[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION APPELLANT;
RESPONDENT,

AND

JAQUES . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

H. C. OF A. 1956.

SYDNEY, *April* 26, 27; *Aug.* 9.

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

Bankruptcy—Avoidance of preferences—Crown debts—Payments within six months preceding petition upon which estate sequestrated—Whether payments void—Crown not bound by avoidance of preferences provisions—Bankruptcy Act 1924-1950 (*No.* 37 *of* 1924—*No.* 80 *of* 1950), *ss.* 5 (3), 95.

Section 5 (3) of the *Bankruptcy Act* 1924-1950 provides: "Except as otherwise expressly provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, . . . shall bind the Crown as representing the Commonwealth or any State." Section 95 which avoids as preferences certain transactions entered into by a bankrupt within six months preceding the presentation of the petition upon which his estate was sequestrated, being neither a provision relating to "the remedies against the property of a debtor" nor one relating to "the priorities of debts" within s. 5 (3) is not made binding on the Crown by virtue of s. 5 (3). As nowhere else in the Act is there any intention shown that s. 95 shall operate to invalidate preferences to the Crown, it must be construed as not extending to such preferences.

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

APPEAL from the Federal Court of Bankruptcy.

The estate of Walter Neville Winkler was sequestrated on 16th July 1953 on his own petition, Stanley Theodore Jaques being appointed official receiver and trustee. Between 16th January 1953 and the date of sequestration Winkler had made nine payments totalling in all £3,077 18s. 5d. to the Deputy Commissioner of Taxation for the State of New South Wales in respect of sales tax owing by him under the *Sales Tax Assessment Act* 1930-1953.

H. C. OF A. 1956. FEDERAL COMMISSIONER OF TAXATION v. JAQUES.

A claim by the official receiver that these payments constituted a preference within s. 95 of the *Bankruptcy Act* 1924-1950 and as such void against him was denied by the deputy commissioner. Thereupon the official receiver moved the Federal Court of Bankruptcy for a declaration that the payments so made were void as against him as a preference, priority or advantage under s. 95 (1) and for consequential orders, whilst the deputy commissioner, by his notice of opposition, claimed (a) that such payments were not a preference within s. 95 (1), and (b) that such payments were made in respect of debts due to the Queen in right of the Commonwealth and that s. 95 (1) had no application against the Crown.

Clyne J., before whom the motion came for hearing, made the declaration and consequential orders sought, from which decision the deputy commissioner appealed to the High Court.

Neither before *Clyne* J. nor on this appeal did the deputy commissioner rely upon the first ground taken in his notice of opposition.

The relevant statutory provisions appear fully in the judgments of the Court hereunder.

Dr. *F. Louat* Q.C. (with him *L. W. Street*), for the appellant. The sections of the *Bankruptcy Act* 1924-1950 which could operate to bind the Crown fall into two classes, those which control the proprietary and contractual rights of first, creditors and secondly, third persons in relation to bankruptcy proceedings. The words "remedies against the property of a debtor" in s. 5 (3) mean remedies available to persons, creditors or not, against property owned by the debtor at the time of sequestration and does not include remedies brought into being by the sequestration order itself, so as to become exerciseable by the trustee in bankruptcy. The purpose of s. 5 (3) is to oblige the Crown to comply with the provisions of the Act for the more effective administration of the bankruptcy jurisdiction, but not with all of the provisions. If compliance with all were intended the Act would without more have stated in terms that it bound the Crown. Section 5 (3) of the Commonwealth *Bankruptcy Act* derives from the *Bankruptcy Act* 1914 (Imp.), s. 151, following s. 150 of the *Bankruptcy Act* 1883 (Imp.). The words "remedies against the property of a debtor" in s. 5 (3) have their origin in s. 7 of the Imperial Act of 1914, tracing back to s. 9 of the Imperial Act of 1883 and s. 12 of the Imperial Act of 1859 and mean "remedies against the property of a debtor whilst he is still a debtor", i.e. existing at the time of the receiving order or after presentation of the petition when an application is made for a stay. That this is so appears from s. 150 of the 1883 Act which was enacted

to close the gaps pointed out by *Jessel* M.R. in *Ex parte Postmaster-General*; *In re Bonham* (1). [He referred to *Williams* on *Bankruptcy*, 16th ed. (1949), p. 250, qualified to some extent in *A Supplement to Williams on Bankruptcy*, 16th ed. (1954), pp. 223, 224.] Nothing in *In re Love* (2) casts doubt upon the soundness of the statement from *Williams* first quoted. [He referred to *In re Thomas*; *Ex parte Commissioners of Woods and Forests* (3).] When s. 60 (2) of the Commonwealth Act speaks of "remedy against the property . . . of the bankrupt" it means a remedy existing at the moment of sequestration. This legislative review shows that our s. 5 (3) has the same function as its counterpart has in England, i.e. the function of subjecting the Crown to the initial machinery of stay, of arresting remedies and substituting the remedies of the bankruptcy jurisdiction. Section 95 does not create any remedy against the property of the debtor in the sense in which that expression is used in s. 5 (3). [He referred to *Lister* v. *Hooson* (4).] Under the Commonwealth Act the trustee in bankruptcy is not concerned with the property of the debtor, but with the distinct and opposed conception of the property of the bankrupt: *vide* ss. 54 (2), 71 (12). Section 91 exhaustively defines the property of the bankrupt and this despite the use of the word "include". [He referred to *Dilworth* v. *Commissioner of Stamps* (5).] *In re Sims*; *Ex parte Sheffield* (6) illustrates the operation of a section similar to s. 95. Section 95 does not bind the Crown.

A. B. Kerrigan Q.C. (with him *B. M. Hogan*), for the respondent. The *Bankruptcy Act* does not draw any nice distinction between "debtor" and "bankrupt"; the words are used almost interchangeably: *vide* ss. 14, 15, 16, 71 (12), 77 (1), 154. The expression "property of a debtor" in s. 5 (3) is synonymous with "property of a bankrupt". Section 91 defines the property of the bankrupt and s. 90 defines the point of time at which such property is to be ascertained. [He referred to *Ponsford, Baker & Co.* v. *Union of London & Smith's Bank Ltd.* (7).] Property of the bankrupt at the commencement of the bankruptcy includes all property paid away if it were a preferential payment from the first act of preferential payment. The word "void" in s. 95 has been held to be "voidable": *Re Hart*; *Ex parte Green* (8) but the language there used seems hardly consistent with *Re Farnham* (9) and *In Re Carl Hirth*;

(1) (1879) 10 Ch. D. 595, at pp. 600, 601.
(2) (1952) Ch. 138.
(3) (1888) 21 Q.B.D. 380, at pp. 382, 384.
(4) (1908) 1 K.B. 174, at p. 176.
(5) (1899) A.C. 99, at p. 105.
(6) (1896) 3 Mans. 340.
(7) (1906) 2 Ch. 444, at p. 452.
(8) (1912) 3 K.B. 6, at pp. 12, 13, 17.
(9) (1895) 2 Ch. 799, at pp. 807, 808, 810, 811.

H. C. OF A. 1956.

FEDERAL COMMISSIONER OF TAXATION v. JAQUES.

Ex parte The Trustee (1). From the latter cases there is good reason to hold that the doctrine of the law of bankruptcy is that for the purposes of the *Bankruptcy Act* property paid away preferentially should be treated as if it had never left the bankrupt. This is in accordance with *Williams* v. *Dunn's Assignee* (2). Once the act of bankruptcy is committed the debtor has no title to give anyone. The transaction may be considered voidable in the sense that the trustee must do something to avoid it, but once avoided it is void *ab initio*. When the trustee moves the court to avoid the transaction he is operating under a section which is a remedy against the property of the bankrupt. If the Crown is entitled to retain preferential payments the result is to alter the order of priority of debts. The Crown formerly had complete priority (*New South Wales Taxation Commissioners* v. *Palmer* (3)) but the priorities of the Crown are now controlled : ss. 84 (1) (*h*), 89. The operation of s. 95 is to supplement s. 84, and s. 95 is itself a provision relating to priorities. Sections 60, 90, 91, 95 and 99 should be read as a chain of sections all relating to remedies against the property of the bankrupt or debtor. [He referred to *In re Thomas* ; *Ex parte Commissioners of Woods and Forests* (4) ; *Halsbury's Laws of England*, 3rd ed., vol. 2, par. 888, pp. 449, 450.] Section 5 (3) ought not to be read down to cover only those matters mentioned by *Jessel* M.R. in *Ex parte Postmaster-General* ; *In re Bonham* (5), but should be read to cover all the remedies provided by the present *Bankruptcy Act*. When the present *Bankruptcy Act* is found to require the whole of the property of the bankrupt to be got in and divided in due priority among the creditors, then the Court will give to a section in the Act a construction which will bring about that result rather than one which will frustrate it. The appeal should be dismissed.

Dr. *F. Louat* Q.C., in reply.

Cur. adv. vult.

Aug. 9.

The following written judgments were delivered :—

DIXON C.J., FULLAGAR, KITTO AND TAYLOR JJ. This appeal is brought against an order made by the Federal Court of Bankruptcy (*Clyne* J.) upon an application in connexion with the estate of one Winkler.

(1) (1899) 1 Q.B. 612, at pp. 619, 620, 623, 624.
(2) (1908) 6 C.L.R. 425, at p. 434.
(3) (1907) A.C. 179.
(4) (1888) 21 Q.B.D. 380, at pp. 381, 382, 384.
(5) (1879) 10 Ch. D., at pp. 600, 601.

On 16th July 1953, Winkler presented a debtor's petition upon which, on the same day, a sequestration order was made against him. On nine occasions within the preceding six months, he had made payments to the Deputy Commissioner of Taxation at Sydney, the aggregate amount paid being £3,077 18s. 5d. All the payments were in respect of sales tax which Winkler owed under the provisions of the *Sales Tax Assessment Act* (*No.* 1) 1930-1953 (Cth.) and the *Sales Tax Act* (*No.* 1) 1930-1952. After the making of the sequestration order the official receiver made a demand upon the deputy commissioner for the repayment to him of the whole amount of the payments, contending that each payment constituted a preference, priority or advantage, which was void as against him by virtue of s. 95 of the *Bankruptcy Act* 1924-1950 (Cth.). The deputy commissioner claimed to be entitled to retain the amount, on the two grounds that s. 95 (1) had no application against the Crown, and that, within the meaning of s. 95 (2), the payments had been received in good faith and for valuable consideration and in the ordinary course of business. The official receiver thereupon applied to the Bankruptcy Court for a declaration that the payments were void under s. 95, and for an order for the payment of the amount thereof to him. The application succeeded, and the resulting order is the subject of this appeal.

Sub-section (1) of s. 95 is in these terms : " Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own money, in favour of any creditor or of any person in trust for any creditor, having the effect of giving that creditor, or any surety or guarantor for the debt due to that creditor, a preference, a priority or an advantage over the other creditors, shall, if the debtor becomes bankrupt on a bankruptcy petition presented within six months thereafter be void as against the trustee in bankruptcy." Sub-section (2) protects from the operation of the section (*inter alia*) the rights of a purchaser, payee or encumbrancer in good faith and for valuable consideration and in the ordinary course of business. Sub-section (3) deals with the onus of proving that the provisions of sub-s. (2) have been complied with ; and the remaining sub-section, sub-s. (4), describes circumstances in which a creditor shall not be deemed to be a purchaser, payee or encumbrancer in good faith.

Before *Clyne* J., and again in this Court, the deputy commissioner abandoned his former reliance upon sub-s. (2). He conceded that, at the time of making each of the payments to which the proceedings

H. C. OF A. 1956.

FEDERAL COMMISSIONER OF TAXATION v. JAQUES.

Dixon C.J. Fullagar J. Kitto J. Taylor J.

referred, Winkler was unable to pay his debts as they became due from his own moneys, and that the payments were, within the meaning of sub-s. (1), payments having the effect of giving the Crown a preference, priority or advantage over the other creditors of the bankrupt. He opposed the application on the one ground only, that the payments made to him on account of sales tax were not payments to which s. 95 (1) applies, because sales tax is a Crown debt and s. 95 (1) does not bind the Crown.

It is clear that sales tax is a Crown debt, for s. 30 of the *Sales Tax Assessment Act* (*No.* 1) expressly so provides. The question to be decided, therefore, is whether s. 95 (1) binds the Crown. On well-established principle, it does not do so unless an intention that it shall is to be found either expressed or necessarily implied in the Act. The principle is " now well laid down and clear " : *Madras Electric Supply Corporation Ltd.* v. *Boarland* (1). The *Bankruptcy Act* expressly makes certain of its provisions binding upon the Crown, and, in addition, it contains, in relation to certain Crown debts, provisions from which an implication as to other Crown debts necessarily arises. Section 5 (3) contains the express provision : " Except as otherwise expressly provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of an order of discharge, shall bind the Crown as representing the Commonwealth or any State." The provisions which carry implications on the subject will be referred to in a moment.

The ground of *Clyne* J.'s decision was that s. 95 binds the Crown as being a provision " relating to the remedies against the property of a debtor." His Honour reached this conclusion largely upon a consideration of the case of *In re Thomas* ; *Ex parte Commissioners of Woods and Forests* (2), in which, undoubtedly, these words were given a wide meaning. They were held to include the disclaimer provision of the *Bankruptcy Act* 1883 (Imp.), which is represented by s. 104 in the present Australian Act. *Cave* J. took the view that all the provisions of the Act relating to the vesting of a bankrupt's property in his trustee and taking away the remedies of creditors against his property or person should be treated together as providing " one mode of dealing with the remedies against the property of the debtor ", and that the disclaimer provision was one of these, because it contained one of the terms on which the property of the debtor vested in the trustee. The other member of the court, *Wills* J., was of the same opinion, saying that in his view the whole

(1) (1955) A.C. 667, at p. 688. (2) (1888) 21 Q.B.D. 380.

group of sections which dealt with taking property out of the bankrupt and vesting it in the trustee should be looked at as one homogeneous whole, and treated as provisions relating to remedies against the property of a debtor.

Even on this broad construction, however, s. 95 (1) cannot be held to relate to such remedies, for it stands apart from the provisions which provide for the divesting of property from a debtor on his becoming a bankrupt and for matters incidental to the divesting, and it does not affect any remedies which, but for the Act, might have been pursued against the debtor's property. It relates, indeed, to property, money, obligations and judicial proceedings which, it assumes, would otherwise be valid and therefore immune from attack by means of any remedy provided by law. And it does not concern itself with creating any remedy. It simply renders certain transactions void as against the trustee, leaving the general law or other statutory provisions to supply appropriate remedies for the situations thus created. Its operation in respect of a payment to a creditor (and for present purposes the other kinds of transactions to which it applies may be ignored) is to make the payment, as against the trustee, void as a payment, so that, in favour of the trustee, the creditor must be considered to have received money which belongs to the bankrupt's estate, and his debt must be considered not to have been paid. The trustee's remedies are to sue for the recovery of the money as money had and received to his use, which is a remedy provided by the common law : *Marks* v. *Feldman* (1) ; *Bowling* v. *Cox* (2) ; *Re an Intended Action* ; *Trustee of Rousou* v. *Rousou* (3) ; or to apply to the Bankruptcy Court for an order for repayment, which is a remedy provided by s. 25 : *Price* v. *Parsons* (4). The creditor, on the other hand, is remitted to the only remedy which he would have had if the payment had not been made, namely to prove in the bankruptcy : *In re Stephenson* ; *Ex parte Official Receiver* (5) ; *Re K. B. Docker* (6).

It may be thought to be a question whether s. 95 (1) is not one of the provisions of the Act " relating to the priorities of debts ". It is true that it is not included in the group of sections by which the Act prescribes the order of priorities to be observed by the trustee in the application of the estate of a bankrupt, namely ss. 84, 85, 86, 87, 88A and 89 in Div. 2 of Pt. VI. It is, however, in the nature of a corollary to those sections, in the sense that it is directed to

(1) (1870) L.R. 5 Q.B. 275, at pp. 281, 282, 284.
(2) (1926) A.C. 751, at p. 754.
(3) (1955) 2 All E.R. 169 ; 1 W.L.R. 545.
(4) (1936) 54 C.L.R. 332.
(5) (1888) 20 Q.B.D. 540, at p. 542.
(6) (1938) 10 A.B.C. 198, at p. 247.

H. C. OF A. 1956.

FEDERAL COMMISSIONER OF TAXATION v. JAQUES.

Dixon C.J. Fullagar J. Kitto J. Taylor J.

ensuring that the administration of a bankrupt's estate in accordance with them shall not be prevented by any conveyance, transfer, charge, payment, obligation or judicial proceeding, occurring within six months before the presentation of the petition and not possessing certain saving characteristics, which, if it were allowed to be effective, would put a debt ahead of the place appropriate to it in the prescribed order. Its operation, so far as payments are concerned, is to " prevent a payment to anybody who, but for such payment, would share in the administration of the bankrupt's estate ", that is to say " any person who, at the date of the payment to him, would have had to come in and prove and rank with the other creditors in the bankruptcy ": *In re Paine*; *Ex parte Read* (1). The section is therefore analogous in its purpose to the old rule which invalidated a fraudulent preference on the ground that if it were permitted to stand " the policy of the bankruptcy laws would be defeated " : *Wheelwright* v. *Jackson* (2), and to the provision now in force in England under s. 44 of the *Bankruptcy Act* 1914 which has been described as invalidating such a preference as " a fraud upon the administration in bankruptcy " : *Butcher* v. *Stead* (3).

It is clear that the priority provisions found in Div. 2 of Pt. VI are binding upon the Crown, not only because of what is enacted in s. 5 (3), but also because of the intention which they themselves disclose that they shall apply to Crown debts. Section 84 provides in sub-s. (1) that, subject to the provisions of the Act, the trustee shall apply the estate of the bankrupt in a stated order of priority. The order is set out in eight paragraphs lettered from (*a*) to (*j*), and it is qualified in certain respects by provisions contained in other sub-sections of s. 84 and in ss. 85, 86, 87 and 88A. All debts which are neither allotted a place in the order of priorities nor postponed (as by s. 85) are to be paid *pari passu*, subject to being proved in the bankruptcy : s. 89. When s. 84 is examined, it is found that certain Crown debts are given a degree of priority by express provision. Included in the sixth class, in par. (*h*), together with certain municipal and local rates, are assessed land tax and income tax not exceeding a year's assessment, and certain debts for advances made, and for goods supplied, under statutes relating to the improvement, development or settlement of land or the aid, development or encouragement of mining. The implication is clear that Crown debts not within this divers category, and not covered by any of the descriptions in the other paragraphs of s. 84 (1), are " debts " which fall within s. 89 and are, by that section, denied priority over

(1) (1897) 1 Q.B. 122, at p. 124.
(2) (1813) 5 Taunt. 109, at p. 115 [128 E.R. 628, at p. 630].
(3) (1875) L.R. 7 H.L. 839, at p. 852.

any debts except those specially postponed: *In re Galvin* (1); *In re H. J. Webb & Co. (Smithfield, London) Ltd.* (2); affirmed *sub nom. Food Controller* v. *Cork* (3).

This being so, it may be thought that consistency in legislative policy should have led to the inclusion in the Act of a provision extending the application of s. 95 to a transaction by which the Crown has obtained a preference, priority or advantage to which it would not have been entitled in an administration in accordance with the Act. But the question whether s. 5 (3) is such a provision must depend upon the meaning of the words which it uses. The expression " the provisions of this Act relating to . . . the priorities of debts " is not wide enough to include a provision which in no way affects the order to be observed in the payment of debts under an administration in bankruptcy, and which produces no result in an administration except that in consequence of its application the property to be administered is increased and the creditors entitled to participate in distributions are added to. The priorities which the Act prescribes are priorities as between the debts in payment of which the trustee may apply the estate. Those debts are confined to such provable debts (see s. 81) as are in fact proved in the bankruptcy; for s. 112 obliges the trustee to declare and distribute dividends amongst " the creditors who have proved their debts ", and s. 89, providing for payment of debts *pari passu* subject to the other provisions of the Act, applies in terms to " debts proved in the bankruptcy " and to those debts alone. When, therefore, s. 5 (3) speaks of the priorities of debts, it refers only to the priorities of proved debts, that is to say debts admitted in accordance with a prescribed procedure as having been debts to which the bankrupt was subject at the date of the sequestration order, or to which he has become subject before his discharge by reason of an obligation incurred before the date of the sequestration order: s. 81. Section 95 is plainly not a provision relating to the priorities of such debts. Indeed, a debt which is satisfied by a preferential payment is *ex hypothesi* not provable, and only in consequence of the application of the section does it become provable.

Section 95 is therefore not one of the provisions referred to in s. 5 (3). As nowhere else in the Act is any intention shown that the section shall operate to invalidate preferences to the Crown, it must be construed as not extending to such preferences.

For these reasons, the appeal should be allowed, and the order of the Federal Court of Bankruptcy discharged. There should be,

(1) (1897) 1 I.R. 520, at p. 533.
(2) (1922) 2 Ch. 369, at pp. 386, 389, 390, 399.
(3) (1923) A.C. 647, at pp. 663, 664, 665, 669.

H. C. OF A. 1956. FEDERAL COMMISSIONER OF TAXATION v. JAQUES.

instead, a declaration that the payments referred to in the notice of motion are not void as against the trustee of the property of the bankrupt as a preference, priority or advantage under s. 95 of the *Bankruptcy Act* 1924-1950, and an order that the respondent trustee pay the costs of the deputy commissioner both here and below.

WEBB J. This is an appeal from a decision of the Federal Court of Bankruptcy (*Clyne* J.) under s. 25 of the *Bankruptcy Act* 1924-1950, on a question of law, namely, whether the Crown is bound by s. 95 of the Act. The Bankruptcy Court held that the Crown was bound.

Section 95 reads: " . . . every payment made . . . by any person unable to pay his debts as they become due from his own money, in favour of any creditor . . . having the effect of giving that creditor . . . a preference, a priority or an advantage over the other creditors, shall, if the debtor becomes bankrupt on a bankruptcy petition presented within six months thereafter be void as against the trustee in bankruptcy."

The appellant commissioner received several payments of federal sales tax, totalling £3,077 18s. 5d. from a taxpayer, Winkler, who, it is now conceded by the appellant commissioner, was, when he made those payments, unable to pay his debts as they became due from his own money, and who became bankrupt within six months after such payments.

For the appellant commissioner it was submitted that the Crown is not bound by s. 95.

Section 30 of the *Sales Tax Assessment Act* (*No.* 1) 1932-1953 provides that sales tax is a debt due to the Crown.

Section 5 (3) of the *Bankruptcy Act* 1924-1950 provides, *inter alia*, that: " . . . the provisions of the Act relating to the remedies against the property of a debtor, the priorities of debts . . . shall bind the Crown . . . ".

It is the scope of such provisions that has to be determined. The respondent trustee submits that s. 95 is a provision relating to such remedies and priorities.

As to " remedies ": when, under s. 104, the trustee disclaims property of the bankrupt consisting of land burdened with onerous covenants the disclaimer operates to determine the liabilities of " the bankrupt and his property " in or in respect of the property disclaimed. It is clear that " remedies against the property of the debtor " are defeated as a result of the disclaimer: *In re Thomas*; *Ex parte Commissioners of Woods and Forests* (1). But s. 95 does not defeat any remedy *against* the property of the debtor: it does

(1) (1888) 21 Q.B.D. 380.

not reduce or diminish that property. On the contrary, it adds to that property. That is the sole purpose of s. 95. I am now giving the words " the remedies against the property of the debtor " their ordinary meaning, as a different meaning is not required or indicated, either by the subject matter or by the context. This then is the end of the matter, as it is for those who assert that the Crown is bound by a statute to point to words in the statute which show that it is intended to bind the Crown, either expressly or by necessary implication. Speaking imprecisely it might be said that s. 95 provides for the pursuit of property of the debtor into the hands of creditors in certain circumstances, and so provides a remedy against his property. But such an important matter as the immunity of the Crown from a statute is not to be disposed of by resort to such a paraphrase.

Then as to " the priorities of debts " : my first impression is that in s. 5 (3) this refers to the order of priority of payment of debts in the administration of the bankrupt's property by the trustee, and that impression is confirmed on a consideration of later sections. It is true that s. 95 (1) speaks of " a preference, a priority or an advantage over the other creditors ", and that s. 84 (1) (*j*) provides : " . . . the trustee shall apply the estate of the bankrupt in the following order of priority :—(*j*) Eighthly, in payment of such *preferences, priorities or advantages* in favour of any creditor or group of creditors . . . prior to . . . sequestration . . . as are passed by a special resolution of creditors at a general meeting . . .". (The italics are mine.)

But, while s. 95 destroys what the debtor had sought to do by way of preference of a particular creditor or creditors before his adjudication as a bankrupt, s. 84 (1) (*j*) creates an order of priority of payment of creditors generally in the bankruptcy. Actually s. 84 and s. 95 operate at different stages and deal with different subject matters. This appears from the fact that s. 95 is in Div. 4 of Pt. VI of the Act, which is headed " *Effects of bankruptcy on Antecedent Transactions* ", and which, together with Divs. 3 and 5 of Pt. VI, provides for the title of, and collection and realization by, the trustee of the " property " of the bankrupt, in a broad sense of the term, which it is the policy of the legislature to require to be available for the creditors ; whereas s. 84 appears in Div. 2 of Pt. VI, which is headed " *Priority of Debts* ", and which, with Divs. 1 and 6, provides for the distribution of that " property ", in a due course of administration, secured more particularly by proof of debts, by an order of priority of payment of debts, and finally by the declaration and payment of dividends to the creditors. I conclude from these provisions that s. 5 (3) when it speaks of " priorities of debts "

H. C. OF A. 1956. FEDERAL COMMISSIONER OF TAXATION v. JAQUES. Webb J.

is referring to s. 84 which, as already stated, creates an order of priority of payment of debts for the benefit of the creditors generally, and not to s. 95 which provides no such order, but adds to the property available for distribution in the bankrupt's estate by destroying any preferential payment made by the debtor to a particular creditor. The distinction is between " priorities of debts " in s. 5 (3) and " a priority . . . over the other creditors " in s. 95. The former involves a characterisation and ranking of *debts*; the latter involves neither. It is not even a ranking of creditors, but a preference of creditors in individual cases, and " priority " is used in s. 95 in that special sense. In my opinion it would be wrong to say that the Crown is bound by a priority of debts under s. 95 which does not relate to any such priority in the sense that its subject matter is such priority: its subject matter is the augmentation of the bankrupt's " property " and for that purpose it seizes on the preferential nature of payments made by the debtor and nullifies them.

Much could be said for the view that to secure equality of treatment all creditors, including the Crown, should be bound by s. 95. Still before the Crown can be held bound it must be shown that the Act binds it, either expressly or by necessary implication. The immunity of the Crown is to be denied only by the language of the Act, and not merely on broad considerations of history and equality among creditors, powerful though such considerations might otherwise be.

I would allow the appeal.

Appeal allowed with costs. Order of the Federal Court of Bankruptcy discharged. In lieu thereof, declare that none of the payments made by the bankrupt Walter Neville Winkler to the appellant the Deputy Commissioner of Taxation, and referred to in the notice of motion dated 18th October 1955, is void as against the trustee of the property of the bankrupt by reason of the provisions of s. 95 of the Bankruptcy Act 1924-1950. Order that the respondent pay the appellant's costs of the application in the Federal Court of Bankruptcy instituted by the aforesaid notice of motion.

Solicitor for the appellant, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *John H. Peoples*.

R. A. H.