24/73

SUPREME COURT OF VICTORIA — FULL COURT

ROWE v HUGHES

Winneke CJ, Gillard and Nelson JJ

23, 31 August 1973 — [1974] VicRp 7; [1974] VR 60

MOTOR TRAFFIC – DRINK/DRIVING – LEARNER DRIVER DRIVING MOTOR VEHICLE – DRIVER'S FATHER SEATED IN PASSENGER'S SEAT – FATHER BREATH TESTED WITH READING OF .210BAC – FATHER CHARGED WITH DRIVING A MOTOR CAR WHILST BAC MORE THAN .05% – FOUND GUILTY OF OFFENCE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS23, 81A(1).

HELD: Order nisi absolute. Conviction and orders set aside. Information dismissed.
1. The words "in such case the licensed driver shall be deemed to be driving a motor car" where they appear in s23 do not mean that for the purposes of the *Motor Car Act* ('Act'), apart from Pt III thereof, the licensed driver is to be deemed to be driving the motor car, and consequently, do not mean that in cases to which they apply, the licensed driver is a person who drives a motor car for the purposes of s81A.
***R v Adams* [1935] HCA 62; (1935) 53 CLR 563; [1935] ALR 421; 8 ABC 97, applied;**
***Lucas v Ross* [1925] VicLawRp 21; [1925] VLR 184; 31 ALR 85; 46 ALT 156, overruled;**
***Bretag v Ames* (1935) 37 WALR 84, not followed.**

2. Accordingly, the stipendiary magistrate was in error in holding that the defendant in this case was deemed to be driving the motor car for the purposes of s81A of the Act, and as this was the sole ground upon which he convicted the defendant, the order nisi was made absolute, with costs to be taxed within the statutory limit, the order convicting the defendant quashed, and in lieu thereof an order made that the information be dismissed.

NELSON J: (delivered the judgment of the Court (Winneke CJ, Gillard and Nelson JJ): This is the return of an order nisi to review the decision of a Magistrates' Court at Ballarat on 4 May 1972. The defendant, Kenneth Stewart Hughes, was convicted on an information which alleged that on 28 March 1972, he did drive a motor car whilst the percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood was more than .05 per cent contrary to s81A(1) of the *Motor Car Act* 1958. The stipendiary magistrate who constituted the Court fined the defendant $40 and made an order cancelling his licence under the *Motor Car Act* to drive a motor car and disqualifying him from obtaining such a licence for a period of 12 months except on the order of a stipendiary magistrate sitting alone.

At the hearing evidence was given that on 28 March 1972, a car with "L" plates fitted was driven in Doveton Street, South Ballarat, by the defendant's son who was aged 17 and who was not the holder of a licence to drive a motor car under the *Motor Car Act*. The defendant was sitting in the car beside his son and both he and his son stated that the defendant was teaching the son to drive. The defendant held a current driver's licence. A breathalyser test was given to the defendant and the percentage of alcohol indicated to be present in his blood by the breathalyser was .210 per cent.

As well as the charge against the defendant of a breach of s81A(1) of the *Motor Car Act*, the son had been charged with driving a motor car whilst he was not the holder of a licence to drive such car, and the defendant had been charged with aiding and abetting the commission of such offence.

The stipendiary magistrate stated that he was satisfied that the son was *bona fide* learning to drive a motor car, and dismissed the information against the son and the information against the defendant for aiding and abetting. He ruled that under s23 of the *Motor Car Act* the defendant was deemed to be driving the motor car for the purposes of an offence under s81A of the Act, and therefore convicted the defendant on the charge laid under that section. It was not contended for the informant that the conviction could be upheld on any ground unless the stipendiary magistrate

was correct in this ruling. The order nisi to review came before me on 22 May 1973, and as the argument on the matter involved a challenge to the correctness of a decision given in this Court by Weigall AJ in 1925, I referred the matter to the Full Court for hearing and determination at the request of the informant.

Section 81A(1) provides:

> "Any person who drives a motor car while the percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood is more than .05 per cent shall be guilty of an offence and shall be liable in the case of a first offence to a fine of not more than $100 or in the case of a second or any subsequent offence to a fine of not more than $200 or to imprisonment for a term of not more than one month."

The section is contained in Pt VI of the *Motor Car Act* which is headed "General and Supplementary" and in Division 2 of that Part which is headed "Offences and Legal Proceedings". The contention of the informant is that the expression "Any person who drives a motor car" in s81A includes a person who under s23 of the Act is deemed to be driving a motor car in the circumstances to which that section relates. Although the informant does not seek to draw such a conclusion from the words of s81A itself and bases his argument on the meaning and effect to be attributed to s23, which could not in itself be described as a penal section, the question which is before the Court is essentially one of determining the scope of s81A which is clearly a penal section.

The principles which have been laid down for the interpretation of penal statutes are therefore, in our opinion, applicable to the question which the Court has to determine, and the Court must bear those principles in mind in its approach to that question.

Those principles require that a penal statute is to be construed strictly, in the sense that the Court must see that the thing charged as an offence is within the plain meaning of the words used, and falls within the spirit of the enactment: *Dyke v Elliott; The "Gauntlet"* LR 4 PC 184 at p191; 20 WR 497; 26 LT 45.

In *R v Adams* [1935] HCA 62; (1935) 53 CLR 563; [1935] ALR 421; 8 ABC 97, the High Court was dealing with a case in which, by virtue of a section in the *Bankruptcy Act* which provided that the execution of a deed of assignment under that Act by a debtor should be deemed for all purposes equivalent to a sequestration order against him, it was contended that a debtor who had executed such a deed was guilty of offences against sections which placed obligations upon "any bankrupt" or "any person against whom a sequestration order is made". The word "bankrupt" was defined in the Act to mean "any person in respect of whose estate a sequestration order has been made". The Court decided that the debtor was not within the ambit of the penal sections. In a joint judgment by Rich, Dixon, Evatt and McTiernan, JJ, their Honours said (53 CLR at pp567-8):

> "Thus liability to the penal sanctions imposed by the sections is expressly made to depend upon the status of bankruptcy. If another provision of the statute is to be interpreted as extending the operation of the sections to persons who do not possess that status, its intention to do so must be clearly expressed. 'The law of England does not allow of offences by construction, and no case shall be holden to be reached by penal laws, but such as are within both the spirit and the letter of such laws' (Blackstone's Commentaries, vol. 1, Hargrave's ed. p88, n. 37), a principle which remains part of the law (cf, per Brett J *Dickinson v Fletcher* (1873) LR 9 CP 1, at p7; 43 LJMC 25) notwithstanding the modification in the ancient strictness of its application which has occurred in the course of the modern search after the true nature of some actual legislative intention. No doubt, in determining whether an offence has been created or enlarged, the Court must be guided, as in other questions of interpretation, by the fair meaning of the language of the enactment, but when that language is capable of more than one meaning, or is vague or cloudy so that its denotation is uncertain and no sure conclusion can be reached by a consideration of the provisions and subject matter of the legislation, then it ought not to be construed as extending any penal category."

Their Honours went on to say that in the case before them this rule of construction was reinforced by the circumstance that the provision relied upon as extending the ambit of the offence occurred in the very statute which created the offence and placed an express limitation upon its ambit. It is in the light of these principles that we proceed to examine the contention of the informant in this case.

Section 81A imposes a duty upon "any person who drives a motor car". To adapt the words of their Honours in *R v Adams* [1935] HCA 62; (1935) 53 CLR 563, at pp567-8; [1935] ALR 421; 8 ABC 97, liability to the penal sanctions imposed by the section is expressly made to depend upon the act of driving. In its ordinary sense the word "driving" would appear to involve the actual physical control over the operation and movement of the motor car, and it was in that sense that Winneke CJ interpreted the word in s81A in *Caughey v Spacek* [1968] VicRp 78; [1968] VR 600. A similar meaning has been attributed to the word "driving" in other sections of the *Motor Car Act* and in other comparable legislation. (See *Wallace v Major* [1946] KB 473; [1946] 2 All ER 87, and *Doyle v Harvey* [1923] VicLawRp 39; [1923] VLR 271; 29 ALR 180; 44 ALT 179.)

It is not contended that the defendant in this case was in actual physical control of the motor car in this sense, but that by virtue of s23 he is deemed to be driving for the purposes of s81A. Section 23 is included in Pt III of the Act, which is headed "Licensing of Drivers". This Part provides for the licensing of persons to drive various types of motor vehicles. It provides for various types of licence and for their issue, suspension, or cancellation. Section 22C provides, *inter alia*, that subject to the Act any person who drives a motor car upon any highway unless he is the holder of a licence to drive a motor car shall be guilty of an offence against the Part. The Part creates a number of other offences, all of which are related to the licences for which it provides. The Part is clearly designed to ensure that every person driving a motor vehicle on a highway is appropriately licensed for that purpose and to make provision for other matters which are ancillary to the licensing scheme which it establishes. It concludes with a provision, s29, requiring any person driving a motor car upon any highway to produce his licence when requested so to do by any member of the police force, a provision which again is obviously ancillary to its main purpose. Section 23, however, deals with unlicensed persons who are learning to drive, and, so far as relevant, is in the following terms:

> "23(1) Nothing in this Part shall prevent—
> (a) an unlicensed person who is over the age of seventeen years and *bona fide* learning to drive a motor car...from driving such a motor car upon any highway if such unlicensed person has a licensed driver...sitting beside him; and in such case the licensed driver...shall be deemed to be driving the motor car."

Mr Graham for the informant contended that the effect of these concluding words was to require the licensed driver to be treated as driving the vehicle for all purposes of the *Motor Car Act*. He contended therefore that such licensed driver was a person driving a motor car for the purposes of s81A and that if the percentage of alcohol in his blood exceeded the permitted level, he was guilty of an offence under that section.

Mr Graham relied strongly upon the case of *Lucas v Ross* [1925] VicLawRp 21; [1925] VLR 184; 31 ALR 85; 46 ALT 156, and as his argument substantially repeated the reasons which were given by Weigall AJ, for his decision in that case we turn immediately to consider those reasons. The decision was given upon the provisions of the *Motor Car Act* 1915, which was a very much shorter and less complex Act than the present *Motor Car Act*. It was not divided into Parts.

Section 7 of the Act provided:

> "Nothing herein contained shall prevent an unlicensed person being a person *bona fide* learning to drive a motor car from driving a motor car upon any public highway provided that such unlicensed person has sitting beside him a licensed driver and in such case such licensed driver shall be deemed to be driving such motor car."

The only section of the Act which could be construed as preventing an unlicensed person from driving a motor car upon a public highway was the immediately preceding s6 which in subs(1) provided that no person should drive a motor car upon any public highway without being licensed for that purpose. Section 10 of the Act made it an offence for any person to drive a motor car on a public highway recklessly or negligently or at a speed or in a manner which was dangerous to the public. The defendant had been charged in a court of petty sessions with an offence against s10. The undisputed facts were that at the time of the alleged offence the car was being driven by a woman who was unlicensed, and that the defendant, a licensed driver, was seated beside her and was teaching her to drive. The police magistrate dismissed the case on the ground that s7 of the *Motor Car Act* must be read in conjunction with s6(1); that when so read its effect was limited

to protecting the person driving the car from a charge of driving without a licence provided he was *bona fide* learning to drive; and that it did not render the licensed driver liable for any accident which might occur through want of care on the part of the actual driver, nor to a charge arising out of negligent driving by such person.

The informant obtained an order nisi to review this decision, and the matter came before Weigall AJ. The solicitor for the defendant appeared, but stated that he did not oppose the order nisi being made absolute and addressed no argument to the court. His Honour took the view that s7 had the effect of casting upon the licensed driver sitting beside the pupil the responsibilities which the Act attached to the driver of the car. His reasons for judgment indicate that he rested this decision on two grounds; firstly, that the section was not limited in effect to protecting the pupil from the consequences of driving without a licence, because on such view the later words "and in such case such licensed driver shall be deemed to be driving such motor car" would be rendered unnecessary; and, secondly, that the Act cast a number of obligations and responsibilities upon a driver, that it would be unreasonable to suppose that those obligations were intended to be enforced against the pupil, who, *ex hypothesi*, was inexperienced in driving, that it was very necessary that there should be some person charged with the duties and obligations imposed on a driver, that the deeming provision was not in terms restricted to the purposes of s6 and s7, that there could not be supposed to be two persons driving, and that therefore for the purposes of the Act or, at any rate, for the purposes of s10, the licensed driver should be deemed to be driving.

The decision in *Lucas v Ross* has not escaped comment. In *Verheyen v Gerbecks* [1960] VicRp 13; [1960] VR 92, Smith J said at p93:

> "The interesting argument in this application has indicated that the decision in *Lucas v Ross* may, perhaps, be difficult to sustain, at least if it is sought to apply it to provisions introduced into the motor car legislation since 1925 and, indeed, even in relation to some of the provisions of the Act that were then in force."

In *Grant v Pavic* [1966] VicRp 27; [1966] VR 199, Winneke CJ, after saying that the decisions in *Lucas v Ross* and *Verheyen v Gerbecks* supported the view that some limitation must be placed upon the operation of the concluding words of s23 said at p201:

> "It is unnecessary for me in this case, as it was for Smith J, in *Verheyen v Gerbecks*, to enquire whether the decision of Weigall AJ, or some of the *dicta* expressed by him in *Lucas v Ross*, can be sustained."

In our opinion, the decision in *Lucas v Ross* was wrong and the case should be overruled. The introductory words to s7 of the 1915 Act, "Nothing herein contained shall prevent an unlicensed person" from driving a motor car, were a clear reference back to the provisions of s6 which alone purported to prohibit such an act. The words, "in such case such licensed driver shall be deemed to be driving such motor car", as Winneke CJ, said ([1966] VR at p201) of the corresponding words in s23 of the present Act, achieved the result that consistently with the policy disclosed by the relevant portions of the Act, every motor car would be, or be deemed to be, driven by a licensed driver. Without such words there was an incongruity in the Act. Section 6 prohibited any person from driving a motor car upon a public highway without being licensed for that purpose. The prohibition was not qualified by any words such as "Subject to the provisions of this Act." It was in terms quite absolute. It was immediately followed by s7 which in effect permitted an unlicensed learner to drive a motor car upon a public highway provided that he had a licensed driver sitting beside him.

To effect a reconciliation between those apparently conflicting provisions, the licensed driver was deemed to be driving the motor car. The unlicensed learner was in fact driving the car, as the section recognised. It was not intended by these words to create the anomalous position of there being two drivers in the ordinary sense of that term. But by deeming the licensed driver to be driving the car in these circumstances, the policy so plainly spelt out by s6 of requiring every car upon a public highway to be driven by a licensed driver was preserved. The preservation of this policy did not, however, require that for every purpose dealt with by the Act such licensed driver should be deemed to be driving the car. The purpose of the provision was fulfilled by applying it to the licensing requirement. The presence of the deeming provision was also in our opinion necessary, or at least desirable, to ensure that an unlicensed learner driver should not have a duty imposed upon him by s6(4), with which duty by definition it would be impossible for him to comply.

Subs(4) provided:

> "Any person driving a motor car as aforesaid shall on demand by any member of the police force produce his licence and if he fails so to do he shall be guilty of an offence against this Act unless he has a reasonable excuse and does within seven days produce his licence at some police station specified by the member of the police force demanding its production."

The fact that s7 provided that nothing in the Act contained should prevent an unlicensed learner, in the circumstances therein referred to, from driving a motor car on a highway did not in terms relieve him from the duty imposed upon every driver by s6(4). Nor did the exculpatory words in the sub-section, because they required that the driver should not only have reasonable excuse for not producing his licence on demand, but should produce it within seven days at a police station. The section may have been interpreted to imply that a learner driver did not fall within the terms of s6(4), but it was obviously desirable to remove any doubt upon the question.

The clear reference back in s7 to the terms of s6 and the provision that in cases to which s7 apply, the licensed driver should be deemed to be driving the car, would in our view indicate beyond doubt that s6(4) did not apply to the learner driver. It may also have been intended by such words, and indeed we think that it probably was so intended, to impose upon the licensed driver in such case the obligation of a driver under s6(4) to produce his licence on demand. Such a requirement would fit in with the licensing scheme which the sections provide. The concluding words in s7 could consequently be given a clear effect in the context of the subject matter with which both sections dealt and did not require to be applied to other sections of the Act in order to give them effect and to prevent them from becoming mere surplusage, despite the contention of Mr Graham to the contrary.

Nor do we think that the second basis upon which Weigall AJ relied in reaching his decision was sound. Mr Graham indeed expressly dissociated his argument from the view which was implicit in his Honour's reasoning that the effect of the deeming clause was to substitute the licensed driver for the pupil in the discharge of the many other duties imposed on a driver by the Act. We can see nothing unreasonable in providing that a learner driver should be guilty of an offence if he drove dangerously or under the influence of liquor or in breach of any other duty which the Act imposed upon a person driving. Mr Graham contended, however, that the effect of the deeming provision was to place these responsibilities upon the licensed driver as well as upon the pupil. Bearing in mind the principles we have already set out, which must be applied to the interpretation of a penal provision, and to which Weigall AJ made no reference, we do not consider that words which could be given an effective operation in regard to the licensing provisions of the Act without making a person subject to penal sanctions in other sections should have been so interpreted as to bring him within the operation of a penal provision which in its own terms would not apply to him, and which had no relation to the licensing provisions.

We were also referred by counsel to the Western Australian case of *Bretag v Ames* (1935) 37 WALR 84. In that case the Full Court consisting of Northmore CJ and Dwyer J, held that a proviso to s21 of the *Traffic Act* 1919-1930 (WA), which proviso was in substantially the same terms as s7 of the *Motor Car Act* 1915, was not limited in operation to the licensing provisions of s21, but that the words "in such case the licensed driver shall be deemed to be driving such motor vehicle" amounted to a substantive enactment that, for the purposes of the *Traffic Act*, a licensed driver sitting beside an unlicensed person and teaching him to drive a motor car should be deemed to be driving such motor car. The defendant in that case, who was a licensed driver sitting in a motor vehicle beside an unlicensed person learning to drive, had been charged with a breach of a traffic regulation, in that he being the driver of a motor car approaching an intersection failed to give way to a vehicle on his right.

Northmore CJ, with whom Dwyer J agreed, stated that if the proviso were treated as relating only to the specific provisions of the section, the words "and in such case the licensed driver shall be deemed to be driving such motor vehicle" would be mere surplusage and meaningless. As we have stated, we do not consider that those words in the case of s7 of the *Motor Car Act* 1915 were mere surplusage and without meaning. If, however, the statutory provisions in Western Australia and those in the *Motor Car Act* 1915 were indistinguishable, and *Bretag v Ames* (1935) 37 WALR 84, supports the decision in *Lucas v Ross* [1925] VicLawRp 21; [1925] VLR 184; 31 ALR 85; 46 ALT 156, then for the reasons we have given in dealing with the latter case, we regret that we

are unable to follow it. It is to be noted that *Bretag v Ames* was decided some months before the decision of the High Court in *R v Adams* [1935] HCA 62; (1935) 53 CLR 563; [1935] ALR 421; 8 ABC 97, to which we have already referred.

What we have said in regard to the proper interpretation of the 1915 Act substantially disposes of the contentions of the informant as to the interpretation of the Act in its present form.

In the present form of the Act, however, it is in our opinion demonstrated even more clearly that a person who under s23 is deemed to be driving a motor car is not thereby brought within the provisions of s81A. In the first place the division of the Act into separate Parts dealing with separate subject matters makes it more difficult to rely upon a section in one part to qualify or enlarge the meaning of a section in another part, than it would be to endeavour to use the same process of interpretation by reference to sections in an Act where no such division is made. Section 23 appears in Pt III of the Act which is headed "Licensing of Drivers" and which is solely concerned with provisions relative to that subject matter.

In *R v Adams* [1935] HCA 62; (1935) 53 CLR 563 at p568; [1935] ALR 421; 8 ABC 97, their Honours refer to the object of a Part of an Act, as stated in its heading, as a factor to be considered in determining whether a section contained in that Part affects the interpretation of a penal section in another Part. It would require an explicit reference or a very compelling inference before a single sentence at the end of a section in a Part of the Act relating to the licensing of drivers could be used for the purpose of extending the meaning of words in a penal section which has no connexion with the licensing of drivers and which is contained in another Part of the Act.

Secondly, the deeming clause still has a significant part to play in relation to the licensing scheme in Pt III and would not become mere surplusage if its operation were restricted to that Part. In one aspect of this relationship to which we have adverted in discussing the effect of the clause in the 1915 Act, the form of the present Act may be more pointed. Section 23 as we have said provides that nothing in Pt III of the Act shall prevent an unlicensed person in the circumstances described from driving a motor car upon a highway if he has a licensed driver sitting beside him and in such case the licensed driver shall be deemed to be driving the motor car. The express prohibition against driving a motor car without a licence which was previously contained in the terms of s6 of the 1915 Act has now disappeared. The reference to nothing in Pt III preventing an unlicensed person from driving is clearly now a reference to the policy contained in Pt III of the Act which is directed to ensuring that only licensed persons shall drive. Section 23 by recognising that in some circumstances an unlicensed person may drive would appear to involve an exception to that policy. The incongruity between the policy of the Act and the exception involved in the section, to which we have already referred in discussing the provisions of the 1915 Act, would still exist if it were not for the deeming provision.

By providing that in such case the licensed person shall be deemed to be driving the motor car, the general policy of Pt III is preserved. Similarly, as we indicated in the case of the deeming clause in the 1915 Act, the deeming clause in the present Act has the effect of protecting the permitted unlicensed driver from a provision of the licensing scheme in Pt III. The former s6(4) of the *Motor Car Act* has now been replaced by a separate section in Pt III of the Act, namely, s29, which is in more extensive terms than the sub-section it replaced, but which still retains all the features to which we have referred in that sub-section. An unlicensed learner-driver would still have to depend upon the words of s23, which deem the licensed instructor to be driving the car, to protect him from the application of s29; so that such words still continue to have material effect in relation to the licensing provisions.

A third feature of the present Act which strengthens the argument against the informant's contention is the present limitation of the terms of s23 to learner-drivers who are over the age of 17. If the informant's contention as to the construction of that section and of s81A were correct, the legislation would have an extraordinary effect. As the instructor is only deemed to be the driver when the learner is over the age of 17, the construction urged by Mr Graham would mean that if the alcohol content in the blood of the instructor exceeded the permitted limit he would be guilty of an offence provided that the pupil was 17 years or over, but not guilty of an offence if the pupil were 16 years or under.

Having regard to the obvious purpose of s81A, we do not consider that the legislature could have intended such an anomalous effect, and this is a further reason for rejecting a construction which would produce such a result. It might be said that a similar anomalous result would follow in the application of the provisions of s29 if the deeming provision in s23 were held to impose upon the instructor the duties of a driver under s29. It is not necessary for us to express any concluded view as to whether in the present form of the Act those duties are imposed upon the instructor. What we have said is that the deeming provision is necessary to protect the learner from the obligations which that section imposes upon a driver.

Even, however, if the effect of the construction we have adopted were to impose the duties under that section on the instructor, a similar anomaly does not emerge. Section 29 is designed to ascertain whether the licensing provisions of the Act are being complied with. In the case of a learner-driver the exculpatory provisions of s23 only apply if he is over the age of 17, and it is only in such a case that the holding of a licence by the instructor is relevant. It would be quite pointless to require an instructor to produce a licence in a case in which he is not deemed to be driving a car and in which the unlicensed driver would be guilty of an offence against s29 whether the instructor were licensed or not.

It was submitted by Mr Graham that as *Lucas v Ross* was decided 48 years ago and the provision that Weigall AJ was then interpreting has been re-enacted in the same, or substantially the same form on a number of occasions in that period, his interpretation should be taken to have received legislative approval in the successive re-enactments. While in some cases such a consideration may carry considerable weight, it is one which is far more difficult to apply in a statute like the *Motor Car Act* which has been so extensively amended and enlarged, and in which its form has been so extensively changed. The observations made by Dixon CJ in *R v Reynhoudt* [1962] HCA 23; (1962) 107 CLR 381, at p388; [1962] ALR 483; (1962) 36 ALJR 26 indicate the caution which must be adopted in attaching any great weight to this argument in the case of this enactment, and we are not persuaded by it that the present Act should be interpreted in the light of what we consider to be an erroneous interpretation of the 1915 Act by Weigall AJ. This is particularly so when it is realised that the decision in *Lucas v Ross*, *supra*, was arrived at without the judge having the advantage of hearing any contrary view argued.

The use of the word "deemed" in legislation has been discussed in a number of cases. It is not necessary for us to review these discussions, but we refer in particular to *St Aubyn v Attorney-General* [1951] UKHL 3; [1952] AC 15, at p53; [1951] 2 All ER 473, per Lord Radcliffe; *Barclays Bank Ltd v Inland Revenue Commissioners* [1961] AC 509, at pp523 and 541; [1960] 2 All ER 817; (1960) 3 WLR 230; *Hunter Douglas Australia Pty Ltd v Perma Blinds* [1970] HCA 63; (1970) 122 CLR 49, at pp65-7; [1969] ALR 676; 43 ALJR 274, per Windeyer J and *Murphy v Ingram* [1973] 2 WLR 983, at p993. As Megarry J said in the case last cited, in the passage to which we have referred:

> "To deem, if I may say so, is usually perilous in that it is always difficult to foresee all the possible consequences of the artificial state of affairs that the deeming brings into being. As Lord Asquith of Bishopstone said in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109,132: If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.' A research student in search of a suitable topic for a thesis might do worse than to choose as his subject, "The Dangers of Deeming'."

In the case of this provision the word is used to attribute to a person a character which he does not in fact possess, namely, that of the driver of a motor car. The statute in which the provision occurs is one which as printed covers 153 pages. It contains many sections, some of which are divided into a number of subsections, and paragraphs. It has been frequently altered and added to by enactment. It deals with many subject-matters relating to motor cars, drivers, and the act of driving. If the fictitious character assigned by s23 to the licensed driver sitting beside an unlicensed learner-driver were to be interpreted as applying to him for all purposes of the Act, it would be well nigh impossible to envisage all the consequences and incidents which would flow from or accompany it in the context of the numerous matters with which the statute deals. The statute should not be so interpreted if on its terms it can reasonably be construed so as to avoid this result and to have a clear and certain operation. By limiting, as we have done, the effect of the relevant words in s23 to the incidents of driving and of being licensed for that

purpose, with which Pt III of the Act deals, the words are given a certain application and a wide field of uncertainty is avoided. Apart from all the other considerations to which we have adverted, this ground alone would, in this Act, in our opinion, warrant the interpretation which we have adopted.

In our opinion the words "in such case the licensed driver shall be deemed to be driving a motor car" where they appear in s23 do not mean that for the purposes of the Act, apart from Pt III thereof, the licensed driver is to be deemed to be driving the motor car, and consequently, do not mean that in cases to which they apply, the licensed driver is a person who drives a motor car for the purposes of s81A. That conclusion is, in our opinion, in line with the principles of interpretation stated and applied by the High Court in *R v Adams* [1935] HCA 62; (1935) 53 CLR 563; [1935] ALR 421; 8 ABC 97.

Although it is difficult and often dangerous to draw an analogy between the interpretation given to one statute and the interpretation given to another, which is in different terms and deals with a different subject matter, there are, we think, important points of similarity between the relevant provisions of the *Bankruptcy Act*, with which the High Court was dealing, and the provisions with which we are concerned, and in so far as these points are concerned, the interpretation which we have adopted is supported by the reasoning in *R v Adams*. Indeed, the section which in that case was relied upon by the Crown to bring the defendant debtor within the ambit of the penal provisions provided that the execution of the deed should be deemed for all purposes equivalent to a sequestration order against him. The expression "for all purposes" does not appear in the deeming clause in s23, and to that extent the argument for the informant in this case is based upon weaker ground than the argument of the Crown in *R v Adams* [1935] HCA 62; (1935) 53 CLR 563; [1935] ALR 421; 8 ABC 97.

It follows from what we have said that the stipendiary magistrate was in error in holding that the defendant in this case was deemed to be driving the motor car for the purposes of s81A, and as this was the sole ground upon which he convicted the defendant, the order nisi should be made absolute, with costs to be taxed within the statutory limit, the order convicting the defendant quashed, and in lieu thereof an order made that the information be dismissed.

(An application by the informant for an indemnity certificate pursuant to s13 of the *Appeal Costs Fund Act* was refused.) Orders accordingly.

Solicitor for the defendant: Molomby and Molomby, as agents for RG Dobson and Co, Ballarat.
Solicitor for the informant: John Downey, Crown Solicitor.
