[HIGH COURT OF AUSTRALIA.]

RE HODGKINSON, A BANKRUPT.

H. C. OF A. 1947.

SYDNEY, *Aug.* 18.

Latham C.J., Rich, Starke, Dixon and McTiernan J J.

Bankruptcy—Offences—Charges against bankrupt—Summary proceedings—Limitation of time for institution—Applicability to all offences under Part XIV. of Act—Bankruptcy Act 1924-1946 (*No.* 37 *of* 1924—*No.* 43 *of* 1946), *ss.* 210 (1), 219 (1), (2).*

The words " any such offence " in sub-s. (2) of s. 219 of the *Bankruptcy Act* 1924-1946 relate to " an offence against this Act " referred to in sub-s. (1) of that section and are not limited to an offence in respect of which no special penalty is imposed.

So *held* by *Latham* C.J., *Dixon* and *McTiernan* JJ. (*Rich* and *Starke* JJ. dissenting).

Re Leach (1933) 6 A.B.C. 281, referred to.

CASE STATED.

Pursuant to s. 20 (3) of the *Bankruptcy Act* 1924-1946, the judge of the Federal Court of Bankruptcy stated a special case for the opinion of the High Court. The special case was substantially as follows :—

1. On 4th February 1946, an order of sequestration was made in respect of the estate of the above-named bankrupt Wilfred John Hodgkinson in this Court on a creditor's petition and by this order Arnold Victor Richardson was appointed official receiver of and as such became the trustee of the said estate. The said Arnold Victor Richardson is hereinafter referred to as the trustee.

2. The bankrupt having been ordered pursuant to s. 119 (1) of the *Bankruptcy Act* 1924-1946 to apply to the Court for an order of discharge, duly made an application to this Court for such an order.

* Section 219 of the *Bankruptcy Act* 1924-1946 provides : " (1) A person guilty of an offence against this Act in respect of which no special penalty is imposed by this Act shall be liable, on conviction on indictment, to imprisonment with or without hard labour for a term not exceeding two years, or, on summary conviction, to imprisonment with or without hard labour for a term not exceeding six months. (2) Summary proceedings in respect of any such offence shall not be instituted after one year from the first discovery thereof either by the official receiver or by the trustee in bankruptcy, or, in the case of proceedings instituted by a creditor, by the creditor, nor in any case shall they be instituted after three years from the commission of the offence. (3) In an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act. . . . "

3. This application of the bankrupt for an order of discharge coming before the Court at its sittings in Sydney was from time to time adjourned on the ground of the alleged ill-health of the bankrupt, but was ultimately heard on 7th May 1947, and on 9th May 1947 this Court made an order that the bankrupt be charged with and tried summarily by it for the following offences against the *Bankruptcy Act* :—

(*a*) An offence against s. 210 (1) (*a*) of that Act, namely, that on or about 21st March 1946, at Sydney, he being bankrupt did not, to the best of his knowledge and belief fully and truly discover to the trustee all his property real and personal and when, how and to whom and for what consideration he disposed of a part thereof except such part as had been disposed of in the ordinary way of his trade, if any, or laid out in the ordinary expense of his family.

(*b*) An offence against s. 210 (1) (*d*) of that Act namely :— That on or about 11th February 1946, at Sydney he, being a bankrupt did make a material omission in a statement relating to his affairs in that in his Statement of Affairs dated 11th February 1946, filed in the Court of Bankruptcy he omitted to set out the names of two unsecured creditors namely R. G. Plasto and R. Watson and in consequence thereof R. G. Plasto was not notified of the date of the bankrupt's public examination on 21st March 1946.

(*c*) An offence against s. 210 (1) (*g*) of that Act namely :— That on or about 21st March 1946, at Sydney he, being a bankrupt did fail to give to the Court a complete and satisfactory account of loss of a substantial portion of his estate, namely, a sum of approximately £1,279, within a period of one year immediately preceding his bankruptcy on 4th February 1946.

The said charges were then formally prepared by the Deputy Commonwealth Crown Solicitor in Sydney and filed in this Court. The date of each of the charges so filed was 28th May 1947.

4. The summary trial of the bankrupt for the foregoing offences came on for hearing before this Court on 4th and 5th June 1947. The bankrupt was represented by counsel and to the charges in respect of each such offence he pleaded not guilty.

5. At the close of the case for the prosecution, counsel for the bankrupt submitted that the charges against the bankrupt could not succeed because the summary proceedings against him in

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respect of the offences with which he was charged were not, as required by s. 219 (2) of the *Bankruptcy Act*, instituted within one year from the first discovery thereof by the trustee and he contended that it was immaterial that a special penalty was provided for offences against s. 210 of the Act. In support of this contention he cited the case of *Re Leach* (1).

6. The Court adjourned the summary proceedings against the bankrupt pending the decision of the High Court on a special case to be stated for its opinion.

7. The summary proceedings in respect of each of the offences with which the bankrupt has been charged were not instituted until after one year from the first discovery thereof by the trustee.

8. As a question of law upon the facts hereinbefore set out has arisen which the bankrupt and the Judge of this Court desire to have determined in the first instance in the High Court, I as the Judge of this Court have stated this case accordingly.

The question is as follows :—

Whether the following provision contained in sub-s. (2) of s. 219 of the *Bankruptcy Act*, namely :—

> "Summary proceedings in respect of any such offence shall not be instituted after one year from the first discovery thereof either by the official receiver or by the trustee in the bankruptcy. . . ."

applies to the aforesaid summary proceedings against the bankrupt in respect of the alleged offences by him against sub-s. (1) (*a*), (1) (*d*) and (1) (*g*) of s. 210 of the *Bankruptcy Act* ?

Tonking, for the bankrupt. The summary proceedings against the bankrupt in respect of the offences with which he was charged were not instituted within one year from the first discovery thereof by the official receiver, the trustee in bankruptcy, as required by s. 219 (2) of the Act, therefore the prosecution cannot succeed (*Re Leach* (1)). The words " such offence " in sub-s. (2) of s. 219 of the *Bankruptcy Act* mean " any such offence against the Act." Although this particular point was not considered in *Marks* v. *The King* (2) the decision in that case supports the contention now addressed to the Court in that it was assumed that s. 219 applied. Summary proceedings in respect of any offence against the Act must be commenced within twelve months from the date of the first discovery thereof. Section 213 of the Act, which relates to the failure of a bankrupt to keep proper accounts, is the only section in which the penalty is not prescribed so that an interpretation

(1) (1933) 6 A.B.C. 281. (2) (1937) 57 C.L.R. 58.

contrary to the interpretation now suggested would limit the operation of s. 219 to s. 213.

Blacket, for the Attorney-General for the Commonwealth, to assist the Court. On the grammatical construction of sub-s. (2) of s. 219, some weight must be given to the word " such " and, it being a sub-section collateral with sub-s. (1), it follows that the word " such " must refer to the matters dealt with in sub-s. (1). The only matter really dealt with in sub-s. (1) is : " A person guilty of an offence . . . in respect of which no special penalty is imposed." If the legislature had intended the interpretation suggested on behalf of the bankrupt the provision would have appeared as a special section, or, at least, would have appeared in sub-s. (1) and sub-s. (2) of s. 219, because it is a matter that greatly affects all the criminal proceedings in bankruptcy. It may be that the reason for the provision applying only to an offence against the Act in respect of which no special penalty was provided is that such case would come within the decisions in *In re Burley* (1) and *Ex parte Nomarhas* ; *Re Comans* (2) in which it was sought under the *Crimes Act* 1914, as amended, to limit the jurisdiction of the Bankruptcy Court to twelve months after the commission of certain offences. The meaning of the words " in any case " in sub-s. (2) of s. 219 is not clear.

The following judgments were delivered :—

LATHAM C.J. This special case raises a question of the correct interpretation of s. 219 of the *Bankruptcy Act* 1924-1946.

There are three sub-sections. The first sub-section provides for a penalty of imprisonment on conviction on indictment in the case of a person guilty of " an offence against this Act in respect of which no special penalty is imposed." That sub-section in respect of such an offence provides a particular penalty ; in fact, that sub-section has an application only to an offence under s. 213 of the Act because, in the case of all other sections of the Act creating offences, special penalties are imposed by the Act.

Sub-section (2) deals with an entirely different subject, namely, the limitation of the period within which summary proceedings may be taken. It has no application to proceedings upon indictment. It provides that summary proceedings in respect of " any such offence " shall not be instituted after one year from the first discovery thereof either by the official receiver or by the trustee in the bankruptcy, or in the case of proceedings instituted by a creditor, by the creditor, nor in any case shall they be instituted after three years from the commission of the offence.

(1) (1932) 47 C.L.R. 53. (2) (1944) 44 S.R. (N.S.W.) 187.

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The question which arises is whether the words "any such offence" refer to the words "an offence against this Act" in sub-s. (1): or, on the other hand, to the words "an offence against this Act in respect of which no special penalty is imposed by this Act." The third sub-section deals with still another matter. It is introduced by the words: "In an indictment for an offence under this Act." The sub-section deals with the contents of an indictment.

Accordingly, we have one section with three provisions dealing with three separate subject matters, but all relating to offences against the Act. There is a strong argument that effect should be given to the word "such" by referring it to the nearest antecedent, taking the nearest antecedent to be "an offence against this Act in respect of which no special penalty is imposed by this Act." On the other hand, the same principle could identify the immediately-preceding antecedent as the words "an offence against this Act." But it must be conceded that the words are "any such offence" and not "any offence" or "any offence against this Act." Thus this grammatical argument rather supports the contention that sub-s. (2) applies only in the case of an offence in respect of which no special penalty is imposed.

On the other hand there are considerations pointing in the other direction. Sub-section (1) is expressed in general terms, but it really applies only to offences against s. 213. Sub-section (2) is expressed in general terms and no reason can be suggested for applying the provision as to limitation of time for proceedings only to offences against s. 213. One would not expect to find a limitation provision applying only to s. 213 expressed in general terms, such as we find in s. 219 (2).

These two constructions are open on the words of s. 219 (2). It should be remembered that the sub-section deals with a limitation of proceedings in the case of a criminal offence, and the principle may fairly be applied in a case of doubt that a provision should be given a construction favourable to liberty and favourable, therefore, to giving a wide interpretation to the provision for the benefit of accused persons contained in the sub-section.

Finally, thirteen years ago in the case of *Re Leach* (1) the provision was construed in this sense, namely, that the words "any such offence" relate to "an offence against this Act" and not to the words "an offence against this Act in respect of which no special penalty is imposed." That decision was given thirteen years ago and it has since been acted upon. The Act has been before Parliament since that time and no amendment has been made.

(1) (1933) 6 A.B.C. 281.

In my opinion these considerations are sufficient to make it proper to adopt the alternative construction of the section, that is, the construction which regards the words "any such offence" in sub-s. (2) as referring to the antecedent "an offence against this Act" in sub-s. (1).

Accordingly, in my opinion, for these reasons, the question which is submitted should be answered in the affirmative; that is to say, that sub-s. (2) of s. 219 does apply to the summary proceedings against the bankrupt in this case.

Rich J. I regret that I am quite unable to agree with what the Chief Justice has said. In construing s. 219 of the *Bankruptcy Act* 1924-1946 the word "such" refers, I think, to the offence in respect of which no special penalty is imposed by the Act and not to all the offences comprehended in Part XIV. of the Act. This construction is in accordance with the ordinary rule of the grammatical construction of the English language that words of relation prima facie refer to the nearest antecedent. It was contended that two decisions had adopted the contrary construction. The first case—*Re Leach* (1)—is directly on the point, but its reasoning and conclusion do not appeal to me. The second case—*Marks* v. *The King* (2)—apparently misses the point and therefore need not be considered. In any event this is not among the class of cases in which courts are reluctant to reconsider old authorities or to upset an interpretation which has been settled so long that people may be supposed to have acted according to it for a considerable time, and on the strength of which many transactions may have been adjusted and rights determined. These considerations do not apply to decisions with respect to the penal provisions of the *Bankruptcy Act*—provisions which require strict construction. For these reasons I would answer the question submitted in the negative.

Starke J. I agree with my brother *Rich*. The question stated should be answered in the negative.

Dixon J. I agree with the Chief Justice for the reasons given by him.

Section 219 is transcribed from an English original, the construction of which in that context is simple. However, the literal transcription of provisions from other sources creates difficulty. The present difficulty lies in a conflict between rules of grammar and more substantial considerations. I concur with what my brother *Rich* has said about the rules of grammar affecting the correct literal meaning of s. 219 (2). The whole question is whether

(1) (1933) 6 A.B.C. 281. (2) (1937) 57 C.L.R. 58.

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we should apply them or whether they should give way to considerations which may be said to go deeper.

I shall not restate the substantial considerations mentioned by the Chief Justice, except to say that they amount to these: s. 219 (2) can have no serious operation if we give effect to the rules of grammar so that it can apply only to one provision, viz., s. 213, whereas on its face it is manifest that it was expressed as applicable to many. Then the liberty of the subject will be restricted in applying the interpretation which grammar favours. Next, there is the decision of Judge *Lukin*, *Re Leach* (1) which has stood for fourteen years and must be overthrown if we are to be so strictly grammatical. Finally, we would find it necessary to overrule our decision in *Marks* v. *The King* (2). It may be that in that case we overlooked the point. But apparently we read the section instinctively in the same way as Judge *Lukin* construed it and I am construing it. We so read it without adverting to the consequences now found to follow from the true grammatical application of the relative "such." Judge *Lukin* did not overlook them, but, having discovered them, he rejected them. There is much to be said for the view that the legislature did not ever intend them. At all events the reading that was given to the sub-section appears to me to produce a satisfactory and reasonable result and it is better to leave it undisturbed even at the risk of offending grammatical sensibilities.

For these reasons I think the question should be answered in the affirmative.

McTIERNAN J. I agree that the question should be answered in the affirmative.

If the strict rule of grammar is to read "such" in s. 219 (2) as applying to the offence described in s. 219 (1) and nothing else, the result would not, I think, be in accordance with the indication of legislative intention as to the scope of s. 219 (2), which, I think, is to be gathered from the whole of Part XIV., of which s. 219 (2) forms part. Reading this sub-section with the rest of Part XIV., I think that "such" should be construed as applying generally to the offences set out in that Part of the Act.

Question answered Yes. No order as to costs.

Solicitors for the bankrupt, *H. J. Price & Co.*

Solicitor for the Attorney-General, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1933) 6 A.B.C. 281.

(2) (1937) 57 C.L.R. 58.