[HIGH COURT OF AUSTRALIA.]

COWARD . . . . . APPELLANT;

AND

STAPLETON . . . . . RESPONDENT.

H. C. OF A. 1953.

BRISBANE *Aug.* 4;

SYDNEY, *Aug.* 28.

Williams A.C.J., Kitto and Taylor JJ.

Bankruptcy—Public examination—Absurd answers by bankrupt—Whether refusal to answer questions—Contempt of court—Committal—Procedure—Right to be heard before committal—Bankruptcy Act 1924-1950 (*No.* 37 *of* 9924—*No.* 80 *of* 1950), *ss.* 68, 80 (10)—*Bankruptcy Rules*, *rr.* 9, 103—*High Court Rules*, *O.* 49, *r.* 1.

A bankrupt, who on his public examination under s. 68 of the *Bankruptcy Act* 1924-1950 gives answers of such a nature as to convey to the court an intention not to give any real answers to the questions to which they relate, can properly be convicted of refusing to answer such questions, but before he is convicted of contempt of court arising out of such refusal the specific charge against him must be distinctly stated and he must be allowed a reasonable opportunity of being heard in his own defence; that is a reasonable opportunity of placing before the court any explanation or amplification of his evidence and any submission of fact or law which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.

Section 80 (10) of the *Bankruptcy Act* 1924-1950 applies only to examinations held pursuant to s. 80 and not to examinations held pursuant to s. 68 of the Act.

Observations on the distinction between false answers and answers amounting to a refusal to answer.

Decision of the Federal Court of Bankruptcy (*Clyne* J.) reversed.

APPEAL from the Federal Court of Bankruptcy.

This was an appeal under s. 26 (2) of the *Bankruptcy Act* 1924-1950 from an order of *Clyne* J. by which the appellant Charles Coward a bankrupt was committed to prison for contempt of court.

The public examination of the bankrupt was commenced before the registrar, who considered that the bankrupt's answers to certain questions were unsatisfactory. He adjourned the further examination to the court and stated his intention of making a report under

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r. 103 of the *Bankruptcy Rules*. The judge of the Bankruptcy Court considered that the registrar's report was not in compliance with s. 103 and pursuant to r. 9 directed the bankrupt to go into the witness box and answer questions.

Immediately after questions had been put to the bankrupt by the judge and counsel for the official receiver, the judge stated that he found it impossible to accept the answers as an accounting for the disbursement of a substantial sum of money; that the story told by the bankrupt was fantastic, absurd and impossible to believe; and that the answers represented a shuffling and fantastic attempt to conceal the truth about the bankrupt's dealings or more correctly manipulations with vast sums of money.

Thereupon the judge ordered the bankrupt to be committed to prison there to be detained until he shall make to the satisfaction of the court proper answers to the questions or until the court should otherwise order. The bankrupt then claimed that the sentence was based on the official receiver's report and asked for an adjournment, so that he might call evidence to prove the charges incorrect. The judge refused to alter the order.

From this judgment the bankrupt pursuant to s. 26 (2) of the *Bankruptcy Act* 1924-1950 appealed to the High Court.

D. Casey (with him *W. J. Cuthbert*), for the appellant. If the examination were conducted under s. 68 of the Act then the bankrupt has given answers. He is not required by that section to answer to the satisfaction of the court as under r. 103. This Court should construe s. 68 (8) according to the plain meaning of the words. It is not the function of the court to fill in any gaps in the statute: *Magor & St. Mellons Rural District Council* v. *Newport Corporation* (1). The judge was wrong in committing the appellant and certainly had no power to commit him until he made proper answers to the satisfaction of the court. If the judge conducted the examination under s. 80, then the bankrupt could be punished, for prevarication and evasion. The maximum punishment was fourteen days, and the judge was wrong in committing him as he did for an indefinite period. Further the answers did not amount to prevarication or evasion. There was no refusal to answer under s. 80 (9). The words are ambiguous and the section being penal, the section should be construed to mean a refusal to give any answer at all: *In re A Debtor* (*No.* 21 *of* 1950); *Ex parte The Debtor* v. *Bowmaker Ltd.* (*No.* 1) (2); *In re A Debtor* (*No.* 41 *of* 1951); *Ex*

(1) (1952) A.C. 189, at p. 190.

(2) (1951) Ch. 313.

parte The Debtor v. *Hunter* (1); *Binns* v. *Wardale* (2); *Ingham* v. *Hie Lee* (3); *R.* v. *Adams* (4); *London & Country Commercial Property Investments Ltd.* v. *Attorney-General* (5); *In re Edols* (6). There was no power for the judge to deal with the matter under r. 9 on his own motion. Under O. 49 r. 1 of the *High Court Rules* the bankrupt should have been informed of the specific charge and required to make his defence: *James* v. *Cowan*; *In re Botten* (7); *Re Grace* (8). Apart from these rules the judge did not charge the bankrupt with any specific charge and give him an opportunity of answering or making a defence: *In re Pollard* (9); *Chang Hang Kiu* v. *Piggott* (10); *R.* v. *Foster*; *Ex parte Isaacs* (11).

A. L. Bennett Q.C. (with him *E. J. Moynahan*), for the respondent. The judge was authorized by r. 9 to conduct the examination, which was subject to the provisions of s. 68 of the Act. It was in no way subject to s. 80, which had no application to an examination held under s. 68. The replies made by the bankrupt to the questions put to him were plainly absurd. They were so absurd as not to amount to real answers. He was therefore in contempt and would be dealt with under r. 103: *Reg.* v. *Judge of the County Court of Surrey* (12). The appellant was properly committed to prison for contempt. He was in contempt by his so called answers to the registrar. He knew the purpose of his being taken before the judge, which was to give him the opportunity of explaining his answers and being heard by way of defence. He however, persisted in his attitude to the court and rendered himself liable to punishment. The requirements of the rules and the usual procedure in contempt cases was substantially observed: *James* v. *Cowan*; *In re Botten* (7); *In re Pollard* (9); *Chang Hang Kiu* v. *Piggott* (10); *Watt* v. *Ligertwood* (13).

D. Casey in reply.

Cur. adv. vult.

Aug. 28.

THE COURT delivered the following written judgment:—

This is an appeal under s. 26 (2) of the *Bankruptcy Act* 1924-1950 (Cth.) from an order of the Federal Court of Bankruptcy (*Clyne* J.), by which the appellant, a bankrupt, was committed to prison for

(1) (1952) 1 Ch. 192.
(2) (1946) K.B. 451.
(3) (1912) 15 C.L.R. 267, at pp. 271-273.
(4) (1935) 53 C.L.R. 563, at pp. 567, 568.
(5) (1953) 1 All E.R. 436, at pp. 441, 442.
(6) (1936) 8 A.B.C. 145.
(7) (1929) 42 C.L.R. 305.
(8) (1895) 6 Q.L.J. 294.
(9) (1868) L.R. 2 P.C. 106.
(10) (1909) A.C. 312.
(11) (1941) V.L.R. 77.
(12) (1884) 13 Q.B.D. 963.
(13) (1874) L.R. 2 H.L.C. 361, at pp. 363-365.

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contempt of court. The order recites that upon the matter of the examination of the appellant under s. 68 of the *Bankruptcy Act* coming on to be heard before the court, and upon hearing counsel for the official receiver and trustee of the appellant's estate, and upon hearing what was said by the appellant in reply to questions put to him by the court and to further and other questions allowed by the court to be put to him, and upon hearing the evidence of two named witnesses, the court was of opinion that the appellant had refused to answer lawful questions touching his trade dealings property and affairs and had been guilty of contempt of the court. For that contempt the order commits the appellant to Her Majesty's prison at Brisbane, there to remain "until he has made proper answer to the said questions to the satisfaction of the court or until the court shall otherwise order".

Section 68 of the *Bankruptcy Act*, to which the order refers, provides for the public examination of a bankrupt by the court, and requires the bankrupt to attend thereat to be examined as to his conduct, trade dealings, property and affairs: sub-s. (1). It provides further that the court may adjourn the examination from time to time: sub-s. (3); that the official receiver may take part in the examination: sub-s. (5); and that the court may put or allow such questions to be put to the bankrupt as it thinks fit: sub-s. (7). Sub-section (8) provides that the bankrupt shall be examined upon oath, and that he shall answer all such questions as the court puts or allows to be put to him.

By s. 24 (1) a registrar is enabled to exercise certain powers, duties and functions, including (b) to hold a public sitting for the examination of the bankrupt, and adjourn the same from time to time, and to put such questions to the bankrupt as he thinks expedient. Pursuant to this provision, the public examination of the appellant commenced before a registrar on 27th February 1950, and it was continued before him on a number of subsequent days. The registrar considered that the appellant's answers to questions put to him on several topics were unsatisfactory, and on 24th November 1950 he intimated his intention of making a report to the judge under r. 103 of the *Bankruptcy Rules*. That rule provides that if a debtor or witness examined before a registrar refuses to answer to the satisfaction of the registrar any question which he may allow to be put, the registrar may report the refusal in a summary way to the judge, and, upon the report being made, the debtor or witness shall be in the same position and be dealt with in the same manner as if he had made default in answering before

a judge. The registrar adjourned the further examination of the appellant under s. 68 to come before the court on 1st December 1950.

On the latter date the examination under s. 68 was called on before *Clyne* J., and at the same time there came before his Honour a report by the registrar that the appellant had refused to answer to the registrar's satisfaction questions relating to a number of matters which were enumerated and commented upon. The report contained references by number to a great many pages of the transcript of the appellant's evidence, but it did not quote or otherwise identify the particular questions which the appellant had refused to answer to the registrar's satisfaction. For that reason the learned judge considered that the report was not in conformity with r. 103. Counsel for the official receiver offered, if the judge would adjourn, to go through the material, apparently for the purpose of picking out the questions and answers which he believed to be material; but the learned judge declined to adopt this course, and directed the appellant to go into the witness-box. In giving this direction his Honour referred to r. 9, which provides that any matter pending before the registrar shall be adjourned to be heard before the court, if the court either specially or by any general direction applicable to the particular case so directs. It is true, as counsel for the appellant has pointed out, that the direction authorized by r. 9 is a direction to the registrar requiring him to adjourn a matter which is before him so that it may come on before the court. The rule does not purport to authorize a direction to a bankrupt to submit to examination before the court. It was contended for the appellant before us that for this reason the examination of the appellant which took place before *Clyne* J. was not authorized by r. 9. This is true, but the point has no significance in this appeal, for the necessary authority existed under s. 68. The power which that section vests in the court to examine the bankrupt is none the less exercisable by the court because s. 24 (1) makes it exercisable also by the registrar, and the order appealed against in this case shows upon its face that the examination which the learned judge conducted was an examination under s. 68.

Counsel for the appellant referred us to s. 80 of the *Bankruptcy Act*, which enables the court to order the bankrupt his wife or any person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt or supposed to be indebted to the bankrupt, or to be able to give information respecting the bankrupt, his dealings or property to attend before the court or a magistrate to give evidence relating to the matters specified

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in that section. Sub-section (10) provides a maximum punishment of committal to prison for fourteen days for any person guilty of prevarication or evasion while under examination. The submission was made that the appellant's committal was, in effect, for prevarication or evasion, and that s. 80 (10) applies in respect of an examination under s. 68 as well as one under s. 80. It is impossible to uphold this argument. The power of committal under s. 80 (10) is given to the court or magistrate, and it is only under s. 80 that examinations may be held before magistrates. Obviously the phrase "while under examination" is confined in its application to examinations under s. 80.

Then it was said that the only duty of the appellant under s. 68 was to answer the questions put to him, and that even if he gave untrue answers he could not be convicted of refusing to answer. It was pointed out that s. 68, unlike r. 103, does not distinguish between answering questions and answering them to the satisfaction of the court. The order under appeal, however, convicts the appellant, not of failing to answer to the satisfaction of the judge, but of refusing to answer. As no question was put to the appellant which he in terms refused to answer, or in respect of which he remained mute, the order must mean that the learned judge considered that some of his purported answers not only were untrue but were so plainly absurd as to convey an intention not to give any real answers to the questions to which they related. That, in effect, is what his Honour said. "A substantial part of the answers I have referred to", he observed, "represented, in my opinion, a shuffling and a fantastic attempt to conceal the truth about the bankrupt's dealings, perhaps I should say, more correctly, manipulations, with vast amounts of money". And he ordered the appellant to be detained in prison until he should make to the satisfaction of the court "proper answers" to the questions.

It is only in a strictly limited class of cases that a witness can properly be convicted of refusing to answer a question which he has purported to answer. A disbelief on the part of the court in the truth of the purported answer is not, without more, a sufficient foundation for such a conviction. The words used, considered in their setting and in the light of the demeanour of the witness, must show that in fact the witness is declining to make any reply which can be properly called an answer to the question. There must be a manifestation in some form of an intention on the part of the witness not to give a real answer. It is essential not to lose sight of the sharp distinction that exists between a false answer and no answer at all. Of course a purported answer may be so

palpably false as to indicate that the witness is merely fobbing off the question. His attitude in the box may show that he is simply trifling with the court and is making no serious attempt to give an answer that is worth calling an answer. In such cases it may well be right to say that the witness refuses to answer the question, but it cannot be too clearly recognized that the remedy for giving answers which are false is normally a prosecution for perjury or false swearing, and not a summary committal for contempt. Such a committal can be justified only by a specific finding of an evinced intention to leave a question or questions unanswered, or by a finding of contempt in some other defined respect.

Now, in this case it is not suggested on behalf of the appellant, either in the notice of appeal or in the submissions of counsel, that *Clyne* J. was not justified in forming a prima-facie opinion that important questions addressed to the appellant remained, in the end, really unanswered. Nor is it denied that by virtue of s. 20 of the *Bankruptcy Act* his Honour had power to commit the appellant for contempt if he should make a concluded finding to that effect. But it is contended that before making such a finding the learned judge, by reason both of the provisions of O. 49, r. 1 of the *High Court Rules* in force at the time (i.e. before 1st January 1953) and of the requirements of the general law, should have informed the appellant of the specific offence with which he was being charged and given him an opportunity of answering the charge. The *High Court Rules* are referred to because the *Bankruptcy Rules* contain nothing which regulates the practice and procedure of the Bankruptcy Court in such a case as the present, and r. 7 of Div. 1 of Pt. II of the latter rules provides that "where any practice or procedure of the Court is not regulated by these Rules, the practice or procedure shall be regulated as nearly as may be by the Rules of the High Court for the time being in force". Rule 1 of O. 49 of the relevant *High Court Rules* provides for bringing before the court a person alleged to be guilty of contempt of court, committed in the face of the court or in the hearing of the court, and provides further that the court shall cause him to be informed orally of the nature of the contempt with which he is charged, and shall require him to make his defence to the charge, and shall after hearing him proceed, either forthwith or after adjournment, to determine the matter of the charge, and shall make such order for the punishment or discharge of the accused person as is just. Even apart from any such express provision, however, it is a well-recognized principle of law that no person ought to be punished

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for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him: *In re Pollard* (1); *R.* v. *Foster*; *Ex parte Isaacs* (2). The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kiu* v. *Piggott* (3). The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.

Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon. While it is clear enough that a refusal to answer may be inferred from the giving of what purports to be an answer, the power to commit summarily for a refusal so inferred is a power attended by obvious dangers, and extreme caution is required in its exercise. Not only does the charge place the liberty of the individual in jeopardy in proceedings of a summary character which do not surround him with all the safeguards of a jury trial; but the issue whether statements offered as answers not only are false but imply a refusal to answer may well depend upon considerations of degree, which may strike different minds in different ways. The court, especially when it has itself preferred the charge, must be alert to see that it withholds judgment on the issue until it has considered everything which the witness may fairly wish to urge in his defence.

In the present case there is no reason to doubt that the appellant knew perfectly well that he was in danger of being held guilty of contempt for refusing to answer questions, and, broadly, what those questions were. As the learned judge remarked at one stage, he had been "examined up hill and down dale over these things for weeks". The registrar had made it clear that it was because he regarded certain answers given by the appellant as spurious that he was reporting him to the judge. And when the judge put the report on one side, and himself resumed the examination, the appellant could not have been in any doubt that he was being allowed a further opportunity to give answers which really were answers, and that if the judge considered that he was refusing to

(1) (1868) L.R. 2 P.C. 106, at p. 120.
(2) (1941) V.L.R. 77, at p. 81.
(3) (1909) A.C. 312, at p. 315.

do so he would be liable to be punished as for contempt of court. As has been said already, in the opinion of *Clyne* J. he failed to profit by this opportunity.

But the learned judge announced his findings to this effect in a judgment which he delivered immediately after he and counsel for the official receiver had finished their questioning of the appellant. His Honour in delivering this judgment recounted *verbatim* a number of questions which had been asked and the answers or purported answers which the appellant had given, and said that he found it impossible to accept those answers as an accounting for the disbursement of a substantial part of the money to which they related. After making the order which is the subject of this appeal, he said to the appellant: "You realise you will have to reconsider your position in gaol and if you cannot give a more satisfactory explanation than you have already given of the destination of the vast sums involved, you may remain in Brisbane Gaol for a very long time". The appellant said: "May I address you, please? This sentence of yours is based precisely on the Official Receiver's Report", to which his Honour replied: "It is based on the answers you have given to me and the answers to the questions put by Mr. *Moynahan* yesterday". The appellant said: "I can call evidence to prove these charges against me are incorrect. I have not had this chance. I suggest that you adjourn this until I can call this evidence. One vital man will be back here in a month's time. I request that". His Honour said that he would not alter the order and that the appellant's request was refused.

It will be seen that the appellant was given no opportunity to say anything by way of evidence or address between the conclusion of his questioning and the delivery of judgment against him; and what took place after the making of the order underlined this fact. No doubt the explanation is that the learned judge, having already allowed the appellant the most ample liberty to give a real, as distinguished from an impudently unreal, account of his relevant dealings, believed that to offer him any further opportunity would be a completely empty formality. But, with great respect to his Honour, to take that view at that stage was to overlook the imperative necessity of deferring the formation of a concluded opinion as to the inference to be drawn from the appellant's words until there could be placed in the scales everything that the appellant might fairly wish to say, not only upon the questions asked of him, but also upon the question whether his purported answers amounted to a contempt of court, and, if so, what the sentence of the court should be.

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In these circumstances the order appealed from cannot be affirmed. We must allow the appeal, set aside the order, and direct that the appellant be discharged from prison. There will be no order as to costs.

Appeal allowed. Order below set aside. Order that the appellant be immediately discharged from Her Majesty's Prison at Brisbane where he is at present confined.

Solicitor for the appellant, *Kenneth H. Mitchell.*

Solicitor for the respondent, *D. D. Bell,* Commonwealth Crown Solicitor.

B. J. J.