taken at his public examination under sec. 68 of the Act were not read to the appellant. The judge who, having come to the conclusion that he has reason to believe that a bankrupt has been guilty of an offence against the Act, orders that he be tried summarily should not preside at the trial.

[McTIERNAN J. referred to *Re Godfrey* (1) and *Re Godfrey* [*No.* 2] (2).]

Those cases relate mostly to the form of the charge.

LATHAM C.J. The court, as at present constituted, will not decide upon the validity or otherwise of sec. 217, nor of other sections. As a decision on this point may not be necessary for the determination of this case argument may proceed on the other points raised.

Badham. In view of the fact that the judge in the court below already "had reason to believe that the" appellant had "been guilty of an offence against the Act," he wrongfully exercised his discretion under sec. 25 of the Act in refusing an application made on behalf of the appellant for a jury to try certain facts in the case. Charges laid under the Act must be proved beyond a reasonable doubt. There was no evidence or, in the alternative, no sufficient evidence on which the appellant could be found guilty of either of the charges preferred against him. Specific gambling transactions

(1) (1929) 1 A.B.C. 165. (2) (1930) 2 A.B.C. 156.

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were neither alleged in the charge nor proved before the court (*In re John Brown & Co.* (1)). It does not necessarily follow from the fact that the appellant gambled that he brought about or contributed to his bankruptcy by gambling. On the state of the evidence the many unidentified or unallocated payments to the credit of his account might very well represent the proceeds of gambling. The " questionnaires," which were completed for administrative, and not punitive, purposes twelve months before the charges were laid, were " confessions, admissions or statements " made by the appellant to a " person in authority," namely, the official receiver, but they were not made voluntarily by him, and, therefore, should not have been admitted in evidence (*Attorney-General of New South Wales* v. *Martin* (2)). Particular provision as to the admissibility of statements was not made in the *Bankruptcy Act*; therefore, by virtue of secs. 68 and 79 of the *Judiciary Act*, the matter is governed by the provisions of sec. 410 of the *Crimes Act* 1900 (N.S.W.). The onus is upon the prosecutor to prove that a statement by an accused person was made freely and voluntarily (*R.* v. *Thompson* (3) ; *Crimes Act* 1900 (N.S.W.), sec. 410 (2)). Although under sec. 68 of the *Bankruptcy Act* evidence given by the appellant at his public examination is made admissible at his trial, that admissibility is limited to evidence relevant to the charges laid. A considerable proportion of the evidence so given was wrongly admitted, to the prejudice of the appellant.

[EVATT J. referred to *Stewart* v. *The King* (4).]

The mere failure to keep proper books of account renders a bankrupt liable to double punishment under the *Bankruptcy Act*, that is, under sec. 119 (7) (*b*) and sec. 209 (*g*). The evidence, whether admissible or not, does not sustain the charge of failing to keep proper books of account. The court has power under sec. 36 of the *Judiciary Act* to order a new trial, and under sec. 37 to give such judgment or make such order, e.g., as to trial before a jury, as should have been given or made by the court below, or it may quash the conviction.

(1) (1906) 22 T.L.R. 291, at p. 292.
(2) (1909) 9 C.L.R. 713.
(3) (1893) 2 Q.B. 12, at p. 18.
(4) (1921) 29 C.L.R. 234.

Bradley K.C. (with him *Jamieson*), for the respondent. The nature of charges laid under the *Bankruptcy Act* was dealt with in *Henderson* v. *Main* (1). The charge of failing to keep proper books of account was fully and properly proved. The offence did not necessarily commence on 1st June 1932, the date shown in the charge, but occurred during the period commencing on that date, and was not complete until the appellant became a bankrupt. The evidence proves the commission of the offence within the period of three years limited by sub-sec. 2 of sec. 219; therefore the fact that the charge exceeds that period is immaterial. Evidence given at the public examination of a bankrupt under sec. 68 is admissible as evidence in his trial for any offence under the Act (*In re a Solicitor* (2); *R.* v. *Erdheim* (3)). The evidence given at his public examination was identified, tendered and admitted in evidence at his trial without any objection by or on behalf of the appellant. The subsequent reading of relevant extracts therefrom in the presence of the appellant and his counsel made these extracts, at least, admissible, and was in reasonable conformity with sec. 217 (3). The evidence so given was admissible under sec. 68 (9), which operates independently of sec. 217 (3) and does not require that the evidence should be read to the bankrupt. The "questionnaires" were rightly admitted in evidence. In any event the judge would not allow himself to be influenced by any evidence which was irrelevant and inadmissible (*R.* v. *Midwinter* (4); *R.* v. *Grills* (5); *R.* v. *Mullins* (6)). The provisions of sec. 214 differ from those of sec. 119 (7) (*f*). It is immaterial whether the appellant was successful or otherwise at gambling. The questions are: Did he on account of gambling neglect his business and use moneys of the business for gambling? On the evidence those questions must be answered in the affirmative. The respondent was not bound to give to the appellant specific particulars of the gambling relied upon. *In re John Brown & Co.* (7) refers, not to gambling, but to rash and hazardous speculations in connection with the business. The form of the charge was settled in *Re Godfrey* (8). *Mens rea*

(1) (1918) 25 C.L.R. 358, at p. 365.
(2) (1890) 25 Q.B.D. 17.
(3) (1896) 2 Q.B. 260, at p. 270.
(4) (1905) 5 S.R. (N.S.W.) 558; 22 W.N. (N.S.W.) 202.
(5) (1910) 11 C.L.R. 400, at p. 410.
(6) (1910) 5 Cr. App. R. 13, at p. 16.
(7) (1906) 22 T.L.R. 291.
(8) (1929) 1 A.B.C. 165; (1930) 2 A.B.C. 156.

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is not an element of the charge under sec. 209 (*g*) of failing to keep proper books of account. [He was stopped on this point.]

Sec. 217 nowhere forbids, and apparently contemplates, that the judge by whom a bankrupt is charged with an offence against the Act shall preside at his trial (See *House* v. *The King* (1)).

LATHAM C.J. You need not proceed further on that point. If it should become necessary to argue the validity of sec. 217, the matter might arise in that connection, but apart from that it is not necessary to deal with it.

Bradley K.C. The refusal to allow the matter to be tried before a jury was a proper exercise by the judge of the discretion conferred upon him by sec. 25 of the Act, and is in accordance with the principles set forth in *Maxwell* on *The Interpretation of Statutes*, 6th ed. (1920), p. 228.

Badham, in reply. Summary proceedings in respect of the charge relating to the appellant's alleged failure to keep proper books of account were instituted more than one year from the first discovery thereof, and also more than three years from the commission of the alleged offence; therefore this charge comes within the prohibition in sec. 219 (2) of the Act. It must be shown that the offence charged occurred substantially throughout the period referred to in sec. 209 (*g*).

[*Bradley* K.C. referred to *Ex parte Reed*; *In re Reed* (2), *R.* v. *Darby* (3) and *In re Nancarrow* (4).]

The charge as laid refers to the whole period and, therefore, is bad. [He was stopped.]

The following judgments were delivered :—

LATHAM C.J. This is an appeal from a conviction by the Federal Court of Bankruptcy of a bankrupt, William Henry John Marks, after proceedings by way of application for an order of discharge. The learned judge of the Bankruptcy Court acted under sec. 217 of

(1) (1936) 55 C.L.R. 499; 9 A.B.C. 117.
(2) (1886) 17 Q.B.D. 244.
(3) (1911) 30 N.Z.L.R. 908.
(4) (1916) S.A.L.R. 198.

the *Bankruptcy Act*, and, having reason to believe that the bankrupt had been guilty of offences against the Act which were punishable by imprisonment, made an order that the bankrupt be charged with the offences and be tried summarily. The bankrupt was, in pursuance of that order, charged with two offences—one under sec. 214 of the Act, which provides that if a bankrupt brings about or contributes to his bankruptcy by gambling he shall be guilty of an offence. The bankrupt was charged in these terms, that " during the period between the thirtieth day of June 1934 and the twenty-eighth day of August 1935 at Sydney in the State of New South Wales you being a bankrupt did contribute to your bankruptcy by gambling." The charge was heard by the Federal Court of Bankruptcy and the bankrupt was convicted.

In my opinion, although there is abundant evidence of gambling—and of heavy gambling—there is not evidence that the gambling in this case brought about or contributed to the bankruptcy. There is ample room for suspicion, but the evidence to which we have been referred does not show that any inquiry has been made into the causes of the bankruptcy or the factors contributing to the bankruptcy. The evidence shows a bankruptcy preceded by gambling, but it is quite doubtful upon the evidence, whatever may be suspected, whether there were losses upon the gambling operations or whether there was such neglect of business associated with or due to the gambling as to account for the bankruptcy. Accordingly, in my opinion, there is not evidence which can justify a conviction upon the first charge.

The second charge was made under sec. 209 (*g*) of the *Bankruptcy Act*. The section provides that whoever, " being a bankrupt, has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position during any period within the five years immediately preceding the date of his bankruptcy, shall be guilty of an offence." The bankrupt was charged in these terms :— That during the period between the first day of June 1932 and the eighteenth day of November 1935 at Sydney in the State of New South Wales you being a bankrupt did omit to keep such books of account as are usual and proper in the business to wit that of motor-car

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dealer carried on by you and as sufficiently disclose your business transactions and financial position during the said period being a period within the five years immediately preceding the date of your bankruptcy to wit the eighteenth day of November 1935.

The period referred to in the charge is a period within the five years immediately preceding the date of the bankruptcy. The charge is a charge that during this period, necessarily defined by reference to two points of time, the bankrupt omitted to keep the required books. It is therefore an offence which is being committed either during the whole of the period or on some days during the period. The offence which is charged is an offence which is alleged to begin or to have been committed during the period beginning on 1st June 1932, that is to say, more than three years before the bankruptcy.

Sec. 219 (2) provides that summary proceedings in respect of an offence against the Act shall not be instituted after three years from the commission of the offence. In this case the proceedings were instituted on 10th December 1936. Therefore, as the charge relates to a period beginning on 1st June 1932, the charge is a charge of an omission, alleged to be an offence, which occurred at an earlier date than three years before the institution of the proceedings.

For that reason, this charge, in my opinion, was not properly made. There is, in my opinion, abundant evidence of failure to keep the books required by the section, but it is not possible under the provision of sec. 219 to proceed summarily in respect of an offence which runs back to the date which is mentioned as the beginning of the period in the formal charge.

A question was raised as to the validity of sec. 217. On the view which I take of the facts and the relevant evidence it is not necessary to consider that question.

In my opinion the convictions should be set aside.

DIXON J. I agree. A charge laid under sec. 214 of the *Bankruptcy Act* must be strictly proved and by admissible evidence. The proof which may reasonably be expected of a charge under that section of bringing about or contributing to the bankruptcy by gambling includes the circumstances leading up to the bankruptcy.

It will not ordinarily be enough to prove gambling or even losses by gambling. For, without some knowledge of the circumstances leading up to the bankruptcy, its various causes cannot be seen. Generally speaking, without knowing what other causes or possible causes there are or may be, it is not possible to be sure that gambling materially contributed to the actual bankruptcy which has occurred. Such proof appears to be lacking in this case, and for that reason, in my opinion, the charge under sec. 214 fails.

Sec. 219 (2) imposes a restriction upon the power of the Court of Bankruptcy to try bankrupts in a summary manner. The restriction requires that the offence shall have been committed within three years from the date of the charge. In the case of a continuing offence, such as that which has been charged under sec. 209 (*g*), I think that the limitation prevents the offence extending backwards outside the three years. Only so much of the period over which the offence continued as falls within the three years may be made the subject of a charge dealt with summarily.

The conviction in this case is for an offence which extends outside the period of limitation by one year, six months and twenty days. The conviction, therefore, appears to me to be bad on its face and should be quashed.

EVATT J. I agree. There are two additional points to which I wish to refer. In the first place, the procedure set out in sec. 217 (3) of the Act in reference to the proceedings on a summary trial before the Court of Bankruptcy was not followed. In the second place, the " depositions " were admitted in evidence although a very great portion of them was quite irrelevant to the issues in the case. It is of course evident that charges prosecuted under sec. 217 (1) (*a*) before the Court of Bankruptcy itself should be dealt with with the same degree of strictness as would be required if the prosecution were being conducted before a judge and jury.

The decision of the court makes it unnecessary to examine the question whether sec. 217 (1) (*a*) of the Act is valid. By that sub-section, the Commonwealth Parliament has purported to make the Court of Bankruptcy both prosecutor and judge in respect of an offence against the Act. Although the doctrine of separation of

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powers is only in force to a certain extent under the Commonwealth Constitution (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1)), there are several statements of principle in the cases which might suggest that the valid exercise of the judicial power has been subjected by the Constitution to certain fundamental safeguards. The question need not be further discussed now.

McTIERNAN J. In my opinion the conviction on each charge should be set aside. I agree with the reasons which have been given and there does not appear to me to be anything that can be usefully added.

Appeal allowed. Convictions quashed.

Solicitors for the appellant, *Creagh & Creagh.*

Solicitor for the respondent, *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

J. B.

(1) (1931) 46 C.L.R. 73, at p. 118.