[HIGH COURT OF AUSTRALIA.]

PARSONS . . . . . APPELLANT;
RESPONDENT,

AND

BUNGE . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

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MELBOURNE, *Feb.* 24, 25; *March* 14.

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

Emergency Legislation—National security—Leave required to issue "legal process . . . in respect of any liability . . . under any contract or agreement"—Bankruptcy proceedings—National Security (War Service Moratorium) Regulations (*S.R.* 1940 *No.* 194), *reg.* 14*.

Bankruptcy—Contested petition—Evidence—Admissibility—Affidavit verifying petition—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 7 (1), 27 (2) (*d*), 56 (2)—*Bankruptcy Rules* 1934 (*S.R.* 1934 *No.* 77), *r.* 156.

As a petition in bankruptcy is not "legal process . . . in respect of any liability . . . under any contract or agreement," within the meaning of reg. 14 of the *National Security (War Service Moratorium) Regulations* (S.R. 1940 No. 194), leave of the Court of Bankruptcy is not required under that regulation to file a petition to sequestrate the estate of a member of the Commonwealth Naval, Military or Air Forces engaged on war service.

* This regulation provided:—"(1) A person shall not without leave of the court issue or cause to be issued any writ or other legal process out of any court in respect of any liability of a member of the Forces . . . under any contract or agreement . . . entered into prior to the sixth day of December 1939, or the date on which the member commenced to be engaged on war service, whichever is the later, or under a judgment in respect of any such contract or agreement. (2) If the court is satisfied that, having regard to all the circumstances of the case, it would be inequitable to the other party to the contract or agreement to give to the member or female dependant, as the case may be, the benefit or protection of this regulation, and that it would not inflict hardship on the member or female dependant, as the case may be, the court shall grant leave to the person making the application." [But see S.R. 1941 No. 61 (superseding S.R. 1940 No. 194), reg. 22 of which deals specifically with bankruptcy proceedings.]

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The nature of bankruptcy proceedings, and the evidence required to prove a contested petition, discussed.

Ex parte Blain; *In re Sawers*, (1879) 12 Ch. D. 522, at p. 529, *Ex parte Lindsay*; *In re Lindsay*, (1874) L.R. 19 Eq. 52, *Ex parte Dodd*; *In re Ormston*, (1876) 3 Ch. D. 452, *In re Sanders*, (1894) 63 L.J. Q.B. 734, and *In re a Debtor*, (1910) 2 K.B. 59, at p. 62, referred to.

Decision of the Federal Court of Bankruptcy affirmed.

APPEAL from the Federal Court of Bankruptcy (District of Victoria).

David Trenfield Parsons, who in July 1940 had become a member of the Military Forces of the Commonwealth, was indebted to Walter Otto Bunge in the sum of £325 12s. 6d. on a promissory note which had been drawn by Parsons on 13th May 1940, and was payable three months after the date thereof, but was dishonoured. On 18th October 1940 Bunge filed a petition in the Federal Court of Bankruptcy (District of Victoria) to sequestrate Parsons' estate, alleging (par. 4) the following acts of bankruptcy:—(*a*) That on or about 18th July 1940 in Victoria, Parsons created a charge upon part of his property, namely, his interest as a beneficiary in the estate of Edward Albert Parsons, late of Lah, farmer, deceased, and other property in favour of the Victorian Producers Co-operative Co. Ltd., of 578 Little Flinders Street, Melbourne, which charge would, if he were to become bankrupt, be void as a preference, or a fraudulent preference under the *Bankruptcy Act* 1924-1933. (*b*) That on 18th July 1940 he created in favour of the Victorian Producers Co-operative Co. Ltd., a charge, by way of a stock mortgage, under the *Instruments Act* 1928 (Vict.), which stock mortgage was registered on 18th July 1940, No. 1025, over part of his property, being 1,208 sheep depasturing in the Parish of Werrigar, which charge, if he were to become bankrupt, would be void as a preference, or a fraudulent preference under the *Bankruptcy Act* 1924-1933. (*c*) That on 18th July 1940 he created in favour of the Victorian Producers Co-operative Co. Ltd. a charge, by way of a stock mortgage, under the *Instruments Act* 1928, which stock mortgage was registered on 18th July 1940, No. 1026, over 2,362 sheep and 19 cattle depasturing at Meran, which charge would, if he were to become bankrupt, be void as a preference, or a fraudulent preference under the *Bankruptcy Act* 1924-1933. (*d*) That at a meeting of his creditors, on 2nd August 1940, convened by his solicitor on his behalf, he gave notice to his creditors that he was about to suspend payment of his debts.

In support of and to verify his petition Bunge filed an affidavit the following paragraphs of which are material to this report:—"1. The said David Trenfield Parsons is justly and truly indebted to me in the sum of £325 12s. 6d. as stated in the petition. The

promissory note therein mentioned was given to me for sheep sold and delivered by me to the said David Trenfield Parsons on the 13th May 1940. 3. Parsons committed the acts of bankruptcy stated in the petition to have been committed by him. 8. I have through my solicitor searched the register kept by the Registrar-General of the State of Victoria and have been informed as a result of such searches that Parsons, on 18th July 1940, gave to the Victorian Producers Co-operative Co. Ltd., a charge, by way of a mortgage of stock, over part of his property, which was registered on 18th July 1940 and numbered 1,025, and a charge over certain other parts of his property, by way of a mortgage of stock, which was registered on 18th July 1940 and numbered 1,026. 9. I was present on 2nd August 1940 at a meeting of Parsons' creditors, convened by his solicitor, L. C. Shaw, of Warracknabeal, on his behalf. At the meeting, Shaw stated that Parsons owed over £15,000, of which about £11,000 was owing for sheep purchased from various persons; that his assets amounted to approximately £7,800, including land valued at £4,688, over which there was a mortgage of £4,165 7s., and 2,045 sheep and 17 cattle, valued at £1,942 10s., over which he had given two stock mortgages to the Victorian Producers Co-operative Co. Ltd. on 18th July 1940; that he had assigned his interest under the will of his father, Edward A. Parsons, deceased, to the Victorian Producers Co-operative Co. Ltd.; that a considerable part of the farming plant shown as an asset was in fact held by Parsons on hire-purchase agreements and not as absolute owner, and he would not make any payment on account of his debts as one creditor had issued a summons. 10. I was present on 9th August 1940, to which date the above meeting was adjourned, when Parsons was present and admitted in answer to questions from creditors that he had given stock mortgages as above stated to the Victorian Producers Co-operative Co. Ltd., after he had been served with a summons which had been issued out of the County Court at Warracknabeal and served on him on 15th July 1940 at the suit of Alexander Russell Dunn for the sum of £65 17s. 3d., being the amount due upon a dishonoured cheque. 11. Save as to the facts of which I have been informed as aforesaid by my solicitor as a result of his searches, and by Parsons and his solicitor at the meetings above mentioned, the facts and circumstances above deposed to and the several statements in the said petition are all within my own knowledge true." Bunge also supported his petition by an affidavit by his solicitor the material portion of which is as follows:—"4. On 7th November 1940 I made searches at the office of the Registrar-General at Melbourne, and found that a stock mortgage dated 18th July 1940

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from David Trenfield Parsons to the Victorian Producers Co-operative Co. Ltd. had been registered on 18th July 1940 and numbered 1,025. By such stock mortgage, Parsons assigned to the company 1,208 sheep depasturing in the Parishes of Werrigar and Bangerang. I also ascertained from such searches that a further stock mortgage, dated 18th July 1940, given by Parsons to the company had been registered on 18th July 1940 and numbered 1,026. By such last-mentioned mortgage, Parsons assigned to the company 2,362 sheep and 19 cattle depasturing in the Parish of Meran."

On 22nd November 1940 Parsons was served with the petition, and on 28th November 1940 he gave notice that he intended to oppose the making of the sequestration order as prayed and intended to dispute the statements contained in the petition and set out above, and he further objected that no leave of the Court of Bankruptcy for the issue or presentation of the petition had been obtained under the *National Security* (*War Service Moratorium*) *Regulations*. The petition was heard on 2nd December 1940 before Judge *Lukin* in the Court of Bankruptcy at Melbourne. Bunge relied upon the affidavits filed in support of his petition, the relevant portions of which are set out above. He was cross-examined on his own affidavit, and, during the course of cross-examination and re-examination, he stated that at the adjourned meeting of creditors on 9th August 1940 both Parsons and Mr. Shaw, his solicitor, were present, and at that meeting, Parsons had stated that " he was leaving his business in Mr. Shaw's hands " and that " Mr. Shaw was doing his business for him." Bunge also produced Mr. Shaw's notices calling the meetings and announcing that the first one was adjourned. One notice was dated 30th July 1940, and the other 5th August 1940. Parsons did not give any evidence in support of his opposition.

It was contended before Judge *Lukin* that leave was necessary under reg. 14 of the *National Security* (*War Service Moratorium*) *Regulations* (Statutory Rules 1940 No. 194).

Judge *Lukin* had some doubt as to whether the regulation applied, but, in view of the circumstances disclosed by the evidence, he gave leave of the court *nunc pro tunc* to issue and cause to be issued the bankruptcy petition. He found that having regard to all the circumstances the granting of leave would not inflict hardship on Parsons. He then dealt with the allegations in the petition, found that Parsons had committed all the acts of bankruptcy alleged and made a sequestration order.

Parsons appealed to the High Court.

J. H. Moore (*Fullagar* K.C. with him), for the appellant. There are three questions involved in this appeal. (1) The first is whether

leave should have been granted under reg. 14 of the *National Security (War Service Moratorium) Regulations* (Statutory Rules 1940 No. 194) to issue a bankruptcy petition. The judge in bankruptcy had no power or jurisdiction to give leave *nunc pro tunc*. The question turns upon the meaning of "other legal process" in the regulation. The *Bankruptcy Rules* (Statutory Rules 1934 No. 77 —1939 No. 41) show that a petition is legal process. It is issued out of the court (rule 156); it requires an affidavit to verify it (rule 158); the registrar must verify the petition (rule 162), and the petition is served (rule 164). By sec. 27 (2) (*b*) of the *Bankruptcy Act* 1924-1933 process can be amended, and by this section the court has obtained jurisdiction to amend petitions. "Legal process" has been interpreted by the courts in *Ex parte Wallace*; *In re Wallace* (1); *In re Winterbottom*; *Ex parte Winterbottom* (2); *In re Laxon & Co.* (3). Prima facie, "legal process" is a very wide expression and must include a bankruptcy petition, and the general scheme of the regulations makes reg. 14 apply to bankruptcy petitions. Reg. 19 applies after a petition has been filed and does not exclude reg. 14. Different tests and times are laid down under the two regulations.

[STARKE J. referred to sec. 52 of the *Bankruptcy Act* 1924-1933.]

Under sec. 56 (2) of the *Bankruptcy Act* 1924-1933 the creditor must show that he has a debt over £50. If a member of the forces is not protected under reg. 14 against a bankruptcy petition, then a member under reg. 15 would never be protected. Reg. 19 gives no protection to a female defendant at all. It was the scheme of the regulations that a female dependant, as well as a member of the forces, would be protected. Regs. 14 and 19 are complementary and are consistent with one another. (2) The next point is that the affidavit in support is not sufficient or satisfactory. For a debtor to commit an act of bankruptcy through an agent, the latter must be specially authorized (*Ex parte Blain*; *In re Sawers* (4); *Re J. A. Bagley* (5)). There was no evidence to show that the bankrupt authorized his solicitor to call a meeting of creditors or to commit any other act of bankruptcy. (3) The third point is that the affidavit verifying the petition is not proper material upon which to make a sequestration order, where notice of objection is given. [He referred to the *Bankruptcy Rules*, rules 156, 158, 162, 174, and sec. 27 (2) (*b*), 56 (1) and 56 (2) (*a*) of the *Bankruptcy Act* 1924-1933.] The rules are the same as the English *Bankruptcy Rules* (*Halsbury's Laws of England*, 2nd ed., vol. 2, p. 75; *Williams* on *Bankruptcy*,

(1) (1884) 14 Q.B.D. 22.
(2) (1886) 18 Q.B.D. 446.
(3) (1892) 3 Ch. 31.
(4) (1879) 12 Ch. D. 522, at p. 529.
(5) (1929) 29 S.R. (N.S.W.) 333, at p. 335; 46 W.N. (N.S.W.) 107, at p. 108.

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15th ed. (1937), p. 589 ; *Ex parte Dodd* ; *In re Ormston* (1) ; *Ex parte Lindsay* ; *In re Lindsay* (2) ; *In re Sanders* ; *Ex parte Sanders* (3) ; *In re a Debtor* (4)). The affidavit is sworn before the petition is issued, and so is not sworn in the proceeding. When its purpose is served, some of the judges say, it is dead (*In re a Debtor* ; *Ex parte Debtor* (5)).

Coppel, for the respondent. Reg. 14 of the *National Security* (*War Service Moratorium*) *Regulations* has no application to a bankruptcy petition. The proper method to interpret it is to take the regulations as a whole and see whether reg. 14 is apt to include a bankruptcy petition. It only deals with steps taken with the aid of a court to enforce a contract. There was plenty of evidence from which the bankruptcy judge could have inferred that the bankrupt had committed the various acts of bankruptcy alleged. The authority to call a meeting was proved, while the evidence of searches in the register of stock mortgages was properly admitted (secs. 44 and 60 of the *Evidence Act* 1928 (Vict.) ; *Wynne* v. *McMullan* (6)).

[RICH A.C.J. The debtor's admission, if proved, would be sufficient (*Slatterie* v. *Pooley* (7)).]

As to the authority of the solicitor, the test is : What effect would his statements produce on the creditors ? You must take all the circumstances into consideration (*Crook* v. *Morley* (8)). As to using the affidavit to verify the petition, this point was not taken in the court below, is not mentioned in the notice of appeal and cannot be taken now (*Nevill* v. *Fine Art and General Insurance Co.* (9) ; *Seaton* v. *Burnand* (10)). [He referred to sec. 7 (1) of the *Bankruptcy Act* 1924-1933.] This is not an irregularity ; there is nothing to stop the court from looking at the affidavit (*Bankruptcy Act* 1924-1933, sec. 27 (2) (*d*)). [He referred to rules 161, 170 (3), 173, 174, 176 of the *Bankruptcy Rules* ; *In re a Debtor* (11).] Cases relied on by the appellant were cases where the affidavit simply stated that the statements in the petition were true (*In re Sanders* (12) ; *Ex parte Lindsay* ; *In re Lindsay* (2) ; *Ex parte Dodd* ; *In re Ormston* (1)).

Moore, in reply.

Cur. adv. vult.

(1) (1876) 3 Ch. D. 452.
(2) (1874) L.R. 19 Eq. 52.
(3) (1894) 63 L.J. Q.B. 734, at p. 736.
(4) (1910) 2 K.B. 59, at p. 62.
(5) (1935) Ch. 353.
(6) (1897) 22 V.L.R. 623, at p. 627.
(7) (1840) 6 M. & W. 664, at pp. 668, 669 [151 E.R. 579, at p. 580].
(8) (1891) A.C. 316.
(9) (1897) A.C. 68, at p. 76.
(10) (1900) A.C. 135, at p. 143.
(11) (1933) B. & C.R. 53.
(12) (1894) 63 L.J. Q.B. 734.

The following written judgments were delivered :—

RICH A.C.J. This is an appeal from a sequestration order made against the appellant.

The respondent is the holder for value of a promissory note for £325 12s. 6d. given by him to the appellant on 13th May 1940 in payment for sheep sold to him. When the promissory note was presented for payment on its due date it was dishonoured. The appellant became a member of the Military Forces and is still serving in them.

On 18th October 1940 the respondent presented a petition in bankruptcy against the appellant, founded on this debt, and also alleging the acts of bankruptcy set out in par. 4 (*a*), (*b*), (*c*), (*d*), of the petition. No order was obtained before presentation of the petition under reg. 14 of the *National Security* (*War Service Moratorium*) *Regulations* (1940 No. 194). When the matter came before the judge in bankruptcy his Honour, having some doubt as to the application of reg. 14 of the regulations to the circumstances of the case, made an order *nunc pro tunc* giving the respondent leave to issue the bankruptcy petition under consideration and proceeded to hear the matter. In the course of the hearing his Honour offered the appellant's counsel the right to call evidence and allowed him to cross-examine the respondent on the affidavit filed in support of the petition. Ultimately his Honour dealt with the allegations in the petition and found that the appellant had committed the acts of bankruptcy to which I have referred, and made a sequestration order. The appellant appeals against the order of sequestration. Orders *nunc pro tunc* may appropriately be made where the court possesses jurisdiction to deal with a matter, but jurisdiction cannot be conferred by antedating an order where jurisdiction does not otherwise exist (*In re Keystone Knitting Mills' Trade Mark* (1)). But reg. 14 does not require leave to be granted in the case of bankruptcy. The phrase "other legal process" in the rule, divorced from the context, would include a bankruptcy petition, which issues out of the court and cannot be withdrawn without the leave of the court (sec. 59). But the phrase, when read with the context, excludes process in the nature of bankruptcy which is designed to take a debtor's property into the possession of the court for its equitable distribution *pro rata* amongst his creditors. The rule in question is restricted to the persons specifically mentioned in clause 2 of reg. 14 and can have no operation in the way of protecting all the creditors of the particular member of the Forces or any female dependant of such member. This construction is supported by the fact that reg. 26 is inapplicable

(1) (1929) 1 Ch. 92.

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to specific periods of limitation provided in the *Bankruptcy Act*. And the special provisions of reg. 19 as to bankruptcy confirm the view that writs and other legal process are concerned only with the ordinary proceedings in courts of law as contrasted with the proceedings of a bankruptcy court.

It remains to consider whether there was an act of bankruptcy proved. The statutory affidavit in support of the petition was sufficient prima-facie evidence that the debtor had committed at least one act of bankruptcy, viz., that contained in sec. 52 (*k*) of the *Bankruptcy Act*. It is true that the debtor gave notice that he would oppose the making of the sequestration order as prayed and intended to dispute the statements in pars. 4 (*a*), (*b*), (*c*), (*d*), of the petition. At the hearing, however, he gave no evidence, but it was sought, by cross-examining the petitioning creditor, to prove that the evidence of the acts of bankruptcy was insufficient. I only propose to consider one of the acts of bankruptcy alleged, viz., that "at a meeting of his creditors he gave notice to his creditors that he was about to suspend payment of his debts." It is clear that, if Mr. Shaw, the debtor's solicitor, was his agent for the purpose of making an admission which would constitute the act of bankruptcy mentioned, there was sufficient proof of it. The question then is whether there is sufficient evidence that Mr. Shaw was acting as the debtor's agent in this regard. In circumstances which showed that the appellant was in an insolvent condition, Mr. Shaw called a meeting of the appellant's creditors. At the first meeting the appellant was not present. At this meeting, after Mr. Shaw had stated that he was acting as the appellant's solicitor, he further stated that the appellant "wanted him to go down to the" (military) "camp and fix up the sequestration of his estate." Mr. Shaw also said that "one creditor had issued a summons and the appellant was not prepared to prefer one creditor to another." This meeting was adjourned, and at the adjourned meeting the appellant himself was present and said that "Mr. Shaw was doing his business for him and he had left it in Mr. Shaw's hands." On this occasion also Mr. Shaw made the statement that he would go to the camp and "see what could be done in the way of sequestrating the estate." This evidence clearly proves that at this meeting Mr. Shaw was acting as the agent of the appellant and was thus authorized to make the statement which constitutes the act of bankruptcy.

In my opinion the appeal should be dismissed.

STARKE J. Appeal from an order of the Court of Bankruptcy, District of Victoria, sequestrating the estate of the appellant. This order has been challenged on several grounds :—

1. That leave had not been obtained for the presentation or the issue of the petition in bankruptcy pursuant to reg. 14, Statutory Rules 1940 No. 194, made under the powers contained in the *National Security Act* 1939-1940. So far as material, the regulation is to this effect:—A person shall not, without leave of the court, issue or cause to be issued any writ or other legal process out of any court in respect of any liability of a member of the Forces (that is, of the Commonwealth Naval, Military or Air Forces engaged on war service) under any contract or agreement (other than certain excepted contracts or agreements which are immaterial for present purposes) entered into prior to 6th December 1939 or the date on which the member commenced to be engaged on war service, whichever is the later.

In July of 1940 the appellant became a member of the Forces. In November of 1940 a petition was presented to the Court of Bankruptcy praying the sequestration of the appellant's estate upon the grounds that he had created charges on his estate which were void as preferences under the *Bankruptcy Act* 1924-1933 if the appellant became bankrupt and also that at a meeting of the appellant's creditors he gave notice to his creditors that he was about to suspend payment of his debts (*Bankruptcy Act*, sec. 52 (*c*) and (*k*)). The petition was founded upon a debt due to the petitioning creditor upon a promissory note for about £325 made by the appellant, due in August 1940 but dishonoured. But the petition in bankruptcy, though founded upon this debt, was not to enforce any liability of the appellant under any contract or agreement nor was it process in respect of any such liability: it was a proceeding to sequestrate the appellant's estate because he had committed acts of bankruptcy and to effect a general cession of his estate, so that thereout his creditors might be paid. Such a proceeding cannot be described as process in respect of any liability under any contract or agreement. In aid of this view, the provisions of reg. 19 should be noticed.

2. That the court should not have made the order for sequestration merely upon the affidavit verifying the petition.

A creditor's petition must be verified by his affidavit, but on the hearing of the petition the court is directed to require proof of the debt of the petitioning creditor and of the act of bankruptcy: See Act, sec. 56; *Bankruptcy Rules* 1934 (Statutory Rules 1934 No. 77), rule 156. According to the practice of the Court of Bankruptcy, evidence by affidavit is receivable upon the hearing of a petition for sequestration, but the practice does not of course exclude oral evidence. The practice so established is within the general authority of the court (Act, secs. 18 et seq.) and is recognized by the *Bankruptcy*

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Rules 170 and 176. Consequently the affidavit verifying the petition which is sworn in the proceedings would be admissible on the hearing of the petition. But the petition should be strictly proved, for it should be remembered that the foundation of jurisdiction is an act of bankruptcy, which entails disabilities on the person committing it. It is for this reason, I think, that the English courts have declined in some cases to make a receiving order merely upon the affidavit verifying the petition (*Ex parte Lindsay* (1); *In re a Debtor* (2); *Ex parte Dodd* (3); *In re Sanders* (4)). It is a rule of prudence rather than any want of jurisdiction in the court to receive and act upon the affidavit. But it is, if I may say so, a wise rule, for affidavits verifying petitions are often in very general language and seldom state facts according to the mode of proof required by law. In this case the affidavit verifying the petition was irregular in its mode of proof and, standing alone, should not be acted upon. But this leads me to the next point.

3. That on the evidence the order should not have been made.

The verifying affidavit and a supporting affidavit purport to state the effect of documents creating mortgages and charges without producing those documents or verified copies and to state the result of searches in the Registrar-General's Office without producing a copy of the documents found there or any extract therefrom in accordance with the *Evidence Act* 1928, sec. 60. In this form, I regard all this matter as inadmissible. The affidavits, however, further state that the appellant's solicitor at a meeting of his creditors stated the effect of the documents creating mortgages or charges and said that the appellant would not make any payment on account of his debts, as one creditor had issued a summons, and that at a later meeting of his creditors the appellant admitted, in answer to questions from his creditors, that he had given the mortgages and charges mentioned by his solicitor. A party's admissions are of course admissible to prove the contents of documents. But it is for the court to satisfy itself that the precise language of the party did amount to an admission, and the affidavit in this case puts the deponent's interpretation upon the appellant's language without setting forth the precise words. An admission tendered in this form should not be received in evidence. Indeed, the petitioning creditor, when cross-examined on his affidavit, said that he could not then recollect the statement to the effect that the appellant would suspend payment of his debts. But there is other evidence which is admissible and sufficient, I think, to establish an act of bankruptcy. Notices

(1) (1874) L.R. 19 Eq. 52.
(2) (1910) 2 K.B., at pp. 62-64.
(3) (1876) 3 Ch. D. 452.
(4) (1894) 63 L.J. Q.B. 734.

calling meetings of creditors to consider the appellant's affairs had been issued. They were given by the appellant's solicitor. The first stated that he was instructed to call a meeting of the appellant's creditors, who were requested to supply a note of the appellant's indebtedness to them. The second stated that, as requested by creditors at the first meeting, an approximate statement of assets and liabilities was enclosed and that the meeting of creditors had been adjourned until a specified date. At the first meeting, the solicitor attended and explained the position of the appellant's affairs, but the appellant himself was not present. At the adjourned meeting, the appellant was present and was questioned as to his affairs. It is sworn by the petitioning creditor, who was cross-examined on his verifying affidavit, that the appellant said at the meeting of creditors when he was present that his solicitor was doing his business for him, that he could say very little, and that he left it in his solicitor's hands. The solicitor at the first meeting informed the creditors that the appellant owed over £15,000, that his assets amounted to about £7,800, including land valued at £4,688, over which there was a mortgage of about £4,165, and 2,045 sheep and seventeen cattle, valued at about £1,942, over which the appellant had given two stock mortgages to a creditor on 18th July 1940, that he had assigned his interest under his father's will to the same creditor, that a considerable part of his farming plant was held under hire-purchase, and that the appellant would not make any payment on account of his debts as one creditor had issued a summons. Such statements, coupled with the notices mentioned, were a plain notice to the creditors at the meetings that the appellant was about to suspend payment of his debts. But it was said that an act of bankruptcy was a personal act or default which could not be committed by the particular act of an agent who had not been authorized to commit it and of which the debtor had no cognizance (*Ex parte Blain*; *In re Sawers* (1)). In the present case, however, a solicitor or agent was sent to a meeting of creditors to represent the debtor, the appellant, and to make statements for and on his behalf. They are thus the debtor's statements and bind him just as if he made them himself. It follows that the appellant committed an act of bankruptcy in notifying a meeting of his creditors, through his solicitor, that he was about to suspend payment of his debts.

But in my opinion the statements made by the solicitor do not strictly, clearly, or satisfactorily prove the contents of the documents relied upon in support of the other acts of bankruptcy alleged in the

(1) (1879) 12 Ch. D. 522.

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petition. They mix up the contents of the documents and their legal effect, which is a particularly objectionable form of proof. It was said that the appellant took no objection to this mode of proof, but his notice of opposition covers the matter, and the transcript notes show that his counsel was using every endeavour to exclude the affidavits tendered in support of the petition and the statements contained in them.

However, the sequestration order was rightly made, for the reasons already given, and therefore this appeal should be dismissed, but the findings in the order for sequestration relating to preference *a*, *b*, and *c* should, I think, be omitted.

WILLIAMS J. On 2nd December 1940 the Court of Bankruptcy made an order sequestrating the estate of the appellant. The petition, upon the hearing of which the sequestration order was made, was presented to the court by the respondent, a creditor of the appellant, on 14th November 1940. On 13th May 1940 the appellant had given the respondent a promissory note for £325 12s. 6d., payable three months after the date thereof, which had been dishonoured on being presented for payment. The petition alleged four acts of bankruptcy; three under sec. 52 (*c*), and the fourth under sec. 52 (*k*), of the *Bankruptcy Act* 1924-1933.

The appellant became a member of the Australian Military Forces about 16th July 1940. No leave had been obtained under reg. 14 contained in Statutory Rules 1940 No. 194, dated 10th September 1940, made under the *National Security Act* 1939-1940, before the presentation of the petition or the issue out of the court of a sealed copy thereof for service upon the appellant. On the hearing of the petition the learned judge in bankruptcy purported to make an order *nunc pro tunc* under the regulation, authorizing such presentation and issue; and, being satisfied that the acts of bankruptcy in the petition had been proved, made the above sequestration order.

The debtor has appealed to this court against the making of the order. His counsel has contended that the appeal should succeed on three grounds.

The first ground raises the question whether reg. 14 applies to the presentation of a bankruptcy petition. Its provisions, so far as material to this appeal, prohibit the issue without leave of a writ or other legal process out of a court in respect of the liability under a contract of a member of the Forces made before the date on which the member commenced to be engaged on war service.

A bankruptcy petition is presented to the court, which then seals two copies. A sealed copy is served on the debtor. Although such

a document would be a legal process issued out of a court, it would not be apt to describe it as having been issued in respect of a liability of a soldier under a contract. It is grounded upon the existence of an act of bankruptcy which has occurred within six months of the presentation of the petition. It is therefore issued in respect of the alleged insolvency of the debtor and for the purpose of obtaining a sequestration order which will enable his estate to be administered for the benefit of his creditors generally. The debtor must be indebted to the petitioning creditor or creditors in a liquidated sum of £50, and one of the purposes behind the presentation of the petition is, no doubt, to obtain payment of the debt or debts or so much thereof as the debtor's estate will be able to pay in due course of administration, but the liability of the debtor under a contract even for £50 or over is not in itself a justification for the presentation of a petition. There must be an available act of bankruptcy. The liability referred to in the regulation is one which is only enforceable against the member of the Forces by the other party to the contract. But, once a bankruptcy petition has been presented, it cannot be withdrawn without the leave of the court. When a debtor commits an available act of bankruptcy any creditor or creditors to whom the debtor owes the above sum can present a petition, so that, if a person has obtained judgment in an action of tort against a member of the Forces for £50, he can present the petition without the leave of the court, and, upon the making of the sequestration order, a creditor claiming a debt under a contract could prove in the administration of the estate. Clause 2 of the regulation provides that the court must be satisfied that, having regard to all the circumstances of the case, it would be inequitable to the other party to the contract to give a member of the Forces the benefit of a regulation and it would not inflict hardship on the member. This provision shows that the draftsman contemplated a writ or other legal process in which the only interests to be considered were those of the parties to the contract. Preferences can only be avoided under sec. 95 of the *Bankruptcy Act* within six months of their creation, and a bankruptcy has relation back to the first available act of bankruptcy committed within six months next preceding the date of the presentation of the petition. It is therefore evident that all the creditors are interested in the question whether leave should be given to issue the petition or not, and it would not be sufficient to inquire if it was inequitable to the petitioning creditor or creditors to refuse the application. It would also be difficult to hold in any case that the issue of the petition would not inflict hardship on the member, whereas in the case of a writ there could be no hardship if the member

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was in a position to pay. Consideration of the regulations contained in the rule as a whole shows that they were intended to provide relief mainly in respect of bilateral transactions based upon contracts, whether the transaction was a simple contract or a mortgage, bill of sale, or lease, and that the only persons whose interests were to be considered were those of the parties thereto. Reg. 26 provides (so far as material) that, in calculating the time fixed by any Act within which any remedy may be pursued, account shall not be taken of any period during which any proposed proceedings thereunder are stayed. This regulation would be difficult to apply to the periods mentioned in secs. 55 (1) (*c*) and 95 of the *Bankruptcy Act*, seeing that there could be creditors outside the operation of the regulations, such as judgment creditors in respect of a tort, or cestuis que trust in respect of ascertained damages for breach of trust, whose rights to present a petition would not be stayed. Usually a creditor can only present a bankruptcy petition after he has obtained a judgment and the debtor has committed an act of bankruptcy under sec. 52 (*e*) or (*j*). If a creditor had obtained a judgment prior to the date mentioned in reg. 26 in respect of a contract, the regulation would prevent his issuing execution or a bankruptcy notice in respect thereof without the leave of the court. The member of the Forces would therefore receive ample protection under the regulation without seeking to stretch it to cover the presentation of a bankruptcy petition. Acts of bankruptcy, other than those mentioned in sec. 52 (*e*), (*f*) and (*j*), are based on the debtor's own voluntary act; and there would appear to be no reason why, for instance, a member of the Forces who was insolvent and who voluntarily created a preference in favour of one creditor should be protected against the consequences of such an act to the prejudice of his creditors generally.

Having regard to the considerations already mentioned, I am of opinion that reg. 19, which deals specifically with bankruptcy petitions, is the only regulation relating thereto. If leave had been necessary, it could not have been granted *nunc pro tunc*. The granting of leave is a condition precedent to the lawful issue of the writ or other legal process. Process issued without leave would be a nullity. The proceedings would be invalidly instituted, and the court would have no jurisdiction to make such an order.

The petition, therefore, was properly presented, and this ground fails.

The second ground was that the affidavits filed to verify the petition could not be used at the hearing. The existing *Bankruptcy Rules* are those contained in Statutory Rules 1934 No. 77, amended

by Statutory Rules 1935 Nos. 32 and 122, 1936 No. 101, 1937 No. 111, and 1939 No. 41. Rule 156 requires a creditor's petition to state the date of the act of bankruptcy and to be verified on affidavit. The rules contain a form, No. 10, which sets out the usual formal affidavit which has to be filed in support of the petition. The deponent in par. 1 of this affidavit swears "that the several statements in the said petition are within my own knowledge true." There is a note at the foot of the form which states that, if the petitioner cannot depose that all of these several statements in the petition are within his own knowledge, he must set forth the statements the truth of which he can depose to, and file a further affidavit by some person or persons who can depose to the truth of the remaining statements. Rule 174 provides that, on the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor has given notice that he intends to dispute, shall be proved, and, if any new evidence of those matters, or any of them, is given, or any witness to the matter is not present for cross-examination, and further time is desired to show cause, the court may grant such further time as the court thinks fit.

Counsel for the appellant referred the court to four English decisions, *Ex parte Lindsay* ; *In re Lindsay* (1), *Ex parte Dodd* ; *In re Ormston* (2), *In re Sanders* ; *Ex parte Sanders* (3), and *In re a Debtor* (4), as being authorities which showed that affidavits filed to verify a petition are not to be used to prove the material facts at the hearing thereof. But all that these cases establish is that, at the hearing of a contested petition, the ordinary formal affidavit verifying the petition is not sufficient proof of the allegations therein to justify the making of the sequestration order and that all material matters alleged in the petition must be proved by proper admissible evidence. They are no authority for the proposition that, although the affidavits which are filed to verify the petition are proper evidence to prove all or any of these matters, they cannot be used for this purpose at the hearing. In the present case the appellant, pursuant to rule 172, filed a notice stating, *inter alia*, that he intended to oppose the making of the sequestration order and to dispute the statements contained in par. 4 (*a*), (*b*), (*c*) and (*d*) of the petition. These sub-paragraphs referred to the four alleged acts of bankruptcy. In view of this notice of objection the respondent was bound to prove by proper admissible evidence that one at least of these acts of bankruptcy had been committed. At the hearing the debtor did

(1) (1874) L.R. 19 Eq. 52.
(2) (1876) 3 Ch. D. 452.
(3) (1894) 63 L.J. Q.B. 734.
(4) (1910) 2 K.B. at p. 62.

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not give any evidence, so that, if the affidavits already filed contained such proof, the respondent was entitled to the sequestration order. These affidavits could be used to prove any material matters so far as they were sufficient for the purpose, and they could be supplemented by further affidavit or oral evidence. The respondent gave further oral evidence at the hearing.

The third ground was that the evidence was insufficient to prove any of the alleged acts of bankruptcy.

In my opinion the evidence was sufficient to prove at least one of the alleged acts of bankruptcy, namely, that at a meeting of his creditors on 2nd August 1940 convened by his solicitor on his behalf the appellant gave notice to his creditors that he was about to suspend payment of his debts. The appellant was not personally present at this meeting, but he was present at the adjournment of the meeting held on 9th August. At that meeting he said that his solicitor was doing his business for him and that he could say very little as he had left everything to his solicitor. In his presence his solicitor said the appellant wanted him, if permitted by the military authorities, to go to the camp in order to arrange for the sequestration of his estate. At the meeting held on 2nd August, after giving details of the assets and liabilities of the appellant which showed that he was hopelessly insolvent and unable to pay his debts, the solicitor said that the appellant was not making any payment of his debts as one creditor had issued a summons and that he would treat all creditors alike. This was a plain notice to the creditors that the debtor was about to suspend payment of his debts. It was pointed out by *Bowen* L.J. in *In re Lamb*; *Ex parte Gibson and Bolland* (1) that " we have in each case to ask ourselves, and in each case to answer the question, what is the reasonable construction which those who receive this statement of the debtor would have a right, under the circumstances of the debtor's case to assume, and would assume, to be his meaning as to what he intends to do with respect to paying, or suspending payment of, his debts "—See *Moy* v. *Briscoe & Co. Ltd.* (2). The solicitor's statement was made at a convened meeting of creditors, and a statement to the creditors generally is more readily construed as a notice of suspension than if it is made to a single creditor : See *Cropley's Ltd.* v. *Vickery* (3). In fact Mr. *Moore* for the appellant did not argue seriously to the contrary. His point was, to quote the words of *Brett* L.J. in *Ex parte Blain* (4), that " a man cannot commit an act of bankruptcy by a particular act of his agent

(1) (1887) 4 Morr. 25, at p. 32.
(2) (1907) 5 C.L.R. 56, at p. 62.
(3) (1920) 27 C.L.R. 321, at pp. 326, 327.
(4) (1879) 12 Ch. D., at p. 529.

which he has not authorized and of which act he has no cognizance." In several cases the act of bankruptcy under discussion has been held to have been committed by an agent on behalf of a debtor: See *In re Wolstenholme*; *Ex parte Wolstenholme* (1); *In re Lamb*; *Ex parte Gibson and Bolland* (2); *In re Johns*; *Ex parte Spears* (3); *In re Burns*; *Ex parte Bird* (4). In *Re J. A. Bagley* (5) *Long Innes* J. said: "I have no doubt that a debtor of sound mind may commit an act of bankruptcy by his agent, providing that he has specially authorized the commission of that act; for instance a debtor may by his agent give notice of suspension of payment." If his Honour meant that it was necessary for the debtor to give his agent express isolated authority to give notice of the intended suspension of payment, I think he went too far, because in my opinion a debtor can commit this act of bankruptcy by an agent where the general authority is wide enough to include the doing of acts or the making of statements which will amount to such a notice. In the present case the appellant authorized his solicitor to summon a meeting of his creditors, to put the whole of his financial position before them and to represent him at the meeting. The solicitor was therefore authorized to disclose that the debtor's business affairs were in such a condition that he was unable to pay his debts and was about to suspend payment thereof. Indeed, the evidence showed he had in fact suspended payment. In any event the statement about sequestrating his estate made by the solicitor at the adjourned meeting was under all the circumstances a sufficient notice. The evidence was therefore sufficient to establish this act of bankruptcy, and it is really unnecessary to consider whether it was sufficient to establish the other three.

The respondent in par. 10 of his affidavit stated that at the adjourned meeting on 9th August the debtor was present and made certain admissions in answer to questions from creditors. When a deponent in an affidavit is relating a conversation, it is essential that he should state the substance of what was said, and, so far as possible, should state who made the different statements contained in the conversation in exactly the same way as if he was being examined orally in the witness-box. For a deponent to say that a person admitted certain matters is to attempt to place his own interpretation on what was said and to usurp the function of the court. In the present case it is possible that the word "admitted" may have been used to mean "said" or "stated." A person can

(1) (1885) 2 Morr. 213.
(2) (1887) 4 Morr. 25.
(3) (1893) 10 Morr. 190.
(4) (1894) 15 L.R. (N.S.W.) B. & P. 1.
(5) (1929) 29 S.R. (N.S.W.), at p. 335; 46 W.N. (N.S.W.), at p. 108.

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make admissions as to the contents of documents out of court which are admissible in evidence against him (*Slatterie* v. *Pooley* (1); *Dent* v. *Moore* (2)). If the admission of the paragraph was objected to, it should have been rejected. Since it is not clear that the paragraph was objected to, but it is evident if this had been done the defect could have been cured at the hearing, it is now too late to raise this point for the first time (*Yorkshire Insurance Co.* v. *Crane* (3) ; *McIntosh* v. *Sashoua* (4)). Even if the paragraph was objected to and should have been rejected, the authority of the solicitor was wide enough to make the admissions on behalf of the debtor with respect to the documents which are contained in par. 9 of the respondent's affidavit, and these admissions were just about sufficient, in the absence of any evidence to the contrary, to prove the three acts of bankruptcy under discussion. Dr. *Coppel* contended that par. 4 of the affidavit of Malcolm Clark, solicitor, wherein he swore that on 7th November 1940 he made searches at the office of the Registrar-General at Melbourne and ascertained that on 18th July the debtor had created the mortgages referred to in par. 4 (*b*) and (*c*) of the petition, was evidence of such facts. If the affidavit had set out a copy of the whole of the relevant entries in the register, or an extract or, in other words, an exact copy of part of such entries, this would have been evidence of the contents of such entries or of the extracted parts thereof under secs. 44 and 60 of the *Evidence Act* 1928, but it is impossible to hold, as Dr. *Coppel* contended, that this paragraph of the affidavit amounted to an extract from such register. The affidavit, therefore, did not prove anything, and it is unnecessary to decide to what extent the entries made in the register pursuant to sec. 69 of the *Instruments Act* 1928 would be evidence to prove the commission of the acts of bankruptcy alleged in par. 4 (*b*) and (*c*) of the petition. But, for the reasons already given, there was other evidence sufficient to justify the making of the order.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Rylah & Anderson.*

Solicitor for the respondent, *E. C. W. Kelly,* Warracknabeal, by *Tunnock & Clarke.*

O. J. G.

(1) (1840) 6 M. & W. 664 [151 E.R. 579].
(2) (1919) 26 C.L.R. 316, at p. 325.
(3) (1922) 2 A.C. 541, at pp. 552, 553.
(4) (1931) 46 C.L.R. 494, at p. 504.