my opinion the proper law of the contract of mortgage should be held to be that of New South Wales. It follows that the moratorium legislation of New South Wales is a good defence to the mortgagee's action (*Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (1)).

The appeal should be allowed with costs.

Appeal allowed with costs. Judgment of Supreme Court discharged. In lieu thereof order that judgment be entered for the defendant with costs including the costs of pleadings.

Solicitor for the appellant, *C. W. Stewart.*

Solicitors for the respondent, *Phillips Fox & Masel.*

H. D. W.

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McCLELLAND v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

HOUSE ; THE KING . . RESPONDENT.

APPELLANT ;

ON APPEAL FROM THE COURT OF BANKRUPTCY.

Bankruptcy—Property obtained on credit and not paid for, pawned by bankrupt—Offence—Sentence by Court of Bankruptcy—Severity—Discretion of Judge—Appeal to High Court—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 73—*Bankruptcy Act* 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 26 (2), 210 (3) (*c*), 217.

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SYDNEY, *Aug.* 6, 17

Starke, Dixon, Evatt and McTiernan JJ.

Twelve months after the sequestration of his estate, the Court of Bankruptcy ordered a bankrupt to apply for his discharge. When the application came on to be heard the court, acting under sec. 217 of the *Bankruptcy Act* 1924-1933, proceeded to charge him with offences against the Act. In the result he was dealt with summarily by the Court of Bankruptcy upon a charge which he

(1) (1933) 48 C.L.R. 565.

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admitted and committed for trial upon charges which he denied. The offence admitted was that within six months before the presentation of the petition in bankruptcy he pawned, otherwise than in the ordinary way of his trade, property which he obtained on credit and for which he had not paid. He was sentenced to three months' imprisonment with hard labour. He sought to appeal to the High Court against the sentence on the ground that it was excessive.

Held :—

(1) That, under sec. 73 of the Constitution and sec. 26 (2) of the *Bankruptcy Act* 1924-1933, an appeal to the High Court against the sentence lay as of right.

(2) That it had not been shown that the judge had improperly exercised his discretion as to the sentence, and therefore it should not be disturbed.

APPLICATION for special leave to appeal and APPEAL from the Court of Bankruptcy (District of New South Wales and the Territory for the Seat of Government).

The estate of Everard Henry House was sequestrated on 19th February 1935, on the petition of a creditor, A. N. Thomson & Co. Ltd., filed on 11th January 1935. On 26th February 1936 a report made by the official receiver in respect of the bankrupt's estate pursuant to sec. 75 of the *Bankruptcy Act* 1924-1933 came before Judge *Lukin*, who thereupon ordered that the bankrupt make a compulsory application under sec. 119 of the Act for a certificate of discharge. His Honour heard this application on 25th March 1936, and ordered that the bankrupt be charged (*a*) under sec. 210 (1) (*g*) of the Act, that on or about 11th April 1935, he failed to give to the court a complete and satisfactory account of the loss of a substantial portion of his estate, namely, the sum of £294 19s. 9d., within a period of one year immediately preceding his bankruptcy ; (*b*) under sec. 210 (2) (*d*), that after the presentation of the petition on which the sequestration order was made he attempted to account for the sum of £294 19s. 9d., part of his property, by fictitious racing losses ; (*c*) under sec. 210 (3) (*b*), that on 18th July 1934, within six months before the presentation of the petition, he obtained from A. N. Thomson & Co. Ltd. under the false pretence of dealing in the ordinary way of his trade six Simplex manual bath-heaters on credit, which said property he had not paid for ; (*d*) under sec. 210 (3) (*c*), that on or about 25th July 1934, within six months before the presentation of the petition, he pawned with one Esther Bernstein, otherwise than in the ordinary

way of his trade, two Simplex manual bath-heaters which he had obtained on credit from A. N. Thomson & Co. Ltd., and had not paid for; and (*e*) under sec. 214 (1), that between 14th April 1934 and 19th February 1935, at Sydney, he, being a bankrupt, contributed to his bankruptcy by gambling.

At the hearing before Judge *Lukin* on 25th May 1936, the bankrupt pleaded guilty to the charge laid under sec. 210 (3) (*c*) and was sentenced to three months' imprisonment with hard labour, with the recommendation that the sentence be served on a prison farm. His Honour gave leave for the charge laid under sec. 210 (3) (*b*) to be withdrawn. In respect of the other three charges, the order as drawn up provided: "And it is hereby ordered and directed that the said Everard Henry House the bankrupt be prosecuted before a court of competent jurisdiction," although, in the course of his judgment, his Honour had said in respect of those other charges that "the Crown can make up their minds whether they will proceed or not."

The bankrupt applied to the High Court for special leave to appeal against the sentence imposed. In an affidavit the bankrupt stated that since the sequestration of his estate he had not acquired or become possessed of any real or personal property whatsoever, and was unable to furnish any security for costs if such was required under the rules. He further stated that he had never been bankrupt or insolvent before or assigned his estate or compounded with his creditors; that at the time of the commission by him of the acts constituting the offence to which he pleaded guilty he was completely unaware that such acts constituted an offence; and that he did not at that or any other time have any intention whatever of deceiving or defrauding his creditors.

The application was treated, without objection, as an appeal.

Further material facts appear in the judgments hereunder.

A. R. Taylor, for the appellant. This court has jurisdiction, under sec. 73 of the Constitution, and also under sec. 26 (2) of the *Bankruptcy Act* 1924-1933, to hear and determine this matter. In the circumstances the sentence is too severe. When he came to pass sentence the mind of the judge may have been prejudiced against the appellant by the contents of reports by the official

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receiver which were made to him from time to time. Sec. 210 (3) (*c*) of the *Bankruptcy Act* is directed against a person who has sacrificed his assets. It should not be assumed that the acts of the appellant were accompanied by a dishonest intention. It was the duty of the judge to consider facts relative to the determination of what punishment, if any, should be imposed upon the appellant. A bankrupt charged under sec. 210 should be given an opportunity of testing the evidence tendered against him. If there is some real conflict as to what the facts are then they should be determined in a proper judicial manner. His Honour's mind was, undoubtedly, influenced by the fact that other charges were pending against the appellant (*R.* v. *Bell* (1); *R.* v. *Griffiths* (2); *Halsbury's Laws of England*, 2nd ed., vol. 9, p. 258). This is sufficient to vitiate the sentence. There was no suggestion that the appellant had improperly applied the moneys obtained by him; or that he had applied the moneys in any way other than in the ordinary course of his business. The facts do not suggest any degree of criminality in the appellant; at the most they indicate that he was making a distracted attempt to ensure a continuance of his business. He did not misappropriate the moneys. His offence was merely a technical breach. It was not the serious offence aimed at by sec. 210. At the time the offence was committed the appellant was not aware that a petition in bankruptcy would be presented against him within six months. The goods were not pawned surreptitiously, but, on the contrary, quite openly, and a full disclosure thereof was made by the appellant in his statement of affairs. Under sec. 20 of the *Crimes Act* 1914 the sentence may be suspended and the appellant admitted to a bond conditioned upon good behaviour on his part.

O'Sullivan, for the respondent. The respondent did not formally put any facts before the court because the appellant intimated that he intended to plead guilty to this charge. Various official reports in which the facts were sufficiently set forth were already before the court. It is not disputed that up to the time of the commission of this offence the appellant was a man of good character. It

(1) (1921) 16 Cr. App. R. 56.

(2) (1932) 23 Cr. App. R. 153.

would appear that the sale of the bath-heaters to the appellant was forced upon him by the salesman for credit. The proceeds were used by the appellant for the purposes of trade and living expenses.

Cur. adv. vult.

Aug. 17.

The following written judgments were delivered :—

STARKE J. The appellant was charged under sec. 210 (3) (*c*) of the *Bankruptcy Act* 1924-1933 that he, being a person against whom a sequestration order was made, did within six months before the presentation of the petition on which the sequestration order was made, pawn, otherwise than in the ordinary way of his trade, property, namely two bath-heaters, which he obtained on credit from A. N. Thomson & Co. Ltd., and had not paid for. He was tried summarily, pursuant to sec. 217 of the Act. He pleaded guilty to the charge. It appeared that the petition for sequestration had been presented on 11th January 1935, that the sequestration order was made on 19th February 1935, that the bath-heaters had been obtained by the appellant on credit from A. N. Thomson & Co. Ltd., and were pawned within a few days of their delivery to him, but were never paid for by him. Judge *Lukin* sentenced him to imprisonment for three months, with hard labour, and recommended that such sentence be served on a prison farm. A motion for special leave to appeal against that sentence was made to this court, but it was treated without objection as an appeal.

There is no doubt, I think, that an appeal lies as of right against the sentence (See Constitution, sec. 73 ; *Bankruptcy Act* 1924-1933, sec. 26 (2)). But the sentence imposed upon an accused person for an offence is a matter peculiarly within the province of the judge who hears the charge : he has a discretion to exercise which is very wide, but it must be exercised judicially, according to rules of reason and justice, and not arbitrarily or capriciously or according to private opinion. In the present case, the appellant was guilty of a dishonest act, and I am quite unable to discover any reason whatever for interfering with the discretion exercised by the learned judge.

The appeal should be dismissed.

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DIXON, EVATT AND MCTIERNAN JJ. The appellant is a bankrupt whose estate was sequestrated on 19th February 1935. Twelve months later the Court of Bankruptcy ordered him to make an application for his discharge. When the application came on to be heard, the court, acting under sec. 217 of the *Bankruptcy Act* 1924-1933, proceeded to charge him with offences against the Act. In the result he was dealt with summarily upon a charge which he admitted and committed for trial upon charges which he denied. The offence admitted was that within six months before the presentation of the petition in bankruptcy he pawned, otherwise than in the ordinary way of his trade, property which he obtained on credit and for which he had not paid. His Honour Judge *Lukin* thereupon sentenced him to three months' imprisonment. From that sentence he now appeals to this court. The grounds of his appeal are that the sentence is excessive and was fixed without taking account of material considerations.

The first question is whether the appeal lies as of right. In our opinion it does. Sec. 73 of the Constitution gives jurisdiction to hear and determine appeals from judgments, decrees, orders, or sentences, of a Federal court. Parliament has made no exceptions in the case of the Federal Court of Bankruptcy. On the contrary, by sec. 26 (2) of the *Bankruptcy Act* 1924-1933, it has enacted that, except where otherwise provided, an order of the court in a bankruptcy matter shall be subject to appeal to the High Court. In the earlier *Bankruptcy Rules* an attempt to impose some restrictions upon the right of appeal was made, but no such attempt appears in the present rules (Statutory Rules 1934, No. 77). Accordingly the appeal lies. No security is required (See sec. 35 of the *High Court Procedure Act* 1903-1933). The appeal is a full one on law and fact (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1); *R.* v. *Hush*; *Ex parte Devanny* (2)). But the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing

(1) (1931) 46 C.L.R. 73, at p. 107.

(2) (1932) 48 C.L.R. 487, at p. 506.

the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred. Unlike courts of criminal appeal, this court has not been given a special or particular power to review sentences imposed upon convicted persons. Its authority to do so belongs to it only in virtue of its general appellate power. But even with respect to the particular jurisdiction conferred on courts of criminal appeal, limitations upon the manner in which it will be exercised have been formulated. Lord *Alverstone* L.C.J. said that it must appear that the judge imposing the sentence had proceeded upon wrong principles or given undue weight to some of the facts (*R.* v. *Sidlow* (1)). Lord *Reading* L.C.J. said the court will not interfere because its members would have given a less sentence, but only if the sentence appealed from is manifestly wrong (*R.* v. *Wolff* (2)). Lord *Hewart* L.C.J. has said that the court only interferes on matters of principle and on the ground of substantial miscarriage of justice (*R.* v. *Dunbar* (3)). See, further, *Skinner* v. *The King* (4) and *Whittaker* v. *The King* (5).

In the present case we think we are unable to interfere with the sentence imposed by his Honour Judge *Lukin* if we apply the principles we have stated.

(1) (1908) 1 Cr. App. R. 28, at p. 29.
(2) (1914) 10 Cr. App. R. 107.
(3) (1928) 21 Cr. App. R. 19, at p. 20.
(4) (1913) 16 C.L.R. 336, at p. 340, per *Barton* J., and at p. 342, per *Isaacs* J.
(5) (1928) 41 C.L.R., 230 at pp. 244-250.

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Dixon J. Evatt J. McTiernan J.

The appellant, the bankrupt, pleaded guilty to an offence under sec. 210 (3) (*c*), which provides that any person against whom a sequestration order is made, who after or within six months before the presentation of the petition on which the order is made has pawned, pledged or disposed of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, shall be guilty of an offence for which the maximum penalty shall be one year's imprisonment. If an offence is dealt with summarily, as this was, not more than six months' imprisonment can be imposed.

The materials from which the facts of the case can be gathered are the bankrupt's statement of affairs, the report of the official receiver, and the depositions of the bankrupt on his public examination. From these it appears that he acted as a builders' hardware agent. His wife conducted a business of her own and thus relieved him of some of the burden of maintaining the home in which they and their one child, a boy of seventeen, resided. For some time he did not pursue any settled occupation. No doubt he had been affected by the condition of the building trade. But, about ten months before the commencement of his bankruptcy, he made an arrangement with a manufacturing company to sell its goods at a commission of ten per cent with an allowance for expenses of £1 a week. He was at liberty to sell or deal in merchandise produced by other concerns and for some time he carried on some kind of a builders' hardware agency from his home. For the most part he did not buy goods except to fulfil orders or prospective orders. He carried no regular stock. The bankrupt estimated that the proceeds of his sales during the ten months amounted to about £900. Of the goods he bought to make the sales he failed to pay for about £290 to £300 worth. He also borrowed about £165 which he did not repay. He said that to attend race meetings and to bet had always been his practice and that a great part of the deficiency was to be attributed to wagering. On 25th June 1934 he obtained from the petitioning creditors three articles for which he received orders. They were two hot water systems and a hot water unit. The total net price was about £31. He was paid by his customers but he did not pay the petitioning creditors, who supplied them.

On 18th July 1934 his second transaction with the petitioning creditors took place. He says that when he was at their establishment he was shown some bath-heaters which were said to be new on the market and, although he did not want them, he was induced to give an order for six. The total net price of the bath-heaters also was a little over £31. They were delivered at his house within a week and on 24th, 25th and 26th July he proceeded to pawn them. He took them two at a time in his car to a pawnbroker with whom he had had dealings. He obtained about £34 upon the six bath-heaters. He did not pay the petitioning creditors for them. How he applied the money did not definitely appear. When the bankrupt was asked whether he lost it at the races or used it to pay other debts, he answered that he could not exactly tell. He has been sentenced upon a charge laid with respect to the two bath-heaters pawned on 25th July 1934. The date is just six days within the period of six months preceding his bankruptcy, which the section provides as a limitation to the offence. It is certain, however, that he was then impecunious and must have known that his capacity to pay for the heaters in the future depended on his success in betting and in selling other goods he might obtain on credit. He is forty-five years of age and nothing is said against his previous character. All the considerations which these facts disclose in favour of the bankrupt and against sending him to gaol were urged upon the Bankruptcy Court. The learned judge of that court said that he must sentence him to imprisonment on the charge in question and the Crown could decide whether on the others it would proceed.

In the circumstances we have stated we do not think that we can say that the sentence, although severe, was unreasonable or clearly unjust, and there is no other ground for saying that it arose from error of fact or of law, or failure to take into account any material consideration, or from giving undue weight to any circumstance or matter. But the order as drawn up does not give express effect to his Honour's statement that the Crown should decide as to further proceedings. It contains an unqualified direction that the bankrupt should be prosecuted on indictment on charges under secs. 210 (1) (*g*), 210 (2) (*d*) and 214 (1). The alleged offence under sec. 214 (1) cannot be regarded as unconnected with that for which

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he has been sentenced. It would be harsh, we think, to punish him for contributing to his bankruptcy by gambling without taking fully into consideration the fact that he has received a sentence of some severity for a transaction forming a very substantial step in the alleged causation.

It does not appear whether the Court of Bankruptcy has committed the bankrupt for trial or whether the order for prosecution is intended to have effect under sec. 214 (2) only. But in view of sec. 222 and to make it clear that it is for the Crown law officers to consider whether it is necessary to proceed further against the bankrupt, we think the order should be varied by inserting the words "unless the Attorney-General thinks fit to proceed no further" after the words "and it is hereby ordered and directed that" and before the words "the said Everard Henry House the bankrupt be prosecuted."

In our opinion the appeal should be dismissed.

Order of Court of Bankruptcy varied by inserting the words "unless the Attorney-General thinks fit to proceed no further" after the words "and it is hereby ordered and directed that" and before the words "the said Everard Henry House the bankrupt be prosecuted." Otherwise appeal dismissed.

Solicitors for the appellant, *Manning, Riddle & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.