v. *Scottish Co-operative Laundry Association Ltd.* (1):—"It is true that if the workman has resumed work after his accident, and is in fact earning the same wages as before his accident, the employer is freed from liability so long as that state of matters continues, even if the workman is still partially incapacitated, but this is because the statutory method of calculating compensation yields nothing." Thus it is true to say, in a case of partial incapacity, that wages and compensation are mutually exclusive, not in the sense that the receipt of wages necessarily proves capacity for work and therefore negatives a right to be paid compensation, but in the sense that post-injury wages reduce the amount of compensation payable because the weekly compensation must not exceed the difference between the worker's average weekly earnings before the injury and his average weekly earnings after the injury: see s. 11 of the New South Wales Act. The doctrine of mutual exclusiveness affords no touchstone for, and indeed has no relevance to, the determination of the question whether a worker is entitled to be paid compensation as being totally incapacitated for work.

In *McDermott* v. *S.S. Tintoretto* (2) Lord *Loreburn* said: "It is clear that compensation is to begin exactly where the right to maintenance ends"; and Judge *Perdriau's* statement was an adaptation of these words. But Lord *Loreburn* was dealing with a totally different question. The maintenance to which he referred was maintenance provided for under the Merchant Shipping Acts, and his Lordship, I think, meant only to re-state what he had already said, namely, that under those Acts maintenance must continue until the injured seaman reaches a port in England and then "the *Workmen's Compensation Act* 1906 takes up the tale", and "the right to compensation . . . begins when the injured seaman ceases to be entitled to maintenance" (2). To alter his Lordship's words by substituting "full wages" for "maintenance" and to erect the statement thus produced into a principle for determining whether compensatable incapacity for work exists, is unwarranted by anything in his Lordship's judgment or anything in the Act. "Incapacity" is physical, not legal, and s. 9 has nothing to do with "the right to full wages". It is concerned with the capacity to earn wages by working, and the inquiry for which it calls is an inquiry as to the effect of the injury on the physical ability of the worker to give labour in exchange for wages.

In the present case the appellant's injury destroyed, for the relevant period, his physical ability to sell labour for wages. The

(1) (1936) 1 All E.R. 475, at pp. 482-483. (2) (1911) A.C., at p. 39.

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Kitto J.

wages he got during that period were not produced by any labour performed in that period, and their receipt has, I think, no bearing upon his capacity or incapacity for work. I am of opinion that the case falls squarely within s. 9 as one of total incapacity for work, and the appellant is entitled to a weekly amount of compensation which, since he is an adult male worker, must not be less than £2 per week.

It was not contended on behalf of the appellant that, if the conclusion I have stated should be reached, s. 13 would apply, so that in fixing the weekly payment of compensation, regard should be had to the wages paid in respect of the annual leave; and in my opinion that contention, if it had been advanced, would have been conclusively answered by the cases of *McDermott* v. *S.S. Tintoretto* (1); *Considine* v. *McInerney* (2); and *Watts* v. *Manchester Corporation* (3). The wages were paid in discharge of a debt which had to be paid, incapacity or no incapacity; they were not in any sense paid in respect of the incapacity. They may be contrasted with sick pay, the distinction between the two being exactly the distinction which the cases have drawn between payments to which s. 13 applies and payments to which it does not apply. A compassionate payment made by an employer to an injured worker because of his incapacity would fall into the same category as sick pay; but I should think it inconsistent with the cases last cited to regard s. 13 as applying to all payments made in respect of the period of incapacity by an employer as such, irrespective of the existence or non-existence of any relation between the payments and the incapacity. I think also that judicial statements as to compensation being for economic loss (by which is meant the economic loss consisting of a loss of ability to earn wages by doing work), do not justify a construction of s. 13 which makes the actual loss of wages a condition of the right to be paid compensation.

In my opinion the appeal should be allowed and each of the questions asked in the stated case should be answered "Yes".

Appeal dismissed with costs.

Solicitor for the appellant, *Val Ackerman*, Hunters Hill, by *G. C. Tremlett.*

Solicitors for the respondent, *Dawson, Waldron, Edwards & Nicholls.*

J. B.

(1) (1911) A.C. 35.
(2) (1916) 2 A.C. 162.
(3) (1917) 1 K.B. 791.

[HIGH COURT OF AUSTRALIA.]

IN RE BRASIER.

Bankruptcy—Offence against Act—Summary proceedings in respect of offence—Limitation of time applicable only to such proceedings, not to proceedings by way of indictment—Bankruptcy Act 1924-1948 (*No.* 37 *of* 1924—*No.* 65 *of* 1948), *s.* 219 (2).

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MELBOURNE, *Oct.* 31.

Latham C.J., Williams and Fullagar JJ.

The *Bankruptcy Act* 1924-1948 provides, by s. 219 (2) (as interpreted in *Re Hodgkinson* (1947) 75 C.L.R. 276), that " summary proceedings in respect of any " offence against the Act " shall not be instituted after one year from the first discovery thereof either by the official receiver or by the trustee in the bankruptcy, or, in the case of proceedings instituted by a creditor, by the creditor, nor in any case shall they be instituted after three years from the commission of the offence".

Held that the words " nor in any case shall they be instituted after three years from the commission of the offence " do not apply to proceedings by way of indictment against a bankrupt for an alleged offence against the Act.

CASE STATED.

This was a case stated by the Federal Court of Bankruptcy for the opinion of the High Court. The case was substantially as follows :—

1. On 16th March 1950 an order of sequestration was made in respect of the estate of the bankrupt, Lillian Ellen Brasier, in this court on her own petition, and by this order George Weir Burns was appointed Official Receiver of, and as such became the trustee of, the estate. George Weir Burns is hereinafter referred to as the Official Receiver.

2. The bankrupt, having been ordered pursuant to s. 119 (1) of the *Bankruptcy Act* 1924-1948 to apply to the court for an order of discharge, duly made an application to this court for such an order.

3. This application of the bankrupt for an order of discharge, coming before the court at its sittings in Melbourne, was heard on 28th August 1950.

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4. At all times material the bankrupt was carrying on business as a dressmaker and as a seller of frocks and coats.

5. By his report to the court made in respect of the bankrupt's application, the Official Receiver reported that he was of the opinion that the bankrupt had committed an offence against s. 209 (*g*) of the Act in that the bankrupt failed to keep any books of account in respect of the period 17th March 1945 to 28th August 1947, being a period within five years immediately preceding the date of sequestration of the bankrupt's estate, and that the accounting records kept in respect of the period 8th February 1949 to November 1949 were not the books of account which it is usual and proper to keep in the business conducted by the bankrupt and did not sufficiently disclose the bankrupt's business transactions and financial position during that period.

6. Counsel for the Official Receiver submitted that pursuant to s. 217 of the Act the bankrupt could be prosecuted by order of the court either summarily or by indictment in respect of the alleged offence; but he pointed out that, by reason of s. 219 (2), if the bankrupt was to be tried summarily, she could be charged only in relation to that period which was within three years from the commission of the offence. He raised the question whether the position would be the same on proceedings by way of indictment and referred to *Marks* v. *The King* (1) and *Re Hodgkinson* (2). Counsel for the bankrupt did not make any submission on this aspect of the case.

7. The court adjourned the application of the bankrupt for an order of discharge pending the decision of the High Court on a special case to be stated for its opinion.

The question for the opinion of the High Court was as follows:— Whether the following provision contained in sub-s. (2) of s. 219 of the said *Bankruptcy Act* namely "nor in any case shall they be instituted after three years from the commission of the offence" applies to proceedings by way of indictment against the bankrupt in respect of the alleged offence by her against par. (*g*) of s. 209 of the said *Bankruptcy Act*?

D. Corson, for the Official Receiver. If this Court, in *Re Hodgkinson* (2), had not seen good reasons for departing from the strict grammatical construction of the words in s. 219 (2) of the *Bankruptcy Act*, "any such offence", the sub-section would not be relevant at all here. In their strict grammatical construction

(1) (1937) 57 C.L.R. 58. (2) (1947) 75 C.L.R. 276.

those words would relate back to the words of s. 219 (1), "an offence against this Act in respect of which no special penalty is imposed by this Act", and would not apply to the offence defined in s. 209 (*g*), because that section prescribes the penalty. However, in the case cited, this Court construed the words "any such offence" as meaning any offence against the Act. Accordingly, the three-years' limitation imposed by the concluding words of s. 219 (2) applies here, so far, at all events as summary proceedings are concerned, and in *Marks* v. *The King* (1) it was held that a summary conviction relating to a period which commenced more than three years prior to the institution of the summary proceedings was bad. The critical words in this case, in the expression "nor in any case shall they be instituted" &c. are "in any case" and "they". The sub-section begins with the words "summary proceedings", and it mentions no other proceedings. Accordingly, the word "they", it is submitted, necessarily means summary proceedings, and cannot cover proceedings by way of indictment. Likewise, the natural meaning of the words "in any case", it is submitted, is "in any case of the kind previously mentioned in this sub-section". However, if reason was seen for departing from the natural meaning, the words "in any case" might bear the meaning "in the case of any proceedings, whether summary or by indictment"; the word "they" could then relate to all such proceedings. The actual decision in *Marks* v. *The King* (1) related to summary proceedings only, but doubt has been felt as to whether the judgments did not involve the assumption that the position would be the same in relation to indictments. Moreover, although *Re Hodgkinson* (2) has no direct bearing on the words which are in question here, it is a decision which has given to some of the words of the sub-section a meaning other than that which they might be thought naturally to bear. It was felt that a similar course might be thought proper because of the seemingly curious result produced by the imposition of a limitation of time on summary proceedings while proceedings by indictment are left free of the limitation. It is submitted, however, that no sufficient reason is to be found in the Act for thinking that the legislature did not intend to make this discrimination. In particular, the mention in s. 209 (*g*) of a period of five years would be pointless if no proceedings could be taken except in respect of three years. Accordingly, the question submitted by the case should be answered: No.

S. H. Z. Woinarski, for the bankrupt. As appears from the case stated, the bankrupt did not present to the Court of Bankruptcy

(1) (1937) 57 C.L.R. 58. (2) (1947) 75 C.L.R. 276.

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any argument on the question which is now before this Court, and it is not desired to present any argument on the question now. The bankrupt submits to whatever answer this Court may think it proper to make to the question but is concerned with the question of the costs of the case. The statement of the case was not the outcome of any objection taken by the bankrupt, and it is submitted that, whatever the answer to the question in the case may be, no liability for costs should be imposed on the bankrupt personally. It is further submitted that it would be proper to order that the Official Receiver pay the costs of the case. This would not mean that they would come out of his own pocket; they would be part of the costs of winding up the bankrupt's estate and would come out of the estate.

The following judgments were delivered :—

LATHAM C.J. This is a case stated for the opinion of the High Court under s. 20 (3) of the *Bankruptcy Act* 1924-1948.

Upon an application for an order of discharge by a bankrupt the Official Receiver reported that there was evidence of an offence by the bankrupt against the provisions of s. 209 (*g*) of the *Bankruptcy Act*. The last-mentioned section refers to the keeping of such books of account as are usual and proper in the business carried on by a person and such books as sufficiently disclose his business transactions and financial position during any period within the five years immediately preceding the date of the bankruptcy. Failure to keep such books constitutes an offence.

In the present case the statement of facts shows that the Official Receiver, making his report in the year 1950, after August 1950, reported that the bankrupt had committed an offence against s. 209 (*g*) in that she failed to keep any books of account in respect of the period 15th March 1945 to 28th August 1947, being a period within five years immediately preceding the date of sequestration of the bankrupt's estate. The date of sequestration of the bankrupt's estate was 16th March 1950.

It was further reported that in respect of a period between 8th February 1949 and November 1949 proper books of account were not kept.

No question arises as to the charge in relation to this latter period, but in relation to the first suggested offence to which I have referred a question arises as to the application of s. 219 (2) of the *Bankruptcy Act*. The question submitted to this Court is whether the following provisions contained in sub-s. (2) of s. 219 of such *Bankruptcy Act*, namely, " nor in any case shall they be