[HIGH COURT OF AUSTRALIA.]

MASLEN . . . . . APPELLANT;
RESPONDENT,

AND

THE OFFICIAL RECEIVER . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1947.

PERTH, *Sept.* 3, 4, 5, 11.

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

Bankruptcy—Contempt—Application for discharge—Stranger to proceedings—Procuring false receipts from creditors—Attempt to deceive the Court—State Supreme Court exercising Federal jurisdiction in bankruptcy—Summary proceedings—"Bankruptcy matter"—Jurisdiction—Right of appeal—Evidence—Transcript of proceedings on application for discharge—Bankruptcy Act 1924-1946, *ss.* 4, 18 (1) (*b*), 20 (1), 26 (2), 76 (2).

An appeal lies as of right under s. 26 (2) of the *Bankruptcy Act* 1924-1946 from an order of a Court of Bankruptcy committing for contempt a person not a party to the proceedings.

At the hearing of an application for a certificate of discharge it was stated by the legal representative of the bankrupt that creditors had been paid 5s. in the pound, but on an intimation by the judge that 20s. in the pound should be paid in the estate, the application was adjourned. On the hearing of the adjourned application receipts were produced purporting to show that creditors had been paid 5s. in the pound prior to the original hearing of the application and that a further 15s. in the pound had been paid to creditors following on the judge's intimation. It was shown that these receipts were false in certain particulars and had been procured by an accountant acting in the interests of the bankrupt.

On motion by the Official Receiver the Supreme Court of Western Australia sitting in bankruptcy committed the accountant for contempt of court on the ground that he had interfered with the course of justice by attempting to deceive the Court by means of the false receipts.

In the application for committal an affidavit was sworn to which was exhibited a transcript of the proceedings on the adjourned application for discharge. The affidavit and the exhibit were used without any objection being taken.

Held (1) That in making the order for committal the Supreme Court was exercising Federal jurisdiction conferred by s. 20 (1) of the *Bankruptcy Act* 1924-1946.

(2) That the Supreme Court acted on a correct principle in entertaining the motion to commit for contempt under that section.

(3) That in summary proceedings of this character it is open for the parties to waive the strict rules of evidence and allow depositions to be used and in the circumstances of this case it was not open for the appellant to complain that the transcript was before the Court.

(4) That the charge of contempt of court had been established.

Decision of the Supreme Court of Western Australia (*Wolff* J.) in part varied and in part affirmed.

APPEAL from the Supreme Court of Western Australia.

Samuel Mackomel, whose estate was sequestrated in 1930, on 25th June 1946 made an application for a certificate of discharge to the Supreme Court of Western Australia (*Wolff* J.) sitting in bankruptcy. At the hearing of the application Mackomel was represented by a solicitor who stated that the sum of 5s. in the pound had been paid to creditors. The judge expressed the opinion that 20s. in the pound should be paid and adjourned the application. The adjourned application was further heard on the 23rd December 1946 when receipts, which purported to show that 5s. in the pound had been paid to creditors prior to 25th June 1946 and that a further 15s. in the pound had been paid to creditors subsequently to that date, were produced to the Court.

The debts proved in the bankruptcy amounted to £154 of which amount £95 11s. 7d. was due to F. C. Washing, and £58 0s. 2d. was due to B. J. Surman.

The wife and daughter of the bankrupt were anxious that he should obtain his certificate of discharge and Edward Robert Maslen, a public accountant, who had done some work as an accountant in connection with businesses conducted by Mrs. Mackomel, interested himself in the matter.

On 2nd December 1943, Maslen paid to B. J. Surman the sum of £10 and obtained from him a receipt for the sum of £14 10s. in which the transaction was described as an assignment of the debt. Maslen stated that before obtaining that receipt he paid Surman an additional £4 10s., but he wrote a letter on 4th July 1946 in which he stated that the amount paid to Surman was £10.

H. C. OF A. 1947.

MASLEN v. THE OFFICIAL RECEIVER.

On 24th July 1944 Maslen obtained from F. C. Washing a receipt for the sum of £23 17s., but in fact the amount paid to Washing was £70. In this receipt the transaction was, again, described as an assignment of the debt in consideration of the payment expressed to have been made.

On the first hearing of the application for a certificate of discharge these transactions were described as payments of 5s. in the pound for assignments of the debts to Maslen as trustee for the bankrupt's wife.

To make these payments and to pay some other small creditors Maslen received from the bankrupt or his wife or daughter a sum or sums amounting to £110.

On the adjourment of the application, Maslen, having been provided with a further sum of £50, proceeded to arrange the necessary additional payments of 15s. in the pound.

He obtained from Surman a receipt dated 3rd July 1946 for the sum of £43 10s. 2d. without actually paying him that amount.

On 3rd July 1946 Washing signed a receipt for the sum of £71 13s. 9d. In fact he then received the sum of £25 11s. 7d.

On the production of these receipts to the court on the hearing of the adjourned application the judge directed that proceedings be taken for contempt of court.

In the application for committal an affidavit was sworn by a shorthand-typist to which was exhibited a transcript of the proceedings on the adjourned application for a certificate of discharge, but the transcript was not referred to during the hearing. No objection was made to the use of the transcript and counsel for the respondent to the motion made it clear that he did not desire that any witnesses be called, other than Surman and Washing, and that he treated the motion as based otherwise on the affidavits and exhibits.

Maslen was found guilty of contempt of court " in that he did interfere with the course of justice by attempting to deceive the Court in that for the purposes of an application for discharge by the said Samuel Mackomel a bankrupt, he did obtain false receipts from creditors of the abovenamed bankrupt in respect of payments made by him to the said creditors." A term of four months' imprisonment and a fine of £100 was imposed upon him. In default of payment of the fine it was ordered that he be detained for a further term of twelve months commencing with the expiration of the term of four months.

From that decision Maslen appealed to the High Court.

A preliminary objection to the competency of the appeal was taken by the respondent.

Good, for the respondent in support of the preliminary objection. A preliminary objection is taken to the appeal on the ground that the motion for committal for contempt of court is not a bankruptcy matter within the meaning of s. 26 (2) of the *Bankruptcy Act* 1924-1946 and there is no appeal, therefore, to the High Court, otherwise than by motion for special leave under s. 35 (1) (*b*) of the *Judiciary Act* 1903-1940. The motion for contempt of court is made against a person who is not a party to or directly connected with the bankruptcy proceedings and is of a criminal nature. It is not a bankruptcy matter but an exercise of the common law powers of the court to commit strangers to the proceedings for contempts which take place and interfere with the administration of justice: See *O'Shea* v. *O'Shea*; *Ex parte Tuohy* (1); *In re Suffield*; *Ex parte Brown* (2); s. 7, *Criminal Code Act* 1913.

[McTIERNAN J. referred to s. 4 of the *Bankruptcy Act*.]

Section 4 of the *Bankruptcy Act* does not define a "bankruptcy matter" but merely "bankruptcy." "Bankruptcy matter" is not identical with bankruptcy proceeding or jurisdiction, and there is a distinction between "bankruptcy jurisdiction" and "bankruptcy matter" by virtue of s. 26 (1) and 26 (2) of the *Bankruptcy Act*. Section 20 of the *Bankruptcy Act* is declaratory or confirmatory, and does not confer jurisdiction on a judge of the Supreme Court of a State exercising federal jurisdiction in bankruptcy. A judge of the Supreme Court of a State has this jurisdiction by virtue of s. 16 (1) (*a*) and s. 22 (2) of the *Supreme Court Act* 1935. There is no appeal from a decision of a judge on a criminal contempt of court to the Court of Criminal Appeal as it is not a conviction on an indictment: See s. 688 of the *Criminal Code*. Section 76 of the *Bankruptcy Act* defines contempts of court which are bankruptcy matters, and s. 20 of the *Bankruptcy Act* has been enacted to confer jurisdiction with reference to such contempts. Exercise of inherent powers of committal for contempt of court is a special jurisdiction and is not the subject of an appeal to the High Court as of right. The present case is not an instance of a contempt set out in s. 76 of the *Bankruptcy Act*.

Seaton K.C. (with him *Reilly*) was not called on.

Counsel proceeded to argue in the appeal:—

Seaton K.C. (with him *Reilly*), for the appellant. The trial judge was the judge who heard the application for discharge from bankruptcy by Mackomel. In hearing the motion to commit he wrongly took into account matters which had come to his knowledge during the course of the discharge proceedings but which were not in evidence

(1) (1890) 15 P.D. 59. (2) (1888) 20 Q.B.D. 693.

H. C. OF A. 1947. MASLEN v. THE OFFICIAL RECEIVER.

either in the discharge proceedings or in the proceedings for committal of the appellant. He also took into account matters contained in the transcript of the discharge proceedings. The transcript was never tendered in evidence in the proceedings for committal and in any event was *res inter alios acta* and inadmissible. If held to have been admitted it should have been disregarded, as counsel for the appellant had no opportunity to object to the admission. In any event the judge should not have dealt with the matter on motion to commit but should have left it to be dealt with on indictment. [He referred to *Oswald* on *Contempt*, 2nd ed. (1895), p. 17 ; *Halsbury, Laws of England*, 2nd ed., vol. 7, p. 3 ; s. 103, *Criminal Code* ; *R.* v. *Joyce* (1) ; *Linwood* v. *Andrews* (2) ; *Re Septimus Parsonage & Co.* (3) ; *Re The Ludlow Charities* ; *Mr. Lechmere Charlton's Case* (4).] The sentence was excessive and its success must be attributed to the fact that the judge's mind was coloured by the inadmissible evidence.

Good, for the respondent. Contempt of court is a unique and special offence and the rules of criminal procedure and evidence do not necessarily apply. The judge is entitled to take into consideration all facts which come to his cognizance on the hearing of the proceedings with reference to which the contempt is committed, and to call on the contemnor to show cause why he should not be committed in view of what has come to the judge's knowledge. In *Re Septimus Parsonage & Co.* (3) the court acted on a report of the Official Receiver (5). In both *Re Septimus Parsonage & Co.* (3) and *Helmore* v. *Smith* (6), the whole of the proceedings in respect of which the contempts were committed are set forth in the reports and there appears to have been no evidence as usually tendered in a criminal trial. [He referred to *Carter* v. *Roberts* (7) ; *In the matter of a special Reference from the Bahama Islands* (8) ; *Jacker* v. *International Cable Co. Ltd.* (9) ; *House* v. *King* (10) ; *In re Brunner* (11)]. As to the judge proceeding on the wrong principle in dealing with a matter on a motion to commit for contempt instead of leaving the matter to be dealt with on indictment, the power of the Court to deal with acts interfering with the course of justice has long been established (*Oswald* on *Contempt of Court*). Acts which constitute an interference with the jurisdiction of the Court are contempts of court (*Re Septimus*

(1) (1930) S.A.S.R. 56.
(2) (1888) 58 L.T. 612.
(3) (1901) 2 Ch. 424.
(4) (1837) 2 My. & Cr. 316 [40 E.R. 661].
(5) (1901) 2 Ch., at p. 426.
(6) (1886) 35 Ch. D. 449.
(7) (1903) 2 Ch. 312.
(8) (1893) A.C. 138.
(9) (1888) 5 T.L.R. 13.
(10) (1936) 55 C.L.R. 499, at p. 503.
(11) (1887) 19 Q.B.D. 572.

Parsonage & Co. (1)). The Court has power to exercise this jurisdiction summarily, irrespective of whether the act is an indictable offence. This jurisdiction of a judge of the Supreme Court is preserved by s. 7 of the *Criminal Code Act* 1913.

Reilly, in reply. The transcript was clearly inadmissible. It did not even have the authority of s. 51 of the *Bankruptcy Act* but was merely a private record and could not in any event have been admitted (*In re Brunner* (2)). It is the duty of the Court to disregard such evidence even if admitted without objection (*Jacker* v. *International Cable Co.* (3)).

Cur. adv. vult.

Sept. 11.

The following written judgment was delivered :—

LATHAM C.J., RICH, DIXON AND MCTIERNAN JJ. This is an appeal from an order of the Supreme Court of Western Australia made by *Wolff* J. committing the appellant, Edward Robert Maslen, for contempt of court. According to the caption, the order was made in the Court's bankruptcy jurisdiction, and the appeal is brought as of right on that footing. The order imposed upon the appellant punishment consisting of a term of four months' imprisonment and a fine of £100. In default of payment of the fine the order directed that the appellant should be detained for a further term of twelve months commencing with the expiration of the said term of four months. The contempt of which the appellant was thus convicted was described in the order as interfering with the course of justice by attempting to deceive the Court, in that, for the purpose of an application by Samuel Mackomel, a bankrupt, he obtained false receipts from creditors of the bankrupt in respect of payments made by him to the creditors.

The respondent, who is the Official Receiver, took a preliminary objection to the competency of the appeal, which was instituted under s. 26 (2) of the *Bankruptcy Act* 1924-1946. Section 26 (1) provides that the Court (that is, a Court of Bankruptcy) may review, rescind, or vary any order made by it in its bankruptcy jurisdiction. Then sub-s. (2) goes on to provide that, except where otherwise provided, an order of the Court in a bankruptcy matter shall, at the instance of the Official Receiver or trustee or any person aggrieved, be subject to appeal to the High Court. The objection made on behalf of the respondent is that the order for committal for contempt

(1) (1901) 2 Ch., at p. 430.
(2) (1887) 19 Q.B.D. 572.
(3) (1888) 5 T.L.R. 13.

H. C. OF A. 1947. MASLEN v. THE OFFICIAL RECEIVER. Latham C.J. Rich J. Dixon J. McTiernan J.

of court is not "an order of the Court in a bankruptcy matter," within the meaning of sub-s. (2).

The Supreme Court of Western Australia is a court which is invested with federal jurisdiction in bankruptcy by s. 18 (1) (*b*) of the *Bankruptcy Act*. Section 20 (1) is in the following terms:— "Every court having jurisdiction in bankruptcy shall have jurisdiction throughout the Commonwealth or within such Districts as the Governor-General by proclamation directs, and shall have the same powers and rights to commit for contempt of Court as belong to the High Court or to the Supreme Court of the State or Territory in which the jurisdiction is being exercised."

The learned judge in summarily convicting the appellant of contempt purported to exercise the federal jurisdiction so conferred. It is objected that an order made against a stranger to the bankruptcy proceedings punishing him for contempt is not an order in a bankruptcy matter. Such an order is, of course, not an order against the bankrupt and it does not affect the administration of the estate of the bankrupt by the Court. The respondent relied upon *O'Shea* v. *O'Shea*; *Ex parte Tuohy* (1), which draws the very obvious distinction between attachment for a criminal contempt and the proceedings in the matter before the court in connection with which the contempt had been committed by the person attached. The respondent also relied upon *In re Suffield*; *Ex parte Brown* (2), for the purpose of marking the distinction between matters of bankruptcy and orders of another character made by a court which happens to possess bankruptcy jurisdiction. There a judge of the Queen's Bench Division, having jurisdiction in bankruptcy, made an order under the *Solicitors' Act* 23 & 24 Vict., c. 107, charging the costs of a solicitor on funds in the hands of a receiver of assets of a partnership. It was held that in making this order the learned judge did not act in the bankruptcy jurisdiction of the court. It is not difficult to see why, for he exercised a special power given to him by the *Solicitors' Act*.

In the present case, however, the jurisdiction which the learned judge intended to exercise is a jurisdiction given by s. 20 of the *Bankruptcy Act*, which specificially confers as a matter of federal jurisdiction upon courts having jurisdiction in bankruptcy a power to commit for contempt of court. "Bankruptcy" is defined in s. 4 in the following way:—"'Bankruptcy', in relation to jurisdiction or proceedings includes any jurisdiction or proceedings under or by virtue of this Act." The jurisdiction which the Court exercised in making the order for committal was a jurisdiction which was created

(1) (1890) 15 P.D. 59.

(2) (1888) 20 Q.B.D. 693.

by s. 20 of the Act. It was therefore a " jurisdiction under or by virtue of this Act " and accordingly the order was an order made in the Court's bankruptcy jurisdiction. Why then is the order not an order in a bankruptcy matter within the meaning of s. 26 (2) ? No reason appears for reading sub-s. (2) of s. 26 as giving a right of appeal which does not cover all orders made by a court of bankruptcy in its bankruptcy jurisdiction. The expression " bankruptcy matter " is only another way of saying " matter in bankruptcy " or " matter of the bankruptcy jurisdiction," and that only means " matter forming a proceeding under or by virtue of the Act." The proceedings for committal were proceedings under the Act. The order for committal therefore falls within the description " order made in a bankruptcy matter " as used in s. 26 (2). The preliminary objection is therefore overruled.

The contempt of which Maslen was adjudged guilty is stated in the order to be that he interfered with the course of justice by attempting to deceive the court, in that for the purposes of an application for a discharge by a bankrupt, Samuel Mackomel, he obtained false receipts from creditors of the bankrupt in respect of payments made by him (that is, by Maslen) to the creditors. In the notice of motion for the appellant's committal it was charged that four such receipts were false, namely, " a receipt dated 2nd December 1943 from Benjamin Joseph Surman acknowledging the receipt of the sum of £14 10s. whereas in fact the sum of £10 was paid to the said Benjamin Joseph Surman ; a receipt dated 24th July 1944 from Frederick Charles Washing acknowledging the receipt of the sum of £23 17s. 10d. whereas in fact the sum of £70 was paid to the said Frederick Charles Washing ; a receipt dated the 3rd July 1946 from Benjamin Joseph Surman acknowledging the receipt of £43 10s. 2d. whereas in fact the sum of £14 was paid to the said Benjamin Joseph Surman ; and a receipt dated the 3rd July 1946 from Frederick Charles Washing acknowledging the receipt of the sum of £71 13s. 9d."

[After a statement of the facts the judgment proceeded :]

The total result is that receipts were obtained to show that 5s. in the pound had been paid in 1943 and 1944 and another 15s. in the pound in July 1946, whereas in fact, in the case of Surman, whatever had been paid at the earlier date, much less than 15s. in the pound had been paid in July 1946, and in the case of Washing a great deal more than 5s. in the pound in the first instance had been paid. Thus one at least of the earlier receipts was false and both of the two later receipts were false in the respects stated.

Thus it is proved that documents were deliberately procured by Maslen calculated to mislead the Court if produced to it. We think

H. C. OF A. 1947.

MASLEN v. THE OFFICIAL RECEIVER.

Latham C.J. Rich J. Dixon J. McTiernan J.

that some doubt must exist, whether in 1943 and 1944 Maslen really contemplated the production of the receipts for 5s. in the pound to the court as distinguished from other creditors and the Official Receiver. But no such doubt can be entertained as to the two later receipts. Of these no satisfactory explanation was attempted by Maslen. The payments made by him to the creditors were not recorded in his books, though the receipt for £110 from Mrs. Mackomel to enable him to purchase the debts owned by Mackomel was recorded. When he was visited by an investigating officer he attempted to destroy a memorandum which would assist the investigating officers.

It is not easy to see that Maslen had any purpose of personal gain in view. Though he does not seem to have accounted fully to Mrs. Mackomel, the evidence does not justify an inference that he was in any way guided by a desire to profit from the Mackomels. It has been argued on Maslen's behalf that the substance of the transaction, taken as a whole, was that the moneys represented to have been paid were in fact paid, and that it was really immaterial whether Maslen on account of Mackomel or Mrs. Mackomel paid a dividend to Surman and paid Washing in full, or whether he purchased both of their debts. But that overlooks the important fact that it was intended to represent that 5s. in the pound had been paid to the creditors in the first instance and 15s. afterwards in order to comply with the judge's expression of opinion. The purpose of the receipts was to support that untrue picture of the facts and at least two of them were intended to deceive the court when they were prepared. How important might be the facts about which the deception was practised is a question that cannot affect the conclusion.

It has been argued for the appellant that the learned judge proceeded on a wrong principle in dealing with the matter on a motion to commit for contempt and that he should have left the matter to be dealt with on indictment. In fact proceedings for indictment for contempt of court have not been instituted for very many years, but there is no doubt that such proceedings are available. Many warnings have been addressed to judges by courts and by legal writers emphasising the arbitrary nature of the power to commit for contempt and, in particular, warning the members of judicial tribunals that they should act with care and circumspection, particularly in matters where their own dignity is concerned and where they might be thought to be in effect prosecutors in the proceedings. It may be conceded that the summary jurisdiction is properly exercisable for the purpose only of repressing interferences with the course of justice, which, because of their nature or tendency, call for

intervention by the court. The reason for its existence is not so much the punishment of crime as the protection of the administration of justice. In the present case, however, a definite attempt to practise or support a deception upon the court in a pending proceeding was made and presumptive evidence of it came under the learned judge's notice. It was in our opinion in accordance with principle for the court at once to entertain a motion to commit. We see no reason why his Honour should not exercise the jurisdiction specifically conferred upon him by s. 20 of the *Bankruptcy Act*.

A further objection was made relating to the reception and use of evidence. In the application for committal an affidavit was sworn by a shorthand-typist to which was exhibited a transcript of the proceedings on the adjourned application of Mackomel for his certificate of discharge on 23rd December 1946. Before this Court it was contended that the transcript was inadmissible. Maslen was not a party to the proceedings on 23rd December 1946. Evidence given on that occasion is plainly not admissible in the proceedings against him in proof of the facts to which the witnesses then deposed. But in summary proceedings of this character it is open to the parties to waive the strict rules of evidence and to allow depositions to be used. No objection was made to the admission of the transcript, which in fact was not referred to during the hearing. Further, counsel for the respondent to the motion made it clear that he desired that no witnesses should be called except Surman and Washing, and that he treated the motion as based otherwise on the affidavits and exhibits. In these circumstances we think that the appellant cannot complain here that the transcript was before the judge. The learned trial judge, in his reasons for judgment, refers to some suspicion that Mackomel's wife was dummying for Mackomel, and counsel urged that the learned judge could have formed this suspicion only as a result of evidence in prior proceedings to which Maslen was not a party. But, even if that were the case, the forming of a suspicion as to the capacity in which Mrs. Mackomel carried on business had no real bearing on the question whether or not Maslen had been guilty of contempt of court, and it cannot afford to the appellant a ground for attacking the order.

We think that there was an interference with the course of justice by the appellant and that no ground appears for setting aside his conviction for contempt. But we have not in all respects taken exactly the same view of the facts as the learned judge. For instance, we think that there is sufficient doubt about the intention of the appellant to deceive the court with the two earlier receipts, however reprehensible his conduct in procuring them for the deception

H. C. OF A. 1947.

MASLEN v. THE OFFICIAL RECEIVER.

Latham C.J. Rich J. Dixon J. McTiernan J.

of creditors and others may have been, to make it proper to confine the finding of contempt to the two later receipts. Again, we do not think that it would be safe to conclude that he was actuated by any other motive than a desire to secure for the bankrupt a discharge with as little expenditure of Mrs. Mackomel's money as might be. In these circumstances we think that we are entitled to reconsider the punishment imposed by the order on the appellant and that we should do so. Maslen has already served some fourteen days in prison. To send him back to gaol for the balance of the term in addition to fining him £100 is to inflict a punishment of some severity. The period of imprisonment which he has already served and the payment of the fine and of the costs of the motion and of this appeal should provide a punishment adequate to the occasion. We think that justice will be done if the term of imprisonment is reduced to fourteen days' imprisonment, which has already been served. The order should remain unchanged so far as the fine of £100 is concerned, but the appellant should have another fourteen days to pay the fine. Otherwise the appeal should be dismissed with costs. The order will be as follows:—Vary the order of the Supreme Court dated 30th April 1947 by substituting fourteen days for four months. Stay the order for fourteen days from this date. Otherwise confirm the order and dismiss the appeal with costs.

Vary the order of the Supreme Court dated 30th April 1947 by substituting fourteen days for four months. Stay the order for fourteen days from this date. Otherwise confirm the order and dismiss the appeal with costs.

Solicitors for the appellant, *Dwyer & Thomas.*

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

P. A. L.