[HIGH COURT OF AUSTRALIA.]

ISAACS . . . . . APPELLANT;
DEFENDANT,

AND

McKINNON . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

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MELBOURNE, *Oct.* 11, 12; *Dec.* 21.

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

Bankruptcy—Federal Court of Bankruptcy—Jurisdiction—Offence by bankrupt against Bankruptcy Act—Summary trial—Conviction—Release on recognizance—Condition that bankrupt make payments to Official Receiver for benefit of creditors—Validity of condition—Non-compliance with condition—Offence punishable under Crimes Act by "imprisonment for the period provided by law in respect of the offence of which" the offender "was previously convicted"—Whether offence indictable—Penalty "may be imposed by the court by which the offender was originally convicted or by any court of summary jurisdiction"—Original offence punishable by imprisonment for one year, except that on summary trial by Court of Bankruptcy maximum limited to six months—Power of Court of Bankruptcy to try offence against Crimes Act summarily—Sentence which may be imposed by that Court—Constitution (63 & 64 *Vict. c.* 12), *s.* 80—*Acts Interpretation Act* 1901-1948 (*No.* 2 *of* 1901—*No.* 79 *of* 1948), *ss.* 42, 43—*Bankruptcy Act* 1924-1947 (*No.* 37 *of* 1924—*No.* 52 *of* 1947), *ss.* 61, 91, 101, 119 (6) (*c*), (*d*), (7), 210 (3) (*c*), 212 (1) (*a*), 217, 218—*Crimes Act* 1914-1946 (*No.* 12 *of* 1914—*No.* 77 *of* 1946), *ss.* 12, 20.

On summary trial by the Federal Court of Bankruptcy under s. 217 of the *Bankruptcy Act* 1924-1947 a bankrupt was convicted of an offence against the Act. The offence was one for which the offender was liable to imprisonment for a year, if tried otherwise than summarily under s. 217 (1) (*a*) of the Act, but which, on summary trial by the Court of Bankruptcy, was, by reason of s. 217 (2), punishable by imprisonment for no longer than six months. Under s. 20 (1) of the *Crimes Act* 1914-1946 the court, without passing sentence on the bankrupt, released him on a recognizance a condition of which was

that for five years he should pay to the Official Receiver £160 a year in quarterly instalments for the benefit of his creditors. On the information of the Official Receiver, the bankrupt was tried summarily by the Court of Bankruptcy for an offence against s. 20 (2) of the *Crimes Act* in that he had failed to comply with the condition of the recognizance, and he was sentenced to ten weeks' imprisonment. The penalty prescribed by s. 20 (2) of the *Crimes Act* was " imprisonment for the period provided by law in respect of the offence of which " the offender " was previously convicted," and, under s. 20 (3), it might be imposed " by the court by which the offender was originally convicted or by any court of summary jurisdiction."

Held :—

(1) By *Latham* C.J., *Rich*, *McTiernan* and *Webb* JJ. (*Dixon* J. dissenting), that the Court of Bankruptcy had jurisdiction to try the charge of an offence against s. 20 (2) of the *Crimes Act* summarily. That offence was not an indictable offence by reason of the provision of s. 42 of the *Acts Interpretation Act* 1901-1948 that " offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless the contrary intention appears, be indictable offences " : *per Latham* C.J. and *Rich* J., because a contrary intention appeared in the *Crimes Act* ; *per McTiernan* and *Webb* JJ., because the words of s. 20 (2) of the *Crimes Act* describing the term of imprisonment meant, when applied to the circumstances of this case, imprisonment for the period to which the Court of Bankruptcy could have lawfully sentenced the bankrupt and that period did not exceed six months.

(2) By *Latham* C.J., *Rich*, *McTiernan* and *Webb* JJ. (*Dixon* J. dissenting), that the condition of the recognizance was not contrary to the policy of the *Bankruptcy Act*.

APPEAL from Federal Court of Bankruptcy.

On 9th May 1949 in the Federal Court of Bankruptcy (District of Victoria) Eskell Nathan Isaacs (hereinafter called the bankrupt) was convicted, on summary trial under s. 217 (1) (*a*) of the *Bankruptcy Act* 1924-1947, of offences against ss. 210 (3) (*c*) and 212 (1) (*a*) of the Act. Applying s. 20 (1) of the *Crimes Act* 1914-1946, the Court, without passing sentence upon the bankrupt, ordered that he be released on his entering into a bond in the sum of £50 to be of good behaviour for a period of five years and on the further condition that during the five years he pay the sum of £160 a year to the Official Receiver for the benefit of his creditors, such moneys to be paid in instalments of £40 a quarter, the first instalment to be paid on or before 30th June 1949 and thereafter on or before the last day of each succeeding period of three months. The recognizance into which the bankrupt entered recited the foregoing order but expressed the conditions of the recognizance in somewhat different terms, as being " such that if the . . . bankrupt shall

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be of good behaviour for a period of five years from the date hereof and during such period . . . pays to the Official Receiver" £160 a year by quarterly instalments on 30th June 1949 "and thereafter on or before the last day of each succeeding period of three months in each year during the aforesaid period of five years then this recognizance to be void otherwise it shall stand in full force and virtue." The bankrupt paid £10 to the Official Receiver on 30th June 1949 but made no further payments. The Official Receiver, Archibald McKinnon, laid an information in the Court of Bankruptcy against the bankrupt, charging that he had committed an offence against s. 20 (2) of the *Crimes Act* by failing to comply with a condition of the recognizance in that he did not on or before 30th June 1949 pay to the Official Receiver for the benefit of his creditors "the sum of £40 as required by the said recognizance." The bankrupt pleaded guilty to the charge and was sentenced by the Court of Bankruptcy to ten-weeks' imprisonment.

From this decision the bankrupt appealed to the High Court.

After the appeal was heard, Archibald McKinnon died and Ormonde Lloyd Jones was appointed Official Receiver; the latter was substituted as the respondent to the appeal. Further facts appear in the judgments hereunder.

M. J. Ashkanasy K.C. (with him *A. R. Samuel*), for the appellant. The Court of Bankruptcy had no power to deal with the charge of an offence against s. 20 (2) of the *Crimes Act*. The penalty provided by that sub-section for the offender who has failed to comply with the recognizance is "imprisonment for the period provided by law in respect of the offence of which he was previously convicted." The penalty for each of the original offences of which the appellant was convicted is imprisonment for one year (*Bankruptcy Act*, ss. 210, 212). The penalty to which the appellant might have been subjected for the breach of the recognizance was, therefore, at least one-year's imprisonment; thus, it was an indictable offence (*Acts Interpretation Act* 1901-1948, s. 42) and should have been tried by a jury (The Constitution, s. 80). The appellant having been tried summarily under s. 217 of the *Bankruptcy Act* for the original offences, the Court of Bankruptcy could not have imposed more than six-months' imprisonment for either offence; but that would not alter the nature of the offence (*In*

re Burley (1)), and it cannot bring the offence against s. 20 (2) of the *Crimes Act* within the jurisdiction of the Court of Bankruptcy. It is true that s. 20 (3) of the *Crimes Act* says that the penalty provided by s. 20 (2) may be imposed by the court by which the offender was originally convicted or by a court of summary jurisdiction; but this seems to contemplate either a court of summary jurisdiction (which, within s. 26 of the *Acts Interpretation Act* 1901-1948, the Court of Bankruptcy is not) in appropriate cases or a court which has power to try on indictment. Although sub-ss. 2 and 3 of s. 20 of the *Crimes Act*, as they now appear, were enacted after the *Bankruptcy Act*, it seems unlikely that the special procedure under s. 217 of the latter Act was in mind when they were drafted; the two sets of provisions do not combine to make a workable scheme. Even if the Court of Bankruptcy had jurisdiction, there are two reasons why the conviction should not be allowed to stand; these appear on the face of the proceedings, and therefore the plea of guilty is not a bar to the setting aside of the conviction. The information, when read with the recognizance, discloses no offence. The information charges that the appellant did not pay the sum of £40 "as required by" the recognizance. When one looks at the conditions of the recognizance, it is seen that there is no such requirement. All that is required is payment of £160 a year by quarterly instalments; not necessarily equal instalments. If the conditions followed the order of the court as pronounced, there would be such a requirement; but, on the conditions expressed in the bond, it cannot be said that the payment of £10 before 30th June 1949 was not a sufficient compliance. Moreover, the condition requiring payment to the Official Receiver is invalid because it is contrary to the principles and policy of the *Bankruptcy Act*. In s. 20 (1) of the *Crimes Act* the words "such conditions as the court thinks fit to impose" must mean such conditions as are in accordance with law. The present condition cuts across the scheme of the *Bankruptcy Act* as to the disposal of the property of the bankrupt. All his property, including after-acquired property up to the time of discharge, vests in the Official Receiver (*Bankruptcy Act*, ss. 91 and 61); and the bankrupt may be refused a discharge until he pays a dividend of ten shillings in the pound (*Bankruptcy Act*, s. 119 (6) (*c*)). The vesting of after-acquired property is subject to the rule that the bankrupt is to be permitted to retain such part of his future earnings as is necessary for the maintenance of himself and his family (*Affleck* v. *Hammond* (2)).

(1) (1932) 47 C.L.R. 53.

(2) (1912) 3 K.B. 162.

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Section 101 of the Act recognizes that rule and provides a method (the only method, it is submitted) whereby the quantum is to be determined. The condition of the bond which is now in question has the effect of subjecting the bankrupt to an order which could not properly be made under that section, and the bond is thus in conflict with the section. The bond says nothing about the bankrupt's earnings, but that does not tend against the present submission. It is clear that he could look only to future earnings to make the payments, unless it was to be supposed that he would receive gifts of money from some source not foreseen, and this should not be assumed. Obviously, on the facts of this case, the bankrupt was looking to future earnings to provide the payments under the bond, and the amount of his earnings proved disappointing in comparison with his estimate of the prospects. The requirement of the bond could have (and on the facts would have) the effect of reducing the amount left to him below what was required (and properly allowable) for maintenance. In the result the bond brings pressure to bear on the bankrupt in a manner which is not consistent with the Act.

G. Gowans, for the respondent. Under the *Acts Interpretation Act*, s. 42, an offence for which a statute provides a term of more than six-months' imprisonment is not indictable if an intention to the contrary appears in the statute. Such an intention does appear in s. 12 of the *Crimes Act* (*R.* v. *Archdall & Roskruge; Ex parte Carrigan & Brown* (1)). The case cited is not a decision on s. 20 (2) of the *Crimes Act*, but the reasoning applies with equal force because it turns on s. 12 of that Act. In s. 20 (3) of that Act there is a clear grant of power to the Court of Bankruptcy, as the court " by which the offender was originally convicted," to deal with the breach of the bond. This, in itself, seems sufficient to take the matter out of s. 42 of the *Acts Interpretation Act*. The effect of s. 20 (3) of the *Crimes Act*, it is submitted, is to put the Court of Bankruptcy, for the purposes of trying the charge of breach of the bond, in the same position as it was in when trying the original charges. For the original offence the power of the court was limited to a sentence of six months, and it is similarly limited as to the breach of the bond. That resolves any difficulty that might be seen in s. 42 of the *Acts Interpretation Act*. It is the result of the proper construction of the relevant legislation, and it is not an unreasonable result; no difficulty is presented which would

(1) (1928) 41 C.L.R. 128.

call for a " reading down " of any of the relevant provisions; to say that this result could not—or might not—have been contemplated is mere speculation and is beside the point. As to the objection that the bond did not require a payment of £40 on 30th June 1949, the plea of guilty is a bar to the objection. Moreover, even if one disregards the order as pronounced, it is implicit in the bond, when it speaks of quarterly instalments, that they are to be equal in amount. The objection to the validity of the bond is unsound. The bond is not directed—in express terms, at any rate—to the bankrupt's earnings, and it is difficult to see how it can be inconsistent with s. 101 of the *Bankruptcy Act*. Any question of the effect of the bond on the bankrupt's maintenance was a matter of fact for the Court of Bankruptcy; it does not go to the validity of the bond. Further, the provisions of the Act which vest after-acquired property in the Official Receiver do not necessarily ensure that what comes into the hands of the bankrupt will in fact pass to the Official Receiver. Far from being inconsistent with the Act, the condition of the bond seems rather an attempt to ensure that the provisions of the Act will be carried into effect.

M. J. Ashkanasy K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:— Dec. 21.

LATHAM C.J. This is an appeal by Eskell Nathan Isaacs from a conviction by the Federal Court of Bankruptcy (*Clyne* J.) of the appellant for an offence against s. 20 (2) of the *Crimes Act* 1914-1946. The appellant had been convicted by the Court of Bankruptcy for offences against, first, s. 210 (3) (*c*) of the *Bankruptcy Act* 1924-1947 for that, being a bankrupt, he did dispose of otherwise than in the ordinary way of his trade, certain recorders which he obtained in February and March 1948 and did not pay for; and, secondly, against s. 212 (1) (*a*) for that, being a bankrupt, he did incur a debt on or about 28th January 1948 and in doing so obtained credit by means of fraud. The Court of Bankruptcy dealt with these offences against the Act upon a summary trial under s. 217 (1) (*a*) of the Act. The court then applied s. 20 (1) of the *Crimes Act*. This provision is in the following terms:—" If the Court thinks fit to do so, it may release any person convicted of an offence against the law of the Commonwealth without passing any sentence upon him, upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the Court that he will be of good behaviour for such period as the Court thinks fit

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to order and will during that period comply with such conditions as the Court thinks fit to impose, or may order his release on similar terms after he has served any portion of his sentence."

The Court directed that the bankrupt be released upon his entering into a recognizance to be of good behaviour for a period of five years, and on the further condition that he should during the period of five years pay to the Official Receiver " One hundred and sixty pounds (£160) a year by quarterly instalments on the Thirtieth day of June One thousand nine hundred and forty-nine and thereafter on or before the last day of each succeeding period of three months in each year during the aforesaid period of five years." The bankrupt paid £10 to the Official Receiver on 30th June 1949. He paid no further moneys. The *Crimes Act*, s. 20 (2), provides that if any person who has been released in pursuance of the section fails to comply with the conditions upon which he was released, he shall be guilty of an offence. The penalty provided is " Imprisonment for the period provided by law in respect of the offence of which he was previously convicted." Section 20 of the *Crimes Act* also provides :—" (3) The penalty provided by the last preceding sub-section may be imposed by the Court by which the offender was originally convicted or by any Court of Summary Jurisdiction before which he is brought. (4) In addition, the recognizance of any such person and those of his sureties shall be estreated, and any other security shall be enforced."

The bankrupt was charged with an offence against s. 20 (2). The information gave particulars of the offence in the following words—" . . . in that he did not on or before the 30th day of June 1949 pay to the . . . Official Receiver for the benefit of his creditors the sum of £40 " as required by the recognizance into which he had entered.

The Court of Bankruptcy dealt with the matter summarily. The penalty to which the bankrupt was liable if the offence was held to be proved was imprisonment for the period provided by law in respect of offences against ss. 210 and 212 of the *Bankruptcy Act*. These sections each provide for a maximum penalty of one year's imprisonment. The bankrupt pleaded guilty and was convicted. The Court, acting under s. 20 (3) of the *Crimes Act*, sentenced him to ten weeks' imprisonment and also ordered that the recognizance should be estreated. The bankrupt appeals to this Court (*Bankruptcy Act*, s. 26(2)) and contends that the Court had no jurisdiction to convict him because, it is said, the condition in the bond requiring him to pay moneys to the Official Receiver was invalid. Ordinarily a plea of guilty prevents any appeal,

but where the appeal is founded upon a lack of jurisdiction the plea is not a bar to an appeal: cf. *R.* v. *Ingleson* (1)—if "the proceedings are bad" there may be an appeal notwithstanding an actual plea of guilty.

The argument submitted to the Court on behalf of the bankrupt referred to the *Bankruptcy Act*, s. 91, which (read with s. 61) vests in the Official Receiver "all property which belongs to or is vested in the bankrupt at the commencement of bankruptcy, or is acquired by or devolves on him before his discharge." It was suggested, therefore, that any moneys which the bankrupt acquired before his discharge vested in the Official Receiver and that for this reason the condition of the bond as to the payment of moneys to the Official Receiver is nugatory. The appellant also relied upon s. 101 of the *Bankruptcy Act*—"Subject to this Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the Court, on the application of the trustee, directs."

This section recognizes the principle that earnings of the bankrupt which are necessary for the support of himself and his family do not vest in the Official Receiver, and provides that his earnings do so vest only when received and to the extent to which an order is made under the Act: *Affleck* v. *Hammond* (2); *In re Roberts* (3). No order was made under this section, and therefore, it is contended, any moneys which he earned continued to belong to him, so far as they were necessary for the support of himself and his family, if he had a family, and that the order that he should pay money to the Official Receiver was therefore invalid. (The same argument could be used to show that this Court acted wrongly in granting bail to the bankrupt upon his personal recognizance pending the hearing of this appeal.) The argument for the bankrupt was to the effect that the condition of the bond required him to pay moneys to the Official Receiver irrespective of its possible result in reducing his earnings below an amount required for the support of the bankrupt and his family. In fact no evidence was given as to his needs, and the learned judge, before he settled the conditions of the bond, inquired from the bankrupt as to whether he would be able to make the payments required by the condition in the bond, and the bankrupt expressed full confidence in his ability to do so. Section 119 (6) provides that when an application is made for discharge

(1) (1915) 1 K.B. 512.
(2) (1912) 3 K.B. 162.
(3) (1900) 1 Q.B. 122.

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from bankruptcy the Court shall on proof of certain facts follow one of four courses of action, including—" (*c*) suspend the discharge until a dividend of not less than Ten shillings in the pound has been paid to the creditors." No order was made in pursuance of the authority conferred by this provision, and the suggestion is, as I understand it, that the same or a similar result cannot be attained by making payment of money a condition of a recognizance under s. 20 (1) of the *Crimes Act*.

The provision in s. 20 (1) is, when it is applied in the case of an offence against the *Bankruptcy Act*, a provision which is additional to the provisions of that Act. It gives a power to a court which is not conferred by that Act. The conditions of a recognizance must be relevant to the behaviour of the bankrupt in matters affecting his bankruptcy, but the effect of s. 20 (1) of the *Crimes Act* is to confer upon courts powers, in relation to offences against laws of the Commonwealth, which the courts would not, or at least might not, possess apart from the section. But no doubt the Court may not, by imposing a condition in a recognizance, act in breach of any applicable law.

In my opinion the arguments for the bankrupt do not show that the condition of the bond is invalid. There is no condition that money shall be paid to the Official Receiver out of earnings or the other income receipts mentioned in s. 101. That section does not apply to capital receipts : *Nette* v. *Howarth* (1). The bankrupt would perform the condition of the bond if he received a capital sum and made to the Official Receiver the payments specified in the condition. Further, the bankrupt might have earned (as he expected) sufficient moneys to enable him to meet the conditions of the bond by making the payments required to the Official Receiver, and still have enough left to support himself and his dependent family, if any. It is true that such a sum and such moneys would be vested in the Official Receiver by virtue of the *Bankruptcy Act* itself. But there may be reasons, in the case of a bankrupt who has been convicted of an offence against the Act, for imposing upon him by means of a recognizance a personal obligation to make specified payments to the Official Receiver. The imposition of such an obligation is at least not inconsistent with the Act—it prescribes, in such cases, a method of securing the observance of the provisions of the Act.

It is argued, however, that the condition of the bond is invalid because it is contrary to the policy of the Act. In my opinion

(1) (1935) 53 C.L.R. 55.

a court should be very cautious in applying some conception of "the policy" of a statute for the purpose of limiting the operation of some particular provision in cases where it cannot be said that there is any uncertainty of interpretation or any inconsistency between any relevant provisions. In this case, it is said that by virtue of the Act all the property of the bankrupt has become vested in the trustee for distribution in accordance with the statute and not otherwise. The consequence is, I understand, said to be that no order can be made by virtue of the *Crimes Act*, s. 20, or otherwise, for payment of any moneys by a bankrupt to the Official Receiver. In view of the provisions of the *Bankruptcy Act* relating to the control and disposition of the property of a bankrupt, such an order should be made, if at all, only in an exceptional case. The present question is whether there is power to make it in *any* case. In my opinion the argument to the contrary attributes insufficient weight to the fact that the *Crimes Act*, s. 20 (2), in itself creates an offence for which the *Bankruptcy Act* makes no provision whatever. Only convicted offenders come within its provisions. The conditions of a recognizance entered into under s. 20 (1) are intended to make it possible to create an obligation or duty which did not previously exist under any other Act. Whether such an additional obligation or duty should be imposed upon an offender is to be determined by the discretion of the Court which tries an alleged offender, subject, as already mentioned, if a recognizance is required, to the limitation of the conditions of the recognizance to such as have relevance to the original offence in respect of which s. 20 (1) has been applied. In determining what conditions should be imposed the Court of Bankruptcy may properly take into account the past behaviour, the present character and condition, and the future prospects of a bankrupt. There are various circumstances which might lead the Court to conclude that it would be proper to require the bankrupt to make regular payments of money. It may be that the bankrupt may receive assistance from friends which would enable him to make the payments which were fixed by the Court. It may be that a bankrupt has good earning power (as the bankrupt believed in the present case) and that it would be a desirable thing, from the point of view both of the bankrupt, in working his way in a regular and ascertainable manner towards his discharge, and of his creditors, that he should make regular payments to the Official Receiver without there being an inquiry from time to time as to the precise amount which was required for the support of himself and his family. There are doubtless

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other considerations (such, for example, as an improvident disposition, which might with advantage be subjected to some control) which might be regarded by the Court of Bankruptcy as making a requirement for the periodical payment of money a wise order in a particular case. If it were shown to the Court that the failure to comply with a condition of a recognizance was not due to any fault of the bankrupt, the Court would take such a matter into account in determining whether to convict and if so, what penalty to impose.

I am unable to appreciate the relevance of the reference on behalf of the bankrupt to s. 119 (6) (*c*). This provision enables the Court where certain facts are proved to suspend a discharge until a dividend of not less than ten shillings in the pound has been paid to creditors. There is no inconsistency between this provision and a requirement that a bankrupt shall make periodical payments to the Official Receiver.

A further point mentioned in argument was that the condition of the bond requires the bankrupt to pay to the Official Receiver £160 a year by "quarterly instalments on the Thirtieth day of June One thousand nine hundred and forty-nine and thereafter on or before the last day of such succeeding period of three months in each year" during a period of five years. There is no express provision that the instalments shall be equal. In other words, the condition of the bond is (it is said) not that £40 per quarter shall be paid, but that £160 shall be paid in each year by quarterly instalments. The bond was entered into on 9th May 1949 and the bankrupt was convicted on 5th August 1949 when he had actually paid "an instalment" (£10) on the first of the dates fixed for payment and before the second instalment had become payable, i.e., before the expiry of the first year. Therefore, it is said, there had been no breach of the condition of the bond. On the other hand it may be argued that the condition implies that the quarterly instalments are each to be one-quarter of the annual amount of £160. But the bankrupt did not submit any argument upon this point in the Court of Bankruptcy and in my opinion he cannot rely upon this point upon an appeal—for the reason that he pleaded guilty.

The conviction against which the bankrupt appeals was a conviction for an offence against s. 20 (2) of the *Crimes Act*. Section 20 (2) provides that the penalty for an offence against the section shall be imprisonment for the period provided by law in respect of the offence of which a person was previously convicted. The

offences of which the bankrupt was previously convicted were offences against ss. 210 and 212 of the *Bankruptcy Act*, which provide for a penalty of imprisonment for one year. Therefore the offence against s. 20 (2) is an offence which is punishable by one year's imprisonment and is, unless the contrary intention appears, an indictable offence: *Acts Interpretation Act* 1901-1948, s. 42. The *Bankruptcy Act*, s. 217 (1), however, provides that if the Court in any application for an order of discharge, either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against the Act, it may—(*a*) charge him with the offence and try him summarily; (*b*) commit him for trial before any court of competent jurisdiction. In the present case the Court of Bankruptcy applied provision (*a*) and tried the bankrupt summarily for the offences against ss. 210 and 212 of the *Bankruptcy Act*. When this procedure is followed, then the Court may, if it finds that the bankrupt is guilty, sentence him to imprisonment for a period not exceeding six months: s. 217 (2). This provision, I agree, is not applicable to offences which are not offences against the *Bankruptcy Act*. An offence against s. 20 (2) of the *Crimes Act* is therefore not an offence to which s. 217 applies. I agree also that the fact that s. 217 (2) enables the Court, in the cases to which the section applies, to try a bankrupt summarily for offences against the *Bankruptcy Act* does not produce the result that an offence against the *Bankruptcy Act* in respect of which one year's imprisonment is provided as a penalty becomes by reason of its being tried summarily under s. 217 an offence for which the maximum term of imprisonment does not exceed six months: *In re Burley* (1). But it is said that as the punishment for a breach of a recognizance is, under s. 20 (2) of the *Crimes Act*, that which is provided in respect of the original offence (namely, one year), the offence of failing to comply with the condition of a recognizance is an indictable offence and must be tried before a jury—Commonwealth Constitution, s. 80. The bankrupt was not so tried in the present case and it is said that (s. 217 of the *Bankruptcy Act* not being applicable) there is no provision which enabled the Court of Bankruptcy to try him. For this reason it is contended that the Court of Bankruptcy had no jurisdiction to pronounce the conviction against which the bankrupt now appeals.

In my opinion the argument by which this conclusion is supported does not sufficiently take into account certain relevant provisions of the *Crimes Act*.

(1) (1932) 47 C.L.R. 53.

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The *Crimes Act*, s. 12, is as follows:— "(1) Offences against this Act, other than indictable offences, shall be punishable either on indictment or on summary conviction. (2) Where proceedings for an offence against this Act are brought in a Court of Summary Jurisdiction, the Court may either determine the proceedings, or commit the defendant for trial. (3) A Court of Summary Jurisdiction may not impose a longer period of imprisonment than one year in respect of any one offence against this Act."

This section has remained unchanged since it was enacted in 1914. The Court of Bankruptcy is not a court of summary jurisdiction as defined in the *Acts Interpretation Act* 1901-1948, s. 26 (*d*), which provides that "court of summary jurisdiction" shall mean justices or justices of the peace or other magistrates sitting for the purposes mentioned in the section. It will be observed that s. 12 (3) of the *Crimes Act* apparently allows a court of summary jurisdiction to impose a period of imprisonment up to one year notwithstanding the provisions of s. 42 of the *Acts Interpretation Act* to which reference has already been made.

In the *Crimes Act* 1914, s. 20 was in the following form:—"(1) If the Court thinks fit to do so, it may release any person convicted of an offence against the law of the Commonwealth, upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the Court that he will be of good behaviour for the term of imprisonment passed upon him, and will during that term comply with such conditions as the Court thinks fit to impose, or may order his release on similar terms after he has served any portion of his sentence. (2) A person released in pursuance of this section who fails to comply with the conditions on which he has been released shall be liable to be arrested and taken back to prison for the remainder, if any, of his sentence, and shall in addition be guilty of an offence and shall be liable to be imprisoned for a term equivalent to the term of the sentence in respect of which he was released, and his recognizance and those of his sureties or any other security given may be estreated."

At the time when the *Crimes Act* 1914 was passed there was no Commonwealth Court of Bankruptcy. That Court was created under the *Bankruptcy Act* 1924. As will immediately be seen, it was after the establishment of the Court of Bankruptcy that the provisions which now appear as sub-ss. (2), (3) and (4) of s. 20 of the *Crimes Act* were enacted.

In 1926, by the *Crimes Act* 1926, s. 20 was amended by inserting after the words "the law of the Commonwealth" the words "with-

out passing any sentence upon him". Sub-section (2) was repealed and the existing provisions were substituted for it. Section 20 in its original form provided for sentencing an offender, for releasing him upon a recognizance, and for arresting him and compelling him to serve the remainder of the sentence imposed together with a further sentence if he failed to comply with the conditions of the recognizance. The new provisions in the Act of 1926 were very different. Under s. 20 as amended by that Act no sentence is originally passed, but the offender is released upon a recognizance and if he is guilty of a breach of the recognizance he may be imprisoned for the period provided by law in respect of the offence of which he was originally convicted. Section 20 (3) provides that that penalty may be imposed by the Court by which the offender was previously convicted or by any court of summary jurisdiction before which he is brought.

In 1928 in *R.* v. *Archdall & Roskruge*; *Ex parte Carrigan & Brown* (1) the question arose whether a court of summary jurisdiction could try a defendant for an offence under the *Crimes Act* for which a penalty of imprisonment for one year was provided. It was held that under s. 12 this could be done and that trial by jury was not necessary notwithstanding the provision which is now contained in s. 42 of the *Acts Interpretation Act* 1901-1948. The offence charged in that case was an offence against s. 30K of the *Crimes Act*, which declared that certain conduct should be "an offence," not that it should be "an indictable offence." It was argued that under the *Acts Interpretation Act* (the provision now contained in s. 42) the offence was an indictable offence so that it could not be punished summarily. It was held, however, that a contrary intention appeared in the *Crimes Act* and it was pointed out in the judgment of *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Powers* JJ. that the *Crimes Act* in s. 12 had adopted a scheme which involved an intention contrary to that of the provision of the *Acts Interpretation Act* which was relied upon by the defendant. It was held that under the *Crimes Act* offences against the Act are divided into two categories, those declared indictable, and those not indictable, that is, "not declared by sections other than s. 12 to be indictable." The last-mentioned offences are, it was held, "by s. 12 itself declared to be both indictable and punishable summarily." *Higgins* J. (2) tabulated many sections of the *Crimes Act* where offences were expressed to be indictable, and many sections (even when the penalty exceeded six months)

(1) (1928) 41 C.L.R. 129.

(2) (1928) 41 C.L.R., at p. 139.

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which were not expressed to be indictable—" they are simply called offences." His Honour proceeded—" In effect in framing the *Crimes Act* Parliament says ' We mean this Act to say expressly what offences are to be indictable and what are not for the purposes of this Act ' . . . Parliament meant by indictable offences in s. 12 (1) offences which the Act itself declared to be indictable." Accordingly it was held that, as the offence against s. 30K of the *Crimes Act* was by that section declared to be merely an offence and not an indictable offence, it could be tried summarily, notwithstanding the provision of s. 80 of the Commonwealth Constitution, which requires that trial of indictable offences shall be by jury, and notwithstanding the provision which is now contained in s. 42 of the *Acts Interpretation Act* 1901-1948.

In my opinion the reasoning adopted by the Court in that case applies to the present case. Section 20 (2) of the *Crimes Act* provides that if any person who has been released in pursuance of the section fails to comply with the conditions of a recognizance he shall be guilty of " an offence." Accordingly the Act provides, when interpreted in the light of the case last cited, that the offence created by this provision may be prosecuted summarily. Section 20 (3) provides that the penalty provided by sub-s. (2) may be imposed by the court by which the offender was originally convicted or by any court of summary jurisdiction before which he is brought. The court by which the offender was originally convicted is the Commonwealth Court of Bankruptcy. Section 20 (3) therefore confers upon that Court, as well as upon a court of summary jurisdiction, a jurisdiction to impose the penalty for which the section provides.

The appeal should, in my opinion, be dismissed.

Since the appeal was heard Mr. Archibald McKinnon, the Official Receiver, has died. Mr. Ormonde Lloyd Jones has been appointed as Official Receiver and an order should be made substituting him for Mr. McKinnon as respondent in these proceedings.

RICH J. I have read the judgment on this appeal prepared by my brother *McTiernan*, and am in substantial agreement with the conclusions at which he has arrived and with his reasons for coming to these conclusions.

I should like nevertheless to add a few words of my own upon the question raised as to the jurisdiction of the Bankruptcy Court to try the appellant for his breach of one of the conditions of the

recognizance upon which the Court released him, without passing sentence upon him, after he had been convicted of two offences against the *Bankruptcy Act*.

By s. 20 (2) of the Commonwealth *Crimes Act* it is provided that if any person who has been released in pursuance to s. 20 fails to comply with the conditions upon which he was released, he shall be guilty of an offence and the penalty for such an offence is expressed to be imprisonment for the period provided by law in respect of the offence of which he was previously convicted.

By sub-s. 3 of s. 20 of this Act the penalty thus provided may be imposed by the court by which the offender was originally convicted or by any court of summary jurisdiction before which he is brought.

The clear effect, in my opinion, of s. 20, sub-ss. 2 and 3, is that where a person is convicted of an offence against a law of the Commonwealth and without being sentenced to imprisonment is released on conditions, he can, if he fails to comply with these conditions, be dealt with by the court by which he was originally convicted as well as by a court of summary jurisdiction.

It is difficult to see how by any processes of construction or implication the words " the court by which the offender was originally convicted " can be treated as having either no existence or no effect.

I am unable to agree that the case of *In re Burley* (1) has any bearing on this question. There the High Court decided that where there was an offence against the *Bankruptcy Act* the penalty for which was one year's imprisonment this offence did not by virtue of its being charged and tried summarily under s. 217 of that Act become an offence the maximum term of imprisonment in respect of which did not exceed six months within the meaning of s. 21 (1) (*b*) of the *Crimes Act* 1914-1926.

Again I do not understand how any relevant provision of the *Acts Interpretation Act* can be applied to destroy the plain meaning of the following words in sub-s. 3 of s. 20 of the *Crimes Act*, namely " the court by which the offender was originally convicted." Under s. 42 of the *Acts Interpretation Act* offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless the contrary intention appears, be indictable offences. In my opinion s. 20 (3) does show a contrary intention: see *R.* v. *Archdall and Roskruge*; *Ex parte Carrigan and Brown* (2). In this case two persons were convicted by a police magistrate of

(1) (1932) 47 C.L.R. 53.

(2) (1928) 41 C.L.R. 128.

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offences against s. 30K of the *Crimes Act* 1914-1926 which provided that "whoever . . . without reasonable cause or excuse, by boycott . . . of property . . . hinders the provision of any public service by the Commonwealth . . . shall be guilty of an offence. Penalty: Imprisonment for one year."

By s. 12 of the *Crimes Act* 1914-1926 it was enacted that offences against this Act, other than indictable offences, shall be punishable either on indictment or on summary conviction and by sub-s. 3 of this section a court of summary jurisdiction may not impose a longer period of imprisonment than one year in respect of any one offence against this Act.

By s. 4 of the *Acts Interpretation Act* 1904 it was provided that "offences against any Act, which are punishable by imprisonment for a period exceeding six months, shall unless the contrary intention appears in the Act, be indictable offences."

This Court in the case referred to unanimously held that the offence created by s. 30K of the *Crimes Act* 1914-1926 was not an indictable offence, and that the offence could be tried in a court of summary jurisdiction, the relevant provision of the *Crimes Act* showing an intention contrary to s. 4 of the *Acts Interpretation Act* 1904.

In my opinion, when sub-s. (3) of s. 20 of the *Crimes Act* provides in plain language that the penalty for a breach of a condition of a recognizance may be imposed by the court by which the offender was originally convicted, it discloses an obvious contrary intention within the meaning of s. 42 of the *Acts Interpretation Act*.

I would dismiss the appeal.

DIXON J. This is an appeal by a bankrupt from a summary conviction by the Federal Court of Bankruptcy. The offence of which the appellant was convicted is that he failed to comply with one of the conditions of a recognizance entered into by him before the Registrar in Bankruptcy. Sub-section (2) of s. 20 of the *Crimes Act* 1914-1946 creates the offence. Section 20 is a general provision conferring upon courts before whom offenders against Federal law are convicted power to release them on recognizances and making breach of the conditions of such a recognizance an offence punishable by imprisonment for the same term as might have been imposed for the original offence. Sub-section (3) provides that the penalty may be imposed by the court by which the offender was originally convicted or by a court of summary jurisdiction.

The appellant was originally convicted summarily before the Federal Court of Bankruptcy exercising the power conferred by s. 217 (1) (*a*) and (2) of the *Bankruptcy Act* 1924-1947. He was convicted of an offence against s. 210 (3) (*c*) and he was convicted also of an offence against s. 212 (1) (*a*) of that Act. Upon each such conviction the Court might have sentenced the appellant to imprisonment for any period not exceeding six months : s. 217 (2). No sentence was imposed upon him but an order was made that he be released under s. 20 of the *Crimes Act* upon his giving security by recognizance in the sum of £50 to be of good behaviour for a period of five years and on the further condition that during such period he pay the sum of £160 a year to the Official Receiver of his bankrupt estate for the benefit of his creditors, such moneys to be paid in instalments of £40 a quarter the first of such instalments to be paid on or before 30th June 1949 and thereafter on or before the last day of each succeeding period of three months.

The Registrar in Bankruptcy, acting, presumably, under s. 23 of the *Bankruptcy Act*, took a recognizance from the appellant in pursuance of the order. The recognizance recited the order and stated the conditions upon fulfilment of which the recognizance should be void. Except that the conditions failed to state the amount of the instalments and made the first of them payable exactly on 30th June 1949 instead of on or before that date and omitted to say, when requiring that the payments should be made to the Official Receiver, that they were to be so made to him as Official Receiver of the appellant's bankrupt estate for the benefit of his creditors, the conditions followed the recited order. On 30th June 1949 the appellant paid the Official Receiver £10 and no more. The Official Receiver then laid an information against him in the Federal Court of Bankruptcy for failing to comply with the recognizance. He appeared in person before the Court of Bankruptcy and pleaded guilty. He was sentenced to ten weeks' imprisonment. It is from this conviction that he now appeals.

In summary proceedings a plea of guilty has not perhaps the same formal effect as upon indictment but it admits the facts. Thus no question of fact can now arise and the appeal must be confined to matters of law appearing on the face of the proceedings including the recognizance itself. The variances between the condition of the recognizance and the recited order have given rise to some difficulties, but for the purposes of my decision I shall pass these by. No point was made for the appellant of the fact

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that under s. 217 (1) (*a*) and (2) the jurisdiction of the Court to deal with a bankrupt summarily is confined to offences by him against the *Bankruptcy Act* and depends upon the Court's having, in an application by him for discharge, reason to believe that the bankrupt has been guilty of an offence against that Act. But as it goes to the power of the Court of Bankruptcy to deal with the offence without the intervention of a jury it is a fact that cannot be disregarded. The only authority possessed by the Federal Court of Bankruptcy to try an offence summarily or to deal with it summarily is conferred by s. 217. It is true that sub-s. (3) of s. 20 of the *Crimes Act* 1914-1946 says that the penalty provided by sub-s. (2) may be imposed by the court by which the offender was originally convicted. But it does not say that it may be so imposed summarily. Some other legislative enactment must be found if the offender is to be deprived of a jury and punished summarily by the Federal Court of Bankruptcy. It cannot in my opinion be found in the joint operation of sub-s. (3) of s. 20 of the *Crimes Act* and s. 217 of the *Bankruptcy Act*. I am prepared to concede that the opening words of that sub-section (viz. "The penalty . . . may be imposed by the Court by which" etc.) may be expanded to mean that the charge of failing to comply with the conditions of the recognizance may be tried by, and on conviction the punishment may be imposed by, the Court by which &c. But that can only authorize a summary hearing if the court in question has a power to hear charges summarily which is capable of applying to a charge under s. 20 (2) of the *Crimes Act*. The Federal Court of Bankruptcy has no such power unless it can be found in s. 217. But I think that it is quite clear that s. 217 is incapable of application to a charge under s. 20 (2) of the *Crimes Act*. It is incapable of so applying because:—(i) it is confined to offences against the *Bankruptcy Act*; (ii) it depends on the Court's having reason to believe on a certificate application that the offence has been committed; (iii) it prescribes a procedure by which the Court itself then charges the bankrupt with the offence. The difficulty of applying s. 217 in this case to the offence against s. 20 of the *Crimes Act* is shown by the fact that the prosecution was instituted by an information laid by the respondent as an Official Receiver. Possibly the Official Receiver assumed to act under s. 15 (*d*) of the *Bankruptcy Act*, which provides that it shall be the duty of the Official Receiver to take such part and give such assistance in relation to the prosecution of any bankrupt who is deemed to have been guilty of an offence against this Act as the Court or the

Attorney-General directs. But that provision relates only to offences against the *Bankruptcy Act* and it refers only to assistance in the prosecution and not to laying the charge, which under s. 217 (*a*) it is for the Court to make. What other statutory enactment can be invoked giving, whether expressly or impliedly, the Federal Court of Bankruptcy authority to convict summarily of an offence under s. 20 (2) of the *Crimes Act* ? There is no express enactment to that effect and the implication, if it exists, must be discovered in s. 20 (3) either alone or in combination with some other statutory provision.

To discover such an implication in s. 20 (3) alone, that is without the aid of some other statutory provision to combine with it, would indeed be a bold step. At the time when s. 20 of the *Crimes Act* was enacted in its first form s. 217 of the *Bankruptcy Act* did not exist, and when s. 20 was amended in 1926 the *Bankruptcy Act*, which was not brought into operation until 1928, had been lying for some time dormant and unheeded. Offences against Federal law were either punishable on indictment or else upon summary conviction before courts of summary jurisdiction. The latter expression is defined by s. 26 (*d*) of the *Acts Interpretation Act* 1901-1948 and of course the definition does not include the Federal Court of Bankruptcy. Sub-section (3) of s. 20 of the *Crimes Act* expressly provides that, as an alternative to the court before which the offender was originally convicted, a court of summary jurisdiction may impose the penalty. The sub-section, in other words, contemplated when it was enacted a charge upon indictment unless the original court was one of summary jurisdiction or unless the offender was brought before another court of summary jurisdiction. It never contemplated such a peculiar situation as arises from the very special powers and procedure which s. 217 of the *Bankruptcy Act* bestows and prescribes. No implication can be made to cover such a case.

Then is there any other statutory provision that can combine with s. 20 (3) to give a power to the Bankruptcy Court of proceeding summarily ? I know of none. Section 12 of the *Crimes Act* will not help. There are three independent considerations any one of which would suffice to show that it will not combine with s. 20 (3) to give a new summary jurisdiction to the Federal Court of Bankruptcy.

In the first place s. 12 (1) in speaking of summary conviction is obviously referring to conviction before a court of summary jurisdiction and that means a court of summary jurisdiction as defined.

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In the second place s. 12 is inapplicable to sub-s. (3) of s. 20 because sub-s. (3) deals explicitly with the question whether the offence created by sub-s. (2) shall be heard summarily and deals with the question by providing that the offender may as an alternative be brought before a court of summary jurisdiction.

In the third place though, according to the decision in *R.* v. *Archdall and Roskruge*; *Ex parte Carrigan & Brown* (1), ss. 42 and 43 of the *Acts Interpretation Act* 1901-1948 do not apply generally to the *Crimes Act*, they must have an application, at lowest an indirect application, to s. 20 of the *Crimes Act*, subject always of course to the express provision of sub-s. (3) that the offender may be brought before a court of summary jurisdiction. Sections 42 and 43 of the *Acts Interpretation Act* 1901-1948 provide that an offence against any Act, if punishable by imprisonment for a period exceeding six months, shall be indictable, but if for a period not exceeding six months, it shall be punishable on summary conviction. Section 20 of the *Crimes Act* though creating an independent offence assigns no particular punishment to it. Sub-section (2) simply concludes—"Penalty: Imprisonment for the period provided by law in respect of the offence of which he was previously convicted." Unless ss. 42 and 43 apply to this provision sub-s. (3) becomes almost pointless. For it is a provision drawn upon the assumption that some basic distinction between summary proceedings and indictment exists and that must come back to ss. 42 and 43 of the *Acts Interpretation Act*. It may be assumed that the offence under sub-s. (2) of s. 20 of the *Crimes Act* takes its character as indictable or summary from the original offence of which the offender was previously convicted. The two offences of which the appellant was originally convicted are both indictable. For the maximum period of imprisonment fixed by ss. 210 (3) (*c*) and 212 (1) (*a*) of the *Bankruptcy Act* which create them is in each case one year. It is true that power is given to the Bankruptcy Court to deal summarily with these indictable offences by s. 217 and that when it does so the sentence which the Court may impose is limited to six months' imprisonment: s. 218 (2). But this Court has decided that the restriction is a "limitation upon the power of the Court of summary jurisdiction to inflict the maximum punishment attached to the offence, and not an alteration in the character of the offence, or of the sanction attached to it by the statute": *In re Burley* (2). Thus the limitation is not to be reckoned for the purpose of ascertaining the maximum term of imprisonment referred

(1) (1928) 41 C.L.R. 128.

(2) (1932) 47 C.L.R. 53, at p. 55.

to by s. 21 of the *Crimes Act* (1). It is difficult if not impossible to distinguish in this respect between s. 21 and s. 20. In my opinion what sub-s. (2) of s. 20 describes as " the period provided by law in respect of the offence of which (the offender) was previously convicted " must, in its application to the present case, refer to the year's imprisonment provided in ss. 210 (3) (*c*) and 212 (1) (*a*) and not to the six months to which the power of the Court is limited in s. 217 (2). Thus sub-s. (3) of s. 20 applies to the case of the appellant as if it expressly provided that the penalty of one year's imprisonment may be imposed by the court by which the offender was originally convicted (the Bankruptcy Court) or by any court of summary jurisdiction before which the offender is brought.

As at present advised I do not see where the Federal Court of Bankruptcy obtained its power of dealing summarily with the offence. That could only be done by a court of summary jurisdiction.

However as I think that the conviction must be quashed on the ground that the condition of the recognizance broken by the appellant could not lawfully be imposed it is unnecessary for me to place my decision upon this ground.

Section 20 (1) of the *Crimes Act* 1914-1946 upon which the Bankruptcy Court acted in releasing the appellant upon his recognizance is expressed in very general terms. It says if the court (that is, no doubt, any court before which an offender against Federal law is brought) thinks fit to do so, it may release any person convicted of an offence against the law of the Commonwealth without passing sentence upon him, upon his giving security with or without sureties, by recognizance or otherwise, to the satisfaction of the court that he will be of good behaviour for such period as the court thinks fit to order and will during that period comply with such conditions as the court thinks fit to impose or may order his release on similar terms after he has served any portion of his sentence.

The words " such conditions as the court thinks fit to impose " are very wide but they do not authorize the imposition of conditions which are repugnant to the principles or policy of the law or are foreign to the purpose of the power. The provision is concerned with the consequences of crimes against Federal law. Federal laws against which offences may be committed deal with a variety of subjects and the specific applications of the power to impose conditions must vary accordingly. Here we are concerned with

(1) (1932) 47 C.L.R., at p. 57.

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its application to bankruptcy offences. In that field of operation s. 20 cannot authorize the imposition of conditions at variance with positive provisions of the bankruptcy law or with the rules of law or of policy which form part of the system. For example, I take it to be clear that if a bankrupt were released upon a recognizance a condition of which was that the bankrupt should appropriate part of his wages to the payment of a particular creditor whose debt ranked *pari passu* with other debts under s. 89, the condition would be void. For it would be opposed to a deeply-rooted principle of the bankruptcy law and would be an attempt to apply wages to effect a particular preference or priority in payment not recognized by s. 84 and not authorized by s. 122, though otherwise no application of wages could be directed except to the trustee for distribution among creditors in a due course of administration.

A chief purpose of the modern law of bankruptcy is to take his property from a debtor who does not meet his obligations, to protect him against personal liabilities (subject to specific exceptions) and to turn claims upon him into rights of proof against his assets present and after-acquired. The condition of the recognizance now in question was expressed to make it incumbent upon the appellant, although a bankrupt incapable of acquiring property on his own account, to pay at all hazards an annual sum to the Official Receiver for a fixed period of five years. If he relied on his own resources he could make these payments out of his future earnings or not at all. The penalty for failure would be imprisonment. It is important to notice that although the bankrupt could in fact and in law have no source of his own whence to make the payment but future earnings, the condition in no way concerns itself with earnings. The condition is absolute in its obligation.

Now the question how far what a bankrupt earns may be taken for his creditors has long been the subject of rules of law developed in the courts and of statutory provisions. A literal application of bankruptcy provisions which included in the property divisible among creditors all property acquired by or devolving on the bankrupt before his discharge would mean that all his earnings would pass at once to the trustee. It was of course seen that such a reading of the law would make it impossible for a bankrupt to subsist. When the question arose before Lord *Mansfield* he described it as of terrible consequence if determined one way—"For what is to become of the bankrupt if he cannot earn a maintenance by his daily labour?" The Court decided that the

assignees in bankruptcy were not entitled to the earnings of a bankrupt. "The assignees cannot let out the bankrupt: they cannot contract for his labour": *Chippendall* v. *Tomlinson* (1). Although *Blackburn* J. described these remarks of Lord *Mansfield* as declamatory (*Wadling* v. *Oliphant* (2)), the figure employed by the Chief Justice has been much used. *James* L.J. in *Ex parte Vine*; *Re Wilson* (3), said:—"The general principle always has been that, until a bankrupt has obtained his discharge, all his property is divisible among his creditors. But an exception was absolutely necessary in order that the bankrupt might not be an outlaw, a mere slave to his trustee; he could not be prevented from earning his own living. On that principle the trustee could not sue for moneys due to the bankrupt in respect of his personal labour, and, if the bankrupt could sue for them only for the benefit of his trustee, he would really be without remedy."

In *Ex parte Benwell*; *Re Hutton* (4), *Cotton* L.J. protested against an application for a prospective statutory order for payment out of the future earnings of a bankrupt bone-setter conducting a profitable practice. "What," said his Lordship, "had the bankrupt in the present case? He had only the natural capacity and skill to earn an income in the future, if people should choose to come to him as patients. It is only the capacity of earning money. That is the only property which could vest in the trustee under the order. This capacity of earning money could not be sold so as to make the possessor of the skill the slave of the purchaser." It was held not "income" within s. 90 of the *Bankruptcy Act* 1869 because "income" in that provision was *ejusdem generis* with "salary."

It became settled law that the personal earnings of a bankrupt did not pass to the trustee or assignees in bankruptcy except to the extent that they were not reasonably required for the maintenance of himself and his family. The bankrupt could sue for such personal earnings and the trustee could not: *Williams* v. *Chambers* (5); *Re Graydon*; *Ex parte Official Receiver* (6); *Re Roberts* (7); *Re Hancock* (8); *Affleck* v. *Hammond* (9). Express provisions were introduced into the bankruptcy law authorizing the Court to make orders for the appropriation of future salary and income or part thereof to the trustee: cf. s. 90 of the *Bank-*

(1) (1785) 4 Douglas 318, at pp. 321, 322 [99 E.R. 900, at p. 902].
(2) (1875) 1 Q.B.D. 145, at p. 150.
(3) (1878) L.R. 8 Ch. D. 364, at p. 366.
(4) (1884) L.R. 14 Q.B.D. 301, at p. 308.
(5) (1847) 10 Q.B. 337 [116 E.R. 130].
(6) (1896) 1 Q.B. 417.
(7) (1900) 1 Q.B. 122.
(8) (1904) 1 K.B. 585.
(9) (1912) 3 K.B. 162.

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ruptcy Act 1869. The ambit of such provisions has been enlarged and the present Australian section is wide in its scope. It is s. 101 and is expressed as follows :—" Subject to this Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the Court, on the application of the trustee, directs ".

It will be seen that though the section applies to many classes of prospective revenue, the jurisdiction of the Court to make an order is founded on the fact that the bankrupt is in receipt of one of these forms of income and the jurisdiction is limited to ordering him to pay money thereout, and not absolutely. Such an order may be modified from time to time.

Correspondingly when he comes up for his discharge the bankrupt may, in certain circumstances, be required to submit to an obligation to pay to the trustee out of his future earnings the balance or part of the balance of the debts provable in his bankruptcy. If adverse facts are proved the Court may adopt this course : s. 119 (6) (*d*) and (7). Again the payment must be out of earnings and again the order is under the control and supervision of the Court.

In administering s. 101 the Court must consider the needs of the bankrupt for the maintenance of himself and his family. The imposition upon the appellant of the condition contained in the recognizance appears to me to be foreign to the principles and the policy of the foregoing provisions and rules of law. It attempts to add to the obligations of the bankrupt a liability which disregards the considerations which the law establishes for the determination of his obligations in such a case. It imposes a personal liability upon him independently of his deriving anything from earnings. In this it not only disregards the conditions laid down by s. 101 which insure that only out of earnings or income will the bankrupt be required to make such payments, but it runs counter to the principle that, being stripped of his assets, the bankrupt should be relieved of personal liability for his ordinary debts, and it is in potential conflict with the rule that what a bankrupt reasonably requires for the maintenance of himself and his family shall not vest in his trustee. Moreover it adopts a fixed sum and a fixed period which will stand no matter what causes may arise for the reduction of the amount and no matter when it might be proper to grant the appellant a discharge from bankruptcy.

I am therefore of opinion that the condition is void and on that ground that the conviction is wrong. I think that the appeal

should be allowed and the order of the Court of Bankruptcy of 5th August 1949 convicting the appellant of an offence under s. 20 of the *Crimes Act* 1914-1946 and sentencing him to ten weeks' imprisonment and estreating the recognizance should be set aside. The appellant's bail given in this Court should be discharged.

McTIERNAN J. The offence against s. 20 (2) of the *Crimes Act* 1914-1946 to which the appellant pleaded guilty before the Court of Bankruptcy and of which the Court summarily convicted him is, in my opinion, by reason of the penalty for the offence stated in s. 20 (2), an offence punishable by imprisonment for a period not exceeding six months. The offence is therefore not indictable: and it is punishable upon summary conviction: ss. 42 and 43 of the *Acts Interpretation Act* 1901-1948.

The words of s. 20 (3) of the *Crimes Act* are ample enough to give the Court of Bankruptcy, as the Court which previously convicted him of the offences against the *Bankruptcy Act*, power to convict the appellant summarily of the offence of failing to comply with one of the conditions upon which the Court released him under s. 20 (2) of the *Crimes Act*, without passing sentence upon him for either of the offences against the *Bankruptcy Act*. The power given by s. 20 (3) to impose the penalty mentioned in s. 20 (2) includes the power to convict of the offence against the latter sub-section. Compare *Mallan* v. *Lee* (1), so far as it expounds the words " punishable accordingly " in s. 5 of the *Crimes Act*. The words of s. 20 (3) do not express an intention to exclude the power to convict summarily: see s. 43 of the *Acts Interpretation Act* 1901-1948.

It is true that by committing the offence against s. 210 of the *Bankruptcy Act* of which the Court of Bankruptcy had previously summarily convicted the appellant, he became liable to imprisonment for a year, the penalty mentioned in s. 210: and the same thing is true with respect to his offence against s. 212 of the *Bankruptcy Act* of which the Court had also previously convicted him. But s. 217 provides that the Court of Bankruptcy may sentence a bankrupt, who is summarily convicted, to imprisonment for a period not exceeding six months.

The question is whether the latter period is the measure of the penalty in s. 20 (2) for which the appellant became liable by breaking his bond, or the period of twelve months which is the maximum period provided by the *Bankruptcy Act* in respect of each of the offences against that Act of which the Court of Bankruptcy had previously convicted him summarily.

(1) (1949) 80 C.L.R. 198.

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The words of s. 20 (2) of the *Crimes Act* are " Imprisonment for the period provided by law in respect of the offence of which he " (the offender) " was previously convicted." The offender is the person who commits an offence against s. 20 (2) of the *Crimes Act*. The imprisonment, which is the punishment provided by s. 20 (2) for this offence, is not stated to be for the maximum period provided by law in respect of the offence of which that person was previously convicted. The words describing the term of the imprisonment mean imprisonment for the period to which the Court which previously convicted the offender could have lawfully sentenced him. That is the penalty which the offender escaped by being released under s. 20 (1) of the *Crimes Act* and that is the penalty which would logically be provided by the law as the punishment for the offence of breaking the conditions upon which he was released. The term of imprisonment which the Court of Bankruptcy could have imposed upon the appellant is limited by s. 217 not by s. 210 or s. 212. The term was any period not greater than six months. The penalty which the words of s. 20 (2) describing the penalty for an offence against that sub-section make applicable to the present case is imprisonment for the period provided by s. 217 of the *Bankruptcy Act*, that is a term not exceeding six months.

In the case of *In re Burley* (1) the question was different from that in the present case. Here the question is what is meant by the words " imprisonment for the period provided by law in respect of the offence." There the question was what was meant by " the maximum term of imprisonment in respect of the offence." It was held that the maximum term of imprisonment was twelve months, that is the term to which a court could sentence the offender if convicted upon indictment : not the lesser period of six months which was the maximum period to which the Court of Bankruptcy could sentence the offender if summarily convicted under s. 217. It was said in the case of *In re Burley* (2) that s. 21 of the *Crimes Act* refers to " the maximum term to which the offender exposes himself when he commits the offence." The words of s. 20 (2) stating the penalty do not refer to the maximum term of imprisonment to which the offender exposed himself when he committed the offence of which he was previously convicted : those words refer to the term of imprisonment which it was within the power of the Court to sentence the offender when he was previously convicted. That is the measure of the penalty which answers to the description of " imprisonment for the period provided by law in respect of

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(2) (1932) 47 C.L.R. 53.

the offence of which he" (the offender) "was previously convicted." The maximum term of imprisonment to which the offender could lawfully have been sentenced is not the measure of the penalty provided by s. 20 (2) unless it was within the power of the Court which previously convicted the offender and released him under s. 20 (1) to impose such maximum term of imprisonment upon him.

It follows that the Court of Bankruptcy acted within the jurisdiction given to it by the *Bankruptcy Act* and s. 20 (2) and (3) of the *Crimes Act* in convicting the appellant summarily of the offence of failing to comply with a condition of his release under s. 20 (1) of the *Crimes Act*, and in sentencing him to be imprisoned for ten weeks. The Court also ordered that the recognizance entered into by the appellant be estreated. Section 20 (4) of the *Crimes Act* gives jurisdiction to make this order.

The condition with which the appellant failed to comply has already been fully set out and described. The Court of Bankruptcy is a court to which s. 20 (1) of the *Crimes Act* gives the powers contained in that provision. It adds those powers to the powers conferred by the *Bankruptcy Act* upon the court. Section 20 (1) gives to the Court of Bankruptcy the same general discretion in respect of the conditional release of offenders as the provision gives to any other court. The question whether any condition upon which a court orders the release of an offender is within the general discretion given by s. 20 (1) would depend upon its connection with some relevant principle such as retribution, correction or punishment and perhaps various moral and social considerations. From this point of view the discretion which the Court of Bankruptcy has under s. 20 (1) is not more limited than that of any other court to which it applies. But the discretion is one which every court is bound to exercise subject to law. Neither the Court of Bankruptcy nor any other court may impose a condition which contravenes the *Bankruptcy Act* or any other statute or is contrary to public policy. Compliance with the condition as to payment to the Official Receiver would not be a breach of any express provision of the Bankruptcy Act or any other Act. The question of the consistency between the condition and public policy has been raised. The public policy invoked is the common law of bankruptcy which excepts the personal earnings of the bankrupt from the rule that until discharge all the property of the bankrupt is divisible amongst his creditors. Section 101 is founded upon a recognition of this principle. If a bankrupt agreed to release to his creditors all his personal earnings the question would arise whether the law

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would enforce the agreement. A man has a natural right to own what he earns by his work in order that he may maintain himself and his family. Although he becomes bankrupt he is a person in whom this right inheres. There would be a question whether the law would enforce the release of this right. But the relevant condition of the recognizance in this case does not, in my opinion, raise these matters for consideration. The condition is that the appellant would during the period of five years pay to the Official Receiver for the benefit of creditors £160 per annum by quarterly instalments. The presumption is in favour of the legality of the condition which is impugned. Neither the language of the condition nor the evidence proves that the appellant released in favour of his creditors so much of his prospective personal earnings that he would be left without adequate means of subsistence. The evidence showing how the condition came to be entered into is that after conviction the Judge asked the appellant about his prospects of getting employment. The appellant said he could get a permanent position at a salary of £12 per week and "about £4 or £5 per week from radio servicing on the side at night." The judge asked him how much of these earnings he could pay his creditors and the appellant answered that he could pay anything up to £2 10s. or £5 a week and if he got the "Army contract for servicing" he could increase the amount "considerably." In answer to the Judge's question whether he "could" manage £160 a year the appellant said "Yes." The reason which the appellant gave for failing to pay more than one instalment was that the industrial upheaval prevented him from realising the expectations which he disclosed to the Court. In my opinion the attack upon the condition of the recognizance should not succeed.

I should dismiss this appeal.

WEBB J. For a time I took the view that the period of imprisonment provided by law in respect of each of the offences of which the appellant was convicted under s. 210 (3) (*c*) and s. 212 (1) (*a*) of the *Bankruptcy Act* was twelve months and not six months; that the penalty for breach of the conditions of security provided by s. 20 (2) of the *Crimes Act* was therefore twelve months and not six months; and that the Federal Court of Bankruptcy had no jurisdiction to deal summarily with the breach of s. 20 (2) of the *Crimes Act*. This seemed to follow from the reasoning in the case of *In re Burley* (1), although I had misgivings about applying that

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decision, as it results in holding that the maximum punishment for breach of the conditions of security is twice that provided for either of the original offences when the latter is dealt with summarily, in which event the maximum imprisonment is six months. There would be nothing remarkable in this if it were the policy of the legislation so to provide; but no such policy appears, as the maximum imprisonment is the same for breach of the conditions of security as it is for the original offence when the latter is tried on indictment. Inconsistency should not be attributed to the legislature if the language of its enactment is open to a construction which avoids inconsistency. After reading the judgment of *McTiernan* J., I think that *Burley's Case* (1) is distinguishable and that the words "Imprisonment for the period provided by law in respect of the offence of which he was previously convicted," appearing in s. 20 (2) of the *Crimes Act*, may be taken to refer to the maximum imprisonment which the court that dealt with the previous offence could have imposed on the offender after his conviction summarily, namely six months for each offence, and not to refer to the maximum imprisonment of twelve months to which the offender became liable on committing the offence; and that the Federal Court of Bankruptcy had jurisdiction to deal summarily with the breach of s. 20 (2). Section 20 (3) of the *Crimes Act* was passed in 1926—two years after s. 217 of the *Bankruptcy Act* 1924. Section 20 (3) was not a re-enacted provision.

As to the validity of the condition for the payment of money to the Official Receiver for the benefit of the appellant's creditors, I think that the protection that the *Bankruptcy Act* and the policy of that Act afford a bankrupt in limiting his liability is no longer available to him after he is convicted of an offence, whether against the *Bankruptcy Act* or against any other law: he is then in no better, and in no worse, situation than any other offender. The condition for payment for the benefit of his creditors could not, of course, be held to supersede the *Bankruptcy Act*. But I see no reason why he should not bind himself to pay over moneys which his friends might provide for his release, or even moneys which he might require for his support. If he were not a bankrupt he would not be excused from performance of a condition to pay money imposed under s. 20 of the *Crimes Act* as a condition of release because he needed the money for his keep. Why should he be favoured as compared with other offenders because he has the disqualification of being a bankrupt? In my opinion neither the

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Bankruptcy Act nor the policy of that Act is infringed or defeated by putting a bankrupt offender on the same footing as other offenders.

Ormonde Lloyd Jones substituted for Archibald McKinnon as respondent. Appeal dismissed with costs.

Solicitor for the appellant: *T. D. Armstrong.*

Solicitor for the respondent: *G. A. Watson,* Crown Solicitor for the Commonwealth.

E. F. H.