[HIGH COURT OF AUSTRALIA.]

CAIN . . . . . APPELLANT;
BANKRUPT,

AND

WHYTE . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

H. C. OF A. 1933.

MELBOURNE, *March* 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Financial emergency legislation—Petitioner recovering judgment against debtor—Payment of judgment debt deferred under financial emergency legislation—Presentation of bankruptcy petition—Debt payable at "some certain future time"—"Other sufficient cause"—Bankruptcy Act 1924-1932 (*No.* 37 *of* 1924—*No.* 31 *of* 1932), *secs.* 55 (1) (*b*), 56 (2), (3)—*Financial Emergency Relief Extension Act* 1932 (*Q.*), *sec.* 24*.

On 7th January 1933 the respondent, who was a creditor of the appellant, filed a petition in bankruptcy against the appellant, alleging as the act of bankruptcy the appellant's failure to execute a deed of assignment of her property under Part XI. of the *Bankruptcy Act* pursuant to a resolution of a meeting of the appellant's creditors. On 18th January 1933 the respondent obtained leave from the Supreme Court of Queensland to enter final judgment against the appellant for the whole of the respondent's debt. On the same

* The *Financial Emergency Relief Extension Act of* 1932 (Q.) provided:—"16. (*a*) Sub-sections two and three of section one of the Principal Act are repealed, and the following new sub-sections are inserted in lieu thereof, namely:—'(2.) This Act shall be deemed to have come into force on the first day of August, one thousand nine hundred and thirty-one, and shall continue in force until the thirty-first day of December, one thousand nine hundred and thirty-three: Provided that the Governor in Council may from time to time, if in his discretion he thinks fit, by Order in Council published in the *Gazette* extend the provisions of this Act for such time as shall be expressed in any such Order in Council. (3) On the thirty-first day of December, one thousand nine hundred and thirty-three, or such date subsequent thereto as may be fixed from time to time by the Governor in Council under the previous sub-section as the date of the ceasing of the operation of this Act, this Act shall be deemed to have been repealed.' . . . 23. The following

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day the Supreme Court, pursuant to sec. 24 of the *Financial Emergency Relief Extension Act of* 1932 (Q.), deferred the payment of the whole of such judgment debt until 31st December 1933. The bankruptcy petition was heard on 13th February 1933, when *Henchman* J. held that the fact of the making of the order by the Supreme Court deferring payment of the judgment debt did not constitute "other sufficient cause" within the meaning of sec. 56 (3) (*b*) of the *Bankruptcy Act* to prevent the making of the sequestration order sought. On appeal to the High Court,

Held, that the decision was right and that the appeal should be dismissed.

Decision of *Henchman* J. affirmed.

APPEAL from the Court of Bankruptcy (District of Southern Queensland).

This was an appeal from a decision of *Henchman* J. sitting as a Judge in Bankruptcy for the District of Southern Queensland. The facts are fully stated in the judgment of his Honor, which was as follows :—

The facts of this case as admitted or proved before me may be summarized as follows :—For some years past the debtor, Mrs. Cain, who is admittedly domiciled in Queensland, has conducted an hotel business as a licensee of Lennon's Hotel. Prior to February 1929, she was indebted to the petitioner in respect of the principal sum of £7,000 secured by promissory notes made payable to the petitioner. These notes were given at various dates, each being payable on demand with interest at an agreed rate. Although demand was duly made for payment, none of the notes have been met in whole or in part. At all material times, including the date of the act of bankruptcy relied on (that is to say, 29th December 1932), and the date originally fixed for the hearing of this petition,

new section is inserted after section thirteen of the Principal Act, as follows :—'[13A.] Notwithstanding anything in this Act to the contrary contained, a mortgagor who has, prior to the passing of *The Financial Emergency Relief Extension Act of* 1932, applied to the Court under the provisions of this Act for an order of relief by the Court, shall not be debarred from making a further application for relief under the Principal Act as amended by *The Financial Emergency Relief Extension Act of* 1932' and any such mortgagor shall be competent to apply to the Court for a further order of relief which the Court may in its discretion think fit to grant: Provided that nothing in this section shall prejudice or affect the powers and absolute discretion of the Court in granting or refusing any application for relief under this Act.' 24. A new section 13B is inserted after section 13A, previously inserted as follows :—'[13B.] (1.) Where the Supreme Court or any other Court has made an order for the payment by any person to any other person of a sum of money, and such Court is satisfied that immediate

and up to the present moment, this principal sum of £7,000, together with interest amounting to £980, has remained still wholly due and unpaid. On 5th December last, the petitioner commenced, by specially indorsed writ, an action in the Supreme Court of Queensland, to recover, *inter alia*, this debt. On 8th December 1932, certain informal meetings of Mrs. Cain's creditors were held, at which she was present or represented. In the same month she was requested to call, and did call, a meeting of her creditors for the purpose of passing a resolution for a deed of assignment under Part XI. of the *Bankruptcy Act*. This meeting met at the hotel on 29th December, and duly resolved as follows: "That the debtor execute a deed of assignment under Part XI. of the *Bankruptcy Act* 1924-1932 to Rex Don Kennedy, and that Rex Don Kennedy be appointed trustee under such deed." Mrs. Cain admittedly failed within seven days thereafter to execute such a deed of assignment, as it was her duty to do under sec. 162, sub-sec. 5, of the Act. On 7th January 1933 this petition was filed, alleging as the necessary act of bankruptcy, Mrs. Cain's failure to execute such a deed. The petition is supported by three other creditors whose debts total about £2,620, all owing for two years or upwards. It is opposed by seven creditors whose debts total about £3,655. No evidence has been put before me as to the total amount of the liabilities of the debtor; so I am unable to say what proportion of her total creditors are represented on one side or the other. On 16th January, the debtor duly gave notice of opposition to the petition on a number of grounds, which I need not repeat. Meantime, a final judgment summons had been taken out by the petitioner in the action begun by her in the Supreme Court; and on 18th January that Court gave leave to

payment of the whole or part of the money would inflict great hardship on the person ordered to pay the money by reason of the operation of this Act upon his property or investments or upon the realization thereof, or by reason of any other cause which such Court in the circumstances of the case deems sufficient, such Court may, at the time of the entry of judgment or subsequently thereto, upon the application of the person ordered to pay the money, in its discretion, if in all the circumstances it thinks it desirable so to do, order that the payment of the whole or part of the sum of money in question shall be deferred until such time and upon such conditions as such Court thinks fit. A default judgment shall be deemed to be an order of the Court. (2.) An order may be made under this section in respect of orders for the payment of money made by any Court before the commencement of *The Financial Emergency Relief Extension Act of* 1932 as well as in respect of orders made after the commencement of such Act.'"

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the petitioner to enter final judgment against the debtor for the debt now in question—that is to say, £7,980. On the same day, and immediately thereafter, as counsel before me agree, that Court, pursuant to sec. 24 of the *Financial Emergency Relief Extension Act of* 1932, deferred the payment of the whole of such judgment debt until 31st December 1933. On the same day, the senior Puisne Judge, who had constituted that Court, sitting in Bankruptcy, adjourned the hearing of this petition until 6th February instant, since which date it has been before me, and from time to time adjourned until to-day.

Such being the facts, Mr. *Graham* for the petitioner urges that, under sec. 56 of the Act, he has proved the debt of the petitioning creditor, the service of the petition and the act of bankruptcy, and that this Court should be satisfied with such proof and should make a sequestration order pursuant to the petition.

Mr. *Philp* for the debtor has, however, raised a number of contentions with which it is necessary to deal. I need make no further reference to certain objections which he took to the form of the petition himself, with which I dealt the other day. A full note of such objections and of my ruling thereon, will be found in my notebook. I pass at once to the other objections raised by Mr. *Philp*. The first of these is that the Court should not make an order on this petition because, as Mr. *Philp* puts it, the petitioner was privy to the act of bankruptcy which she now alleges. He explains that by this he means that the petitioner made herself privy to the refusal of Mrs. Cain to execute the deed of assignment within seven days, because at the meeting at which the resolution calling upon her to execute such deed was passed, she did not vote in favour of calling upon Mrs. Cain to execute such deed. The facts are apparently that Mrs. Whyte, the petitioner, was present at that meeting by a representative, who did not present a proxy on her behalf and took no part in the proceedings. I am quite unable to understand how the fact that Mrs. Whyte's representative took that position can in any way tend to prove that Mrs. Whyte was privy to Mrs. Cain's subsequent action in refusing to execute a deed within seven days. There is no evidence apart from what I have mentioned, to show

that the petitioner in any way was privy to Mrs. Cain's decision not to obey the behest of her creditors.

A more substantial ground is the second one taken by Mr. *Philp*. He says, in effect, that at the hearing it is the duty of the Court to require proof of the debt of the petitioning creditor—that is to say, that it still subsists at the time of hearing. He argues that, in this case, no proper debt has been proved, in that by the order of the Supreme Court of 18th January, payment of the judgment for £7,980 obtained by the petitioner has been stayed, and that that stay makes the debt fall without sec. 55 (1) (*b*) of the Act, makes it cease to be a liquidated sum payable either immediately or at some certain future time. The argument, as it was put before me, is that, although in fact the Supreme Court had deferred payment of the debt until a definite date (31st December next), the *Financial Emergency Relief Extension Act* contains a provision (sec. 16) enabling the Governor in Council to extend the time of operation of that Act, and the Governor in Council might act on that power, and if he did, the debtor might apply for, and might succeed in obtaining from the Supreme Court, a further deferment of the payment of the debt, and that therefore, although now presently payable at a certain future time (31st December next) the debt really should be considered as payable only at some uncertain future time. I feel myself quite unable to appreciate anything more than the subtlety of that argument. So far as I can see, all I have got to look at is what is the present position of the debt. Is it a debt at this moment payable at a certain future time ? I feel that I must hold, on the evidence, that it is. It was payable on demand. By virtue of the order of the Supreme Court, it is now not payable before 31st December next, or probably 1st January 1934. But it is now payable on that date. The 1st January 1934 appears to me to be a certain future time within the meaning of sec. 55 (1) (*b*). I feel further, that it is not within my competence to consider the possible course of future legislation. It is not for me to speculate as to whether the Governor in Council will think fit to extend the operations of this Act, it is not for me to contemplate whether, if he did so, this debtor would apply for a further extension of time, or if she applied for it, would be likely to get it. All those things

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are quite beyond the purview of this Court at the present moment. Mr. *Philp* then put it this way. He says the debt must be the same debt at the date of the presentation of the petition, and at the date of the hearing. He argues that the debt is now a different debt because the new incident of non-liability to payment before 31st December next, has been added to it by force of the State law. He calls in aid the decision *In re King and Beesley*; *Ex parte King and Beesley* (1), in which case the reporter pointed out that the petition itself alleged that execution on the judgment had not been stayed. He urges that the grant of a sequestration order at the present moment on the original debt, would be in effect to hold that the debt is still presently payable, notwithstanding that no legal proceedings (apart from proceedings in Bankruptcy), may now be taken in Queensland to recover it. He submits that, in the events that have happened, by taking judgment in the Supreme Court action, the petitioner has brought about a state of facts which prevents this Court from finding as a fact that a good petitioning creditor's debt still exists. All this argument depends upon the suggestion, so far as I can see, that the debt now proved to be due is a different debt from the debt which has been proved to have existed at the date of the filing of this petition. It is difficult to deal with such an argument except to say that, as far as one can see, the debt is not a different debt. To my mind, the amount of £7,980 which was due at the moment the petition was filed in respect of five dishonoured promissory notes and interest thereon, is the same debt as is now due for the same reason from the debtor to Mrs. Whyte. The mere fact that superior authority, the State law, has deferred payment of it so that, instead of being payable on demand it is now payable only on the last day of December next, and cannot be recovered by execution before then, does not make it, in any respect, for the purposes of this *Bankruptcy Act*, a different debt from the debt which it has always been. I do not know that I can answer that contention in any other way than I am suggesting. To my mind it is the same debt, although the State law has intervened to prevent its being presently payable. In this connection, Mr. *Philp* refers me to sec. 52 (*j*), referring to bankruptcy notices. I think,

(1) (1895) 1 Q.B. 189.

however, that sec. 52 (*j*) offers no assistance in the construction of sec. 55 (1) (*b*), or of sec. 56. I come, then, to the conclusion that, in spite of all that has been very ably said on behalf of the debtor, it is my duty to find, and I do find, that the debt of the petitioning creditor has been duly proved, the service of the petition has been duly proved, the act of bankruptcy alleged has been duly proved.

But for what I am about to say, I should normally proceed to make a sequestration order in view of these findings. Mr. *Philp*, however, argues that the Court has a discretion even though the proofs that I have alluded to have been made. He suggests that in the present case "other sufficient cause" exists, within the meaning of sec. 56 (3) (*b*), which throws upon me an obligation to dismiss, or gives me a discretion to dismiss, the petition. I agree that the sections do leave a certain amount of discretion in the Bankruptcy Judge (see secs. 54, 56 (2) and 56 (3)), and I do not agree with the argument put forward by Mr. *Graham* that the words "other sufficient cause" should be limited to the one case where the Court is satisfied that the petition is put forward solely for some collateral illegitimate end, and not for the purpose of securing the equal distribution of the available assets amongst the creditors. To my mind, the High Court of Australia did not intend to put a limit on the meaning of the words "other sufficient cause" in *Dowling* v. *Colonial Mutual Life Assurance Society* (1), and I do not propose to be the first to say that such wide words as "other sufficient cause" are necessarily limited to meaning a cause in the nature of fraud or abuse of the provisions of the bankruptcy law. I can well conceive that "other sufficient cause" might arise in connection with any particular case. To my mind, it is the duty of the Bankruptcy Judge to examine in each case, if the question is raised, whether there is other sufficient cause than the fact that the debtor is able to pay his debts in full, for refusing to make an order.

I rule then that I am fully entitled to examine the contention put forward by Mr. *Philp* on behalf of the debtor that there is, in the present case, other sufficient cause sufficient to justify the dismissal of this petition. I approach that question with the full appreciation

(1) (1915) 20 C.L.R. 509.

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that, prima facie, on proof of the matters mentioned in sec. 56 (2), the Court will proceed to make an order for sequestration, and that it is for the debtor to show some cause overriding the interest of the public in the stopping of unremunerative trading, and the rights of individual creditors who are unable to get their debts paid to them as they become due. Something has to be put before the Court to outweigh those considerations before it can be said that sufficient cause is shown against the making of a sequestration order. In the present case I do not think that any such cause has been shown. I do not think that the making of an order is in any sense contrary to the spirit of the Commonwealth and State legislation passed to meet the existing financial stringency. I agree that I am bound to consider the present financial stringency. I hold that I am entitled to consider the preamble of the *Financial Emergency Act of* 1931, reciting the Premiers' Plan, and the legislation of the State in conformity therewith. I am entitled, I hold, to take into consideration the fact that the Queensland Court has granted for a year, extension of payment of the debt.

With regard to the question of taking into consideration the allegation that bankruptcy would be ruinous to the creditors—I am not too sure that I am entitled to take that into consideration. The allegation was made in the notice of opposition, and has been replied to by the putting in of affidavits by a number of those creditors that they desire sequestration. I am doubtful whether I really am entitled to look at them. But if I am, I do not consider that the allegation that the creditors will be ruined by a sequestration is established. I do not think, however, that the mere existence of the present stringency, the fact that Mrs. Cain has conducted a large business, the fact that a number of her employees may be thrown out of employment, or the fact that the property will realize, or may realize, if sold now by the trustee, less than it would have realized a year or two ago, or it may perhaps realize in the near future, that any of these things are enough to withhold me from making an order. It does not follow that the trustee is going to act imprudently. If there is a sequestration, it does not follow that he will destroy this old-established business. It does not follow

that he will dismiss the servants that are accustomed to running that business.

With regard to the allegation that it would be ruinous to Mrs. Cain herself to make a sequestration against her, all I can say is that the object of the *Bankruptcy Act* is to strip a bankrupt of his property and divide it amongst the creditors.

For these reasons, and on the findings already set out, I make a sequestration order and appoint the Public Curator of Queensland, an Official Receiver of this Court, to be Official Receiver in the Estate.

From that decision the debtor now appealed to the High Court.

Wilbur Ham K.C. (with him *Tait*), for the appellant. In the circumstances of this case the Judge in Bankruptcy should have made no order and the petition should have been dismissed. Having regard to the fact that the petitioning creditor's debt was stayed in pursuance of a scheme for the relief of debtors, the Judge in Bankruptcy should not have made the sequestration order, the effect of which is to stultify the order of the Supreme Court deferring payment of the debt (which order is admitted by the respondent to have been correctly made under sec. 24 of the *Financial Emergency Relief Extension Act* of 1932). Under Part IV. of that Act there is no merger of a simple contract debt in a judgment for the purposes of the *Bankruptcy Act* (*In re King and Beesley* (1)). The *Bankruptcy Act* did not require any amendment after the *Financial Emergency Relief Acts* were passed by the various States, because the Bankruptcy Court had the widest powers to stay proceedings. The judgment creditor having been prevented from enforcing his judgment by reason of the order of the Supreme Court deferring payment, cannot enforce payment by resorting to the provisions of the *Bankruptcy Act*. Since the Emergency legislation was passed, where it has been proved that it was unjust and improper to strip the debtor of his property, the bankruptcy proceedings should have been stayed. To permit the sequestration order to stand in this case would make the whole of the Emergency legislation of the States futile. The flaw in the judgment appealed from is the failure to recognize this change of view and the appellant has shown sufficient cause why the

(1) (1895) 1 Q.B. 189.

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sequestration order should not have been made against her. The bankruptcy proceedings should be either dismissed or stayed. It is in the interests of the general community that the assets should not be thrown on the market. The financial emergency legislation was passed at the invitation and with the sanction of the Commonwealth Parliament. The policy of the *Financial Emergency Acts* is to prevent creditors stripping their debtors and preventing them from carrying on their business. The onus is on the creditor to show why the order deferring payment of the debt should be stultified.

A. D. Graham, for the respondent, was not called upon.

RICH J. I am content to agree with the judgment of the learned primary Judge and think that the appeal should be dismissed.

STARKE, DIXON, EVATT AND MCTIERNAN JJ. agreed.

Appeal dismissed with costs.

Solicitors for the appellant, *Hobbs, Caine & McDonald.*
Solicitors for the respondent, *McGregor, McGregor, Given & Capner.*

H. D. W.