[HIGH COURT OF AUSTRALIA.]

HERBERT . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

H. C. OF A. 1941.

SYDNEY, *April* 8, 21.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Bankruptcy—Offence—"Credit" obtained by fraud—Loans of money—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *sec.* 212 (1) (*a*).

Sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933, which provides that any person against whom a sequestration order is made who in incurring any debt or liability has obtained "credit" by means of fraud shall be guilty of an offence, is not restricted to debts or liabilities incurred for goods sold or services rendered, but is general in its operation and applies where a loan of money is obtained by fraud.

Decision of the Federal Court of Bankruptcy affirmed.

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

Joseph Lionel Herbert was tried summarily on four charges, laid under sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933, that on or about 27th July 1939, 3rd August 1939, 1st September 1939, and 8th September 1939 respectively at Sydney he, being a person against whom, on 12th December 1939, a sequestration order was made under the Act, did, in incurring a liability to one Blanche Taylor, obtain credit from her to the extent of the sum mentioned in each charge by means of fraud.

Herbert borrowed the money the subject of the charges by making representations which Judge *Lukin* found to be false. For the loans so obtained Herbert gave Mrs. Taylor promissory notes, payable on specified future dates, which upon maturity were presented and dishonoured.

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A submission made on behalf of Herbert at the conclusion of the case for the Crown that sec. 212 (1) (*a*) only applies to a debt or liability incurred after the date of the sequestration order was overruled by the trial judge. After hearing evidence by and on behalf of Herbert, the trial judge accepted the evidence of Mrs. Taylor in regard to the facts constituting the offences, but not that of Herbert. Herbert was accordingly found guilty of each of the four charges and was sentenced to imprisonment for four months in respect of each offence, such sentences to be concurrent. The trial judge recommended that the sentences so imposed should be served on a State prison farm if available.

From those convictions and sentences Herbert appealed to the High Court.

Further facts appear in the judgments hereunder.

Barwick (with him *Falstein*), for the appellant. The offence, if any, here proved was that of obtaining money by fraud within the meaning of sec. 210 (3) (*d*). To obtain money on loan is not to obtain credit within the meaning of sec. 212 (1) (*a*). What has to be obtained under the section is credit. Credit is only obtained where the other party has the choice either of demanding instant payment or of allowing time. There is no such choice in the lending of money. The matter is well illustrated in *R.* v. *Pierce* (1), where, because of an existing liability, the creditor was entitled to insist on prompt payment, but because of the fraud chose to extend credit by not insisting on prompt payment. Until credit in this sense is obtained by the fraud, sec. 212 (1) (*a*) does not apply (*R.* v. *Cosnett* (2)). The essence of the offence is the fraudulent persuasion to adopt one of two possible alternatives. The distinction between obtaining goods by fraud and obtaining credit by fraud is substantial —*R.* v. *Peters* (3) and *R.* v. *Juby* (4) are not authorities to the contrary. In *Re Gilroy* ; *Ex parte Gilroy* (5), *R.* v. *Carpenter* (6) and *R.* v. *Parker and Bulteel* (7) it was assumed, without actual decision, that to obtain a loan is to obtain credit, but the point was not raised. The obtaining of credit was also discussed in *R.* v. *Jones* (8). In the present case a negotiable instrument was given in exchange for the loan. A negotiable instrument is in the nature of cash, and may be negotiated immediately. In this matter, therefore, the appellant did not obtain credit from Mrs. Taylor, as he placed her in a position

(1) (1887) 3 T.L.R. 586 ; 56 L.T. 532.
(2) (1901) 17 T.L.R. 524 ; 84 L.T. 800.
(3) (1886) 16 Q.B.D. 636, at p. 641.
(4) (1886) 3 T.L.R. 211 ; 55 L.T. 788.
(5) (1892) 3 B.C. (N.S.W.) 45.
(6) (1911) 22 Cox C.C. 618, at p. 622.
(7) (1916) 25 Cox C.C. 145, at pp. 148, 154.
(8) (1898) 1 Q.B. 119, at pp. 124, 125.

to obtain by negotiation of the bill an immediate return of her money. On an analysis what was obtained by the representation in this matter was money and not credit. In sentencing the appellant the trial judge erred in taking into consideration extraneous matters. In the circumstances the sentences were excessive.

McIntosh, for the respondent. Credit is obtained even though a security be given (*R.* v. *Fryer* (1)). To obtain a loan is to obtain credit: See *Archbold's Criminal Practice*, 26th ed. (1922), p. 1269, and the cases there cited. The moment money is borrowed which is repayable not *instanter* but at some future date credit is given to the borrower for the repayment of the money over that period. Debt and credit are related (*Re Pierce* (2); *R.* v. *Peters* (3)). The basic idea of credit is exactly opposite to cash payment. A loan of money is based on the repayment of it. Where, therefore, there is a term of repayment, that must be based on the trust imposed upon the borrower, in other words, upon his credit to repay. The respondent relies upon *Re Gilroy*; *Ex parte Gilroy* (4), *R.* v. *Carpenter* (5), *R.* v. *Parker and Bulteel* (6) and *R.* v. *Jones* (7). The correctness or otherwise of the sentences is a matter which is left to the discretion of the court.

Cur. adv. vult.

April 21.

The following written judgments were delivered :—

RICH A.C.J. This is an appeal from the conviction and sentence upon the summary trial of the appellant under sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933.

The appellant, against whom a sequestration order had been made on 12th December 1939, was charged that he did on dates prior to the date of this order in incurring a liability to one Blanche Taylor obtain credit from her to the extent of varying amounts. The appellant borrowed the money the subject of the charges by making representations which the trial judge found to be false. For the loans obtained the appellant gave Mrs. Taylor promissory notes, which were presented and dishonoured. There were five charges, but at the trial the Crown did not press the first charge. The remaining four charges were heard together. At the conclusion of the case for the Crown appellant's counsel submitted that the facts proved did not bring his client within the terms of sec. 212 (1) (*a*), because the section only applies to a debt

(1) (1912) 7 Cr. App. R. 183, at p. 185.
(2) (1887) 3 T.L.R. 586.
(3) (1886) 16 Q.B.D., at p. 641.
(4) (1892) 3 B.C. (N.S.W.) 45.
(5) (1911) 22 Cox C.C. 618.
(6) (1916) 25 Cox C.C. 145.
(7) (1898) 1 Q.B. 119.

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or liability incurred after the date of the sequestration order. His Honour overruled this objection, and, after hearing appellant's evidence, accepted the evidence of Mrs. Taylor in regard to the facts constituting the offences, but not that of the bankrupt, and accordingly found him guilty on the second, third, fourth and fifth charges. On the appeal before this court counsel for the appellant did not argue the objection overruled by the learned primary judge, or that the sums obtained by the appellant were not obtained by means of fraud, but he contended that sec. 212 (1) (*a*) only relates to transactions in which goods or services are obtained on credit. The question which falls for determination is whether the section is general in its application or merely restricted to particular types, e.g., obtaining goods. The opening phrase in the section is perfectly general. It says "any debt or liability." And there appears to me to be no reason for assuming that the generality of this phrase was intended to be limited by any restricted meaning of the word "credit." In other words, in incurring any debt or liability a party may succeed in doing so by means of fraud.

This general operation of the section is supported by the opinion of *Manning* J. in *Re Gilroy* (1), where similar words in sec. 123 (*a*) of the New-South-Wales *Bankruptcy Act* 1887 (51 Vict. No. 19) were under consideration. In that case, on an application for a certificate of discharge it appeared that the bankrupt before the passing of the Act had obtained a loan on the security of certain mortgages and a promissory note bearing an approved indorsement which was subsequently found to have been forged. His Honour, after holding that it was not material whether the offence in question was committed before or after the Act came into operation, said :—"A further question is whether the bankrupt has obtained credit by fraud in incurring a debt or liability. I think he has so obtained credit. A man must be said to have so obtained credit if he has obtained money or goods by a false representation. If he creates the relation of debtor or creditor, he obtains credit" (1). Similarly, in a case under the English *Debtors Act* 1869, sec. 13 (1), from which the Federal and New-South-Wales sections are derived, in the course of a summing up to a jury *Channell* J., dealing with a number of charges of obtaining money on loan by deposit, said : "You know he" (the defendant) "got the money on loan : now that being so, of course he got credit, but it does not prevent the charge being established of obtaining money by false pretences . . . the defendant obtained both money and credit" (*R.* v. *Carpenter* (2))—See also *R.* v. *Parker*

(1) (1892) 3 B.C. (N.S.W.) 45.
(2) (1911) 22 Cox C.C., at pp. 622, 623.

and Bulteel (1); *R.* v. *Peters* (2); *R.* v. *Jones* (3). In the *Oxford Dictionary* one of the meanings of "credit" is "trust in a person's ability and intention to pay, as give credit, deal on credit, long credit," and a quotation is given from *Jevon's Primer of Political Economy*, p. 110, "Anyone who lends a thing gives credit, and he who borrows it receives credit." In *Johnson's Dictionary* "credit" is defined as being "correlative to debt." And it is immaterial that security is given. "There is a personal trust" (reposed) "none the less, though it is not to the extreme extent" (*Re Fryer* (4)). Now, a man who takes a bill from the drawer is surely a person giving credit to him (*Ex parte Douthat* (5), per *Bayley* J.).

The remaining ground of appeal, that in imposing sentence the trial judge took into consideration matters extraneous to the charges before the court, cannot in my opinion be sustained, and the appeal should be dismissed.

STARKE J. The appellant was summarily convicted under the provisions of the *Bankruptcy Act* 1924-1933 of four several offences under the provisions of sec. 212 (1) (*a*) of the Act. The section provides that any person against whom a sequestration order is made who in incurring any debt or liability has obtained credit by means of fraud shall be guilty of an offence.

The appellant borrowed four several sums of money from Mrs. Blanche Taylor by means of fraud or by statements known by him to be false. He gave a promissory note for two of the amounts borrowed, payable three months after date, and for the other amounts he gave a post-dated cheque, for which a promissory note seems to have been substituted payable one month after date. All these negotiable instruments were dishonoured.

A sale of goods or other things upon the promise of deferred or future payment is a sale upon credit. The purchaser is trusted with the goods or things without present payment and obtains or is given credit for the debt or liability which he incurs in the acquisition of those goods or things. But it was argued that a person incurring a debt or liability for money lent repayable at a future time does not obtain any credit, but money. It was conceded that, if false pretences were used for the purpose of obtaining the loan, then the offence of obtaining money by false pretences would have been committed, but not the offence of obtaining credit by means of fraud: See *R.* v. *Green* (6).

(1) (1916) 25 Cox C.C., at p. 154.
(2) (1886) 16 Q.B.D., at p. 641.
(3) (1898) 1 Q.B., at pp. 124, 125.
(4) (1912) 7 Cr. App. R., at p. 185.
(5) (1820) 4 B. & Ald. 67, at p. 71 [106 E.R. 863, at p. 864].
(6) (1913) 9 Cr. App. R. 127.

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In my opinion, the argument ought not to succeed. The appellant admittedly incurred debts or liabilities to Mrs. Taylor for money lent to him. Mrs. Taylor gave him time to repay to her the amount of those debts or liabilities. She thus gave, and the appellant obtained, credit for the amounts of these debts or liabilities incurred by him for money lent. Credit was not the less obtained because negotiable instruments were given by the appellant to Mrs. Taylor for the amount of the debt or liability (*R.* v. *Fryer* (1)). And he incurred these debts or liabilities by means of fraud. All the elements constituting the offence under sec. 212 (1) (*a*) are thus present. It may be that the facts constitute the offence of obtaining money by false pretences as well as another offence, namely, that in incurring debts or liabilities the appellant obtained credit by means of fraud. There is authority in support of the foregoing conclusion : *Re Gilroy* (2) ; *Re Salomons* (3), noted in *Archbold's Criminal Practice*, 30th ed. (1938), p. 1296 ; *R.* v. *Carpenter* (4).

The appeal should be dismissed.

McTIERNAN J. The appellant was upon a summary trial by the Court of Bankruptcy found guilty of four offences against sec. 212 (1) (*a*) of the *Bankruptcy Act* and was sentenced to imprisonment for four months for each offence, the sentences being ordered to be concurrent. The maximum penalty provided by the section is one year's imprisonment.

The grounds relied upon in this appeal are, first, that the facts proved do not come within sec. 212 (1) (*a*), and, secondly, that the sentences were excessive.

It was proved by the evidence of a Mrs. Taylor that in July 1939 the appellant told her that he had put all his capital into a company in which they were interested and asked her to lend him £25. He made a representation that he had a property which he was trying to sell to enable him to get some ready money. The representation was false. The appellant, she said, promised he would repay the money. He gave the witness a promissory note for £25 dated 27th July, due 28th October, and signed by himself. The witness gave him her cheque for £25, which he cashed. She said that when the money was lent she relied upon the representations he made to her.

The first point taken for the appellant is that the sub-section is limited to debts or liabilities incurred for goods sold or services rendered. The second point is that where the seller of goods, or the party

(1) (1912) 7 Cr. App. R., at p. 185.
(2) (1892) 3 B.C. (N.S.W.) 45.
(3) (1890) 1 B.C. (N.S.W.) 11.
(4) (1911) 22 Cox C.C. 618.

performing services, or, assuming the sub-section applies to a loan, the lender, enters into a binding stipulation with the other party, postponing payment to a future date, that party does not obtain credit. This view of what is meant by obtaining credit would limit the operation of the sub-section to the case where the creditor, having the option to stipulate for immediate payment or for payment at a future date, gives the debtor the benefit of the second alternative. It is for this reason that the contention is made that the sub-section does not apply to a loan for a fixed period. Necessarily, in that case the alternatives are not before the lender. The only method of carrying out the transaction is to advance the money and stipulate for payment at a future date.

The sub-section is not by express words limited to goods and services. Is the implication necessarily implied? The implication, it may be observed, would exclude land and possibly other property from the operation of the sub-section as well as loans of money. There is nothing in the Act to lead one to suppose that its framers did not intend the sub-section to apply to any debt or liability, whether in respect of goods, services, money lent, or property of any kind. There can be no doubt that a loan is within the mischief aimed at by the sub-section. If in incurring such a liability credit is obtained by fraud, the transaction is, in my opinion, within the words of the sub-section. The Act is not limited to traders, and there is no reason to suppose that the sub-section was enacted to deter nothing but frauds in trade strictly so called and in the hiring of services. The points taken on behalf of the appellant are conclusively answered by at least four decisions. They are *R.* v. *Peters* (1); *R.* v. *Jones* (2); *R.* v. *Fryer* (3); *Re Gilroy* (4).

In commercial and financial affairs the word "credit" may signify the financial arrangement in a transaction or the reputation for solvency and honesty which entitles a person desirous of incurring a debt or liability to do so on the terms that payment is to be deferred. In its former meaning it includes the delivery of goods or the advancing of money with the trust that the debtor will have the means to pay and will pay at a future date. The element of trust or confidence in the creditor is not eliminated by taking a promissory note for the debt. It is rather manifested by doing so. Lord *Coleridge* C.J. in *R.* v. *Peters* (5) quoted *Johnson's* definition of credit. He said it was "the correlative to debt." That authority would not, I think, have agreed that in incurring the liability

(1) (1886) 16 Q.B.D. 636.
(2) (1898) 1 Q.B. 119.
(3) (1912) 7 Cr. App. R. 183.
(4) (1892) 3 B.C. (N.S.W.) 45.
(5) (1886) 16 Q.B.D., at p. 641.

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expressed in a promissory note the maker does not obtain credit. In his letter to Boswell, 28th March 1762, on the evil of poverty he wrote: "To come hither with such expectations at the expense of borrowed money which I find you know not where to borrow, can hardly be considered as prudent. I am sorry to find, what your solicitation seems to imply that you have already gone to the whole length of your credit. This is to set the quiet of your whole life at hazard."

The learned trial judge considered the appellant deserving of four-months' imprisonment because he used fraudulent solicitations to influence Mrs. Taylor to give him credit. It is submitted that the sentence was excessive. The fraud was systematic and it involved loss to Mrs. Taylor. There is nothing to suggest that the learned judge did not most properly exercise his discretion in imposing this sentence.

In my opinion the appeal should be dismissed.

WILLIAMS J. The facts have been referred to in the judgments of the Acting Chief Justice and of my brother *Starke*, with which I agree, and I have little to add.

The short point involved in the appeal is whether sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933 applies to a case where a person, who subsequently becomes bankrupt, has obtained a loan of money, payable *in futuro*, by fraud.

Mr. *Barwick* for the appellant has submitted that the sub-section only applies where the person who gives the credit can have a choice whether to do so or not, as, for instance, whether to supply goods or give services on credit as opposed to a cash payment. He said such a choice cannot arise in the case of a loan because such a transaction necessarily involves the giving of time to pay.

As I stated during the argument, it appears to me that the real question for the prospective creditor to decide is whether or not he can trust the intending debtor to satisfy the debt or liability on its due date. Such a debt or liability could be incurred just as easily as a result of a loan as it could be in respect of goods sold and delivered or services rendered. Indeed, the contract of service resembles a loan in this respect, because it usually involves the giving of some credit, as services are almost universally rendered before they are paid for, whereas in the case of a sale of goods the delivery and payment are often simultaneous.

The sub-section applies to any debt or liability, and I can see no warrant for confining its meaning in the manner Mr. *Barwick* has suggested. His argument is opposed to the authorities referred to

in the judgments already mentioned and to *R.* v. *Brownlow* (1): See also *Re Corby* (2).

Sec. 210 (3) (*d*) makes it an offence to obtain money by fraud, and this sub-section does to some extent overlap with the sub-section under review, but it also covers a far wider field. A similar position arises in the case of sec. 210 (3) (*a*). This consideration does not appear to me to throw any light on the true construction of sec. 212 (1) (*a*).

The Act contains other sub-sections relating to the obtaining of credit: See sec. 119 (7) (*c*), sec. 210 (3) (*b*) and (*c*), and sec. 211 (*a*). It appears from sub-secs. 210 (3) (*a*), (*b*) and (*c*) that when the Parliament intended to confine the offence to the obtaining of any property on credit it was careful to limit the liability of the bankrupt by express words. The interpretation section, namely, sec. 4, provides that, unless the contrary intention appears, property includes money, but there is a sufficient indication of such an intention in the case of sub-secs. 210 (3) (*a*), (*b*) and (*c*).

The conclusion I have come to is that sec. 212 (1) (*a*) does apply to obtaining a loan by fraud.

Mr. *Barwick* also contended that the sentence imposed upon the appellant should be reviewed because the learned Judge in Bankruptcy had taken certain extraneous matters into consideration, but, even if this is so, I do not think the sentence which he imposed was, under the circumstances, too severe.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Abram Landa, Barton & Co.*

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

J. B.

(1) (1910) 4 Cr. App. R. 131.
(2) (1908) 8 S.R. (N.S.W.) 252, at p. 257.