[HIGH COURT OF AUSTRALIA.]

ABRAHAMS . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

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SYDNEY, *Aug.* 5, 6; *Sept.* 8.

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

Bankruptcy—Offence—Liability incurred—Credit—Goods supplied to third person—Payment therefor guaranteed by bankrupt—Fraud—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, refers to credit obtained by or given to the bankrupt himself. A bankrupt who, by giving a guarantee, has procured credit to be given to another person, has not "obtained credit" within the meaning of the sub-section.

Decision of the Federal Court of Bankruptcy reversed.

APPEAL from the Federal Court of Bankruptcy (District of New South Wales) and the Australian Capital Territory.

Benjamin Lewis Abrahams was tried summarily on a charge laid under sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933, that on or about 2nd April 1940 at Sydney he, being a person against whom, on 23rd July 1940, a sequestration order was made under the Act, did in incurring a liability to William Becker Pty. Ltd. obtain credit from the said William Becker Pty. Ltd. to the extent of £49 7s. 2d. by means of fraud.

At the trial before Judge *Lukin* the managing director of William Becker Pty. Ltd. said that on 1st April 1940 one Mrs. Speelman, whom he then met for the first time, attended at the company's warehouse and, at her request, was shown certain goods, which later were sold to her. While discussing the matter of payment for the

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goods so bought by her she referred to Abrahams, and an appointment was made for him to meet the managing director at the warehouse on the following day. Upon keeping the appointment Abrahams was informed by the managing director that Mrs. Speelman had visited the warehouse on the previous day and had chosen certain goods to the value of £50, and that she had given to the managing director Abrahams' " telephone number as he would act as a guarantor being her future husband." Asked by the managing director what his guarantee was worth Abrahams replied that " it was only that week he had taken sole control of the *Merchandise Retailer*, and had invested £2,000, for which he paid cash." Abrahams gave to the managing director a letter, signed by himself and addressed to the company, as follows :—" In consideration of your company extending credit to Mdme. Speelman I hereby personally guarantee payment of account, subject to your allowing the usual trading terms. This guarantee to be a continued one, and my signature in completion is attached herewith to the amount of £50."

The managing director said that relying upon this guarantee he, on behalf of the company, later during that day allowed a chauffeur, who, apparently, had been engaged by Abrahams, to take delivery of the goods for and on behalf of Mrs. Speelman. The invoice and account, which was for the sum of £49 7s. 2d., were sent to Mrs. Speelman, but, although she was reminded thereof on two subsequent occasions, the account remained unpaid. The company thereupon made a written demand upon Abrahams " to pay this account immediately under the guarantee supplied by you." Upon his failure to pay the account the company recovered judgment against Abrahams and a sequestration order was made against him. The company proved in the bankruptcy.

The statement made to the managing director by Abrahams that he had taken sole control of the *Merchandise Retailer* and had invested £2,000 for which he paid cash was false to his knowledge.

Abrahams was found guilty on the charge and was sentenced to imprisonment with hard labour for four months, with a recommendation that the sentence should be served on a State prison farm if the State authorities approved thereof.

From that conviction and sentence Abrahams appealed to the High Court.

Further facts appear in the judgments hereunder.

Moverley, for the appellant. The appellant was not a person proved to have incurred a debt or liability and obtained credit by

means of fraud within the meaning of sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933. That statutory provision is a strict bankruptcy provision relating to the control of the conduct of a bankrupt who has been engaged in trading. There is not any evidence of fraud on the part of the appellant. A person who is merely a guarantor is not one who obtains credit within the meaning of sec. 212 (1) (*a*). This case is not covered by the decision in *Herbert* v. *The King* (1). Sec. 212 (1) (*a*) applies to bankrupts who have traded dishonestly, but does not apply to the collateral contract of guarantorship or suretyship. Even if credit were obtained by the appellant, it was not obtained for himself (*Re Brittain* (2)). The provisions of secs. 210 (3), 211 (*a*), and 212 (1) show that the intention of the legislature was to check dishonest traders. The meaning of "credit" is correctly stated in *McDonald, Henry and Meek's Australian Bankruptcy Law and Practice*, 2nd ed. (1940), p. 579. A person does not obtain credit unless he obtains possession of goods (*R.* v. *Juby* (3) ; *R.* v. *Peters* (4) ; *R.* v. *Jones* (5))—See also *R.* v. *Bryant* (6). Credit can be obtained only if the relationship of debtor and creditor exists or is created (*Re Gilroy* ; *Ex parte Gilroy* (7)). The difference between a debtor and a guarantor is stated in *Halsbury's Laws of England*, 2nd ed., vol. 16, p. 6. Upon the evidence it was not possible for a finding properly to be made that the appellant was in any way associated with the transaction other than as guarantor (*Storr* v. *Scott* (8)). Credit was not given to the appellant as guarantor and to the debtor as in *Anderson* v. *Hayman* (9). The evidence does not justify a conviction. From the nature of the offence it should be shown and proved that the person who obtained credit had no means to meet payment of the debt ; therefore it ought to be shown that the subject guarantee was not a valuable guarantee. In the circumstances of this case the sentence is harsh and excessive.

S. G. O. Martin, for the respondent. The evidence shows a joint enterprise in this transaction on the part of the appellant and the person who ordered and obtained the goods, and both were liable as principals on the transaction : thus it follows that both obtained credit. This case is distinguishable from *R.* v. *Bryant* (6). Sec. 212 (1) (*a*) does not require that the person charged shall have obtained credit for himself. For the purposes of that provision it is immaterial for whom the credit is obtained. The section is not

(1) *Ante*, p. 461.
(2) (1931) 4 A.B.C. 47.
(3) (1886) 3 T.L.R. 211.
(4) (1886) 16 Q.B.D. 636, at pp. 640, 641.
(5) (1898) 1 Q.B. 119, at pp. 124, 125.
(6) (1899) 63 J.P. 376.
(7) (1892) 3 B.C. (N.S.W.) 45.
(8) (1833) 6 Car. & P. 241 [172 E.R. 1224].
(9) (1789) 1 H.Bl. 120 [126 E.R. 73].

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limited to actual debts, it extends to debts *in futuro*. *Re Brittain* (1) is distinguishable on the facts. The contingent liability arose as soon as the promise of the guarantee was given. The credit was obtained jointly because had it not been for the appellant's credit or promise the goods would not have been supplied to the other person (*R.* v. *McLean* (2); *Anderson* v. *Hayman* (3)); therefore the appellant is liable under sec. 212 (1) (*a*) (*Re Brittain* (4)). Credit is synonymous with a promise. Upon the giving of the guarantee the relationship of debtor and creditor was created between the person supplied and the supplier and between the supplier and the appellant; therefore the appellant obtained credit (*Re Gilroy*; *Ex parte Gilroy* (5)). The word "credit" in sec. 212 (1) (*a*) must be given a wide meaning (*Herbert* v. *The King* (6); *R.* v. *Peters* (7); *R.* v. *Jones* (8)). Sec. 212 (1) (*a*) is not restricted to traders, it is of general application.

Moverley, in reply.

Cur. adv. vult.

Sept. 8. The following written judgments were delivered :—

RICH A.C.J. The question for determination in this appeal is whether the bankrupt committed an offence under sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933. The elements which have to be considered in construing this section are (1) the incurring of a debt or liability, (2) the obtaining of credit, and (3) the presence of fraud. The argument on the appeal was devoted to the question whether in the circumstances the bankrupt himself obtained credit. The elements (1) and (3), which, combined with the giving of credit, make the offence, were proved.

It appears that, in order that Mrs. Speelman should obtain the delivery of certain goods without cash payment, the bankrupt promised to give to the vendor company a guarantee for the debt thus incurred. The company gave Mrs. Speelman credit on the bankrupt's promise. As the matter then stood no credit had been given to him in respect of the goods, and he had not indemnified the company. The guarantee is in these terms :—"Messrs. Wm. Becker Pty. Ltd., 57 York Street, Sydney. Dear Sirs,—In consideration of your company extending credit to Mdme. Speelman I hereby personally guarantee payment of account, subject to your

(1) (1931) 4 A.B.C. 47.
(2) (1928) N.Z.L.R. 454.
(3) (1789) 1 H.Bl. 120 [126 E.R. 73].
(4) (1931) 4 A.B.C., at p. 48.
(5) (1892) 3 B.C. (N.S.W.) 45.
(6) *Ante*, p. 461.
(7) (1886) 16 Q.B.D. 636.
(8) (1898) 1 Q.B. 119.

allowing the usual trading terms. This guarantee is to be a continued one, and my signature in completion is attached herewith to the amount of £50 (Fifty pounds). Yours faithfully, Benj. Abrahams."

Mrs. Speelman took delivery of the goods but failed to pay the account for them. Thereupon the company demanded payment from the bankrupt of the account under the guarantee given by him. He in turn failed to pay, and was sued by the company and judgment was recovered against him. These facts show that the relationship of debtor and creditor was originally established between Mrs. Speelman and the company, and that the bankrupt was only collaterally or contingently liable. The principal debtor obtained the credit by procuring the surety. The bankrupt's undertaking was conditional and secondary, and was not the original contract upon the credit of which the debt first accrued. The trust reposed in the bankrupt, if such there be, was as to his ability to meet a future contingent liability, and not with respect to the sale of the goods, which was the immediate concern of Mrs. Speelman. There was no sufficient evidence to prove that the transaction was a joint adventure on their part. Moreover, as we were reminded during the argument, in construing a penal clause "we ought to apply to it that strict or cautionary interpretation which the courts are in the habit of giving to such clauses" (*Tuck & Sons* v. *Priester* (1)), and unless penalties are imposed in clear terms they are not enforceable (*Attorney-General* v. *Till* (2)). I am of opinion that one of the ingredients, viz., credit, which completes the make-up of the offence is missing, and that the bankrupt has not committed the offence charged.

The appeal should be allowed, the order of the Court of Bankruptcy discharged and the conviction quashed.

STARKE J. The appellant was charged with an offence under sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933, which provides:—"Any person against whom a sequestration order is made who in incurring any . . . liability, has obtained credit by means of fraud . . . shall be guilty of an offence." He was tried summarily before the Federal Court of Bankruptcy and convicted.

The facts were that one Madame Speelman attended the warehouse of Becker Pty. Ltd. and chose goods to the value of £50. She referred the company to the appellant as a guarantor. The managing director of the company communicated with the appellant and informed him of the facts and that Madame Speelman had referred

(1) (1887) 19 Q.B.D. 629, at p. 645. (2) (1910) A.C. 50, at p. 51.

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the company to him as a guarantor, who, she had stated, would be her future husband. The managing director asked the appellant what his guarantee was worth, and he replied that he had taken sole control of a publication known as the *Merchandise Retailer*, and had invested £2,000 in it, for which he paid cash. The appellant gave his guarantee in writing as follows :—" In consideration of your company extending credit to Mdme. Speelman I hereby personally guarantee payment of account, subject to your allowing the usual trading terms. This guarantee is to be a continued one, and my signature in completion is attached herewith to the amount of £50." The company, relying upon the guarantee, supplied the goods chosen by Madame Speelman to the value of £50 upon credit.

The statements above set forth, which were made by the appellant, were false to his knowledge. The company has not been paid for the goods. And about three months after delivery of the goods to Madame Speelman the estate of the appellant was sequestrated.

The appellant only intervened to procure credit for Madame Speelman. It was she who became liable for the goods and to whom credit was given. The promise of the appellant was to answer for the debt, default or miscarriage of another, to use the words of the Statute of Frauds. But he obtained no credit for himself, despite some loose expressions in some old reports. The provisions of sec. 212 (1) (*a*) refer, in their ordinary usual and business signification, to credit obtained by or given to the bankrupt himself and not to credit obtained by the bankrupt for or given to another person upon his guarantee or otherwise.

The appeal should be allowed.

McTIERNAN J. The questions raised are whether the appellant was rightly convicted upon a charge laid under sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933, and, if he were, whether the sentence of four months imprisonment passed on him was excessive.

Sec. 212 (1) (*a*) provides : " 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 maximum penalty provided by the section for this offence is twelve months imprisonment.

The charge was that on or about 2nd April 1940 he, being a person against whom on 23rd July 1940 a sequestration order was made, did in incurring a liability to Wm. Becker Pty. Ltd. obtain credit from that company to the extent of £49 7s. 2d. by means of fraud. The allegation that a sequestration order was made against the appellant is true and is not denied. For proof of the other ingredients

in the charge, the Crown relies upon the following facts:—On 2nd April the managing director of the company told the appellant that a Mrs. Speelman had chosen goods to the value of £50, and that she said that the appellant "would act as a guarantor being her future husband." The appellant in replying to a question as to what his guarantee was worth made a false statement about his financial means. A letter was signed by the appellant and given by him to the managing director. The letter was in these words:—"In consideration of your company extending credit to Mdme. Speelman I hereby personally guarantee payment of account, subject to your allowing the usual trading terms. This guarantee to be a continued one, and my signature in completion is attached herewith to the amount of £50." Mrs. Speelman then took delivery of the goods. The invoice and account were sent to her by the company. The account was for £49 7s. 2d. It fell due for payment and she failed to pay it. The company made a written demand on the appellant "to pay this account immediately under the guarantee supplied by you." He failed to pay it. The company recovered judgment against him and a sequestration order was made against the appellant. The company proved in the bankruptcy. It appears from these facts that Mrs. Speelman bought the goods and incurred the debt for the price of the goods. The company parted with the goods and gave her time for the payment of the debt. The appellant guaranteed the payment of the price. The relationship of debtor and creditor existed between Mrs. Speelman and the company, but not between the appellant and it. The company therefore gave credit to the value of the goods to Mrs. Speelman.

The position is exactly described by the language commonly used in framing a count on a guarantee for the price of goods supplied to a third person. A common form of the count is, omitting parts not material, as follows:—"That in consideration that the plaintiff would sell and deliver goods to G.H. on credit the defendant guaranteed and promised the plaintiff to be responsible to him for the due payment of the price of the said goods, and the plaintiff accordingly sold and delivered goods to the said G.H. on credit at prices amounting to £——" (*Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), p. 162). The inference from the facts is either that Mrs Speelman herself obtained such credit from the company with the assistance of the appellant's guarantee or the appellant obtained the credit for her. If the former inference is the correct one, the appellant did nothing to bring himself within the provisions of sec. 212 (1) (*a*). If the latter inference is correct,

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the question arises whether, assuming fraud, a person who obtains credit for another brings himself within those provisions.

In the case of *R.* v. *Bryant* (1), which was decided under sec. 13 (1) of the *Debtors Act* 1863, it was argued that it was quite immaterial whether the credit was given to the defendant or not, and that the words of the section covered the case of a person who in incurring a debt or a liability obtained credit for himself or for someone else. The argument was rejected. The jury was directed to acquit, as credit was not given to the defendant, but to the person whose name was given by the defendant. In the case of *R.* v. *Steel* (2), there was an indictment under sec. 13 (1) of the *Debtors Act* 1869. *Darling* J. pointed out:—"The indictment runs 'that A.B. . . . unlawfully in incurring a certain debt and liability to one C.D. did obtain credit. . . .' That indicates clearly enough that credit must have been given to him; it means, in this indictment, that *he* (appellant) in incurring a debt, did *himself* obtain credit" (3). The decision of the Court of Criminal Appeal was that it is necessary to the guilt of the person charged under sec. 13 (1) that the credit alleged to have been obtained must have been obtained by and given to himself. This being the judicial construction of the language which Parliament used in sec. 212 (1) (*a*), I think that it should not be departed from.

It is true that by his statement about his financial position the appellant won the trust and confidence of the company's managing director in his ability to meet the liability to which the guarantee exposed him if Mrs. Speelman failed to pay for the goods. But the appellant did not incur any debt or liability to the company upon terms that the payment of it was to be postponed to a later date. The liability which the appellant incurred was a conditional liability. The case of *Herbert* v. *The King* (4) is different in principle from the present case. It was there argued on behalf of the defendant that sec. 212 (1) (*a*) was limited to the case where credit was given for the price of goods and did not extend to a loan and that in any case the defendant had not obtained credit because he gave promissory notes in exchange for the money lent to him. The court decided that these arguments could not succeed. In my opinion the proper conclusion in the present case is that the appellant did not obtain credit for himself and that credit to the value of £49 7s. 2d., the price of the goods sold to Mrs. Speelman, was given to her by the company.

(1) (1899) 63 J.P. 376.
(2) (1910) 5 Cr. App. R. 289.
(3) (1910) 5 Cr. App. R., at p. 294.
(4) *Ante*, p. 461.

It becomes unnecessary to consider whether the allegation of fraud was sustained and whether the sentence was excessive. In my opinion the conviction and sentence should be set aside and the appeal allowed.

WILLIAMS J. On 1st April 1940 Mrs. Speelman went to the warehouse of William Becker Pty. Ltd., 57 York Street, Sydney, and ordered certain goods to the value of £49 7s. 2d. Whilst she was there she had an interview with Mr. Becker, the managing director, and it is evident he was unwilling to deliver the goods without payment and so give her credit. At the interview she asked him to telephone the appellant, which he did, and on 2nd April the appellant came to see him. Becker told the appellant that Mrs. Speelman had been to see him and had chosen certain goods to the value of £50 and had said that he would act as a guarantor. He told Becker that was correct. Becker asked him what his guarantee was worth, and he replied: "It was only that week he had taken sole control of the *Merchandise Retailer*, and had invested £2,000, for which he paid cash."

Relying on this statement, which was in fact absolutely false, Becker agreed to deliver the goods to Mrs. Speelman if the appellant guaranteed the debt. By a document in writing dated 1st May, but executed on 2nd April, the appellant promised the company that in consideration of its extending credit to Mrs. Speelman he thereby personally guaranteed the payment of her account subject to their allowing the usual trading terms, the guarantee to be a continuing one to the amount of £50. The goods were delivered to Mrs. Speelman, but she did not pay for them, and the company then called upon the appellant to meet his liability under the guarantee. He failed to do so, and the company commenced proceedings against him. On 1st July 1940 it entered judgment for debt £49 7s. 2d. and costs £5 2s., amounting altogether to £54 9s. 2d.

On 23rd July 1940 an order was made sequestrating the appellant's estate.

On 24th March 1941 Judge *Lukin* ordered that the bankrupt be charged and tried summarily for an offence against sec. 212 (1) (*a*) of the *Bankruptcy Act* 1924-1933, namely, that on or about 2nd April 1940 at Sydney, in the State of New South Wales, he, being a person against whom on 23rd April 1940 a sequestration order was made under the Act, did, in incurring a liability to William Becker Pty. Ltd., obtain credit from the said William Becker Pty. Ltd. to the extent of £49 7s. 2d. by means of fraud. On 19th May

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Williams J.

1941 his Honour convicted him of this offence and ordered that he be imprisoned for four months with hard labour.

The appellant has appealed to this court against this order.

There was ample evidence before his Honour on which he could hold that the statement by which the company was induced to accept the guarantee was fraudulent.

The only question is whether sec. 212 (1) (*a*) is wide enough to cover the case where the bankrupt has by fraud induced the creditor to accept his personal guarantee of the debt of another. The sub-section is in the following terms :—" 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." By giving the guarantee the appellant incurred a contingent debt or liability to the company and thereby obtained credit for Mrs. Speelman ; but the sub-section appears to me to mean that the bankrupt must obtain credit for himself in respect of the debt or liability which he personally incurs (*R.* v. *Bryant* (1) ; *R.* v. *Steel* (2)).

The sub-section originated in the English *Debtors Act* 1869. This Act was passed for the abolition of imprisonment for debt, for the punishment of fraudulent debtors, and for other purposes. Sec. 13 (1) provided that a person should be guilty of a misdemeanour if, in incurring any debt or liability, he obtained credit under false pretences or by means of any other fraud. A search of the cases decided under this sub-section discloses that the credit complained of has always been obtained for the bankrupt himself as the actual debtor. It has never been held that a guarantor has obtained credit for himself in respect of his contingent liability to pay the debt of another. Where the creditor is not prepared to give credit to the principal debtor, and the latter introduces a proposed guarantor, the former may be in doubt whether to accept a personal guarantee or only to accept one backed by adequate security. If the guarantor then makes a fraudulent statement as to his financial position, and thereby induces the creditor to trust to his ability to meet the contingent debt, in the event of the principal debtor making default, the creditor does, in a broad sense, give credit to the guarantor by trusting him to be able to meet his contingent liability. In fact he gives credit to both the principal debtor and the guarantor (*Anderson* v. *Hayman* (3)). But the more usual meaning of credit is to obtain time to pay an actual debt (*Herbert* v. *The King* (4)). The sub-section is a punitive one and the rule in the construction of penal statutes is that " where an equivocal word or ambiguous sentence

(1) (1899) 63 J.P. 376.
(2) (1910) 5 Cr. App. R. 289.
(3) (1789) 1 H.Bl. 120 [126 E.R. 73].
(4) *Ante*, p. 461.

leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself" (*Remmington* v. *Larchin* (1), per *Scrutton* L.J.). The *Bankruptcy Act* contains other sub-sections relating to the obtaining of credit, viz., 119 (7) (*c*), 210 (3) (*b*) and (*c*), and in each of these cases it is clear that the word credit is used in correlation to an actual debt.

In the present case the conclusion is that the bankrupt did not obtain the credit for himself but for Mrs. Speelman and did not therefore commit any offence under the sub-section.

The appeal should be allowed.

Appeal allowed. Order of court below discharged and the conviction thereby directed quashed.

Solicitors for the appellant, *Harold J. Price & Co.*

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

J. B.

(1) (1921) 3 K.B. 404, at p. 410.