[HIGH COURT OF AUSTRALIA.]

McQUARRIE AND ANOTHER . . . APPELLANTS;
RESPONDENTS,

AND

JAQUES . . . . . RESPONDENT.
APPLICANT,

H. C. OF A. 1954.

SYDNEY, *Aug.* 25, 26; *Dec.* 15.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Bankruptcy—Judgment debtor—Execution levied—Goods held by sheriff seven days before sale—Money paid to execution creditor—Withdrawal of sheriff—Act of bankruptcy—Petition issued by another creditor—Sequestration order made—Relation back—Benefit of execution—Right of execution creditor to retain—Bankruptcy Act 1924-1950, *ss.* 4, 52 (*e*), 55, 60, 90, 92.

Before an act of bankruptcy had occurred the debtor's goods were seized in execution at the suit of the appellants. The goods were held for more than seven days before being sold which under s. 52 (*e*) of the *Bankruptcy Act* 1924-1950 constituted an available act of bankruptcy to which a bankruptcy of the debtor must be deemed to have relation back and then commence if the petition be presented within six months: s. 90 of the *Bankruptcy Act* 1924-1950. In fact within six months a petition was presented founded on another later act of bankruptcy and a sequestration order was made. But in the meantime the sale, the return of *fieri feci* to the writ and the payment of the money to the appellant all took place. Upon the trustee in bankruptcy seeking a declaration and order that, by virtue of s. 92 of the *Bankruptcy Act* 1924-1950 the appellants were not entitled to retain the benefit of the execution against the goods of the bankrupt, *Clyne* J. held that before the execution had been completed by seizure and sale the execution creditors had notice within the meaning of s. 92 (1) of the commission of an available act of bankruptcy by the debtor inasmuch as they must be taken to have known that the sheriff had held the goods for seven days after seizure so that an act of bankruptcy was committed: s. 52 (*e*). The order which *Clyne* J. made under s. 92 declared that the appellants were not entitled to retain against the respondent the benefit of the execution and the order required the appellants to pay the respondent the amount of the benefit of the execution.

Held, that although at common law the appellants as execution creditors would obtain a title to the proceeds of the execution that would be paramount

to that of the Official Receiver, the paramountcy of the appellants' title is destroyed by s. 92 which is substantially transcribed from the corresponding English provisions (now s. 40 of the *Bankruptcy Act* 1914 (Imp.)) which under the English authorities have been held to mean that once the execution creditor was fixed with notice before the completion of the execution by sale that an act of bankruptcy had occurred, even when it was occasioned by the execution itself, that was the end of any claim on his part to retain or receive the proceeds of the execution.

Per Dixon C.J. and *Fullagar* J. that whatever view may be taken of the relation of the decided cases to the actual text embodied in our s. 92 and to one another it is clear that *Figg* v. *Moore Bros.* (1894) 2 Q.B. 690 and *Trustee of Burns-Burns* v. *Brown* (1895) 1 Q.B. 324 are considered to remain unaffected and to be good law, and because these two cases completely cover the facts of the present case then for reasons of convenience as well as of policy and tradition they should be followed independently of any consistent textual construction.

Figg v. *Moore Bros.* (1894) 2 Q.B. 690; *Trustee of Burns-Burns* v. *Brown* (1895) 1 Q.B. 324; *In re Godwin* (1935) Ch. 213; *In re Samuels*; *Ex parte Tee* (1935) Ch. 341; *In re Andrew* (1937) Ch. 122; *In re Love* (1951) Ch. 952, (1952) Ch. 138; and *In re Ford*; *Ex parte Official Receiver* (1900) 1 Q.B. 264, referred to and discussed.

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

APPEAL from the Court of Bankruptcy.

By a motion, of which notice had been given on 28th August 1953, brought in the Court of Bankruptcy on 24th September 1953, Stanley Theodore Jaques, the official receiver and trustee of the estate of John William Noel Bender, a bankrupt, made a claim against the respondents Robert Keith McQuarrie and Douglas Beardmore for a declaration that they were not entitled to retain as against him the benefit of an execution issued by them on 17th April 1950 against the goods of Bender and for an order that the respondents do pay to him, the applicant, the sum of £189 1s. 3d. the amount of the benefit of the said execution. Bender's estate was sequestrated on 17th August 1950, upon the petition of the Commonwealth of Australia.

An action was commenced by the respondents against Bender in August 1948, in the Supreme Court of New South Wales, and in January 1949 the action was remitted to the District Court. On 10th June 1949 the respondents recovered judgment against Bender for £321 for debt including the sum of £226 paid into court and costs. Bender was ordered to pay the sum of £95 to the registrar of the court forthwith. Subsequently, by a consent order, the costs were agreed at £75 1s. 8d.

H. C. OF A. 1954. McQUARRIE v. JAQUES.

A writ of execution against Bender's goods was issued on that judgment on 27th October 1949, but that writ was returned unsatisfied.

Another writ of execution was issued on that judgment and costs on 17th April 1950 and a return thereto was made on 13th July 1950. By the return it was stated that the gross amount levied or received, including interest of £8 17s. 1d., was £189 1s. 3d. The return of the writ of execution showed that a levy on Bender's goods was made on 28th April 1950 and the writ itself had an indorsement signed by "C. J. Welch" as District Court Bailiff dated 13th July 1950, stating that the sum of £189 1s. 3d. was paid after levy on 29th June 1950 and "held for 14 days under *Bankruptcy Act*".

A sum of £183 1s. 6d. was paid into the Metropolitan District Court on 13th July 1950. In a letter dated 13th September 1951, sent by the official receiver to McQuarrie, the official receiver informed McQuarrie that a sequestration order had been made against Bender and stating that he had been informed by the bailiff at Penrith that he had levied execution on the goods of Bender at St. Marys on 28th April 1950, and on 28th June 1950 the goods were sold at auction and that he understood that the sum of £189 1s. 3d. was paid into court. In that letter it was claimed that the respondents were not entitled to the benefit of the execution.

From the depositions of evidence of McQuarrie given on his examination under s. 80 of the *Bankruptcy Act* 1924-1950 it appeared that he attended the bailiff at Penrith on some occasions at the request of the bailiff. The reason for his first attendance was that Bender was away and the bailiff did not know which goods were Bender's and which were not and so McQuarrie went to Penrith, saw the goods and pointed out to the bailiff which were Bender's goods.

McQuarrie also attended at the time of the sale and so did Bender.

Though no direct evidence was given that Bender's goods were kept by the bailiff from the time of seizure until the time of sale the judge in bankruptcy thought it was a proper inference of fact that that was the case.

Upon the conclusions of fact to which the judge in bankruptcy came, the bailiff seized the goods of Bender and remained in possession of them long beyond the period of seven days and thus Bender had committed an available act of bankruptcy and of that act of bankruptcy the respondents had notice. Accordingly the respondents were not entitled to have the benefit of their execution

because they had not completed their execution before they had notice that an available act of bankruptcy had been committed by Bender.

The judge (1) declared that McQuarrie and Beardmore were not, nor was either of them, entitled to retain against the applicant the benefit of the execution issued by them on 17th April 1950 against Bender; and (2) ordered that McQuarrie and Beardmore do pay to the applicant the sum of £189 1s. 3d. being the amount of the benefit of that execution.

From that decision McQuarrie and Beardmore appealed to the High Court.

The relevant statutory provisions sufficiently appear in the judgments hereunder.

M. H. Byers, for the appellants. The judge in bankruptcy was in error in relying on *Figg* v. *Moore Bros.* (1) because sub-s. (3) of s. 92 of the *Bankruptcy Act* 1924-1950 has not any counterpart in s. 40 of the *Bankruptcy Act* 1914 (Imp.) which provision is similar to the provision on which that case was decided. His Honour fell into error in two ways, firstly, by treating the words " the benefit of the execution " in s. 92 as being applicable to moneys received in discharge or partial discharge of a writ of execution, because that is the effect of the judgment; and, secondly, as an alternative argument, in holding that what happens in the course of the execution of the writ can operate to deprive a creditor of the protection given by s. 92. What happens in the execution of the creditor's own writ cannot be treated as knowledge by him of the commission of an available act of bankruptcy. The cases which decide to the contrary are cases decided on Imperial legislation prior to the insertion of a provision corresponding to s. 92 (3). If " the benefit of the execution " means sums received under the writ, there can never be a case in which s. 92 can operate because in every case there is an available act of bankruptcy by reason of the sale of the goods. The available act of bankruptcy depends upon the available act of bankruptcy which grounded the petition, that is to say where one has the available act of bankruptcy upon which the petition is presented, it is that act of bankruptcy of which one must have knowledge. If the judge in bankruptcy be right, the execution creditor—especially where there is a sale—is deprived of the benefit which s. 92 appears to give him. The word " or " in s. 92 (1) should read " and ".

(1) (1894) 2 Q.B. 690.

H. C. OF A. 1954. McQUARRIE v. JAQUES.

The court in *In re Andrew* (1) approved *In re Godwin* (2) which is practically identical with the case now before this Court. The same sort of declaration was sought as is sought in this case and it was held that the phrase " the benefit of the execution " referred solely to the protection obtained by an execution creditor by reason of the issue of *fi. fa.* and did not include any payments to the creditor by the sheriff or the judgment debtor. The section relates only to executions which were in fact in existence at one or other of the appropriate dates and has no reference to one which had been unconditionally withdrawn before those dates (*In re Godwin* (3)). The act of bankruptcy is used in the sense of actual bankruptcy, the order of sequestration. The section nowhere states explicitly that one can retain the benefit of the execution in any event. In *In re Andrew* (1) their Lordships considered the time of the receipt of the money to be irrelevant.

[TAYLOR J. referred to *In re Andrew* (4).]

Their Lordships approached the matter by saying, in effect, that they were not so much concerned with moneys paid prior or subsequently because all that the section can gather in is not money but priorities, so they were not concerned with construing the section as to what happens to the priority either in advance or subsequently. That took the appellants out of the hands of the Official Receiver. The judge in bankruptcy took the view that because there was an act of bankruptcy constituted by the actual writ of execution being satisfied, therefore the creditor on whose behalf they were satisfied could not come within the provisions of s. 92, whatever " benefit of the execution " means, because he had notice of the available act of bankruptcy. *In re O'Shea's Settlement* (5) does not assist. If " benefit of the execution " means priority and not money, then if there be money and not priority, *ex hypothesi*, s. 92 cannot apply. *In re Andrew* (1) was referred to and in no way dissented from in *In re Love* (6). Section 40 (Imperial Act) provides that the benefit of an execution will be protected if certain conditions are fulfilled ; it will not be protected in other circumstances. There is an express statement on s. 40 that the benefit shall not be saved where the section is not fulfilled. The various implications do not cut down a person's right to receive money from executions by him. There is an explicit statement in s. 92 itself. The implication from that is that unless one is still dealing with " benefit of the execution " to the extent of a charge

(1) (1937) Ch. 122.
(2) (1935) Ch. 213.
(3) (1935) Ch., at p. 219.
(4) (1937) Ch., at p. 135.
(5) (1895) Ch. 325.
(6) (1951) Ch. 952 ; (1952) Ch. 138.

or priority it is not protected unless the provisions of s. 92 are complied with. Dealing with the further situation which can arise, namely receipt of money, the implication is once a creditor has received his money he is outside the section and therefore s. 92, as applying to money, does not deprive him of his right. By implication s. 92 leaves untouched the satisfied part of the writ of execution. It preserves the charge, and therefore everything that follows after that is protected. All that was decided in *In re Love* (1) is that where there has been a valid charge, then if the execution is complete without notice of bankruptcy, by implication the protection to the receipt of the moneys will accrue by reason of the protection given to the charge in those circumstances. Their Lordships did not say anything inconsistent with the doctrine which was enunciated in *In re Andrew* (2). The judge in bankruptcy treated as an act of bankruptcy which affected the creditor with notice, all those things which happened pursuant to the writ of execution, and, as an authority to support that, referred to *Figg* v. *Moore Bros.* (3) and *Trustee of Burns-Burns* v. *Brown* (4). Each of those cases was decided on a section which did not have in it a provision similar to sub-s. (3) of s. 92. The object of sub-s. (3) is to meet the situation, created by the two positions to which the judge refers, so as to validate the execution which, if the judge is right, would otherwise be invalid, e.g. wherever there is a sale of goods there must be an act of bankruptcy committed under s. 52 (*e*). Sub-section (3) is directed to saving an execution which ends up in sale. Sub-section (1) and sub-s. (3) are both directed at or concerned with saving actions against the trustee in bankruptcy. Sub-section (1) of s. 92 is divided into two branches : one is the affect on the judgment creditor by protecting him from notice ; and the other deals with the purchaser who acquires from the judgment creditor: see *Re Rogers* ; *Ex parte Villars* (5). The word " other " should be inserted in the last line of s. 92 (1).

J. K. Manning Q.C. (with him *W. K. Nicholl*), for the respondent. This case falls within the terms of s. 92 (1) of the *Bankruptcy Act* 1924-1950. The appellants are not entitled to retain the moneys which they have been paid consequent upon the sale of the debtor's goods under the writ of execution, those proceeds being, in the true sense, the benefit of the execution which the section prohibits them from retaining. By 5th May 1950 an act of bankruptcy had

(1) (1951) Ch. 952 ; (1952) Ch. 138.
(2) (1937) Ch. 122.
(3) (1894) 2 Q.B. 690.
(4) (1895) 1 Q.B. 324.
(5) (1874) L.R. 9 Ch. App. 432, at pp. 434, 435.

H. C. OF A. 1954. McQUARRIE v. JAQUES.

been committed under s. 52 (*e*) and the creditor had notice of that act of bankruptcy. At the material date at which s. 92 operates to deprive the creditor of the benefit in question there was a subsisting execution and it is the benefit of that execution which is affected by the section; that is the very benefit at which s. 92 strikes. The creditor had in fact procured the seizure of the debtor's goods by the bailiff; he must have known after the seven days that the bailiff continued in possession: see *Trustee of Burns-Burns* v. *Brown* (1). All that the Court of Appeal considered in *In re Love* (2) was whether the doctrine of relation back could operate so as to avoid recovery of moneys under an execution, even where the equivalent of s. 92 would not have invalidated the creditor's receipt of the money. There the creditor was entitled, if regard be had to s. 92, to keep his money, recovered under the execution. In *In re Love* (2) the court said, in effect, one may disregard relation back, in relation to, *inter alia*, preferences, and one will find the law in relation to executions in ss. 92 and 93 and that is intended to be comprehensive. The next problem is: Is execution a judicial proceeding suffered? This has been the subject of conflicting decisions. In *Re Ward*; *Ex parte Nette* (3) it was held that a creditor could not retain the benefit of an execution under s. 92 even though he was not precluded from holding it by virtue of s. 92, if in fact it amounted to a preference. The approach in that case was wrong because one does not ascertain whether s. 95 overrules s. 92. The approach would be, not whether the one overrules or neutralizes the other, but rather can one read them and give them respectively some effect, each independently of the other? Are they intended to apply to different sets of circumstances only, or to cover the same ground. If s. 92 is protective it is in effect a code. If the section is merely restrictive of his right to retain his money, and nothing more, then every other section would operate which could be brought in, and relation back would apply. But if it is intended to be protective it is intended not to be a code, but to alone limit the rights of the creditor who has got his money in that way. It is intended to apply to execution and to protect, in the sense that if the restriction does not apply, then no other restriction applies. In *In re Andrew* (4) the position was that the idea that s. 92 would deprive the creditor of more than he would be deprived of had the debtor made the payment voluntarily but not fraudulently would be too much—not in the sense of a fraudulent preference. Section 96 could only operate to relieve

(1) (1895) 1 Q.B., at pp. 326, 327.
(2) (1952) Ch. 138.
(3) (1936) 9 A.B.C. 103.
(4) (1937) Ch. 122.

against s. 90 and is clearly inappropriate to give any relief from the doctrine of relation back in respect of an execution.

[DIXON C.J. referred to *In re Andrew* (1).]

That must mean either payments made to the sheriff for transmission to the creditor, or payments made by the sheriff from the proceeds of a completed execution. The important time to be looked at is the time of the commencement of the bankruptcy, therefore the ultimate result of *In re Andrew* (2) is right. If at the date of the act of bankruptcy, of which this creditor had notice, and if at that point of time there is an execution current he cannot keep anything he gets from the execution at a later date—that is because at that time the trustee's title came into being. If s. 92 is merely restrictive in the sense that it places a restriction on the right of the creditor to retain the money if in fact, after an act of bankruptcy and presentation of the petition, those goods are sold and the money received by the judgment creditor and only by reason of his having had the bailiff in at that stage for two months, there is not a clearer case of disentitlement to retain that money by virtue of s. 95: see *Re Quirk*; *Richardson* v. *Eather* (3).

M. H. Byers, in reply. The operation of the section and its limitations are dealt with in *In re Andrew* (4). To look at the commencement of the bankruptcy is against authority. That would involve the doctrine of relation back which would be inconsistent with what is stated in *In re Love* (5).

Cur. adv. vult.

Dec. 15.

The following written judgments were delivered:—

DIXON C.J. The matter at issue in this appeal is a small sum of money but unfortunately to determine its fate it is necessary to enter one of the darker recesses of the bankruptcy law. Long ago it became evident that the doctrine of relation back gave rise to certain conflicts between priorities when an execution had been levied upon the bankrupt's property. There was first the case where, although the execution had not been completed before the act of bankruptcy took place to which the subsequent sequestration related back, yet a levy had been made upon the property of the debtor which at the time of the act of bankruptcy was held by the sheriff. Should the rights of the judgment creditor under his writ of execution be held superior to those of the assignees in bankruptcy

(1) (1937) Ch., at pp. 129, 130.
(2) (1937) Ch. 122.
(3) (1951) 15 A.B.C., at pp. 152, 153.
(4) (1937) Ch., at pp. 135, 136.
(5) (1951) Ch. 952; (1952) Ch. 138.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Dixon C.J.

or were they overreached by the sequestration ? Then there was the case of the levy made upon goods after the act of bankruptcy and completed by sale before the fiat or commission in bankruptcy. How stood the sheriff and the execution creditor then ? For, difficult as it might be to say that the possession of the assignees related back so as to make the sheriff a trespasser, certainly the vesting of the property was retrospective and why should not the seizure and sale amount to a conversion ?

It is nearly two hundred years since the professional opinion of the day with regard to this latter question was disconcerted by the judgment delivered by Lord *Mansfield* for the Court of Kings Bench in *Cooper* v. *Chitty* (1). Lord *Mansfield* held that not only the execution creditor but also the sheriff was liable in trover to the assignees in bankruptcy for the sale of the goods of the debtor seized under a writ of execution before the fiat or commission if the act of bankruptcy to which the sequestration related back occurred before the date as of which the writ was tested. It is true that sixty-five years later Lord *Lyndhurst*, as Chief Baron of the Exchequer, delivered a judgment for that court which treated Lord *Mansfield's* judgment with less than customary veneration and confined its operation with reference to the sheriff to the case of a sale after the commission of bankruptcy had issued. Lord *Lyndhurst* even said : " Unless he (Lord *Mansfield*) meant to convey the notion of perfect indemnity to the officer where there was perfect ignorance, he made a very useless display of what would appear to be legal knowledge, and was filling up six pages with what might have been expressed in six lines " : *Balme* v. *Hutton* (2). But this led to a firm re-establishment by the Exchequer Chamber of Lord *Mansfield's* doctrine as to the sheriff's liability in trover and to the extension of its application to the case of a sale before issue of the commission of bankruptcy alike with a seizure before it, followed by a sale after it took place. Lord *Lyndhurst's* words provoked from *Alan Park* J. a eulogy of Lord *Mansfield*, who, he said, was not, he believed, remembered by any one then present except himself, and it is for this eulogy that the case is better known than for the point of law it decides : *Balme* v. *Hutton* (3). Shortly afterwards, however, the decision obtained the support of the House of Lords expressed in more conventional form : *Garland* v. *Carlisle* (4). Even before *Balme* v. *Hutton* (5) had reached the

(1) (1756) 1 Keny. 395 [96 E.R. 1033]; 1 Burr. 20 [97 E.R. 166].
(2) (1831) 2 C. & J. 19, at p. 32 [149 E.R. 9, at p. 14].
(3) (1833) 1 C. & M. 262, at pp. 308-310 [149 E.R. 398, at pp. 418, 419].
(4) (1837) 4 Cl. & F. 693 [7 E.R. 263].
(5) (1831) 2 C. & J. 19 [149 E.R. 9].

Court of Exchequer the situation had attracted the notice of the legislature and by 6 Geo. IV c. 16, s. 81 it was provided that executions levied two months before the suing out of a commission of bankruptcy should be valid, notwithstanding a prior act of bankruptcy provided that the execution creditor had no notice thereof at the time of the levy. From that time the legislature has repeatedly given its attention to the conflict of priorities which relation back involves with respect to executions against the debtor's property. Sometimes it has been the situation of the execution creditor seizing after an act of bankruptcy but before actual sequestration that has been regarded by the legislature as too unfavourable and then some measure of relief has been conceded to him. At other times the legislature seems to have regarded the law as too favourable to the execution creditor in placing him in a privileged position when there has been a seizure under the writ before the act of bankruptcy to which the trustee's or assignee's title relates back and the legislative purpose seems to have been to modify or qualify his rights. But whatever the provision in force for the time being, the courts seem always to have experienced a difficulty in working out a clear rationale so that it might be seen with certainty how it applies to the varied but stereotyped situations which must arise when an execution is levied and afterwards a bankruptcy takes place. The provisions which have been transcribed into the present Australian Act and govern this matter form no exception. They come from the English *Bankruptcy Acts* 1883 and 1890 through that of 1914 and are to be found in ss. 4, 52 (*e*), 55, 60, 90, 91 (i) and 92 of the Commonwealth *Bankruptcy Act* 1924-1950. Of these s. 92 is the critical provision. The effect of the other sections mentioned may be briefly given. Available act of bankruptcy is an expression meaning any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the sequestration order was in fact made: cf. s. 4. The act of bankruptcy on which a petition is grounded must have occurred within six months before the presentation of the petition: s. 55 (*c*). In England the period has long been three months. Upon sequestration the property of the bankrupt vests in the official receiver named in the order: s. 60 (1). The bankruptcy of the debtor however is deemed to have relation back to and commence at the time of the first of the acts of bankruptcy, if there be more than that on which the petition is founded, proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the petition, that is to say the first available act of bankruptcy: s. 90. Property which

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Dixon C.J.

at this commencement of the bankruptcy belonged to the bankrupt is divisible among his creditors (s. 91 (i)) and so vests in the trustee (s. 60 (1)). Again the period in England is three months.

It is an act of bankruptcy if execution against the debtor in a civil proceeding has been levied by seizure of his goods and the goods have been sold or held by the sheriff for seven days : s. 52 (*e*). In the present case it is to an act of bankruptcy under this provision, the goods having been held for seven days, that the sequestration relates back. It will be necessary later to state the facts a little more fully, but it is enough at this point to say that before an act of bankruptcy had occurred the debtor's goods were seized in execution at the suit of the appellants. Unfortunately they were held for seven days before being sold : that constituted the available act of bankruptcy to which there is relation back. The sale, the return of *fieri feci* to the writ and the payment of the money to the appellant all took place before the presentation of the petition which was founded on another later act of bankruptcy. Now if there were no further statutory provision qualifying the rights of the execution creditor, no s. 92, the position would be very clear. The rights of the execution creditors who are the appellants in this case, would be superior to those of the official receiver. The reason is made clear from the following extracts from the notes to *Williams Saunders* (1). " At common law the defendant's goods were bound from the *teste* of the *fieri facias*, and might be taken in execution by the sheriff, in the hands even of a person who had *bonâ fide* purchased them since the *teste* of the writ . . . And by the statute 29 Car. 2, c. 3, s. 16, it is enacted, ' that no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods of the party against whom, &c. but from the time that such writ shall be delivered to the sheriff, &c. to be executed ; and for the better manifestation of the said time, the sheriff, &c. shall on the receipt of such writ (without fee) indorse on the back thereof the day of the month and year whereon he received the same '. The meaning of the expression, that the property of the goods is *bound* is, not that the property in them is *altered*, for such alteration does not, nor ever did, take place until actual sale of the goods under the writ ; but that the defendant, from the time that they are bound, cannot dispose of them, unless in market overt, so as to prevent their being taken in execution . . . This time, since the above statute, is the delivery of the writ to the sheriff " (2). Now it is provided by the *Sale of Goods Act*

(1) 1 Wms. Saund. 219 (*t*) [85 E.R. 238].

(2) 1 Wms. Saund. 219 [85 E.R. 238, at pp. 238-239].

1923-1953 (N.S.W.), s. 29 that a writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed, and for the better manifestation of such time it shall be the duty of the sheriff, without fee, upon the receipt of any such writ, to indorse upon the back thereof the hour, day, month, and year when he received the same. Then there is a protection of purchasers taking in good faith and for value.

For some purposes the execution creditor has been considered, upon seizure, to obtain a security, e.g. under the old provision 6 Geo. IV c. 16, s. 108. "After seizure, and before sale, the sheriff has a special property in the goods, but the debtor has the general property; up to that time, therefore, the debt is not extinguished, and the judgment creditor has a security for his debt"—*Morland* v. *Pellatt*, per *Bayley* J. (1). "A person who has levied by seizure is such a creditor: he has a security by his right to have the goods sold"—per Lord *Tenterden* C.J., *Wymer* v. *Kemble* (2). But the character of the sheriff's special property and its purpose are described, perhaps with more exactness, by *Patterson* J. in his opinion given to the House of Lords in *Giles* v. *Grover* (3): "But on full consideration it seems to me that this property vested in the sheriff by seizure is merely that which results from his being the appointed officer of the law, and to enable him to sell goods, and to raise the money, not that thereby the property is taken out of the debtor. The goods are in substance in *custodia legis*; the seizure made by the officer of the law is for the benefit of those who are by law entitled; it is made against the will of the debtor, and no property is transferred by any act of his to the sheriff. In this respect it differs from all cases of special property, and of charges on goods created by the debtor whilst he has the absolute dominion over the goods" (4).

It is plain enough that under this law the appellants as execution creditors would obtain a title to the proceeds of the execution that would be paramount to that of the official receiver. And so the older decided cases show: *Edwards* v. *Scarsbrook* (5); *Slater* v. *Pinder* (6).

The question is whether the paramountcy of the appellants' title is destroyed by s. 92 of the *Bankruptcy Act* 1924-1950. The

(1) (1828) 8 B. & C. 722, at p. 726 [108 E.R. 1211, at p. 1212].
(2) (1827) 6 B. & C. 479, at p. 483 [108 E.R. 528, at p. 529].
(3) (1832) 1 Cl. & F. 72 [6 E.R. 843].
(4) (1832) 1 Cl. & F., at p. 77 [6 E.R., at p. 845].
(5) (1862) 3 B. & S. 280 [122 E.R. 106].
(6) (1871) L.R. 6 Ex. 228; (1872) L.R. 7 Ex. 95.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Dixon C.J.

first sub-section of that section begins—" Where a creditor has issued execution against the goods or lands of his debtor or has attached any debt due to him ". Now it is of course clear that, at the date of the available act of bankruptcy which became complete when the sheriff's possession had continued for seven days, the appellants filled the description of creditors who had issued execution against the goods of their debtor. At the time of the presentation of the petition, however, the execution was over, a return to the writ of *fieri feci* had been made and the money was in their hands. The sub-section proceeds :—" he shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy unless ". It is undeniable that the words " benefit of the execution " would include the rights of the appellants as execution creditors existing at the expiration of the seven days whereon the available act of bankruptcy became complete, that is to say the rights resulting from the sheriff's seizure and possession under the writ as described in the foregoing passages from the note to *Williams Saunders* (1) and the opinion of *Patterson* J. (2). But before the presentation of the petition these rights had been exercised and the money had come home to the execution creditors. Do the words extend further and cover the money thus obtained by the exercise of the rights subsisting at the date of the commission of the available act of bankruptcy ? Guided only by the natural meaning of the words one might ask rhetorically, why not ? Next in the sub-section comes the " unless " clause : " unless he has completed the execution or attachment before sequestration and before notice of the presentation of any petition by or against the debtor or before notice of the commission of any available act of bankruptcy by the debtor ". It is necessary, before pointing to more relevant features of this " unless " clause, to pause for the purpose of putting aside the difficulty arising from the fact that the words " before notice " are repeated after the word " or " and before the words " of the available act of bankruptcy by the debtor ". In strict grammar or logic this might be thought to mean that it was enough if the execution creditor was without notice of one or other fact, that is of the presentation of the petition or of the commission of the act of bankruptcy, although he had notice of the other one of them. The section is substantially transcribed from s. 40 of the *Bankruptcy Act* 1914 (Imp.) where the words are not to be found. The interpolation is probably due only to confusion. For it may safely be assumed that when the

(1) 1 Wms. Saund. 219 (*t*) [85 E.R. 238].

(2) (1832) 1 Cl. & F. 72, at p. 79 [6 E.R. 843, at p. 845].

change was made from the English text, it was not with the intention of subverting the meaning of the " unless " clause in such an absurd way. To return to the more substantial and material questions that arise on the clause, there is first the meaning of " completing the execution or attachment " to be considered. An execution may be, of course, brought to an end by a return to the writ showing a fulfilment of the command it contains. To a *fi. fa.* a return of *fieri feci*, of *nulla bona*, of *fieri feci* as to part of the moneys and *nulla bona* as to the rest or that of a countermand on the part of the judgment creditor who sued out the writ would suffice to complete the process of execution, although no doubt a return *quod non inveni emptores* would not do so. But sub-s. (2) (*a*) of s. 92 contains a special provision as to what amounts to a completion of an execution. Sub-section (2) is as follows : " For the purposes of this Act—(*a*) an execution against goods is completed by seizure and sale ; (*b*) an execution against land is completed by sale ; or, in the case of an equitable interest, by the appointment of a receiver ; and (*c*) an attachment of a debt is completed by receipt of the debt ". There is, it might be supposed, a prima facie assumption that sub-s. (2) (*a*) is not an exhaustive definition, that it simply adds to the modes of actual completion of an execution, that of completion by seizure and sale. A *fi. fa.* confers an authority upon the sheriff to receive money in satisfaction of the command of the writ : *Taylor* v. *Bekon* (1). He may then return *fieri feci*. Would not this complete the execution, although there was no seizure and sale ? But as will be seen later, the provision has been read as exhaustive. The consequence of this reading is that unless the expression " benefit of the execution " in the imperative part of sub-s. (1) be treated as limited in its application so that it does not extend to the proceeds of an execution, moneys paid to the sheriff and thus received by the execution creditor and moneys obtained under the *fi. fa.* otherwise than by seizure and sale and paid over to him will always be recoverable by the trustee in case of a subsequent bankruptcy. It must be borne in mind that by statute in England and at least some States of Australia money, cheques and the like may be seized under a *fi. fa.* : 1 & 2 Vict. c. 110, s. 12 : s. 4 of the *Judgment Creditors Remedies Act* 1901 (N.S.W.), s. 219 of the *Law of Property Act* 1928 (Vict.). On the other hand if the words " benefit of the execution " are restrictively interpreted so that they do not cover the proceeds of the execution further difficulties of construction ensue, that is if the section is to be given any very useful operation. It would remain easy upon

(1) (1677) 2 Lev. 203 [83 E.R. 519].

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Dixon C.J.

its text so interpreted to apply it to a case where the sheriff was still in possession of the goods when the sequestration order was made or when the execution creditor learned of the presentation of the petition or when he learned of an available act of bankruptcy and before the making of the sequestration order no money was raised by sale or otherwise in pursuance of the writ. But once the execution raises money which comes to the hands of the judgment creditor then if the words "benefit of the execution" do not of themselves embrace it, there is nothing to deprive the judgment creditor of his right to retain it unless some construction be adopted by which the antecedent rights of the execution creditor at an earlier date, when he was in possession of the goods, are treated as retrospectively destroyed by his failure to complete the execution by seizure and sale before sequestration and before notice of the presentation of the petition or of an available act of bankruptcy. Not only must some such construction of the language of sub-s. (1) be adopted, but a further step must be taken. That step is to treat the retrospective destruction of the execution creditor's rights in respect of the goods in the hands of the sheriff at the time of the act of bankruptcy as vitiating the subsequent sale and receipt of the proceeds. Yet why should this be ? If all sub-s. (1) is pointed at is the execution creditor's so-called charge or security over the goods, why should the perfectly lawful sale and receipt of the proceeds, which *ex hypothesi* is beyond its scope, be invalidated ? Sub-section (3) of s. 92 negatives the possibility of treating an execution or sale thereunder as void because *per se* it amounts to an act of bankruptcy. It does not seem to affect this case. It has been thought useful to state these difficulties by reference only to the text of the provision, read, that is, against the background of the general law otherwise governing the situation. For if it were not done, it might be thought that in what follows surrender of reason to authority had been unconscious. In fact authority works out a pattern according to which the provisions of s. 92 and the other sections to which I have referred must be administered, but how they are to be reconciled with one another and at the same time with the text, is a problem which to me remains unsolved. However before stating the answer which authority seems to give to the particular question in this case, it seems best to give an account of the facts in more, although perhaps not in much, detail.

The bankrupt is one John William Bender. His estate was sequestrated by an order of sequestration made on 17th August 1950 upon a petition lodged by the Commonwealth of Australia

on 15th July 1950. It follows that the earliest date to which the bankruptcy could relate back under s. 90 was 15th January 1950. However, all the material facts occurred after that date. On 17th April 1950 the appellants issued a writ of execution under a judgment obtained against Bender. On 28th April 1950 execution was levied under the writ upon his goods. The goods were held by the sheriff until 28th June 1950 when they were sold by auction. As already has been stated, s. 52 (*e*) of the *Bankruptcy Act* provides that if execution against a debtor has been levied by seizure of his goods under process in a civil proceeding and the goods have been either sold or held by the sheriff for seven days he has committed an act of bankruptcy. Seven days from 28th April elapsed on 5th May. By 6th May 1950 therefore an act of bankruptcy had been committed. When the goods were sold on 28th June perhaps another act of bankruptcy had been completed for the purposes of s. 52 (*e*). On 29th June the sum of money for which execution had been levied, £189 1s. 3d. was paid to the sheriff and held for fourteen days thereafter. On 13th July 1950 a return was made to the writ and the money (£189 1s. 3d.) was paid into court, whence, apparently, it was paid out to the appellants. It included £8 17s. 1d. for interest, but that is immaterial. Although the evidence is not quite satisfactory, it must be taken to be a fact that the appellants were aware before the sale of the goods that the goods had been held by the sheriff for seven days. On these facts the trustee in bankruptcy, who is the respondent to the appeal, obtained the order under appeal on the footing that before the execution had been completed by seizure and sale the appellants as execution creditors had notice within the meaning of s. 92 (1) of the commission by the debtor of an available act of bankruptcy, namely the act of bankruptcy under s. 52 (*e*) consisting in the seizure of the goods under an execution and the holding of them by the sheriff for seven days. The order, which was made under s. 92, declares that the appellants are not entitled to retain against the respondent trustee in bankruptcy of John William Bender the benefit of a certain execution issued by the appellants on 17th April 1950 against the goods of the above-named bankrupt. The order requires the appellants to pay to the trustee the sum of £189 1s. 3d. being the amount of the benefit of the execution.

In considering whether, upon a proper application of s. 92 to the foregoing facts, this order can be supported, the first thing to notice is that the act of bankruptcy forms part of the process of the very execution sued out by the appellants under which they derived the money in question. It is true that it is not necessary

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Dixon C.J.

that the sheriff should remain in possession of the goods for seven days but it is a not uncommon incident of a levy. Certainly it might be considered a tenable view that when the "unless" clause in sub-s. (1) of s. 92 speaks of an act of bankruptcy it refers to something other than the very execution in question or its incidents.

The *Bankruptcy Act* 1869 (Imp.), s. 95, protected the validity of an execution against the goods of a bankrupt executed in good faith by seizure and sale before the date of the order of adjudication if the person on whose account the execution issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. The same statute made seizure and sale an act of bankruptcy if for a judgment debt of more than fifty pounds: s. 6 (5). The period of relation back was twelve months: s. 11. In *Ex parte Villars*; *Re Rogers* (1), within that period Villars as judgment creditor of Rogers, who was subsequently adjudicated bankrupt, levied execution by seizure of Roger's goods. The goods were sold under the execution and Villars received from the proceeds the amount of his debt before the adjudication. The Lords Justices decided that the execution was valid and Villars was entitled to retain the money. Although there is little or no discussion of the point this decision seems necessarily to imply that the very execution itself could not constitute the act of bankruptcy notice of which defeated the execution creditor's title to the fruits of the execution. No one indeed has suggested that, because an execution levied by seizure and sale is itself an act of bankruptcy of which the execution creditor must know, the benefit of the execution could not be retained under the provisions which here stand as s. 92. If it were so s. 92 would be self-defeating. It is true that the sale that completes the act of bankruptcy would also complete the execution for the purposes of the provision and, because of this synchronization of the two things, it might be said that the creditor completed the execution by seizure and sale before notice of the act of bankruptcy. But the suggested reason lies deeper than that. It is that the provisions of s. 92 may be supposed to contemplate some other act of bankruptcy, not the execution itself.

These provisions in their present form first found their place in English legislation in the *Bankruptcy Act* 1883, s. 45. In that Act execution against the debtor levied by seizure and sale of his goods formed an act of bankruptcy and a mere levy of execution without

(1) (1874) L.R. 9 Ch. App. 432.

sale did not, however long the sheriff held the goods: s. 4 (*e*). But unfortunately as it proved for the operation of s. 45 thereof a new act of bankruptcy depending on execution was introduced by the *Bankruptcy Act* 1890, s. 1. The new provision said that a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods in an action in any court or any civil proceedings in the High Court and the goods have been either sold or held by the sheriff for twenty-one days. The " unless " clause in sub-s. (1) of s. 45 of the 1883 Act, the equivalent of our s. 92, was applied to the act of bankruptcy consisting in the holding for twenty-one days of the goods taken under the very execution in question with, of course, fatal consequences to the right of the creditor to retain the benefit of the execution. This meant that whenever in the course of the execution the goods seized were held for twenty-one days, it thereupon became impossible for the execution creditor to retain the benefit of the execution in the case of bankruptcy, except on the ground of ignorance of the course of his own proceedings in execution of his judgment. Two cases decided this. First, in *Figg* v. *Moore Bros.* (1) it was so held by *Vaughan Williams* J. In that case there was a seizure of goods of which the sheriff retained possession for twenty-one days. Two days after the expiration of that period he was " paid out " by the judgment debtor and fourteen days later paid over the money to the execution creditor. A month after that the debtor was adjudicated bankrupt, upon a petition, as it would seem, founded on another act of bankruptcy of which the execution creditor was without notice. Mr. *Wace*, of counsel for the creditor, " submitted that the principle of *Ex parte Villars* (2) applies, and that the title of an execution creditor is not avoided by notice of the act of bankruptcy occasioned by his own act, whether it arises from the seizure and sale or by the sheriff holding for twenty-one days " (3). But *Vaughan Williams* J. would have none of this. " It was urged that the principle of *Ex parte Villars* (2) applied to this case; but I think it is clearly distinguishable. In that case it was held that an act of bankruptcy committed by seizure and sale under a levy did not render inoperative the seizure and sale itself, so as to deprive the creditor of the fruits of his diligence. In such a case it is obvious that the act of bankruptcy is not committed until immediately after the completion of the transaction on which it is founded. But here, at the time when the transaction was completed by the money being paid to the sheriff, the execution

(1) (1894) 2 Q.B. 690.
(2) (1874) L.R. 9 Ch. App. 432.
(3) (1894) 2 Q.B., at p. 692.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Dixon C.J.

creditors had notice that two days previously this act of bankruptcy had been committed, because they cannot be heard to say that they did not know that the sheriff had been holding the goods for twenty-one days" (1). This decision was approved and followed by the Court of Appeal in *Trustee of Burns-Burns* v. *Brown* (2). The issue was whether a sum of money in the hands of the sheriff belonged to the trustee or to the execution creditor. The money was the proceeds of certain goods sold under the execution before the sheriff was notified of a petition in bankruptcy and before a receiving order was made. Before selling the goods the sheriff had held them for much more than twenty-one days after seizure and of this the execution creditor was aware. The Court of Appeal had no difficulty in deciding that the trustee's claim prevailed. Lord *Halsbury*, who presided, said: "The present question could not have arisen under the *Bankruptcy Act*, 1883, itself. But the *Bankruptcy Act*, 1890, s. 1, has created a new act of bankruptcy, viz., the holding of the goods by the sheriff under an execution for twenty-one days. I cannot read in the Act anything which exempts the execution creditor himself from the operation of this clause. In the present case the sheriff had possession of the goods in question for more than twenty-one days. To my mind, it is clear that an act of bankruptcy was thus committed to the knowledge of the execution creditors, and the sheriff had notice of it. The result is that, under the combined operation of the *Bankruptcy Acts* of 1883 and 1890, all the conditions existed which are necessary to give the trustee in the bankruptcy a title to the goods" (3). *A. L. Smith* L.J. said: "Here the goods in question were held by the sheriff for twenty-one days. I turn now to s. 45 of the Act of 1883, and see what in these circumstances is to happen. By this section an execution creditor is not entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor if, before the completion of the execution, he has notice of the commission of any available act of bankruptcy by the debtor. It is clear in this case that the defendants had notice of an available act of bankruptcy committed by the debtor before the execution was completed, for they themselves put in the execution, and must be taken to have had notice that the sheriff had held the goods for twenty-one days. The case is, therefore, brought entirely within s. 45, and I think that *Figg* v. *Moore Bros.* (4) was rightly decided. *Ex parte Villars* (5) does not apply" (6).

(1) (1894) 2 Q.B., at pp. 693, 694.
(2) (1895) 1 Q.B. 324.
(3) (1895) 1 Q.B., at p. 327.
(4) (1894) 2 Q.B. 690.
(5) (1874) L.R. 9 Ch. App. 432.
(6) (1895) 1 Q.B., at p. 328.

These decisions completely cover the facts of the present case. Except for the difference in the period of possession by the sheriff required to make an act of bankruptcy, seven days here, twenty-one in England, there is no relevant distinction. Execution is levied by seizure of the goods. They are held for the statutory period. The execution creditors know of the consequent act of bankruptcy before the completion of the execution. They are therefore disentitled and cannot retain or obtain the money. It is true that in *Figg* v. *Moore Bros.* (1), the execution was not completed by sale, the sheriff was paid out, but the point was not made that the reference in sub-s. (2) (*a*) to completion of the execution amounts to an exhaustive definition and it does not form the ground of the decision.

To my mind the two cases govern the determination of the appeal, if they are to be followed. It will be noticed that in them no question is raised of the meaning of the expression " the benefit of the execution ". It seems almost certain that no one thought that the expression should be limited in its application to the execution creditor's rights in respect of the goods before sale. But whatever the reason, it was taken for granted that once the execution creditor was fixed with notice before the completion of the execution that an act of bankruptcy had occurred, even when it was occasioned by execution itself, that was the end of any claim on his part to retain or receive the proceeds of the execution. And for many years afterwards it was, and perhaps still is, so understood. It could not be otherwise unless the expression " the benefit of the execution " was restricted to the so-called charge or security of the execution creditor over the goods before sale. Not a few cases were decided inconsistently with the view that the expression was so restricted : e.g. *In re Ford* (2) ; *In re Brelsford* (3) ; *In re Kern* (4).

But at length, what seems to have been regarded as a new difficulty was discovered and it was solved by placing the restricted meaning upon the expression. In *In re Godwin* (5), the trustee of a bankrupt, who on 21st November 1933 had filed his own petition on which an adjudication was made, claimed from two execution creditors sums received by them respectively before 21st August 1932, the earliest date to which the bankruptcy could relate back. Each creditor had levied execution. The sheriff under each execution had held the goods seized for more than twenty-one days, but that was immaterial because it was outside the limit of three months

(1) (1894) 2 Q.B. 690.
(2) (1900) 1 Q.B. 264.
(3) (1932) 1 Ch. 24.
(4) (1932) 1 Ch. 555.
(5) (1935) 1 Ch. 213.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Dixon C.J.

before the presentation of the petition. In each case the sheriff withdrew, and did so before the commencement of the three months period, because the debtor had paid off the debt by instalments, the payments being made directly to the creditor. In each case the trustee claimed the moneys so paid. It will be seen that there could be no question of relation back giving to the trustee a title to the moneys. He could obtain them by means of the provisions standing as s. 92 in this country and in England as s. 40 of the *Bankruptcy Act* 1914 or not at all. His claim was based on the theory that the moneys formed part of " the benefit of the execution " because they were paid to avoid sale of the goods by the sheriff and that the execution had never been completed within the definition of sub-s. (2) which was said to be exhaustive. The argument might have been met by a denial of the first proposition on the ground that nothing but goods or moneys which arise in the hands of the sheriff as a result of his exercise of the authorities that the writ confers upon him or his obedience of the command that it lays upon him form the benefit of the execution, and that money paid in satisfaction of debt directly to the creditor in order to secure a withdrawal of the writ does not do so. Or the argument might have been met by a denial of the second proposition, on the ground that sub-s. (2) (*a*) was not exhaustive but did no more than add the test it provides to the ordinary methods of completing an execution. And for this there was the authority of a decision of *Astbury* J. and *P. O. Lawrence* J. in *Re Fairley* (1). But the Divisional Court (*Luxmoore* and *Farwell* JJ.) does not appear to have regarded either of these answers with favour. The Court negatived the trustee's claim by restricting the application of the expression " benefit of the execution " thus—" In our judgment, having regard to the nature of the protection obtained at common law by an execution creditor, and to the manner in which, and the purpose for which, the provisions of ss. 40 and 41 " (*scil.* of the *Bankruptcy Act* 1914) " have been developed, and to the further fact that there is no mention in either of the sections of any payment by the execution creditor to the trustee in bankruptcy, the phrase ' the benefit of the execution ', on the true construction of the section, refers solely to the protection obtained by an execution creditor by reason of the issue of the writ of fi. fa. and its delivery to the sheriff, and does not describe, and was never intended to describe, any of the payments to an execution creditor whether by the sheriff or by the judgment debtor. The section consequently relates only to executions which are in fact in existence at one or other

(1) (1922) 2 Ch. 791, at p. 795.

of the appropriate dates mentioned in the section, and has no reference to an execution which has been unconditionally withdrawn long before any of those dates" (1). The words "one or other of the appropriate dates mentioned in the section" appear to mean the date of sequestration or of the presentation of the petition, or of the commission of an available act of bankruptcy.

Shortly after this decision *Farwell* J. in *In re Samuels*; *Ex parte Tee* (2) applied the definition of the expression "the benefit of the execution" adopted in *In re Godwin* (3), to a situation in which the moneys claimed by the trustee and by the execution creditor had been paid directly to the latter by the debtor in order to secure the withdrawal of the execution, the withdrawal however of the sheriff being subject to a reservation of the right to re-enter. This reservation was held to make no difference and the trustee's claim was dismissed. His Lordship, however, did say "Whatever the effect of reserving the right of re-entry may be, in my judgment a payment made to avoid an execution is not the benefit of the execution within the meaning of the Act" (4). That is an observation which would be justified quite independently of the restricted definition placed in *Godwin's Case* (3) upon the words "the benefit of the execution". Indeed the trustee's claim in both cases must have failed if the simple position had been taken that those words according to their natural meaning did not extend further than the moneys recovered or the advantages gained by pursuing the writ of execution according to its exigency. In *In re Andrew* (5), an attempt was made unsuccessfully to induce the Court of Appeal to reject the restricted definition adopted in *In re Godwin* (3) which, it appears from the dialogue reported in (6) between Lord *Wright* M.R. and Mr. *Tindale Davis* who in vain sought leave to appeal to the House of Lords, meant an alteration of a practice in bankruptcy under the provisions standing here in s. 92 which had existed for very many years. The Solicitor-General of the day (Sir *Terence O'Connor*) came for the trustee to support an appeal from a decision of *Farwell* J. following *In re Godwin* (3) and *In re Samuels* (2). The proceeding was a case stated by the county court in its bankruptcy jurisdiction to the Chancery Division. The facts disclosed by the stated case may be reduced to the summary statement that prior to any other act of bankruptcy by the debtor his goods were seized under an execution but were not held for twenty-one days. He agreed with the execution

(1) (1935) Ch., at p. 223.
(2) (1935) Ch. 341.
(3) (1935) Ch. 213.
(4) (1935) Ch., at p. 346.
(5) (1937) Ch. 122; (1936) 3 All E.R. 450; 155 L.T. 586.
(6) (1936) 155 L.T., at p. 590.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Dixon C.J.

creditor to pay the debt by instalments upon the sheriff being withdrawn, reserving a power to re-enter in case of default. A sum was paid at once to the sheriff and subsequently three payments were made by the debtor directly to the execution creditor. Then the debtor committed an act of bankruptcy. Thereafter the sheriff re-entered and seized and sold goods in satisfaction of the debt but a receiving order was made on the debtor's petition before he paid over the money to the execution creditor. It was conceded that these moneys must be paid to the trustee and the contest was confined to payments made earlier.

Three questions were asked in the case stated. The first, which alone was answered by *Farwell* J. and the Court of Appeal, inquired whether the moneys paid to the respondents could be retained by them as not being "the benefit of the execution". The second asked whether the execution had been completed within the meaning of s. 40. The third asked, on the footing that the execution had not been so completed, whether the official receiver as trustee was entitled to the return of the moneys paid to the respondents, or of any part of them. *Farwell* J. answered the first question in favour of the execution creditors. From that decision the trustee appealed to the Court of Appeal which consisted of Lord *Wright* M.R., *Romer* and *Greene* L.JJ.

The Solicitor-General's case appears to have been: (1) that the execution had not been completed until the sale of the goods after the act of bankruptcy of which he took the execution creditor to be under notice (1); (2) that the limitation upon the meaning of the expression "the benefit of the execution" was erroneous and that the expression covered the moneys paid by the debtor to the execution creditor upon and in consequence of the withdrawal of the first levy. (The sum paid to the sheriff and the subsequent payments made directly to the creditor were not distinguished, although it would be hard to deny that the former arose under the writ of *fi. fa.* and perhaps equally hard to affirm that the latter did so.) (3) that the rights of a trustee under s. 40 are not limited to the benefits of the execution received by a judgment creditor after the date to which the trustee's title relates back (2). The second contention was rejected and the case was decided on that ground. In his judgment delivered on behalf of the Court Lord *Wright* said:—"Two views have been advanced. One is that the words 'benefit of the execution' mean the fruits or the proceeds received by the creditor in consequence of the execution. It is contended for the trustee, that as they were received by virtue

(1) (1937) Ch., at p. 124. (2) (1937) Ch. 122, at p. 127.

of the agreement stated above and in order to induce the sheriff to withdraw, they are the benefit of the execution ; and it is further contended that as the sheriff when he withdrew reserved the right of re-entering if the agreement was broken, the execution was not complete before the notice of the presentation of the bankruptcy petition against the debtor or of the commission by the debtor of an available act of bankruptcy. The contention for the respondents is that ' the benefit of the execution ' does not refer to moneys actually received by the creditor in whole or partial satisfaction of his debt, whether under or in consequence of an execution or not, but that the words refer to the charge which the creditor obtains by the issue of the execution, and that to the extent that by the payment of moneys that charge has been reduced or abrogated, there is pro tanto no benefit of the execution to be considered. It is contended that moneys so paid in total or partial satisfaction of the charge and discharge of the debt, in whole or in part, become the creditor's moneys, just as if they had been paid without the intervention of an execution, and that in the facts of a case like the present what is meant by the benefit of the execution is the priority right constituted by the execution of the creditor over the debtor's goods for the debt or balance of the debt " (1). What is described as the respondent's contention was accepted in the form stated. Lord *Wright* sums up the result at the end of his judgment in a passage which contains the two following statements : " Section 40 can only apply if or to the extent that there is a subsisting execution which is still operating to charge the debtor's goods, and it cannot operate in so far as goods have already been sold and the proceeds applied to the partial discharge of the debt " and " In our opinion, to the extent that the debt has actually been discharged, it is impossible to apply to money so paid the appellation of ' benefit of the execution ' " (2).

It is not surprising that the execution creditors in the present case, that is the appellants, say that this pronouncement must mean that s. 92 (1) cannot apply to their case. " The execution no longer subsisted ". " The goods had been sold and the proceeds applied to the discharge of the debt ". " The debt had been actually discharged ". What difference could it make that before the completion of the execution by sale the creditors had notice of an available act of bankruptcy ? Once define " benefit of the execution " to exclude the proceeds of the goods or any other moneys received in discharge of the debt then, on the words of

(1) (1937) Ch., at pp. 127, 128. (2) (1937) Ch., at p. 136.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Dixon C.J.

the sub-section, it can no more matter that the execution was not "completed by seizure and sale" before knowledge of an available act of bankruptcy than in *Godwin's Case* (1) and *Andrew's Case* (2) it mattered that it had not been so completed before sequestration. If s. 92 (1) is not applicable, there is nothing to qualify or modify the old law which gives to the rights of an execution creditor, who has seized before the act of bankruptcy to which the sequestration relates back, paramountcy over the title of the trustee. So ran the argument for the appellants.

Earlier in this judgment it was suggested that if the restricted construction is placed on the words "benefit of the execution" which now has been adopted there is no escape from this result except by a difficult course consisting in two steps. The first is to treat sub-s. (1) of s. 92 as meaning that the rights of an execution creditor in respect of the goods arising from the *teste* of the writ, its delivery to the sheriff and the latter's seizure of the goods are retrospectively destroyed by the creditor's knowledge of the subsequent act of bankruptcy notwithstanding that the rights have been exercised and fulfilled. The second is then to treat the retrospective invalidating of the execution creditor's rights as vitiating the subsequent sale of the goods and receipt of the proceeds notwithstanding that those rights have been fully exercised and have no longer an existence or significance.

Yet whatever may be the logical consequences of the interpretation adopted in *Godwin's* (1) and *Andrew's* (2) *Cases*, of the critical words, it is clear that never did it occur to any of the judges who placed that meaning upon the words that it was inconsistent with the decisions in *Figg* v. *Moore Bros.* (3), and *Trustee of Burns-Burns* v. *Brown* (4). On the other hand it seems almost certain that the judges who decided those cases took it for granted that the provisions, represented here by s. 92 (1), applied to the proceeds of the execution in the hands of the execution creditor.

To this confusion still another difficulty has been added. It had been assumed that s. 92 was concerned only with executions where the *teste* of the writ or its delivery to the sheriff or at all events the seizure was before the act of bankruptcy to which the sequestration related back: see *Halsbury's Laws of England*, 3rd ed., vol. 2, p. 542, note (*g*). And Mr. *Stable* as counsel for the successful execution creditors in *In re Andrew* (2) stated as part of his argument that this was its operation: (5). It was the view too

(1) (1935) Ch. 213.
(2) (1937) Ch. 122; (1936) 3 All E.R. 450; 155 L.T. 586.
(3) (1894) 2 Q.B. 690.
(4) (1895) 1 Q.B. 324.
(5) (1936) 3 All E.R., at p. 456.

of Mr. *Wace*, who wrote in his *The Law and Practice of Bankruptcy* (1904) at p. 237 :—" The present section appears to be restrictive not protective : and it is conceived that the relation back of the title of the trustee to a prior act of bankruptcy invalidates the execution as against him irrespective of notice to the execution creditor ". There seems to me to be nothing remarkable or unjust in such a state of the law. It accords with the policy and purpose of the doctrine of relation back and it was only for a time that express legislation worked a modification in its application. But now it has been decided that if an execution creditor's writ is tested or delivered to the sheriff after the available act of bankruptcy and there is a seizure and sale of goods of the debtor from which he receives the proceeds without infringing upon the " unless " clause in s. 92 (1), then relation back cannot affect him : *In re Love* (1). The basal ground of this decision, as it is expressed by *Evershed* M.R., was " that the affirmative was implicit in the negative, that is, that if the creditor had completed the execution before the date referred to, and without such notice as is mentioned, then he would be entitled to retain against the trustee the proceeds of the execution " (2). The decision is not directly material to the present case and it is unnecessary to discuss it except as it bears upon the restrictive interpretation of the words " benefit of the execution " which limits their application to the so-called charge or security that the creditor obtains by the issue of a writ of execution and a seizure thereunder before the debtor commits an available act of bankruptcy. But surely that interpretation can hardly be explained unless on the ground that it treats the provision as directed to qualifying or restricting the priority which an execution creditor obtains from a writ delivered to the sheriff and from a seizure thereunder when delivered or made before the commission by the debtor of an available act of bankruptcy to which the sequestration of his estate relates back. Yet the decision in *In re Love* (1) applies the provision to an execution issued and levied after the available act of bankruptcy has been committed and moreover applies the affirmative protection found to be implied in the " unless " clause to the retention by the execution creditor of money, the proceeds of the execution. It is not altogether easy to reconcile this with the pronouncement of Lord *Wright* that the provision " cannot operate in so far as goods have already been sold and the proceeds applied to the partial discharge of the debt ". (The word " partial " is not meant to limit the proposition which of course applies if the discharge is complete.) But whatever view

(1) (1951) Ch. 952 ; (1952) Ch. 138. (2) (1952) Ch., at p. 151.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Dixon C.J.

may be taken of the relation of the decided cases to the actual text embodied in our s. 92 and to one another, it seems clear enough that *Figg* v. *Moore Bros.* (1), and *Trustee of Burns-Burns* v. *Brown* (2) are considered to remain unaffected and to be good law. If it were necessary to decide the present case independently of all authority but those two cases, there is only one point upon which I would doubt their correctness. That point is the use made of so much of what is s. 52 (*e*) of the Commonwealth *Bankruptcy Act* as relates to the holding of the goods by the sheriff for a period of days. For reasons that have already been mentioned, it might well have been held that this act of bankruptcy when it occurs in the course of the very execution itself is outside the scope of s. 92 (1) which might be read as referring to acts of bankruptcy other than one occasioned by the execution itself. But, it having been decided otherwise by cases so long acted upon, I think it would be proper to accept the decision. There are many reasons of convenience as well as of policy and tradition for administering here a provision of the bankruptcy law such as s. 92 in accordance with the case law by which it has become encrusted in England. Section 92 is itself the product of a long course of statutory development in which judicial decision has played a considerable part. On the whole I think the best course is to apply the provision according to the results produced by the cases which have been discussed above. This may be a little different from applying it according to some definite and consistent construction. It rather means that it should be given an operation according to the decisions independently of any consistent textual construction. That would mean in the first place that, where the writ of execution is delivered to the sheriff and the goods seized before the commission of the available act of bankruptcy proved, the rights of priority which the old law would give to the execution creditor are lost if before the sale of the goods seized any one of three things happen, either the sequestration takes place or the petition is presented and that fact comes to his knowledge or he learns of the commission by the bankrupt of an available act of bankruptcy. In any of these events he loses his rights in respect of the goods or the proceeds of the goods. It further means that for this purpose the holding of the goods for seven days in the course of the very execution so that there is an act of bankruptcy under s. 52 (*e*) supplies an available act of bankruptcy sufficient for the foregoing purposes. (This, of course, is decisive against the appellant in the present case.) On the other hand, it means that if money comes to the hands of

(1) (1894) 2 Q.B. 690.

(2) (1895) 1 Q.B. 324.

the execution creditor in full or partial payment of the debt before any one of the above three things happens, he may keep it. He may do so notwithstanding that the execution has not been "completed by seizure and sale". Further, he may do so whether the money comes to him through the sheriff or is paid to him directly by or on behalf of the debtor. And if the foregoing conditions are fulfilled he may keep the money whether an available act of bankruptcy did or did not occur before he issued his writ and delivered it to the sheriff or a seizure thereunder was made.

Of the above stated conclusions those which I have described as decisive against the appellants are alone necessary for the decision of this appeal. But I have thought it desirable, in view of the preceding discussion of the cases to add the other conclusions stated.

It follows in any case that the appeal must be dismissed.

WEBB J. The question that arises on this appeal is whether the appellants, who carried on business in partnership, retained the benefit of an execution that they had levied against goods of one Bender. A sequestration order was made against Bender within six months after the seizure and sale of the goods by the sheriff and the payment of the sale proceeds to the appellants. The seizure took place on 28th April 1950 and the sale by the sheriff on 28th June 1950. The sequestration order was made on 17th August 1950 upon the petition of the Commonwealth of Australia.

Section 52 (*e*) of the *Bankruptcy Act* provides, *inter alia*, that a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods and the goods have been either sold or held by the sheriff for seven days. Section 90 provides, *inter alia*, that the bankruptcy shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy on which a sequestration order is made, or to the first of the acts of bankruptcy committed within six months of the presentation of the petition. Section 92 provides, *inter alia*, that if a creditor has issued execution against the goods of a debtor he shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy "unless he has completed the execution before sequestration and before notice of the presentation of any petition *or* before notice of the commission of any available act of bankruptcy"; and that for this purpose an execution against goods is completed by seizure and sale. I think the word "or" which I have italicized should be read as "and". The contrary was not

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Webb J.

contended by counsel for the appellants. Although the context might suggest that "or" is intended to be disjunctive and to introduce an alternative the nature of the subject matter suggests otherwise.

If the knowledge of the sheriff is to be imputed to an execution creditor, then the appellants had not completed the execution before notice of the act of bankruptcy that took place when the sheriff had held the goods for seven days before selling them; and so the appellants were not entitled to retain the benefit of the execution. As to this see *Figg* v. *Moore Bros.* (1) and *Trustee of Burns-Burns* v. *Brown* (2). If such knowledge is not to be imputed to an execution creditor, still there was, I think, sufficient evidence that the appellants had in fact a knowledge that disentitled them to retain the benefit of the execution, as one of the appellants, McQuarrie, admitted, when giving evidence in proceedings under s. 80 of the *Bankruptcy Act*, that during the period covered by the execution he went, at the bailiff's request, to Penrith, where the debtor's goods were located, and pointed out those goods to the bailiff. He also admitted that he attended the sale of the goods by the sheriff. I think then it should be assumed, in the absence of evidence to the contrary, that the execution creditors knew from time to time what the sheriff was doing in relation to the goods after they had been pointed out by McQuarrie, and, more particularly, that the goods were held by the sheriff between the date of seizure and sale, i.e. for two months.

I would dismiss the appeal.

FULLAGAR J. This is an appeal from an order of the Federal Court of Bankruptcy (*Clyne* J.) whereby it was declared that the appellants were not entitled, as against the respondent, who is the trustee in bankruptcy of the estate of John William Bender, to retain the benefit of an execution issued against the goods of Bender before the making of the sequestration order. The order purported to give effect to s. 92 (1) of the *Bankruptcy Act* 1924-1950.

On 10th June 1949, the appellants obtained a judgment in a district court of New South Wales against Bender for a sum of £321 with costs. Costs were assessed by agreement at seventy-five pounds. A sum of £226 had been paid into court. An amount of about £170 was thus left outstanding. On 27th October 1949, the appellants caused a writ of execution against the goods of Bender to be issued. This writ was returned wholly unsatisfied about the beginning of December 1949: the exact date does not appear. This

(1) (1894) 2 Q.B. 690. (2) (1895) 1 Q.B. 324.

amounted, under s. 52 (*e*) of the Act, to the commission of an act of bankruptcy by the debtor, but, by reason of s. 55 (1) (*c*), it ceased to be an " available " act of bankruptcy about the beginning of June 1950, and the respondent has not sought to rely upon it in any way. On 17th April 1950, the appellants caused to be issued a second writ of execution against the goods of the debtor, and a levy of goods under this writ was made on 28th April 1950. The goods apparently remained in the possession of the sheriff until 28th June 1950.

On 6th May 1950, therefore (see *In re North*; *Ex parte Hasluck* (1)), when the sheriff had been in possession for seven days, another act of bankruptcy had, by virtue of s. 52 (*e*) been committed by the debtor. On 28th June 1950 the goods, or some of them, were sold by the sheriff. This also involved an act of bankruptcy under s. 52 (*e*). Each of these two acts of bankruptcy was at all material times an " available " act of bankruptcy. On 13th July 1950 (i.e. after the expiration of the fourteen days prescribed by s. 93 (2)) the writ was returned, and a sum of about £183, representing the net proceeds of the sale of the goods, was paid into court. It would seem that it was subsequently paid out to the appellants. On 15th July 1950, a petition for the sequestration of the debtor's estate was presented by the Commonwealth, and a sequestration order was made on 17th August 1950. The act of bankruptcy on which the order was made does not appear.

By notice of motion dated 28th August 1953 the trustee in bankruptcy sought a declaration that the appellants were " not entitled to retain against the applicant the benefit of a certain execution issued by them on 17th April 1950 against the goods of the bankrupt ", and an order for payment to him of the amount in question. The declaration and order were sought under s. 92 of the Act. That section, so far as material, is in the following terms :—" (1) Where a creditor has issued execution against the goods or lands of a debtor, . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy unless he has completed the execution . . . before sequestration and before notice of the presentation of any petition by or against the debtor or before notice of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act—(*a*) an execution against goods is completed by seizure and sale . . . (3) An execution levied by seizure and sale of the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases property in good faith

(1) (1895) 2 Q.B. 264.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Fullagar J.

under a sale by the sheriff shall in all cases acquire a good title to it against the trustee in bankruptcy". It was common ground before us that the word "or", where it last occurs in sub-s. (1), should be read, in effect, as "and". This seems to give effect to what must have been the intention of sub-s. (1), and gives it the same meaning as the corresponding English section plainly bears.

It would seem clear enough in this case that the execution was "completed" within the meaning of s. 92. It was completed when the sale took place on 28th June (s. 92 (2) (*a*)). It would seem equally clear that it was completed before sequestration, and before the creditors had notice of the presentation of any petition: no petition was in fact presented until 15th July. *Clyne* J., however, held that the execution was not completed until after the creditors had notice of the commission of an available act of bankruptcy, inasmuch as they must be taken to have known that the sheriff had held the goods for seven days after seizure so that an act of bankruptcy was "committed" on 6th May. His Honour accordingly made the order sought by the trustee, which is the order now under appeal.

It does, as *Clyne* J. himself observed, seem at first sight curious that a creditor may thus, so to speak, defeat himself in the very process of protecting himself. It is to be noted, however, that the relevant "available act of bankruptcy" here arose out of the sheriff's retention of possession for seven days. A second act of bankruptcy was committed when the actual sale took place. The decision does not mean that the occurrence of that second act of bankruptcy with the knowledge of the creditors would alone have defeated the creditors, and I should not myself think that it would have done so: see *Re Husband*; *Ex parte Dawes* (1); *Re Rogers*; *Ex parte Villars* (2) and *Figg* v. *Moore Bros.* (3). The decision does mean, however, that an execution creditor with knowledge of nothing relevant but the process of his own execution may be defeated by the debtor's bankruptcy unless the goods seized are sold within seven days of seizure. Even then, it would seem, he may be defeated under s. 93 (2).

The decision of *Clyne* J. is supported by English authority, which is clear at least in its effect, and which his Honour had already applied in *Re Quirk*; *Richardson* v. *Eather* (4). The appellant, however, relies upon certain recent English cases, and it is difficult to understand any of the decisions without a brief examination of the development of the law in England.

(1) (1875) L.R. 19 Eq. 438, at p. 440.
(2) (1874) L.R. 9 Ch. App., at p. 445.
(3) (1894) 2 Q.B., at p. 693.
(4) (1951) 15 A.B.C. 148.

From quite early times the title of an assignee or trustee in bankruptcy to the goods of the debtor has " related back " to an act of bankruptcy—(see s. 90 of the Commonwealth Act). One consequence of this was that an execution creditor without notice of any act of bankruptcy might lose the fruits of his execution, and a sheriff who had had no such notice might become liable in trover in the event of a subsequent bankruptcy. There seems indeed to have been some difference of judicial opinion about the position of the sheriff until the Exchequer Chamber reversed the decision of the Court of Exchequer in *Balme* v. *Hutton* (1). The headnote to this case reads :—" A sheriff who has seized goods under a *fi. fa.* and has sold and delivered them after a secret act of bankruptcy by the Defendant, but before a commission issues against him, is liable in trover to the assignees under the commission " (1). (The issue of a commission was at that time the equivalent of the modern receiving order.) This decision was approved by the House of Lords, after taking the opinions of the judges, in *Garland* v. *Carlisle* (2).

A limited relief from this state of affairs had indeed been given by s. 81 of the *Bankruptcy Act* 1825 (6 Geo. 4, c. 16), which protected executions bona fide levied more than two months before the issuing of the commission. Then came s. 133 of the Act of 1849, and s. 95 of the Act of 1869. All these provisions were, as *Martin* B. points out in *Slater* v. *Pinder* (3), " in furtherance of the same object, to relieve the execution creditor and the sheriff from the operation of the doctrine of relation (back) " (4).

It is important to observe that no special protective provision was required where the act of bankruptcy was subsequent to seizure under the writ of execution, though prior to sale. (Since the enactment of s. 16 of the *Statute of Frauds*, the debtor's goods are " bound " as from the delivery of the *fi. fa.* to the sheriff, but the reason why " seizure " is the important thing in this connection is explained by *Mellish* L.J. in *Re Davies* ; *Ex parte Williams* (5). The case of *Edwards* v. *Scarsbrook* (6) arose under the Act of 1849. Section 133 of that Act provided that executions executed and levied by seizure and sale should be valid notwithstanding any prior act of bankruptcy if the creditor had not at the time of the seizure or sale notice of any prior act of bankruptcy. In that case notice of an act of bankruptcy was received after seizure but before sale. It was held that s. 133 was intended to protect the creditor

(1) (1833) 9 Bing. 471 [131 E.R. 689].
(2) (1837) 4 Cl. & F. 693 [7 E.R. 263].
(3) (1871) L.R. 6 Ex. 228.
(4) (1871) L.R. 6 Ex., at p. 235.
(5) (1872) L.R. 7 Ch. App. 314, at p. 317.
(6) (1862) 3 B. & S. 280 [122 E.R. 106].

H. C. OF A. 1954. McQUARRIE v. JAQUES. Fullagar J.

only where he needed protection, and that it applied only where the act of bankruptcy preceded seizure. Although, therefore, the case did not fall within the terms of s. 133, the creditor was held entitled to retain the proceeds of sale. It is to be noted that the sale in *Edwards* v. *Scarsbrook* (1) took place before the filing of any petition. Apart from express provision in the Act of 1849, that would not, I think, have mattered: goods having been seized under the writ, the creditor would have been, in effect, a secured creditor. But there was another section in the Act of 1849—s. 184—which said, in effect, that an execution creditor should not receive more than a rateable part of his debt unless sale had taken place before the filing of a petition. In *Young* v. *Roebuck* (2), the facts were in substance the same as those in *Edwards* v. *Scarsbrook* (1) except that sale was not effected until after the filing of a petition. That difference, however, by reason of s. 184, was vital, and the creditor failed. Both *Edwards* v. *Scarsbrook* (1) and *Young* v. *Roebuck* (2) were expressly approved in *Slater* v. *Pinder* (3).

The case of *Slater* v. *Pinder* (3) arose under the Act of 1869. Now, that Act repealed, and did not re-enact, s. 184 of the Act of 1849. Section 95 of the Act of 1869, however, corresponded with s. 133 of the Act of 1849. It provided, so far as material, that the following transactions should be valid notwithstanding any prior act of bankruptcy: "(3) Any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication". In *Slater* v. *Pinder* (3), as in *Young* v. *Roebuck* (2), the goods had been seized before any act of bankruptcy, but had not been sold until after adjudication. The case, therefore, did not fall within the terms of s. 95. It was nevertheless held, s. 184 of the Act of 1849 having been repealed, that the creditor must succeed against the trustee in bankruptcy. Section 95 applied only where the act of bankruptcy preceded seizure under the writ: where seizure preceded act of bankruptcy, the creditor needed no statutory protection. *Kelly* C.B. said:—"Now, down to the *Bankruptcy Act* of 1849 (12 & 13 Vict. c. 106), there can be no doubt that seizure entitled the execution creditor to the goods of a bankrupt, or their proceeds, as against an assignee

(1) (1862) 3 B. & S. 280 [122 E.R. 106].

(2) (1863) 2 H. & C. 296 [159 E.R. 123].

(3) (1871) L.R. 6 Ex. 228.

in bankruptcy, unless before such seizure an act of bankruptcy had been committed. But by s. 184 of that Act it was provided that where an act of bankruptcy occurred before the execution had been perfected by seizure and sale, the title of the assignee should prevail; and thus the law stood until 1869, when the 184th section of the Act of 1849 was repealed. Unless, therefore, the new *Bankruptcy Act* contains any provisions amounting either expressly or by implication to a re-enactment of the Act of 1849, s. 184, the execution creditor would, in the case before us, be entitled to recover; and I cannot find any such provisions in the Act" (1). It may be noted that the learned Chief Baron does not appear to state accurately the effect of s. 184, which referred to the filing of a petition and not to the occurrence of an act of bankruptcy. The inaccuracy, however, does not seem to affect the validity of the reasoning: see also *In re Norton*; *Ex parte Todhunter* (2); *In re Hall*; *Ex parte Rocke* (3) and *In re Bannister*; *Ex parte Vale* (4).

Before leaving *Slater* v. *Pinder* (5) it should be noted that since 1861 seizure and sale under a *fi. fa.* had amounted to the commission of an act of bankruptcy. But it could not have been suggested that this was in any way relevant. The very act of the sheriff in selling the goods completed an act of bankruptcy, and it might have been said that the creditor must have been taken to have notice of that act of bankruptcy. But it was not an act of bankruptcy *prior to* seizure, and it was only where there was an act of bankruptcy prior to seizure that the creditor needed any special statutory protection.

The next consolidating Act in England was the Act of 1883. The section corresponding to s. 95 of the Act of 1869 was s. 45. But s. 45 was framed in negative, instead of affirmative, terms. The conditions of an execution which would be effective as against the trustee were expressed to be very nearly the same, but, instead of saying that an execution which fulfilled those conditions would be valid notwithstanding any prior act of bankruptcy, it said that a creditor who had issued execution against the goods of the debtor should "*not* be entitled to retain the benefit of the execution against the trustee *unless*" those conditions were fulfilled. It is unnecessary to set out s. 45, because it is, for all practical purposes, identical with s. 92 of the Commonwealth Act, though sub-s. (3) did not appear in England until 1914. That last sub-section appears to be a condensation of s. 15 of the Act of 1913, and to have for

(1) (1871) L.R. 6 Ex., at p. 238.
(2) (1870) L.R. 10 Eq. 425.
(3) (1871) L.R. 6 Ch. App. 795.
(4) (1881) 18 Ch. D. 137.
(5) (1871) L.R. 6 Ex. 228.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Fullagar J.

its object the protection of the sheriff and of a purchaser from the sheriff. No material alteration was made in the English Act of 1914, which is the Act now in force. It is s. 40 of that Act that reproduces s. 45 of the Act of 1883.

What the draftsman of the new s. 45 seems to me to have attempted to do is to devise a single section which will perform the function of the old s. 184 of the Act of 1849 and at the same time the function of s. 95 (3) of the Act of 1869 (s. 133 of the Act of 1849). Section 184, as has been seen, might operate to defeat an execution creditor even where seizure had preceded act of bankruptcy. To use convenient words used in a recent case in England, it was " restrictive " and not " protective ". It said that the creditor should have no benefit of his execution unless he sold before the filing of a petition. But s. 95 (3) of the Act of 1869 was protective and not restrictive. Subject to s. 87, where seizure took place after act of bankruptcy it would protect him. Where seizure took place before act of bankruptcy the creditor did not need its protection, and he would (subject again, of course, to s. 87) be safe even though at the time of sale he had notice of the presentation of a petition or notice of an act of bankruptcy, because the common law sufficiently protected him. What was the effect of this welding together, so to speak, of what had been protective with what had been restrictive ? Section 45 must have been intended to have a partially protective operation, because, in the absence of any provision at all, the trustee would be entitled in every case where act of bankruptcy preceded seizure, whether sale took place or not, and whether the creditor had notice of anything or not. One would certainly be disposed to regard the section as defining both affirmatively and negatively the position of an execution creditor in the event of the debtor's bankruptcy, as laying down at once the conditions on which he might retain, and the conditions on which he might not retain, the " benefit of his execution "—whatever those words might mean. But what was meant by the introductory words— " Where a creditor has issued execution " ? Did those words refer to any period whatever in the past ? Might a creditor have to disgorge what he had obtained by execution many years before bankruptcy simply because goods seized had not been sold, but the sheriff had been paid out ? If so, this was a very drastic, and not very sensible, change in the law. I should have thought myself that there was a great deal to be said for the view that the section was framed in the light of *Edwards* v. *Scarsbrook* (1) and *Slater* v. *Pinder* (2) that it did not touch the case where seizure preceded

(1) (1862) 3 B. & S. 280 [122 E.R. 106].

(2) (1871) L.R. 6 Ex. 228.

act of bankruptcy, and that the opening words excluded any period beyond the period of " relation back ". It is indeed not a little surprising that the question whether s. 45 had so radical an effect as to do away altogether with *Edwards* v. *Scarsbrook* (1) and *Slater* v. *Pinder* (2) seems never to have been really considered in England in the years immediately following 1883. The law was, however, held—perhaps one should rather say, assumed—to have been thus radically altered in three cases between 1894 and 1900.

The English Act of 1890, by s. 1, for the first time made seizure under a *fi. fa.* and retention of the goods by the sheriff for a period of twenty-one days an " act of bankruptcy ", and shortly after that enactment the two cases were decided on which *Clyne* J. based his decision in *Re Quirk*; *Richardson* v. *Eather* (3), and his decision in the present case. The first case was *Figg* v. *Moore Bros.* (4) which came before *Vaughan Williams* J. The sheriff had seized goods of the debtor under a *fi. fa.* on 26th September 1892. By 17th October he had had them in possession for twenty-one days, so that an act of bankruptcy was " committed ". On 19th October the sheriff was " paid out ". On 30th November a receiving order was made on a creditor's petition, and adjudication followed. Seizure having preceded any act of bankruptcy, the case obviously raised the question whether s. 45 of the Act of 1883 had radically altered the law. Mr. *Wace*, for the execution creditors, seems to have submitted exactly the argument which one would have expected him to submit. He relied on *Edwards* v. *Scarsbrook* (1) and *Slater* v. *Pinder* (2). He submitted also that s. 45 did not defeat the creditor where there had been no sale but the sheriff had been " paid out ". This seems equivalent to saying that to retain moneys so paid was not to retain the " benefit of an execution ". *Vaughan Williams* J., in an unreserved judgment, decided against the creditors. He did not advert at all to the argument that s. 45 did not apply where the sheriff had been paid out. Nor did he advert expressly to the question whether s. 45 had made a radical alteration in the law. But he held the case covered by the language of s. 45. He said : " I agree with Mr. Wace, that apart from any express statutory enactment a judgment creditor who levies execution gets by the common law a good title by the seizure of the sheriff, if he has no notice of any available act of bankruptcy committed by the debtor. Here the sheriff had seized prior to any act of bankruptcy being brought to the knowledge of the defendants, and by the common law they are entitled to the benefit of

(1) (1862) 3 B. & S. 280 [122 E.R. 106].
(2) (1871) L.R. 6 Ex. 228.
(3) (1951) 15 A.B.C. 148.
(4) (1894) 2 Q.B. 690.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Fullagar J.

that execution, unless their rights are displaced by some express statutory enactment" (1). And he proceeded to hold that that common law right had been taken away by s. 45 of the Act of 1883. The statement of the common law in the passage quoted does not appear to accord entirely with what is said by *Kelly* C.B. and *Martin* B. in *Slater* v. *Pinder* (2).

Figg v. *Moore Bros.* (3) was approved by the Court of Appeal in *Trustee of Burns-Burns* v. *Brown* (4). Here the essential facts were these. On 6th April 1893 the judgment creditors obtained a *fi. fa.* and the sheriff seized goods of the debtor. On 8th April, under instructions, he withdrew. On 11th September he re-entered into possession, and held the goods, to the knowledge of the creditors, for more than twenty-one days. On 10th November he sold the goods. On 14th November he received notice that a petition had been presented by another creditor. On 29th November a receiving order was made on the debtor's own petition presented on the 28th, and on 2nd February 1894 the debtor was adjudicated bankrupt. It is thus seen that at the time of seizure no act of bankruptcy had been committed, and there was not before sale any notice of any act of bankruptcy apart from the sheriff's retention of possession for twenty-one days. On the other hand what the creditor got was the proceeds of a sale: it was not a case of payment by the debtor to the sheriff or to the creditor. This time neither *Edwards* v. *Scarsbrook* (5) nor *Slater* v. *Pinder* (2) was mentioned. The argument for the creditor, as reported, was simply that the act of bankruptcy referred to in s. 45 was a voluntary act of the debtor and not a constructive "act" or, as it was called, an act "*in invitum*". It was never intended, it was said, that the creditor should defeat himself in the course of his own execution. (One would have thought that there was much to be said in favour of this argument also.) And reliance was placed on *Re Rogers*; *Ex parte Villars* (6). The case was dealt with *brevi manu*. Lord *Halsbury* said that the point taken was unarguable. "I cannot", he said "read in the Act anything which exempts the execution creditor himself from the operation of this clause" (7). *Lindley* L.J., as he then was, said:— "I do not see how it is possible to construe *the Act of* 1890 in any other way. *Ex parte Villars* (6) was decided upon a different Act, and it is not applicable to the altered state of the law" (7). (The italics are mine.) The Act of 1890 was the Act which created the new act of bankruptcy. Thus, for the second time, the question

(1) (1894) 2 Q.B., at p. 692.
(2) (1871) L.R. 6 Ex. 228.
(3) (1894) 2 Q.B. 690.
(4) (1895) 1 Q.B. 324.
(5) (1862) 3 B. & S. 280 [122 E.R. 106].
(6) (1874) L.R. 9 Ch. App. 432.
(7) (1895) 1 Q.B., at p. 327.

whether s. 45 of the Act of 1883 had abrogated *Edwards* v. *Scarsbrook* (1) and *Slater* v. *Pinder* (2) seems not to have received the attention it deserved.

The third of the three cases which I have mentioned above was *Re Ford*; *Ex parte Official Receiver* (3). I will refer further to this case later. The decision involved the same view of s. 45 as had been taken in the other two cases. It cannot be denied that, if *Figg* v. *Moore Bros.* (4) and the *Burns-Burns Case* (5) are still to be considered good law, the decision under appeal is correct. Counsel for the appellants, however, relied on certain very recent English decisions. The cases referred to were three in number, and they require careful consideration.

The first case is *In re Godwin* (6). In that case the debtor's goods had been seized under a *fi. fa.* on 16th June 1932. On 2nd July, 8th July and 22nd July respectively the bankrupt paid direct to the creditor three sums of £60, £60 and £13. On 3rd August the sheriff withdrew from possession. On 21st November the bankrupt filed his own petition, and he was adjudicated bankrupt on 6th December. The trustee claimed the three sums which had been paid in July to the creditor. His argument was that the creditor had received a benefit of his execution when he received each of those sums and he was not entitled to retain any of those sums because the execution had not been completed by sale before the bankrupt filed his petition. A Divisional Court, consisting of *Luxmoore* and *Farwell* JJ., rejected the trustee's argument. They took the view that the expression "benefit of the execution" in s. 40 (1) referred solely to the protection obtained by an execution creditor by reason of the issue of a *fi. fa.* and its delivery to the sheriff. In this case the sheriff appears to have been in possession for twenty-one days before the last two payments to the creditor were made. It would thus seem that the creditor, at the time of each of those payments, had notice of an available act of bankruptcy —though it ceased to be an "available" act before the filing of the petition. If this be correct, the case might have been held to fall within *Figg* v. *Moore Bros.* (4) and the *Burns-Burns Case* (5). This point, however, appears not to have been raised. It is, I think, to be regretted that it was not raised. If it had been raised, it might have led not merely to an examination of the correctness of the decisions in *Figg* v. *Moore Bros.* (4) and the *Burns-Burns Case* (5), but to a consideration of the whole question of the effect on the pre-existing law of s. 45 of the Act of 1883.

(1) (1862) 3 B. & S. 280 [122 E.R. 106].
(2) (1871) L.R. 6 Ex. 228.
(3) (1900) 1 Q.B. 264.
(4) (1894) 2 Q.B. 690.
(5) (1895) 1 Q.B. 324.
(6) (1935) Ch. 213.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Fullagar J.

The case of *In re Godwin* (1) was followed in *In re Samuels* (2), where the period of the sheriff's possession was not material, but otherwise the facts were, to all intents and purposes, identical except that the sheriff had reserved a right of re-entry when he withdrew from possession. It was held by *Farwell* J. that this fact made no difference.

A generally similar situation came before the Court of Appeal in *In re Andrew* (3). The facts there were these. On 21st January 1935 the sheriff went into possession under a *fi. fa.* On 23rd January an arrangement was made between the creditor and the debtor for the making of certain payments, and the sheriff withdrew. On that date the debtor made a payment to the sheriff of £25, and on 20th February, 25th February and 13th May, further payments were made to the creditor. On 28th May the debtor committed an act of bankruptcy. On 6th June the sheriff re-entered, and sold sufficient goods to cover the balance of the creditor's judgment. On 18th June a receiving order was made on the debtor's petition. After the receiving order the sheriff paid the proceeds of the sale of 6th June to the Official Receiver, and no question was raised as to these payments. The Official Receiver, however, claimed also the sums which had previously been paid by the debtor to the sheriff and to the creditor respectively. The Court of Appeal held that the creditor was entitled to retain them. He was not, it was said, in claiming to retain those sums, claiming to retain the benefit of his execution. The court adopted the view of the words "benefit of the execution" which had previously been adopted by *Luxmoore* and *Farwell* JJ. Lord *Wright* M.R., who delivered the judgment of the court said: "The result is the same whether the payment has been made to avoid seizure or to avoid sale, or whether the partial discharge of the debt has been effected by a sale of goods under an execution which is kept on foot in order, if possible, to realise enough to pay the balance of the debt" (4).

The three cases of *In re Godwin* (1), *In re Samuels* (2) and *In re Andrew* (3) have the effect, I think, of overruling the decision in *Re Ford* (5). In that case the sheriff had seized the debtor's goods on 31st December 1898. On 5th January 1899, the debtor paid £40 on account and the sheriff withdrew, reserving a right of re-entry. On 14th January a receiving order was made on the debtor's petition. It was held by *Wright* and *Channell* JJ. that the execution had not been completed and that the creditor

(1) (1935) Ch. 213.
(2) (1935) Ch. 341.
(3) (1937) Ch. 122.
(4) (1937) Ch., at p. 136.
(5) (1900) 1 Q.B. 264.

therefore was not entitled to retain the sum of £40. *Wright* J. said: "Under the circumstances, I am unable to see how the execution can be held to have been completed when the Act requires both seizure and sale to exist before completion" (1). The same view as that taken in *Re Ford* (2) had also been taken in *In re Brelsford* (3) and *In re Kern* (4). The essence of the view finally adopted in *In re Andrew* (5) may perhaps be stated thus. If money has actually been received, although without completion of an execution by sale, before any of the three events mentioned in s. 40 (i.e. receiving order, notice of a petition, notice of an available act of bankruptcy) the creditor's position is the same as if what he received was the result of a sale. This view might perhaps have been based on the ground that the definition of "completion" in s. 40 (2) was not exhaustive. In other words, it might have been put that what s. 40 (2) meant was that an execution must be taken to have been completed at latest when sale took place but might have been completed before. This had been in substance the view taken by *Astbury* and *P. O. Lawrence* JJ. in *In re Fairley* (6). The Court of Appeal in *In re Andrew* (5) however, expressly rejected this view, and based the decision on the view of the meaning of the words "benefit of the execution", which had been originally adopted in *In re Godwin* (7). On this construction, what s. 40 denies to the creditor is merely the right to enforce the charge created under the *fi. fa.* after any one of the three events mentioned in s. 40 (1) has taken place.

The actual decision in *In re Godwin* (7) seems to me to be inconsistent with the decision in *Figg* v. *Moore Bros.* (8) in a respect which I have already mentioned. In both cases the sheriff had been in possession for twenty-one days. Yet in the one case the creditor was held entitled, and in the other case not entitled, to retain moneys received after notice of the act of bankruptcy so involved. The point, however, was not taken in *In re Godwin* (7), and in this respect *In re Godwin* (7) cannot be regarded as overruling *Figg* v. *Moore Bros.* (8). Apart from that point, there does not seem to be any inconsistency between the decision in *Figg* v. *Moore Bros.* (8) and the decisions in *In re Godwin* (7), *In re Samuels* (9) and *In re Andrew* (5). It is true that in *Figg* v. *Moore Bros.* (8) the goods were not sold but the sheriff was "paid out", and that there are passages in *In re Godwin* (10), which might be thought to

(1) (1900) 1 Q.B., at p. 267.
(2) (1900) 1 Q.B. 264.
(3) (1932) 1 Ch. 24.
(4) (1932) 1 Ch. 555.
(5) (1937) Ch. 122.
(6) (1922) 2 Ch. 791.
(7) (1935) Ch. 213.
(8) (1894) 2 Q.B. 690.
(9) (1935) Ch. 341.
(10) (1935) Ch., at pp. 219, 221.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Fullagar J.

suggest that the creditor was entitled to retain any *payment* made either to himself or to the sheriff before bankruptcy. But I do not think that this was intended. In fact in *In re Samuels* (1) and *In re Andrew* (2) the payments in question were made before the creditor had notice of any available act of bankruptcy, and in *In re Godwin* (3) they were treated as having been made before the creditor had any such notice. In all three cases what is meant, I think, is that the creditor is entitled to retain any moneys paid by the debtor before the occurrence of any of the three events specified in the section. So far as any such moneys are concerned, he is in the same position as if they were the proceeds of a sale effected before the occurrence of any of those events. I think, with respect, that much difficulty attaches to this view. It is not easy to regard the reference to *retention* of a *benefit* as a reference to anything but money received and in hand, and what the section is, in practical effect, made to say is: "You cannot retain the proceeds of a sale unless you have completed your execution by seizure and sale before any one of three events takes place". I am disposed to think that the best solution of the whole problem would be to say that the section has no application to a case where seizure of goods precedes act of bankruptcy. That view was, I think, present to the mind of *Danckwerts* J. in a case to be mentioned in a moment. It would obviate the necessity of attributing a somewhat unnatural meaning to the words "benefit of the execution", and would at the same time have avoided the very serious—and almost certainly unintended—consequences of the position for which the trustee in bankruptcy contended. If that view had been adopted, it would, of course, have followed that both *Figg* v. *Moore Bros.* (4) and the *Burns-Burns Case* (5) were wrongly decided.

The remaining case cited by counsel for the appellant was *In re Love* (6). This case really raised the whole question of the effect of s. 45 of the Act of 1883 on the pre-existing law. The essential feature of the case was that act of bankruptcy preceded seizure by the sheriff, and the trustee claimed to be entitled under the doctrine of relation back, although the conditions prescribed by s. 40 of the Act of 1914 (s. 45 of the Act of 1883) had been fulfilled in all respects. This, to my mind, was carrying the war into the enemy's country with a vengeance. For, whatever else was obscure, I should have thought it clear that s. 45 protected a creditor who complied with the conditions prescribed by s. 45. The act of bankruptcy was committed on 8th September 1949. On 14th October

(1) (1935) Ch. 341.
(2) (1937) Ch. 122.
(3) (1935) Ch. 213.
(4) (1894) 2 Q.B. 690.
(5) (1895) 1 Q.B. 324.
(6) (1951) Ch. 952; (1952) Ch. 138.

the debtor was fined £10 for contempt of a County Court. On 10th October a Minister of State obtained judgment for £62 for arrears of national insurance contributions. On 17th October a warrant of execution issued and on 4th December the debtor's goods were seized. On 11th November a petition was presented by a creditor. On 15th November the debtor's goods were sold. The Minister was paid out of the proceeds, and the sum of £10 appears to have been paid to the Registrar of the County Court in satisfaction of the fine imposed on the debtor. Up to this stage there appears to have been no notice of any act of bankruptcy or of the presentation of the petition. On 14th December a receiving order was made, and on 5th January 1950 the debtor was adjudicated bankrupt. The Minister voluntarily repaid to the Official Receiver the sum of £62 which had been paid to him, but the Registrar of the County Court maintained that he was entitled to retain the sum of £10 in satisfaction of the fine. The argument for the trustee was that his title extended, by virtue of the doctrine of relation back, to goods which had been sold by the sheriff after an act of bankruptcy but before the making of a receiving order and without notice of the presentation of a petition or of any available act of bankruptcy. It was held by *Danckwerts* J. and by the Court of Appeal that the Registrar was entitled to retain the sum in question. The ground of the decision was that the conditions set forth in s. 40 (1) had been fulfilled, and that the creditor was therefore protected.

I have already suggested that the view that s. 45 of the Act of 1883 effected a radical alteration in the position of execution creditors appears to have been accepted in the early days without very much consideration. This view was, I think, probably present to the mind of *Danckwerts* J., for his Lordship said: "I have difficulty in following the argument that s. 45 of the Act of 1883 and s. 40 of the Act of 1914 were and are wholly restrictive and not at all protective. And why should the conclusion be drawn (as apparently it has been drawn) that the Act of 1883 was intended in this respect radically to alter the position as contained in s. 95 of the Bankruptcy Act, 1869, which gathered together several provisions in a manner which was evidently intended to protect the transactions therein mentioned against the rigour of the bankruptcy law?" (1) I would respectfully adopt those words. The case of *In re Love* (2), however, while it *did* decide that s. 40 could operate to protect an execution creditor where act of bankruptcy preceded seizure, did *not* decide that the section dealt *only* with cases where act of bankruptcy preceded seizure. Indeed the

(1) (1951) Ch., at pp. 962, 963.

(2) (1951) Ch. 952; (1952) Ch. 138.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Fullagar J.

contrary view may possibly be inferred from the judgments in the Court of Appeal. The case cannot, in my opinion, be regarded as helping the appellant in the present case.

I think that the recent cases cited by the appellants represent a new approach to a problem created in 1883, and a realization of difficulties which were passed over *sub silentio* in *Figg* v. *Moore Bros.* (1) and the *Burns-Burns Case* (2). By the overruling of *Re Ford* (3) they come near home, so to speak. But it is impossible, in my opinion, to regard them as overruling, on any point material to the present case, either *Figg* v. *Moore Bros.* (1) or the *Burns-Burns Case* (2). We may regard those cases as certainly unsatisfactory, and probably wrong. But they have stood for sixty years. They deal with a question which, while not an everyday question, is one which is quite likely to arise, and which must have arisen on numerous occasions in England and in this country. They have probably been acted upon many times without litigation. I do not think that we should refuse to follow them at this stage. It is quite likely that the House of Lords or the Privy Council, even if entertaining the same view of them which I entertain, might nevertheless think that they ought not to-day to be overruled. This appeal should, in my opinion, be dismissed.

KITTO J. On 17th April 1950, the respondents issued a writ of *fieri facias* out of the District Court of the Metropolitan District by way of execution upon a judgment which they had obtained in that court against one Bender. Under the writ the bailiff seized certain goods of Bender's on 28th April 1950 and sold them on 28th June 1950. The sale produced sufficient to satisfy the writ, and the sum of £189 1s. 3d. being the amount due under it, was paid into court by the bailiff and was eventually paid out to the appellants. A bankruptcy petition was presented against Bender by a creditor on 15th July 1950, and on that petition a sequestration order was made on 17th August 1950. Bender's official receiver and trustee in bankruptcy having successfully claimed in the Federal Court of Bankruptcy that the appellants were liable to pay to him the £189 1s. 3d., this appeal is brought against the order of that court.

In the court below, *Clyne* J. inferred from the scanty evidence before him, though there was no express evidence on the point, that Bender's goods which were seized under the writ were held by the bailiff from the time of the seizure until the time of sale.

(1) (1894) 2 Q.B. 690.
(2) (1895) 1 Q.B. 324.
(3) (1900) 1 Q.B. 264.

It was submitted in this Court that there was no sufficient foundation for this inference, but in my opinion it was a necessary inference in the circumstances of the case. This means that by 5th May 1950 Bender had committed the act of bankruptcy described in s. 52 (*e*) of the *Bankruptcy Act* 1924-1950, which provides (so far as material) that a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court and the goods have been held by the sheriff (which includes any officer charged with the execution of a writ: s. 4) for seven days. As the execution was the appellants' own execution, they cannot be heard to say that they had no notice of the act of bankruptcy brought about by the holding of the goods by the sheriff: *Figg* v. *Moore Bros.* (1); *Trustee of John Burns-Burns* v. *Brown* (2).

The act of bankruptcy so committed was an available act of bankruptcy, because, occurring as it did within six months before the date of the presentation of the petition on which the sequestration order was made, it was available for a bankruptcy petition at that date: s. 4. Accordingly Bender's bankruptcy must be deemed to have relation back to, and to commence at, the time of that act of bankruptcy: s. 90; and all property which belonged to or was vested in him at that time, or was acquired by him thereafter, must be deemed to have vested in his official receiver for division amongst his creditors: ss. 60, 91 (i). (As the official receiver did not prove in these proceedings the date of the act of bankruptcy relied upon in the petition on which the sequestration order was made, I assume against him that it was committed not earlier than 5th May 1950).

The official receiver founded his claim upon the provisions of sub-ss. (1) and (2) of s. 92 of the *Bankruptcy Act* 1924-1950 (Cth.). Sub-section (1), so far as it is material in this case, provides that where a creditor has issued execution against the goods of a debtor, he shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy unless he has completed the execution before sequestration and before notice of the presentation of any petition by or against the debtor or before notice of the commission of any available act of bankruptcy by the debtor; and sub-s. (2) provides that for the purposes of the Act an execution against goods is completed by seizure and sale.

The appellants contend that the case does not fall within sub-s. (1), and they assign as the reason for this conclusion that the expression "retain the benefit of the execution", according to the

(1) (1894) 2 Q.B., at p. 694.

(2) (1895) 1 Q.B., at pp. 327, 328.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Kitto J.

interpretation which the courts have placed upon it, refers only, in the case of an execution against goods, to the retention by a creditor of the security or charge which he has over goods under a subsisting execution, and that it has no reference to moneys received by the creditor under or by means of the execution. I agree that the expression has the meaning so attributed to it, but I do not agree that the appellants are therefore entitled to succeed in this appeal. Their argument misconceives, I think, the nature and effect of the operation of s. 92 in relation to other provisions of the Act.

Section 92 is the successor to a series of sections in England by which provisions as to the relation back of the title of a trustee in bankruptcy were supplemented. These sections may be found discussed in *Yate-Lee and Wace* on *Bankruptcy and Bills of Sale*, 3rd ed. (1891), at pp. 409, 410, and they are set out in the same work at pp. 436 et seq. Both where an execution took effect to bind the goods before the commission of the act of bankruptcy to which the trustee's title related back and where it took effect after that event, it was found desirable to deal by special enactment with the question whether the title of the trustee should prevail over the charge of the execution creditor, or vice versa. The question was one of competing proprietary rights. The writ of *fi. fa.* bound the debtor's goods, originally upon being issued and as from its *teste*, and later (as now) upon its being delivered to the sheriff for execution (see s. 29 of the *Sale of Goods Act* 1923-1953 (N.S.W.)). As was held in *Slater* v. *Pinder* (1) which is an important case on this subject, the binding effect thus produced was a " security ", within the meaning of the provisions of the *Bankruptcy Acts* which, like s. 60 (3) of the Australian Act, qualified the general enactment that after sequestration no creditor should have any remedy against the property of the bankruptcy, by providing that this should not affect the power of any secured creditor to realize or otherwise deal with his security. Accordingly, in the case where the debtor's goods were bound in an execution *before* the act of bankruptcy to which the trustee's title related back, the situation before special provision to the contrary was made was the same as that which existed where any other form of valid security over the goods had been created: the trustee took his title subject to the security, and the bankruptcy of the debtor therefore did not affect the creditor's right to proceed with his execution and thereby recover his debt: *Edwards* v. *Scarsbrook* (2). On the other hand,

(1) (1871) L.R. 6 Ex. 228, affirmed (1872) L.R. 7 Ex. 95.

(2) (1862) 3 B. & S., at p. 285 [122 E.R., at p. 108]; 32 L.J. (Q.B.) 45, at p. 46.

where the debtor's goods became bound *after* the act of bankruptcy, the necessary result of the doctrine of relation back was that the title of the trustee prevailed over the execution creditor's security, so that if the sheriff sold the goods seized he sold goods which turned out to be the unencumbered property of the trustee, and the trustee could therefore recover the amount of the proceeds, as for money had and received to his use, from the creditor who received them: cf. *Jones Bros. (Holloway) Ltd.* v. *Woodhouse* (1).

Legislation was first directed to the relief of the creditor in the latter class of cases. Section 81 of the *Bankrupt Act* 1825 (6 Geo. 4 c. 16), validated executions bona fide levied more than two months before the issuing of the commission in bankruptcy, notwithstanding any prior act of bankruptcy committed by the bankrupt, provided that the creditor had no notice of the act of bankruptcy. Then s. 133 of the Act of 1849 (12 & 13 Vict. c. 106), made a similar provision but substituted the date of the *fiat* or the filing of the petition for the issuing of the commission. (In each case the date was the date of commencement of the bankruptcy proceedings). Section 95 of the Act of 1869 (32 & 33 Vict. c. 71), altered the condition of validity by requiring that there should be seizure before the date of the order of adjudication and that the creditor should not have had at the time of seizure notice of an available act of bankruptcy. In the Act of 1883 (46 & 47 Vict. c. 52), and in the Act of 1914 (4 & 5 Geo. 5, c. 59), no express provision was made on the point, and it became a matter of doubt, which was not resolved until the Court of Appeal dealt with it in *In re Love* (2), whether the rights of a creditor whose execution was levied after but without notice of an act of bankruptcy and was completed before notice of petition and before receiving order were protected by an implication arising from provisions (to be mentioned in a moment) which were expressed as restrictions upon the rights of a creditor under an execution operating upon the debtor's property *before* act of bankruptcy.

The favourable position of a creditor who succeeded in getting priority by means of an execution binding the goods *before* the commission of an act of bankruptcy was qualified by s. 184 of the Act of 1849 (12 & 13 Vict. c. 106), which provided that no creditor having security for his debt should receive more than a ratable part of the debt, except in respect of, *inter alia*, any execution levied by seizure and sale before the date of the *fiat* or the filing of the petition. This provision was dropped when the Act of 1869

(1) (1923) 2 K.B. 117.

(2) (1952) Ch. 138.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Kitto J.

(32 & 33 Vict. c. 71) was passed, but in the Act of 1883 (46 & 47 Vict. c. 52) the policy of the 1849 Act was reverted to, a provision being made in s. 45 in terms substantially the same as those of s. 92 of the Australian Act. The Act of 1914 (4 & 5 Geo. 5, c. 59) repeated this provision in s. 40. It is important to note that, under all these provisions, if the stated conditions were complied with the creditor who had bound his debtor's goods by *fi. fa.* before act of bankruptcy was entitled to the proceeds of the execution, not because of any implication in the legislation (though the implication was there clearly enough), but because the security had been created before the notional commencement of the bankruptcy and therefore the doctrine of relation back did not carry the trustee's title back far enough to destroy the security which the execution gave. This is clear from the cases of *Edwards* v. *Scarsbrook* (1) and *Slater* v. *Pinder* (2) which have already been cited.

Setting s. 92 of the Australian Act against this historical background, it becomes, I think, clear that it is a provision which, so far as it applies to executions against goods, deals only with the security acquired by a creditor by delivering his *fi. fa.* to the sheriff for execution, and makes that security of no avail against the title of the trustee in bankruptcy unless the conditions laid down are fulfilled. The " benefit of the execution " is the security, the " acquired right " as *Cleasby* B. called it in *Slater* v. *Pinder* (3), and it is this benefit which the creditor may not " retain " against the trustee in bankruptcy. As *Luxmoore* and *Farwell* JJ. pointed out in *In re Godwin* (4), there is no suggestion in the section itself of any repayment of money to the trustee in bankruptcy by the execution creditor; all that the section does is, to use the words of *Kelly* C.B. in *Slater* v. *Pinder* (5) to defeat or nullify the creditor's right to sell the goods. If the creditor is to be held liable to pay money to the trustee, that is not because s. 92 so provides; it is because it follows, from the operation of the doctrine of relation back and the application of s. 92 to the circumstances of the case, that the creditor has received the proceeds of a sale which, as between him and the trustee, was a wrongful sale of the trustee's goods.

That is all that I understand to be decided by the cases upon which the appellants here rely. The first of them is *In re Godwin* (6), where there had been a levy of execution, followed by a payment

(1) (1862) 3 B. & S. 280 [122 E.R. 106].
(2) (1871) L.R. 6 Ex. 228.
(3) (1871) L.R. 6 Ex., at p. 241.
(4) (1935) Ch., at p. 219.
(5) (1871) L.R. 6 Ex., at p. 239.
(6) (1935) Ch. 213.

by the debtor to the creditor, then an unconditional withdrawal by the sheriff with no reservation of any right of re-entry, and then a sequestration on the debtor's own petition without any earlier act of bankruptcy. The money paid being claimed by the trustee in bankruptcy under s. 40 of the English Act of 1914, the court (*Luxmoore* and *Farwell* JJ.) rejected the claim. Their Lordships said: "the phrase 'the benefit of the execution,' on the true construction of the section, refers solely to the protection obtained by an execution creditor by reason of the issue of the writ of fi. fa. and its delivery to the sheriff, and does not describe, and was never intended to describe, any of the payments to an execution creditor whether by the sheriff or by the judgment debtor. The section consequently relates only to executions which are in fact in existence at one or other of the appropriate dates mentioned in the section, and has no reference to an execution which has been unconditionally withdrawn long before any of those dates" (1). This view was applied by *Farwell* J. in the next case, *In re Samuels* (2), where the only difference was that, the payments having left a balance of the judgment debt still owing, the sheriff in withdrawing had reserved a right of re-entry. His Lordship held that a payment made to avoid an execution is not the benefit of the execution within the meaning of the Act.

It will be observed that these learned judges are construing the section as if it were expressed thus: An execution creditor who has bound the debtor's property in goods by delivering his writ to the sheriff shall not be entitled to retain against the trustee in bankruptcy the security thus obtained if, before the execution is completed, bankruptcy supervenes or he receives notice, either of the presentation of a petition by or against the debtor or of the commission of an available act of bankruptcy by the debtor. So construed, the section takes the execution as it exists when the sequestration occurs or the creditor receives notice of a petition or of an available act of bankruptcy, and it enables the trustee in the subsequent bankruptcy to say, as between himself and the creditor, that as from that event the title which ultimately accrued to him by the operation of the Act, including the relation back provisions, was free from the rights of the creditor under the execution.

This construction was affirmed by the Court of Appeal in *In re Andrew* (3), where the order of events was, seizure by the sheriff under a *fi. fa.* arrangement made between the creditor and the

(1) (1935) Ch., at p. 223.
(2) (1935) Ch. 341.
(3) (1937) Ch. 122.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Kitto J.

debtor for payment of the judgment debt by instalments, withdrawal of the sheriff reserving a right of re-entry, payments by the debtor to the creditor under the arrangement, act of bankruptcy by the debtor and notice thereof to the creditor, failure by the debtor to pay further instalments, re-entry by the sheriff and sale of the goods seized, and, finally, the bankruptcy of the debtor on his own petition within six months after the payments to the creditor. It was never suggested by anyone in the case that the creditor had any right to the proceeds of the sale, and in fact the sheriff handed them over to the trustee on the bankruptcy supervening within the fourteen days limited by s. 41 (2). The case was concerned with the moneys paid to the creditor before the act of bankruptcy to which the trustees' title related back, and what was decided was that s. 40 of the English Act of 1914, the equivalent of s. 92 of the Australian Act, did not enable the trustee to recover these moneys from the creditor. The ground of the decision was precisely that upon which *In re Godwin* (1) and *In re Samuels* (2) had proceeded. The "benefit of the execution" was held to be the execution creditor's priority right in the debtor's goods, as it stood when he got notice of the act of bankruptcy; and accordingly it was said: "To the extent that the creditor has been paid his debt under and in virtue of an execution, the debt is pro tanto discharged, and to that extent there is, in our opinion, nothing on which s. 40 can operate" (3). The key to the meaning of this sentence, and the answer to the argument which the appellants in the present case attempt to found upon it, is that the sentence speaks as at the point of time at which the event occurs which takes the particular case out of the "unless" clause of the section. So does the later statement that s. 40 "cannot apply if there is no subsisting execution". So does the statement that the section "can only apply if or to the extent that there is a subsisting execution which is still operating to charge the debtor's goods, and it cannot operate in so far as goods have already been sold and the proceeds applied to the partial discharge of the debt, or where payments on account have been made by the debtor in partial discharge of the debt in order to avoid seizure or sale, or to induce a temporary withdrawal by the sheriff" (4). So, too, do the words with which the court summed up its view of the section: "In our opinion, to the extent that the debt has been actually discharged, it is impossible to apply to money so paid the appellation of 'the benefit of the execution'. The money so paid has,

(1) (1935) Ch. 213.
(2) (1935) Ch. 341.
(3) (1937) Ch., at p. 135.
(4) (1937) Ch., at p. 136.

in our opinion, become the money of the creditor with the result of wiping out pro tanto the debt. The benefit of the execution can then only refer, in our opinion, to the charge still remaining under the still subsisting execution for the balance of the debt" (1).

These statements do not mean that s. 40 can only be allowed an operation in respect of a charge subsisting under an execution that is still in existence at the time when a claim by the trustee against the creditor comes before a court for adjudication. Their meaning is put beyond doubt in these two sentences: "The operation of the section in such cases is limited to cases where there is at the date of the receiving order or when the creditor has notice of a bankruptcy petition or of an act of bankruptcy still on foot a subsisting execution, and is limited to the balance for which the execution is still operative. In respect of that balance it is true that there is a benefit of the still incomplete execution which may be affected by the operation of s. 40, sub-s. 1" (2).

In my opinion the principle of *In re Andrew* (3) entitles the Official Receiver to succeed in this case. It remains only to say a word about the later decision of the Court of Appeal in *In re Love*; *Ex parte Official Receiver* v. *Kingston-on-Thames County Court Registrar* (4). The order of events was, act of bankruptcy; issue of execution, the creditor having no notice of the act of bankruptcy; presentation of a petition against the debtor; completion of the execution, by sale of the goods, with no notice to the creditor either of the act of bankruptcy or of the presentation of the petition; bankruptcy of the debtor. The trustee in bankruptcy claimed the proceeds of the execution, not of course in reliance upon s. 40 of the English Act of 1914 for the conditions of that section had been fully satisfied, but on the ground of the relation back of his title to the act of bankruptcy which occurred before the issue of the execution. The creditor could not claim any protection under the English equivalent of the Australian s. 96, because that provision has to do with dealings by the bankrupt and does not apply to a disposal of his property *in invitum* under judicial process: *In re O'Shea's Settlement* (5). The Court of Appeal held, however, that the creditor was protected because the express negative provision of s. 40 carried a positive implication to the effect that, if an execution is completed before the receiving order and without notice of the presentation of a petition or of the commission of an available act of bankruptcy, the creditor may retain the benefit

(1) (1937) Ch., at p. 136.
(2) (1937) Ch., at pp. 135, 136.
(3) (1937) Ch. 122.
(4) (1952) Ch. 138.
(5) (1895) 1 Ch. 325.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

KITTO J.

of the execution against the trustee in bankruptcy. This does not mean that the court was departing from the view that " the benefit of the execution " means the security under a subsisting execution. *In re Andrew* (1) had been cited in the judgment of the primary judge, and there is no trace of any disinclination to accept the view which in that case had been so emphatically declared. What I take from the judgments, as applied to s. 92 of the Australian Act, is that where execution is completed before sequestration and without the creditor having received notice of any petition or available act of bankruptcy, the section operates to protect the rights which the creditor had under his *fi. fa.* at the time as at which the trustee claims that his title by relation back should be held to have prevailed over those rights. It was, I think, because this was the view taken that *Jenkins* L.J. (2), in rejecting the argument that an execution to be within the protection of s. 40 must have been issued before the commission of an act of bankruptcy, put his reason in these words: " It is perfectly true that, when once a bankruptcy ensues, ' relation back ' operates, so that the property of the bankrupt is deemed to have been vested in the trustee as from the date of the act of bankruptcy, but, in my view, it does not follow from this that the property of a debtor not yet adjudicated bankrupt is to be treated for all purposes as if it was in fact already vested in the trustee. Here, at the date when execution was issued, there is no doubt at all that the property was the property of the debtor. True it is that, owing to the act of bankruptcy that had taken place unknown to the creditor, the property was subject to the risk or contingency that, in the event of adjudication ensuing, it would vest in the trustee and when so vested would be deemed to have so vested from the date of the act of bankruptcy; but I think it is a very different thing to say that, when the position is considered as at the date of adjudication for the purposes of section 40 (1), it must be considered as if the trustee had in fact already had the property vested in him at the date when the creditor issued his execution " (3). *Evershed* M.R. dealt with the matter similarly (4). Of course, once the conclusion was reached that, despite relation back, s. 40 enabled the creditor to retain the benefit which he got by delivering his writ to the sheriff, it necessarily followed that the trustee in bankruptcy had no title to recover any of the proceeds of the execution from the creditor; and this is all that appears to be meant by statements in the judgments

(1) (1937) Ch. 122.
(2) (1952) Ch. 138.
(3) (1952) Ch., at pp. 144, 145.
(4) (1952) Ch., at pp. 151, 152.

that the creditor was entitled to retain " the proceeds of the execution ".

For these reasons I am of opinion that the order of *Clyne* J. was rightly made, and that the appeal should be dismissed.

TAYLOR J. I agree with the reasons given by my brother *Kitto* and wish only to add a few observations.

The question whether an execution creditor is permitted by the section to retain " the benefit of an execution " which has been completed after the commission by the debtor of an available act of bankruptcy and before the making of a sequestration order against the debtor never arises until after sequestration, for, until that event has taken place, the property of the debtor remains vested in him. It is, I think, the circumstance that the question does not arise until that stage which has given rise to the misapprehension involved in the appellants' argument. If " the benefit of the execution " is the charge which the execution creditor secures upon delivery of the writ of execution to the sheriff then, it is said, s. 92 has no application where the debtor's goods have been sold pursuant to the writ and the charge of the creditor discharged by payment to him, before sequestration, of the amount of his debt. In those circumstances, it is contended, the creditor's right to retain the moneys received by him does not depend upon the continued subsistence, at the time of the sequestration order, of his charge as against the trustee. But, as has already been pointed out, this argument takes no account of the doctrine of relation back and seeks to construe s. 92 without reference to the purpose which, upon an examination of the Act, it is clearly intended to serve. This aspect of the matter has already been discussed and I do not wish to add to that which has already been said, except, perhaps, by saying that I do not regard *In re Andrew* (1) as being in conflict with the view which I accept. In that case the payments which were attacked were made by the debtor before the commission by him of an " available " act of bankruptcy in order to secure the withdrawal of the sheriff. Upon holding, as it did, that the expression, " the benefit of the execution ", constituted exclusively a reference to the charge of the execution creditor, the Court of Appeal dismissed the trustee's claim. Once this construction was placed upon the section that result was inevitable for the only charge which subsisted at any time during the period of relation back was the charge for the balance of the moneys owing and,

(1) (1937) Ch. 122.

H. C. OF A. 1954. McQUARRIE v. JAQUES. Taylor J.

accordingly, this was the only charge which could be affected by s. 40 of the *Bankruptcy Act* (Imp.). Cases under this section, as well as cases under s. 92 of the Commonwealth Act, will always include instances where a charge, previously acquired by the delivery to the sheriff of a writ of execution, is still subsisting at the time of the making of the sequestration order and those present no difficulty. But cases under those sections will also include instances where, prior to the making of such an order, the execution has been wholly or partially completed by seizure and sale and the charge of the execution creditor has been discharged wholly or partially by the receipt by him of the proceeds of the sale. The question which arises in such cases is whether the charge relied upon to justify receipt of the proceeds of the execution should be regarded as valid and subsisting as against the trustee at the time of the realization of the debtor's property. This, in turn, will depend upon whether at the time the goods of the debtor were seized and sold the creditor had notice of the commission by the debtor of an available act of bankruptcy, for upon the answer to that question will depend the conclusion whether the proceeds of the execution, to the extent to which they have been received by the creditor, represent the proceeds of the sale of unencumbered "property of the bankrupt" or moneys paid in discharge of a valid and subsisting security. I am satisfied that their Lordships in *In re Andrew* (1) did not intend to decide otherwise and support for the view which I have expressed is to be found in their observations that: "To the extent that the creditor has been paid his debt under and in virtue of an execution, the debt is pro tanto discharged, and to that extent there is, in our opinion, nothing on which s. 40 can operate. The operation of the section in such cases is limited to cases where there is at the date of the receiving order or when the creditor has notice of a bankruptcy petition or of an act of bankruptcy still on foot a subsisting execution, and is limited to the balance for which the execution is still operative. In respect of that balance it is true that there is a benefit of the still incomplete execution which may be affected by the operation of s. 40, sub-s. 1. . . . Sec. 40 can only apply if or to the extent that there is a subsisting execution which is still operating to charge the debtor's goods, and it cannot operate in so far as goods have *already* been sold and the proceeds applied to the partial discharge of the debt, or where payments on account have been made by the debtor in partial discharge of the debt in order to avoid seizure or sale, or

(1) (1937) Ch. 122.

to induce a temporary withdrawal by the sheriff. In our opinion, to the extent that the debt has been actually discharged, it is impossible to apply to money so paid the appellation of 'the benefit of the execution'. The money so paid has, in our opinion, become the money of the creditor with the result of wiping out pro tanto the debt. The benefit of the execution can then only refer, in our opinion, to the charge still remaining under the still subsisting execution for the balance of the debt" (1).

The word "already", which I have italicized, emphasizes that their Lordships were there speaking of moneys received as the result of a sale which had taken place before sequestration and before presentation of a petition and before notice to the creditor of any available act of bankruptcy.

The main purpose of these observations is, however, to indicate that, in so far as the argument of the appellant asserts that there is no room for the operation of s. 92, in cases, such as the present, where an execution has been completed and the execution creditor's charge has been dissolved before the making of a sequestration order, it is quite inconsistent with the plain words of the section. In such cases, the appellant says there is no subsisting "benefit" capable either of being destroyed or protected by the provisions of s. 92. Consideration of the terms of the section quite clearly indicate that no such result was intended. The section expressly provides that an execution creditor shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy unless, *inter alia*, he has completed the execution before notice of the commission of any available act of bankruptcy by the debtor. But where an execution has been completed by seizure and sale and the execution creditor is paid out there is, thereafter, no subsisting charge. Yet, nevertheless, the section says that in such cases the execution creditor shall not, unless the prescribed condition is satisfied, be entitled to retain the benefit of the execution. The adoption of the appellants' argument in its entirety would lead to the conclusion that, so far as the section is concerned, it would be immaterial whether the execution was completed *before* or *after* notice to the creditor of the commission of an act of bankruptcy by the debtor. Such a conclusion would be quite contrary to the plain terms of the section and cannot be adopted. The question, in all cases where the execution has been completed before sequestration and before notice of the presentation of a petition by or against the debtor, is whether the execution was completed before notice of an available act of bankruptcy.

(1) (1937) Ch., at pp. 135, 136.

H. C. OF A. 1954.

McQUARRIE v. JAQUES.

Taylor J.

The only other observation which I wish to make arises out of the facts which were before the Court of Appeal in *In re Andrew* (1). In that case the moneys received by the creditor were moneys which were paid to avoid an execution. I should have thought that moneys paid by a debtor to a creditor in those circumstances are untouched by the section. They represent neither the benefit nor fruits of an execution and are merely payments made by the debtor to the creditor notwithstanding the fact that pressure of the process of execution may have induced the debtor to make the payment. Whether a creditor may retain the benefit of payments made in such circumstances will depend on other provisions of the *Bankruptcy Act*.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Matthew McFadden & Co.*

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

J. B.

(1) 1937) Ch. 122.