H. C. OF A. 1929.

J. C. WILLIAMSON'S TIVOLI VAUDEVILLE PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

for the Board to consider) the amount of money which the parties treated the shares as an equivalent is the amount paid by the taxpayer.

Questions answered as follows:—(1) *Yes.* £170,000 *was paid within the meaning of the Act and satisfied by the allotment of* 170,000 *fully paid-up shares.* (2) *No.* (3) *Prima facie the paid-up value is the measure of the amount of the payment. Costs of reference to High Court to be paid by Commissioner.*

Solicitor for the appellant, *H. M. Lee.*

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

H. D. W.

Appl *Davis* v *Cth* 82 ALR 633 | Cons *Harris & Caladine, In the Marriage of* 97 FLR 224 | Not Foll *Harris* v *Caladine* (1991) 65 ALJR 280 | Cons *Harris* v *Caladine* (1991) 172 CLR 84 | Cons *Russell* v *Russell* (1976) 134 CLR 495 | Cons *Kotsis* v *Kotsis* (1970) 122 CLR 69 | Cons *Bond* v *George A Bond & Co Ltd* (1930) 44 CLR 11 | Cons *Peacock* v *Newtown Marrickville & General Co-op Building Society (No4)* 67 CLR 25 | Appl *Public Prosecutions, Director of (Cth)* v *Bayly* (1994) 126 ALR 290

Appl *Public Prosecutions, Director of (Cth)* v *Bayly (No1)* (1994) 75 ACrimR 549 | Cons *Public Prosecutions, Director of (Cth)* v *Bayly (No1)* (1994) 63 SASR 97 | Refd to *Reid* v *R* [1999] 2 VR 605 | Cons *Reid* v *R* (1999) 152 FLR 26 | Cons/Appl *Beneficial Finance Corp* v *Multiplex Constructions* (1995) 36 NSWLR 510 | Appl *McMahon* v *Queensland* (2000) 158 FLR 458 | Appl *McMahon* v *Queensland* [2002] 1 QdR 195

[... OF AUSTRALIA.]

LE MESURIER . . . . . APPELLANT;
APPLICANT,

AND

CONNOR . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE COURT OF BANKRUPTCY DISTRICT OF WESTERN AUSTRALIA.

H. C. OF A. 1929.

MELBOURNE, *Oct.* 7, 8, 9.

SYDNEY, *Dec.* 10.

Knox C.J., Isaacs, Rich, Starke and Dixon JJ.

Bankruptcy—Constitutional law—Powers of Federal Parliament—Proclamation of Bankruptcy Districts—Duties of Registrars—To be such as the Federal Attorney-General directs—Validity—Courts having jurisdiction in bankruptcy—Power to invest "such State Courts . . . as are specially authorized by Governor-General" —Validity—Purported investiture of State Courts—Power to Court to delegate to Registrar powers of administrative nature—Validity—Purported delegation by three Judges—Powers conferred on Registrar—Validity—Agreement between Commonwealth and States as to State officers acting as Registrars—Appointment

H. C. OF A. 1929. LE MESURIER v. CONNOR.

of Registrars—Validity—Bankruptcy notice—Power of Registrar so appointed to issue—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (XVII.), (XXXIX.), 77 (III.)—*Bankruptcy Act* 1924-1928 (*No.* 37 *of* 1924—*No.* 39 *of* 1928), *secs.* 12 (1), (5), 18 (1) (*b*), 23, 24*—*Commonwealth Public Service Act* 1922-1924 (*No.* 21 *of* 1922—*No.* 46 *of* 1924), *sec.* 78.*

Held, by *Knox* C.J., *Rich* and *Dixon* JJ. (*Isaacs* and *Starke* JJ. dissenting):—(1) Sec. 77 (III.) of the Constitution does not enable the Parliament to make a Commonwealth officer a functionary of a State Court and authorize him to act on its behalf and administer part of its jurisdiction. (2) Although sec. 51 (XXXIX.) of the Constitution confers power upon the Parliament to make laws with respect to matters which attend, or arise in, the execution of any power vested by the Constitution in the Federal Judicature, as distinct from matters incidental to the subjects assigned to the Commonwealth, nevertheless it does not authorize the reconstitution of a State Court which is invested with Federal jurisdiction or of the organization through which its powers and jurisdiction are exercised, because sec. 77 (III.) contemplates the selection by the Parliament of an existing judicial organ which depends alike for its structure and its being upon State law and the grant to it of powers of adjudication upon specified subjects of Federal jurisdiction. (3) *Quære*, whether, within the meaning of sec. 51 (XXXIX.), State Courts invested with Federal jurisdiction form part of the "Federal Judicature" and their jurisdiction is a power "vested by this Constitution." (4) Secs. 12 (5), 23 and 24 of the *Bankruptcy Act* 1924-1928 are *ultra vires* and void. (5) Sec. 18 (1) (*b*) of the *Bankruptcy Act* 1924-1928, which provides that the Courts having jurisdiction in bankruptcy

* The *Bankruptcy Act* 1924-1928 provides:—By sec. 12, "(1) For the purposes of this Act the Governor-General may by proclamation declare any part of the Commonwealth to be a District;" and "(5) The Registrars and Deputy Registrars shall be officers of the Court and shall have such duties as the Attorney-General directs or as are prescribed." By sec. 18, "(1) The Courts having jurisdiction in bankruptcy shall be . . . (*b*) such State Courts or Courts of a Territory as are specially authorized by the Governor-General by proclamation to exercise that jurisdiction." By sec. 23, "The Court may delegate to the Registrar such of the powers of an administrative nature vested in the Court (except this power of delegation) as the Court deems expedient to be delegated to him." By sec. 24, "(1) Subject to rules, a Registrar shall have, in addition to the powers which may be delegated to him by the Court under the provisions of this Act, the following powers, duties and jurisdiction of the Court, namely" (then a list of powers and duties was set out); and "(2) Any order made or act done by a Registrar in the exercise of his power and jurisdiction shall be deemed the order or act of the Court, subject nevertheless to review on summary application to the Court."

The *Commonwealth Public Service Act* 1922-1924, provides by sec. 78:—"(1) The Governor-General may arrange with the Governor in Council of any State for the performance or execution by an officer in the Public Service of the State, for the Government of the Commonwealth, of any work or services, or of the duties of any office in the Commonwealth Service. (2) In any such case, the Governor-General may, by agreement with the Governor in Council of the State or otherwise, make arrangements for determining (*a*) the rate of payment to be made by the Government of the Commonwealth for the work or services to be performed or the duties to be executed for the Commonwealth by the officer; and (*b*) any matters which may require to be adjusted with regard to the performance of the work or services, or the execution of the duties, by the officer.

shall be such State Courts as are specially authorized by the Governor-General by proclamation to exercise that jurisdiction purports to confer upon the Executive Government a discretionary power to authorize any State Court to exercise Federal jurisdiction and to withhold or revoke that authority, and is not a "law investing" Federal jurisdiction within the meaning of sec. 77 (III.) and is *ultra vires* and void.

Decision of *Burnside* J. reversed.

APPEAL from the Court of Bankruptcy District of Western Australia.

This was an appeal by Cecil John Reginald Le Mesurier against a judgment of *Burnside* J. dismissing an application by the appellant to set aside a bankruptcy notice under sec. 53 of the *Bankruptcy Act* 1924-1928 served on him on behalf of Hannah Alicia Connor on 26th October 1928. The bankruptcy notice, which was in the form prescribed by the *Bankruptcy Rules* 1928, was as follows :—"Take notice that within seven days after service of this notice on you, excluding the day of such service, you must pay to Hannah Alicia Connor of 121 Thomas Street, Subiaco, the sum of £1,118 8s. 4d. claimed by her as being the amount due on a final judgment obtained by her against you in the Supreme Court, dated 30th August 1928, whereon execution has not been stayed, or you must secure or compound for the said sum to her satisfaction or the satisfaction of the Court; or you must satisfy the Court that you have a counter-claim, set-off, or cross-demand against her which equals or exceeds the sum claimed by her, and which you could not set up in the action in which the judgment was obtained. Dated this 25th day of October 1928. By the Court. T. F. Davies, Registrar." The bankruptcy notice also contained the prescribed endorsement, namely, "That the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you. If, however, you have a counter-claim, set-off, or cross-demand which equals or exceeds the amount claimed by her the said Hannah Alicia Connor in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained, you must within three days apply to the Court to set aside this notice, by filing with the Registrar an affidavit to the above effect."

H. C. OF A. 1929. LE MESURIER v. CONNOR.

The objections which the appellant raised before *Burnside* J. to the bankruptcy notice were that the appointment of Mr. T. F. Davies as Registrar in Bankruptcy of the Bankruptcy Court in Western Australia was irregular; that the delegation to the Registrar in Bankruptcy in Western Australia of the power of a Judge of the Supreme Court of Western Australia to issue bankruptcy notices was *ultra vires* of the *Bankruptcy Act* 1924-1927 as three only out of the four Judges of the Supreme Court purported to delegate such power; and that the appellant had a cross-demand for £1,308 16s. 3d. against Hannah Alicia Connor, being a sum in excess of the sum claimed to be due by the appellant to her in the bankruptcy notice.

From the decision of *Burnside* J. refusing the application to set aside the bankruptcy notice the appellant appealed to the High Court. The appeal came on for hearing at the Perth sittings before three Justices of the High Court, when an order transferring the case to Melbourne was announced in the following terms:—This case will be transferred to the Melbourne Registry to be heard by as full a Bench as possible at the next sittings of the Court in Melbourne. The Commonwealth will have leave to intervene but upon terms that it bears the taxed costs occasioned to the parties by the transfer to Melbourne and the rehearing there. The case appears to involve the following questions upon which the assistance of counsel is required:—(1) Does the power conferred upon Parliament by sec. 77 (III.) of the Constitution to make laws investing any Court of a State with Federal jurisdiction enable Parliament to empower the Governor-General to authorize State Courts to exercise bankruptcy jurisdiction as sec. 18 of the *Bankruptcy Act* purports to do? (2) Does the power conferred by sec. 51 (XVII.) to make laws with respect to bankruptcy and insolvency enable Parliament so to empower the Governor-General? (3) Is sec. 20 within the constitutional power of Parliament in so far as it purports to invest the Courts of every State with jurisdiction throughout the Commonwealth? (4) Is sec. 12 (5) within the constitutional power of Parliament in so far as (i.) it makes a Federal officer an officer of the State Court, (ii.) it enables the Attorney-General of the Commonwealth to prescribe the duties of an officer of a State Court? (5)

Does sec. 78 of the *Commonwealth Public Service Act* 1922-1924 authorize the "arrangement" set out in the *Gazette* of 25th July 1928? (6) Does sec. 78 together with such "arrangement" validly authorize the appointment of Registrars by the Attorney-General set out in the *Gazette* of 9th August 1928? (7) Is the issue of a bankruptcy notice as of course? (8) If not, can the function of granting or issuing such a notice be delegated to the Registrar under sec. 23 of the *Bankruptcy Act* 1924-1928? (9) Is a delegation by three Judges a delegation of the power of the Supreme Court of Western Australia, and does it authorize the issue of the actual notice in this case?

By a proclamation dated 6th July 1928, and made as under sec. 12 (1) of the *Bankruptcy Act* 1924-1927, the State of Western Australia was declared a District for the purposes of the Act; and by a proclamation of the same date, made as under sec. 18 (1) of that Act, the Supreme Court of Western Australia was specially authorized by the Governor-General to exercise jurisdiction in bankruptcy throughout the Commonwealth; and by a further proclamation of the same date and made as under sec. 18 (2) of such Act each of the Judges of the Supreme Court of Western Australia was appointed to exercise the jurisdiction in bankruptcy conferred upon the Supreme Court.

The arrangement set out in the *Government Gazette* of 25th July 1928 which was made between the Governor-General in Council and the Governor in Council of the State of Western Australia pursuant to sec. 78 of the *Commonwealth Public Service Act* 1922-1924 provided: (1) that officers of the Public Service of the State of Western Australia may be appointed from time to time to execute in that State the duties of any of the following offices under the *Bankruptcy Act* 1924-1927, namely, the offices of Registrar, Deputy Registrar, Official Receiver and any other offices under that Act; (2) that appointments to be made in pursuance of this arrangement shall be made by the Attorney-General of the Commonwealth with the concurrence of the Minister for Justice of the State; (3) that all officers appointed in pursuance of this arrangement shall hold their offices during the pleasure of the Attorney-General of the Commonwealth and the concurrence of the Minister of Justice of the State

H. C. OF A. 1929. LE MESURIER v. CONNOR.

and without salary; (4) that the Commonwealth will pay to the State of Western Australia in respect of the execution by officers of that State of the duties of offices under the *Bankruptcy Act* such sums as are from time to time agreed upon by the Attorney-General of the Commonwealth and the Minister of Justice of the State.

The appointment, as set out in the *Government Gazette* of 9th August 1928, was an appointment by the Attorney-General of the Commonwealth, with the concurrence of the Attorney-General or other Minister of the State, to take effect from 1st August 1928; the officers so appointed to hold office during the pleasure of the Attorney-General of the Commonwealth and without salary from the Commonwealth. This *Gazette* notified the appointment of Thomas Frederick Davies as Registrar in Bankruptcy for the Bankruptcy District of Western Australia.

The delegation referred to in question 9 above, which was dated 24th October 1928 and was signed by three of the four Judges of the Supreme Court of Western Australia, was in the following terms: "We hereby delegate to you the power of a Judge of the Supreme Court of Western Australia to issue bankruptcy notices under" the *Bankruptcy Act* 1924-1928 "until further notice."

Ham K.C. (with him *Fullagar*), for the appellant. As to questions 1 and 2, sec. 18 (2) of the *Bankruptcy Act* is in conflict with sec. 77 of the Constitution, as it purports to give the Governor-General power to invest a State Court with Federal jurisdiction. Recourse cannot be had to sec. 51 (xxxix.) of the Constitution to extend the powers conferred by chapter III. thereof, which delimits the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth (*In re Judiciary and Navigation Acts* (1); the Constitution, secs. 75, 76 and 77 (iii.)). Such investiture must be made by the Federal Parliament (*Ah Yick* v. *Lehmert* (2); the Constitution, secs. 1, 71). This is not a case of conditional legislation but is a general delegation of authority (*Baxter* v. *Ah Way* (3); *Porter* v. *The King*; *Ex parte Yee* (4)). This question is not

(1) (1921) 29 C.L.R. 257, at p. 265.
(2) (1905) 2 C.L.R. 593, at p. 603.
(3) (1909) 8 C.L.R. 626, at pp. 634-635.
(4) (1926) 37 C.L.R. 432, at p. 449.

covered by *R.* v. *Burah* (1) and *Hodge* v. *The Queen* (2) and *Powell* v. *Apollo Candle Co.* (3).

[ISAACS J. How do you reconcile your argument with the statement of Lord *Selborne* in *R.* v. *Burah*, at p. 905 ?]

Field v. *Clark* (4), quoted in *Baxter* v. *Ah Way* (5), answers that question. The jurisdiction sought to be invested is bad also because many of the powers sought to be invested are of an administrative nature. Such duties should be conferred, if at all, on Federal officers and not on a State Judge (*In re Judiciary and Navigation Acts* (6); *Porter's Case* (7); *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (8); *Halsbury's Laws of England*, vol. IX., p. 13, par. 10). Administrative powers cannot be conferred on State Courts under sec. 51 (XVII.) of the Constitution. As to question 3, the appointment of Courts to have jurisdiction throughout the Commonwealth (*Commonwealth Gazette*, 25th July 1928, at pp. 2,200, 2,202) is bad, and sec. 20 of the *Bankruptcy Act* purporting to give State Courts jurisdiction throughout the Commonwealth is *ultra vires*. A State Court must be taken as it is found, with all its limitations, territorial and otherwise, as to jurisdiction (*Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch)* v. *Alexander* (9); *Lorenzo* v. *Carey* (10); the Constitution, sec. 77). As to question 4, sec. 12 (5) of the *Bankruptcy Act* is invalid as it does not say who are appointed as Registrars; the appointment to hold office during the pleasure of the Attorney-General is bad as the Registrars exercise judicial functions, and it is bad as it subjects a State officer to the directions of the Federal Attorney-General. Secs. 51 (XVII.) and 51 (XXXIX.) of the Constitution will not extend the powers of a State Court invested with Federal jurisdiction. As to questions 5 and 6, sec. 78 of the *Commonwealth Public Service Act* 1922-1924 does not authorize the "arrangement" set out in the *Commonwealth Gazette* of 25th July 1928. That section contemplates that a State officer, while he

(1) (1878) 3 App. Cas. 889.
(2) (1883) 9 App. Cas. 117.
(3) (1885) 10 App. Cas. 282.
(4) (1892) 143 U.S. 649, at p. 694.
(5) (1909) 8 C.L.R., at p. 638.
(6) (1921) 29 C.L.R., at pp. 264, 265.
(7) (1926) 37 C.L.R., at pp. 441, 448.
(8) (1909) 8 C.L.R. 330, at pp. 357, 383-384.
(9) (1912) 15 C.L.R. 308.
(10) (1921) 29 C.L.R. 243, at p. 252.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

remains a State officer, may be able to perform duties for the Commonwealth. The appointment is also bad as sec. 78 of that Act has no application to judicial officers and part of the Registrar's duties are judicial. The inclusion of any judicial duties vitiates the appointment under sec. 78. The appointment to hold office during the pleasure of the Attorney-General also vitiates it under sec. 71 of the Constitution. No State duties remain in the officer under this appointment. There is a substitution of Federal for State duties—not an addition of Federal to State duties, which is the position contemplated by sec. 78 (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1)). As to questions 7 and 8, the issue of the bankruptcy notice is not of course, and the function of issuing it cannot be delegated to the Registrar. Sec. 23 of the *Bankruptcy Act* only authorizes the delegation of administrative powers, and the issue of a bankruptcy notice requires a delegation of judicial powers. A bankruptcy notice effects a change of status of the debtor, and, having regard to the requirements of the Act, it is not something which can be had without the exercise of some discretion. Some responsible officer has to satisfy himself that the requirements of the Act have been complied with, and if such an act is judicial it cannot be delegated (*Bankruptcy Act*, secs. 52 (*j*), 53; *Bankruptcy Rules* 1928, rule 139 (3), and First Schedule. form 5; *In re Howes*; *Ex parte Hughes* (2)). As to question 9, the delegation by three only of the four Judges of the Supreme Court of Western Australia of the power to issue bankruptcy notices is bad. Such delegation should also have been under the seal of the Court. Under sec. 77 of the Constitution it is the Court, and not particular Judges, that may be invested with jurisdiction.

Sir Edward Mitchell K.C. (with him *Gregory*), for the Commonwealth intervening. As to questions 1 and 2, these questions should be answered in the affirmative. The incidental powers conferred by sec. 51 (XXXIX.) of the Constitution are sufficient authority for the powers exercised under sec. 18 of the *Bankruptcy Act*. The incidental powers would be applicable to investing the

(1) (1909) 8 C.L.R., at pp. 355, 382.
(2) (1892) 2 Q.B. 628, at p. 632.

Court with powers which are not judicial in the ordinary sense, but which are essential to the carrying on of the business of the Court. The mode adopted by sec. 18 of the *Bankruptcy Act* was effective. If the substance of what was done under this section is considered, it comes within *R.* v. *Burah* (1), *Hodge* v. *The Queen* (2) and *Powell* v. *Apollo Candle Co.* (3), and the provision as to delegation in sec. 18 of the *Bankruptcy Act* is good. Sec. 18 is good either as an exercise of the powers conferred by sec. 51 (XVII.) and (XXXIX.) of the Constitution, or it is good under the powers conferred by sec. 77 (III.). Under the powers conferred by sec. 51 (XVII.) and chapter III. of the Constitution the Federal Parliament could confer judicial or administrative powers on the Bankruptcy Court. Sec. 18 is merely conditional legislation, and the Governor-General may be left to determine which of the State Courts may be invested with jurisdiction. The power given to "make laws . . . investing any Court of a State with Federal jurisdiction" in sec. 77 (III.) of the Constitution is the power to make laws directly investing, &c. In this case Parliament has legislated leaving it to the Governor-General to choose the Courts (*Nott Bros. & Co.* v. *Barkley* (4)). There is no difference between the expressions "making laws investing" and "making laws with respect to investing" a State Court with Federal jurisdiction. [Counsel referred to *Baxter* v. *Ah Way* (5) ; *Roche* v. *Kronheimer* (6) ; *R.* v. *Macfarlane* ; *Ex parte O'Flanagan and O'Kelly* (7).] As to question 3, it is not claimed that sec. 20 of the *Bankruptcy Act* enables the State Court to sit outside its territorial limits. It is intended that a State Court invested with Federal jurisdiction, sitting in that State, may deal with any act of bankruptcy committed in any part of Australia, and that its orders shall have effect throughout Australia (*Craies* on *Statute Law*, 3rd ed., p. 162). It would not be a Court at all if it purported to sit outside the territorial limits of the State. Unless this view is correct, there would still only be local jurisdiction over persons and acts if the Governor-General proclaimed Bankruptcy Districts. The powers to commit for contempt referred to in sec.

(1) (1878) 3 App. Cas., at p. 905.
(2) (1883) 9 App. Cas., at p. 132.
(3) (1885) 10 App. Cas. 282.
(4) (1925) 36 C.L.R. 20, at pp. 24, 29.
(5) (1909) 8 C.L.R., at p. 632.
(6) (1921) 29 C.L.R. 329.
(7) (1923) 32 C.L.R. 518.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

20 (1) presupposes that the State Court is sitting in the State in which it has jurisdiction. As to question 4, "the Court" in sec. 12 (5) of the *Bankruptcy Act* means the "State Court having jurisdiction in bankruptcy under this Act." "'Bankruptcy,' in relation to jurisdiction or proceedings, includes any jurisdiction or proceedings under or by virtue of this Act" (*Bankruptcy Act* 1924, sec. 4). The person appointed as Registrar was not appointed as an officer of the Court *simpliciter*, and the Attorney-General does not prescribe his duties except in so far as he is an officer of the Federal Bankruptcy Court. Sec. 77 (III.) of the Constitution gives power to invest a State Court with Federal jurisdiction, and sec. 12 (5) of the *Bankruptcy Act* only enables the State Court to carry out that Federal jurisdiction.

[ISAACS J. referred to *Skinner* v. *County Court Judge of Northallerton* (1) and *Savill* v. *Dalton* (2).]

None of the powers conferred on the Registrar by the *Bankruptcy Act* are judicial so as to constitute him a judicial officer. His powers at most are quasi-judicial, and if they are judicial the portion of the Act conferring them is severable (*Local Government Board* v. *Arlidge* (3)). None of these matters are such as to form part of the judicial powers within chapter III. of the Constitution.

[STARKE J. referred to *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (4).

[KNOX C.J. referred to *Federal Commissioner of Taxation* v. *Munro*; *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (5).]

In *Skinner's Case* (6) the Court was not acting as a County Court but as a different Court. All that has been done here is to appoint Federal officers who will act as Federal officers in State Courts. *Skinner's Case* (7) supports this view. As to questions 5 and 6, sec. 78 of the *Commonwealth Public Service Act* 1922-1924 does authorize the "arrangement" set out in the *Commonwealth Gazette* of 25th July 1928, and the provisions of that section together with such "arrangement" do authorize the appointment of Registrars

(1) (1898) 2 Q.B. 680; affd. (1899) A.C. 439.
(2) (1915) 3 K.B. 174.
(3) (1915) A.C. 120.
(4) (1918) 25 C.L.R. 434.
(5) (1926) 38 C.L.R. 153.
(6) (1899) A.C. 439.
(7) (1899) A.C., at p. 441.

by the Attorney-General which appear in the *Gazette* of 9th August 1928 (*Munro and British Imperial Oil Co.s Case* (1)). As to question 7 the bankruptcy notice does issue as of course (*Donohue* v. *Chew Ying* (2) ; *Renton* v. *Renton* (3)). As to question 8, the power can be delegated to the Registrar because it is an administrative and not a judicial act. The answer to question 9 should also be in the affirmative because the Supreme Court of Western Australia has properly exercised the bankruptcy jurisdiction conferred upon it.

Reynolds, for the respondent. The respondent adopts generally the arguments relied upon by the Commonwealth, and what has to be added on her behalf on the various points submitted for argument is of a general nature. The effect of sec. 18 (1) (*b*) of the *Bankruptcy Act* is to authorize the Governor-General to select the Courts, but this Act of Parliament defines the Courts from which the selection shall be made. Sec. 18 (1) (*b*) is not a grant of legislative power to the Governor-General (*Field* v. *Clark* (4)). But if sec. 18 (1) (*b*) were such a grant it could be supported by *R.* v. *Burah* (5) and *Baxter* v. *Ah Way* (6). Parliament, not being a mere delegate, may authorize the Governor-General to invest whether the power is "to make laws investing" or "to make laws concerning the investing." The power of the Federal Parliament to invest judicial functions in State Courts carries with it, as being a necessary implication, a power to invest those Courts with administrative functions appropriate to the exercise of their judicial powers. Power to invest State Courts with appropriate administrative functions is necessarily contained in sec. 77 (III.). Such powers are also implied under sec. 51 (XXXIX.) of the Constitution as being incidental to the power to legislate with regard to bankruptcy and insolvency conferred by sec. 51 (XVII.). It is competent to the Federal Parliament to invest existing State Courts with jurisdiction throughout Australia so as to make a general bankruptcy law operative throughout Australia. The power to legislate as to bankruptcy and insolvency connotes an ability to

(1) (1926) 38 C.L.R. 153.
(2) (1913) 16 C.L.R. 364, at p. 369.
(3) (1918) 25 C.L.R. 291, at p. 296.
(4) (1892) 143 U.S., at p. 694.
(5) (1878) 3 App. Cas. 889.
(6) (1909) 8 C.L.R. 626.

H. C. OF A. 1929. LE MESURIER v. CONNOR.

invest the Bankruptcy Courts with judicial power. Such a power is implicit in sec. 51 (XVII.) without reference to chapter III. of the Constitution. The word "bankruptcy" connotes judicial power, and the Federal Parliament, having been given power to legislate with regard to bankruptcy, can under the powers conferred by sec. 51 (XVII.) alone invest a State Court with Federal jurisdiction in bankruptcy. Such power exists either under sec. 51 (XVII.) or under sec. 77 (III.), or both. The issue of a bankruptcy notice is of course (*Byrne's Law Dictionary*, p. 625, tit. "Of course"). There is no power for the Registrar to refuse to issue a notice where the facts relating to it were brought to his knowledge (*In re Clark*; *Ex parte Beyer, Peacock & Co.* (1); *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (2)). The function of issuing such a notice may be delegated, as the Registrar has only to ascertain the relevant facts and if they are found to exist the notice must issue. The only function of the Registrar under this section is to ascertain whether the facts exist or not. No judicial powers have been conferred on the Registrar, though in some instances he may have power to make certain inquiries or investigations. In the performance of many administrative functions it becomes necessary for the officer to make an adjudication which does not amount to an exercise of judicial power (*New South Wales* v. *Commonwealth* (3)). There are powers given to the Registrar under the *Bankruptcy Act* to make an adjudication, but in exercising that power he is not exercising judicial power (*R.* v. *Murray and Cormie*; *Ex parte Commonwealth* (4)). Sec. 20 of the *Bankruptcy Act* conferring on the Bankruptcy Court jurisdiction throughout the Commonwealth can be supported by *Lorenzo* v. *Carey* (5). The Federal Parliament can give the State Court power to deal with bankruptcy matters wherever the material facts arise. The power to punish for contempt is given as a separate power upon its extended jurisdiction. Sec. 20 does not involve a State Court exercising jurisdiction in another State. Assuming the validity of

(1) (1896) 2 Q.B. 476.
(2) (1909) 8 C.L.R., at p. 383.
(3) (1915) 20 C.L.R. 54, at pp. 83, 86, 89.
(4) (1916) 22 C.L.R. 437, at p. 471.
(5) (1921) 29 C.L.R. 243.

the *Bankruptcy Act*, the delegation referred to in question 9 was properly made by the three Judges.

Ham K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

Dec. 10.

KNOX C.J., RICH AND DIXON JJ. The appellant was served in Perth with a bankruptcy notice which notified him that within seven days he must pay a judgment debt, or secure it, or compound for it to the satisfaction of the judgment creditor or of the Court, or satisfy the Court that he had a counter-claim, set-off, or cross-demand against the judgment creditor to an equal or greater amount. The notice was endorsed with a warning that non-compliance would be an act of bankruptcy, and that if the appellant had such a counter-claim, set-off, or cross-demand, he must within three days apply to the Court to set aside the notice. The notice was entitled : "In the Court of Bankruptcy District of Western Australia." This was all in accordance with the *Bankruptcy Rules* 1928 (Statutory Rules 1928, No. 8)—see rules 137, 139 (2), 11 (1) and (3), "The Court." By a proclamation dated 6th July 1928, made as under sec. 12 (1) of the *Bankruptcy Act* 1924-1927, the State of Western Australia was declared a District for the purposes of the Act, and by a proclamation of the same date, made as under sec. 18 (1), the Supreme Court of Western Australia was specially authorized by the Governor-General to exercise jurisdiction in bankruptcy throughout the Commonwealth. There could, therefore, be no doubt that the Court to which the bankruptcy notice referred was the Supreme Court of Western Australia. Accordingly the appellant's application to set aside the notice was made to that Court.

Among the grounds upon which he relied in support of his application was one to the effect that the notice was issued by a person who assumed to be the Registrar in Bankruptcy in Western Australia of the Supreme Court, that he was not Registrar in Bankruptcy of the Supreme Court, and that there was no such Registrar, his appointment being irregular. The notice was expressed to be "By the Court" and to have been issued under the authority of the

H. C. OF A. 1929. LE MESURIER v. CONNOR. Knox C.J. Rich J. Dixon J.

Registrar. The person who in fact issued it assumed to be Registrar in Bankruptcy and had been appointed as under an arrangement made in intended pursuance of sec. 78 of the *Commonwealth Public Service Act* 1922-1928 to "execute the duties of Registrar in Bankruptcy of the District of Western Australia." This section empowers the Governor-General to arrange with the Governor in Council of a State, *inter alia*, for the execution by an officer in the Public Service of the State for the Government of the Commonwealth of the duties of any office in the Commonwealth Service.

When he was appointed in this manner, it was assumed that the office of Registrar in Bankruptcy was an office in the Commonwealth Public Service, and this assumption is clearly in accordance with the meaning of the *Bankruptcy Act* 1924-1928. The office is created by sec. 12 of that Act, which, after empowering the Governor-General to declare any part of the Commonwealth to be a District, provides, by sub-sec. 2, "There shall be in each District a Registrar in Bankruptcy, and such Deputy Registrars, official receivers, and other officers, as are necessary"; and sub-sec. 5 requires the Registrars and Deputy Registrars to perform such duties as the Attorney-General of the Commonwealth directs or as are prescribed.

Nevertheless, the *Bankruptcy Act* 1924-1928 purports to make the Registrar in Bankruptcy part of the organization of the Court having jurisdiction in bankruptcy although it is a State Court. Sec. 18 (1) enacts that "the Courts having jurisdiction in bankruptcy shall be (*a*) such Federal Courts (if any) as the Parliament creates to be Courts of Bankruptcy; and (*b*) such State Courts or Courts of a Territory as are specially authorized by the Governor-General by proclamation to exercise that jurisdiction." No Federal Courts of Bankruptcy have been created but in every State a Court of the State has been "specially authorized" as in pursuance of this provision. Sec. 12 (5) provides that Registrars and Deputy Registrars shall be officers of the Court. "The Court" is defined by sec. 4 to mean any Court having jurisdiction in bankruptcy or a Judge thereof. A literal application of this definition to sec. 12 (5) would make every Registrar an officer of every Court in the Commonwealth which has bankruptcy jurisdiction. (See, too, sec. 20.) But, however that may be, it is at least clear that sec. 12 (5) purports to

make the Registrar for the District of Western Australia an officer of the Court of that State which is authorized to exercise that jurisdiction—the Supreme Court of Western Australia.

Sub-sec. 1 of sec. 24 provides that, subject to rules, a Registrar shall have, in addition to the powers which may be delegated to him by the Court under the provisions of the Act, certain powers, duties and jurisdiction of the Court which are set out in some fifteen paragraphs; and sub-sec. 2 provides that any order made or act done by a Registrar in the exercise of his power and jurisdiction shall be deemed the order or act of the Court, subject, nevertheless, to review on summary application to the Court. Sec. 23 enables the Court to delegate to the Registrar such of the powers of an administrative nature vested in the Court as the Court deems expedient to be delegated to him. These provisions, which are interdependent, make it plain that the Registrar is to form part of the organization of the Court and is to exercise his powers and functions, whether derived directly from the statute or from the authority of the Court, as its officer and in the administration of its jurisdiction. It was upon this footing, no doubt, that three Judges of the Court delegated to the Registrar the function of issuing bankruptcy notices.

But the question at once arises whether the legislative power of the Commonwealth enables Parliament to regulate, in such a manner, the organization of Courts of States which it invests with Federal jurisdiction. "The Constitution, by chapter III., draws the clearest distinction between Federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilize the judicial services of State Courts recognizes in the most pronounced and unequivocal way that they remain 'State Courts'" (per *Isaacs* J. in *R.* v. *Murray and Cormie* (1), and see per *Higgins* J. (2) and *Gavan Duffy* J. and *Rich* J. (3)). The Parliament may create Federal Courts, and over them and their organization it has ample power. But the Courts of a State are the judicial organs of another Government. They are created by State law; their existence depends upon State law; that law, primarily at least, determines the constitution of the Court itself, and the organization through which its powers and jurisdictions are

(1) (1916) 22 C.L.R., at p. 452. (2) (1916) 22 C.L.R., at p. 464.
(3) (1916) 22 C.L.R., at p. 471.

H. C. OF A. 1929. LE MESURIER v. CONNOR. Knox C.J. Rich J. Dixon J.

exercised. When a Court has been erected, its jurisdiction, whether in respect of place, person or subject matter, may be enlarged or restricted. The extent of the jurisdiction of a State Court would naturally be determined by State law; and in the United States it was decided that the general legislative power of the Congress with respect to the subjects assigned to it did not enable Congress to confer additional jurisdiction upon State Courts (*Martin* v. *Hunter's Lessee* (1); *Houston* v. *Moore* (2); *Robertson* v. *Baldwin* (3)). Sec. 77 of the Commonwealth Constitution expressly confers upon the Parliament power to make laws investing the Courts of the States with Federal jurisdiction. But the provisions of sec. 77 and sec. 79, which explicitly give legislative power to the Commonwealth in respect of State Courts, make it plain that the general powers of the Parliament to legislate with respect to the subjects confided to it, like the similar powers of Congress, must not be interpreted as authorizing legislation giving jurisdiction to State Courts.

It is no less certain that these general powers cannot be interpreted as authorizing legislation dealing with the organization of State Courts. The power conferred by sec. 77 (III.) is expressed in terms which confine it to making laws investing State Courts with Federal jurisdiction. Like all other grants of legislative power this carries with it whatever is necessary to give effect to the power itself. But the power is to confer additional judicial authority upon a Court fully established by or under another legislature. Such a power is exercised and its purpose is achieved when the Parliament has chosen an existing Court and has bestowed upon it part of the judicial power belonging to the Commonwealth. To affect or alter the constitution of the Court itself or of the organization through which its jurisdiction and powers are exercised is to go outside the limits of the power conferred and to seek to achieve a further object, namely, the regulation or establishment of the instrument or organ of Government in which judicial power is invested, an object for which the Constitution provides another means, the creation of Federal Courts. Sec. 77 (III.), therefore, does not enable the

(1) (1816) 1 Wheat. 304, at pp. 330-331.
(2) (1820) 5 Wheat. 1, at pp. 27-28.
(3) (1897) 165 U.S. 275, at p. 278.

Parliament to make a Commonwealth officer a functionary of a State Court and authorize him to act on its behalf and administer part of its jurisdiction.

It remains to consider whether such a power is granted by sec. 51 (xxxix.). This paragraph of sec. 51 confers upon the Parliament "power to make laws . . . with respect to matters incidental to the execution of any power vested by this Constitution in the Parliament . . . or in the Federal Judicature." It has often been pointed out that the paragraph confers power to make laws with respect, not to matters incidental to the subjects which are confided, by sec. 51 or elsewhere, to the Parliament, but to matters which are incidental to the execution of the legislative power. The distinction between a matter incidental to the execution of a power, something which attends or arises in its exercise, and a matter incidental to a subject to which the power is addressed, is material. The principle that everything which is incidental to the main purpose of a power is contained within the grant itself, is so firmly established and so well understood in English law that it would have been superfluous to incorporate it in an express provision of the Constitution. Sec. 51 (xxxix.) differs in this respect from the power conferred upon Congress by the Constitution of the United States to make all laws which shall be necessary and proper for carrying into execution the specific legislative powers, although, until the decision of the Privy Council in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* (1), this difference had not received enough attention. If so much of sec. 51 (xxxix.) as relates to matters incidental to the execution of powers vested by the Constitution in the Parliament did no more than express what would in any case be understood, namely, that whatever was incidental to a subject matter of legislation was included in the grant of legislative power, then its application to sec. 77 (iii.) would not make the power with respect to State Courts greater than that which has already been ascribed to the operation of sec. 77 (iii.). It would not advance the present case, for the reason already given, namely, because that which is called incidental involves a departure from the purpose of the main power, the use of a State judicial agency, dependent upon and governed by the State

(1) (1914) A.C. 237; 17 C.L.R. 644.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Knox C.J. Rich J. Dixon J.

alone, for the exercise of Federal jurisdiction. But, on the other hand, when sec. 51 (XXXIX.) is read as referring to matters which arise in the course of executing the power, incidents in its exercise, then so much of it as relates to the Legislature can have no application to legislation with respect to the organization of the Courts of Justice.

Upon this reading of sec. 51 (XXXIX.) what calls for consideration is that portion which empowers the Parliament to make laws with respect to matters incidental to the execution of a power vested by the Constitution in the Federal Judicature. But before this power could avail in the present case it would be necessary to surmount two difficulties: it would be necessary to treat State Courts invested with Federal jurisdiction as forming part of "The Federal Judicature"; it would be further necessary to treat Federal jurisdiction invested by a statute of the Parliament as a power invested by the Constitution. It is not, however, necessary to consider these two matters if the view is correct which has already been stated with respect to the meaning of sec. 77 (III.) and the place and purpose of secs. 77 and 79 in the Constitution. This view is that express and particular powers are thereby conferred with respect to State Courts because general legislative powers did not extend to authorize legislation regulating their jurisdiction or their constitution and that the power given by sec. 77 (III.) contemplates the selection by Parliament of an existing judicial organ which depends alike for its structure and its being upon State law and the grant to that Court of powers of adjudication upon specified subjects of Federal jurisdiction. Upon such a view it is evident that the reconstitution of the tribunal itself or of the organization through which its powers and jurisdiction are exercised cannot be considered to be a matter incidental to the exercise of the jurisdiction which it takes by the grant. It should, perhaps, be added that if sec. 51 (XXXIX.) had such an effect sec. 79 would be quite superfluous in respect of State Courts. It follows, in our opinion, that secs. 12 (5), 23 and 24 are nugatory in relation to the Courts of the States, and the person appointed to execute the office of Registrar of the District of Western Australia has no authority to issue the bankruptcy notice in this case.

The question was raised whether sec. 18 (1) (*b*) answers the description of sec. 77 (III.), a law investing the Courts of a State with Federal jurisdiction. We were disposed to take the view that as the *Bankruptcy Act* would come under the early consideration of the Parliament and the Parliament might see fit to adopt some other course than that of empowering the Executive to authorize State Courts to exercise jurisdiction in bankruptcy, the necessity for determining whether sec. 18 (1) (*b*) is valid might never arise. In our opinion it is not in accordance with the principles upon which this Court and the Privy Council act, to consider the validity of legislation unless the decision of the case before the Court requires it to do so, and the reasons upon which this practice is based are peculiarly applicable when the intervention of Parliament seems, in any case, to be likely upon the very subject. But in deference to the opinions of our colleagues we think it better in all the existing circumstances to state our opinion on this question. We think that sec. 18 (1) (*b*) does not answer the description " a law investing the Courts of a State with Federal jurisdiction." We are unable to appreciate the application to this question of *Hodge* v. *The Queen* (1), *R.* v. *Burah* (2) and *Powell* v. *Apollo Candle Co.* (3). No one doubts that the Parliament is not a delegate, but is constituted to exercise a plenary legislative power of its own. No one suggests that the Governor-General, in making such a proclamation as sec. 18 (1) (*b*) contemplates, is legislating. But the power conferred upon Parliament by sec. 77 (III.) of the Constitution is to make laws investing any Court of a State with Federal jurisdiction, and we think the simple question is whether sec. 18 (1) (*b*) of the *Bankruptcy Act* is such a law. We think this is to be answered by considering the effect of that section when enacted, and therefore before the Governor-General made any proclamation thereunder. It is apparent that at that stage no State Court was invested with any Federal jurisdiction in bankruptcy. We are, therefore, unable to see how " the law " contained in sec. 18 (1) (*b*) was a law investing State Courts with such a jurisdiction. It might, if valid, have continued in force indefinitely without any State Court being

(1) (1883) 9 App. Cas. 117. (2) (1878) 3 App. Cas. 889.
(3) (1885) 10 App. Cas. 282.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Knox C.J. Rich J. Dixon J.

invested with Federal jurisdiction, unless the Governor-General exercised the authority which the section purports to confer. We think it plain that what the section purports to do is to confer upon the Governor-General, that is the Executive Government, a discretionary power to authorize any State Court to exercise Federal jurisdiction and to withhold or revoke State authority. We think the natural meaning of the words of sec. 77 requires that the law made by the Parliament should not only define the jurisdiction to be invested but identify the State Court in which the jurisdiction is thereby invested. The power is to make laws "investing," not, as in sec. 51, "with respect to," a subject matter. For these reasons we are of opinion that sec. 18 (1) (*b*) goes beyond the power conferred upon the Parliament by the Constitution.

Whether the Supreme Court is or is not a Court having jurisdiction in bankruptcy, that Court has power to set aside and declare void a proceeding expressed to be issued with its authority and in fact issued in the supposed exercise of the functions of an office assumed to exist in the Court.

The appeal should be allowed and the notice declared irregular and void.

ISAACS J. Several objections have been raised to the legal functioning of the Commonwealth *Bankruptcy Act*. The divergence of opinion as to their substantiality and the seriousness of their consequences entitle them to careful scrutiny. Some of them, as will be seen, would reduce the legislative authority of the Australian people, as a whole, acting through their representatives in Parliament, and even in respect of their admitted enumerated powers, below that of any other self-governing body in the Empire. The objections may be classified. They question: (1) the legal existence of any Commonwealth Bankruptcy Court; (2) the legality of its jurisdiction should such Court exist; (3) the legality of attaching a Registrar to such a Court if it be a State Court with invested jurisdiction; (4) the legality of the Registrar's appointment and duties; (5) some minor objections. I take these in order, and think it very desirable, as all have been suggested by the Court and argued by the Commonwealth, to give whatever assistance my individual opinion is worth to those having the responsibility of future action.

1. *The legal existence of a Bankruptcy Court.*—The way in which it is said there does not legally exist at the present moment any Commonwealth Bankruptcy Court may be shortly explained. By sec. 18 of the Act it is provided as follows: "(1) The Courts having jurisdiction in bankruptcy shall be (*a*) such Federal Courts (if any) as the Parliament creates to be Courts of Bankruptcy; and (*b*) such State Courts or Courts of a Territory as are specially authorized by the Governor-General by proclamation to exercise that jurisdiction." No Federal Bankruptcy Court has been created, and therefore par. (*a*) is, of course, inert. Par. (*b*) was passed as by virtue of the power of the Commonwealth Parliament conferred by sec. 77 (III.) of the Constitution, namely, "investing any Court of a State with Federal jurisdiction." The objection is rested on the meaning and extent of the word "investing." It is said that the Constitution, in empowering the Parliament to make a law "investing" a State Court with jurisdiction, requires the law to be one which instantly on its passing "invests" the given Court with the given jurisdiction. That is to say, if the Act is one which could continue in force for any time without the Court being so invested, then, as to that Court at all events, the Act is not a law investing jurisdiction; or, in other words, the law must itself define the jurisdiction to be invested and identify the State Court in which the jurisdiction is thereby invested. If the question arose with reference to the severely limited statutory conditions under which a Local Government body is usually entrusted with authority to make a by-law with penalties, I could better understand the rigidity of language suggested. But when addressed to the exercise by the Commonwealth Parliament of an admitted legislative power, under a great instrument of government, with all the historic attributes of a supreme representative assembly of a self-governing people, the narrow interpretation proposed appears to me impossible of acceptance. True it is that the Parliament possesses none but the powers granted by the Constitution, but the manner in which it is expected, and in my opinion entitled, to exercise them in the absence of express restriction is as a British Parliament usually exercises powers, and in accordance with precedent and an unbroken line of development, which means in a

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Isaacs J.

manner discretionary with Parliament itself. The objection concretely stated is that par. (*b*) is invalid and of no effect, since Parliament has no power to say that only those State Courts which have been selected by the Executive as the most appropriate after all circumstances have been considered, and have been so declared by proclamation, shall be invested with Commonwealth jurisdiction. Unless the Constitution is found to exhibit distrust of the Executive in such a matter—an assumption I put aside as unthinkable—there is no reason that I can see for denying to the Parliament its ordinary choice of methods. If it thinks as a matter of policy and precaution that it is more conducive to the advantageous functioning and administration of the Act that the additional exercise of Commonwealth judicial power under the *Bankruptcy Act* by State Courts should, as to choice of Courts, be determined by amicable arrangement between Commonwealth and State Governments, no doubt after consulting the convenience of the Courts themselves, I know of nothing in the Constitution or out of it to prevent Parliament from adopting that eminently practical course. The objection is, in effect, that Parliament is not allowed by the Constitution so far to trust even its own sense of convenience and advantage to the general interests of the community.

Before stating the affirmative reasons for rejecting that view, it is not unimportant to point out its novel and revolutionary character. For over twenty-five years the understanding and practice of the Parliament and of this Court have been entirely opposed to it. That is at once seen by reference to the *Judiciary Act* of 1903. By sec. 39 (2) of that Act it is enacted that "the several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject matter or otherwise, be invested with Federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions," &c. The exception and the conditions and restrictions are irrelevant. It is patent that that provision for "investing" State Courts is under the identical power applying here. It is patent also that there is no defining of the jurisdiction invested—

for some does not yet exist—and no identification of State Courts as required by the objection in hand. There might be no State Court having the required jurisdiction, but one might be subsequently created by the State. And the matters in which jurisdiction may be exercised may not exist in law for years to come, if ever. True it is that there is nothing said in sec. 39 about an intervening proclamation by the Governor-General, whose action can be controlled as an Executive by the Parliament. But there is, as to future Courts and even as to the alteration of presently existing Courts, the necessary intervening action of State Parliaments and State Executives, outside the control of the Commonwealth Parliament. The "investing" is not confined to instant operation. Nor can it possibly be so confined in any case. You cannot, in the sense suggested, invest "jurisdiction"—which is to be distinguished from judicial power—even on an existing Court, in respect of subject matters that do not yet exist. The "matters" in which jurisdiction is to be exercised may never come into legal potentiality, much less actual existence, for years after the investing enactment is passed. And as the provision in sec. 39 is a standing provision *constantly speaking in the present* (see *Halsbury*, vol. XXVII., p. 208, and *Craies*, 4th ed., at p. 29), the identification of a given State Court depends on the circumstances as they exist at the moment when jurisdiction is exercised. Prior to that event, and perhaps since the passing of the Act, new Courts may have come into existence, old Courts have been abolished or remodelled, jurisdiction extended or restricted, and it would be impossible to say that in 1903, when that Act was passed, the State Courts pointed to by sec. 39 were all in effect enumerated and inalterable. Never in the whole history of this Court has it even been suggested that a State Court exercising Federal jurisdiction under sec. 39 must be one of the Courts identifiable on 25th August 1903 or with its jurisdiction in all respects as then identifiable. Again, there are a host of special statutory provisions of the same character. For instance, sec. 245 of the *Customs Act* 1901, permitting certain prosecutions to be instituted in "any County Court District Court Local Court or Court of summary jurisdiction." It is, I should have thought, beyond controversy that Courts as *described* (though not identified), if

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Isaacs J.

existing, might be abolished and new or additional Courts be created by the State, and that, though it was quite impossible to say that a specific Court ten years after the passing of the Act was identified when the Act was passed, it might at the date of exercising jurisdiction fully answer the statutory description, and so fall within the enactment.

The true answer to the objection is that, as I have said, the relevant section is constantly speaking, and on the combined existence of the Court as described, and of the justiciable matter whenever that combined event occurs, the section in the then present operates by legislative will to "invest" the Court with Federal jurisdiction. To limit the constitutional effect of investing in sec. 77 (III.) to the single moment of the passing of the Act is contrary to all received canons of construction. The inescapable alternative is that for over twenty-five years illegality has been rampant under the sanction of this Court. Sec. 39 (2) is indivisible (see *Owners of s.s. Kalibia* v. *Wilson* (1) and *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (2)), and, since it clearly is not limited to State Courts identified at the time it was passed, is bad *in toto*. But even if it were severable, there cannot be a doubt that in a great number of instances State Courts, either new or altered, have been unlawfully exercising Federal jurisdiction, crimes have been unlawfully punished, fines have been unlawfully enacted, and this Court has aided and abetted the long-continued lawlessness. Now, was that understanding of the word "investing" right? Clearly so, if the Parliament is to be regarded as a Parliament. What syllable is there in the Constitution to say that the "investing" must take effect immediately the Act is passed? Suppose, as in this case, the Act is not to "commence," that is, it is not to come into operation (secs. 3 and 4 of the *Acts Interpretation Act* 1901), until a later date or until proclaimed, there of necessity the "investing" cannot take place when the Act is passed. The "investing," if operative at all, is intended to operate only from the later date. Then suppose, as in this case, that provision is made by the standing power of sec. 4 of the *Acts Interpretation Act* to proclaim specific

(1) (1910) 11 C.L.R. 689. (2) (1921) 29 C.L.R. 357, at pp. 369-370.

Courts before the main Act operates at all, why does not the "investing" apply to those Courts? That is precisely what was done in this case. If, however, it be objected that sec. 18 includes Courts that are not proclaimed till later, the same objection exactly applies to sec. 39 of the *Judiciary Act*, and to accede to the objection now raised to the *Bankruptcy Act* would certainly leave this Court with all the credit of a new and sudden conversion from a long-continued course of error, if error there had been. But, in truth, there was no error (see *Lorenzo* v. *Carey* (1)). The understanding and practice were well founded. The power of "investing" is plenary, "as plenary and as ample within the limits prescribed . . . as the Imperial Parliament in the plenitude of its power *possessed* and *could bestow*" (*Hodge* v. *The Queen* (2)). Let us apply that statement and ask ourselves what was the power which the Imperial Parliament *possessed* if it wished to "invest" a State Court with Federal jurisdiction and acted within the limits of that main power? Could it or could it not have validly passed sec. 18 as it stands? If it could, then we have the warrant of the Privy Council for saying that the Commonwealth Parliament, because it is a Parliament, also possesses that power. Again, as said by *Burah's Case* (3), a legislative plenary power may be exercised either absolutely or conditionally, and in the latter case leaving to the discretion of the Executive the time and manner of carrying the legislation into effect, as well as the area over which it is to extend. The essence of responsible government is that the Legislature has full confidence in the Executive, just as those who assented to the Constitution had full confidence in their Parliament. Having no reason for distrusting the Government of the day—and with power to control its exercise if necessary—Parliament in this instance conferred what it apparently thought a very desirable executive discretion on the administration. Obviously, as I have already intimated, over the vast territory upon which the Act operates Courts of various kinds exist, and circumstances of distance, population and convenience, both of Commonwealth and State, the latter including the Courts themselves, may induce selection or alteration. The discretion conferred by sec. 18 is one

(1) (1921) 29 C.L.R. 243.
(2) (1883) 9 App. Cas., at p. 132.
(3) (1878) 3 App. Cas. 889.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Isaacs J.

of fact, not law, and, trusting to the wisdom of the Executive's choice, the Legislature is content, for the sake of mutual convenience and greater certainty of selection, to accept that choice as the *factum* to which, as soon as it exists, the legislation will at once attach the force of law. The proclamation does not purport to "invest" or to do more than purport to "authorize" in fact. Just as an award under the Arbitration Act is no more than a declaration of fact, having no inherent legal effect, but is vitalized by the Act, that is, by the Legislature, and just as the Governor-General's proclamations under the *Customs Act* prohibiting the importation or exportation of goods are mere *facta* and dependent solely for legal effect on the *Customs Act*, that is, on the will of Parliament, so the proclamation under sec. 18 of the *Bankruptcy Act* is a mere event in fact, owing any effect to the parliamentary enactment. As soon as the proclamation is made the Court is as identifiable as it is if newly created by a State authority. There is no difference between the two. Why a State legislative or administrative act creating or establishing a Court is sufficient and that of the Federal Executive is not, surpasses my imagination.

In view of *R.* v. *Burah* (1), *Hodge* v. *The Queen* (2), *Powell* v. *Apollo Candle Co.* (3) and *Attorney-General for Canada* v. *Cain and Gilhula* (4), the contention is, in my opinion, unsustainable. It is not uninteresting to note that, for over twenty years, sec. 65 of the Western Australian *Bankruptcy Act* 1871 (34 Vict. No. 20) was substantially of the same type as the enactment now impeached. It was abandoned in 1892 when the Supreme Court alone was made the Court in bankruptcy. As one instance of the extending seriousness of the objection in hand, and as a serviceable illustration of its untenability, reference may be made to sec. 76 of the Constitution. It is precisely analogous to sec. 77 (III.), the only difference being that in the former section the High Court and in the latter subsection the State Court is the recipient of jurisdiction. Sec. 76 enables the Parliament to "make laws conferring original jurisdiction on the High Court in any matter . . . (III.) of Admiralty and maritime jurisdiction." In each case the power is to "make laws"

(1) (1878) 3 App. Cas. 889
(2) (1883) 9 App. Cas. 117.
(3) (1885) 10 App. Cas. 282.
(4) (1906) A.C. 542, at p. 547.

not with respect to, but to do, a specific thing. In sec. 76 it is "conferring" jurisdiction, and in sec. 77 (III.) it is "investing" jurisdiction. In sec. 76 it is "the High Court," in sec. 77 (III.) it is "any Court of a State"; in sec. 76, it is "in any matter," and in sec. 77 (III.) it is "any of the matters." Now, could it be seriously contended that if Parliament chose it could not validly enact under sec. 76 that the High Court should have original jurisdiction in "Admiralty and maritime jurisdiction" in all matters which the Governor-General in Council might declare affected the public interests of the Commonwealth? To deny the validity of such an enactment would be astonishing. To concede it, destroys the basis of the objection. Instances might be multiplied.

In my opinion sec. 18 is valid.

2. *The legality of its jurisdiction if such a Court exists.*—This depends on the true meaning of sec. 20, which, it is suggested, purports to authorize the Courts of one State to sit and exercise their authority in another State. It would be strange if Parliament contemplated the possibility (say) of several Supreme Courts sitting in one State, and simultaneously exercising judicial functions in bankruptcy. Sec. 20, however, when properly construed, has no such import. The words "shall have jurisdiction throughout the Commonwealth" are to be referred, not to the place where the jurisdiction is exercised, but to the area over which the jurisdiction extends. The section may be compared with sec. 100 (1) of the English *Bankruptcy Act* 1914, which gives jurisdiction to each County Court acting as a Court of Bankruptcy (see sec. 103 of that Act).

3. *The Registrar as an officer of the Court.*—The objection is that, it is not competent to the Commonwealth Parliament, when investing a State Court with Federal bankruptcy jurisdiction, to provide for a Commonwealth Registrar to assist the Court in the exercise of its Federal jurisdiction. This question, in view of the considerations thought to support the objection, calls for some historical retrospect as well as a careful examination of the Constitution itself. By sub-sec. XVII. of sec. 51 of the Constitution the Parliament of the Commonwealth is empowered to make laws for the peace, order and good government of the Commonwealth with respect to "Bankruptcy and insolvency." Under this power, the Act—putting aside

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Isaacs J.

all provisions as to the Courts which should have jurisdiction to enforce it—makes a general form and character typical of bankruptcy legislation for a very long period, over sixty to eighty years, and more distinctly marked since 1883. Indeed, as far as Registrars are concerned, they were appointed, as is stated in *Robson* on *Bankruptcy*, 3rd ed. (1876), at p. 40, as early as by the Statute 1 & 2 Will. IV. c. 56, "to attend upon and assist the Judges and Commissioners of the Court." It would be burning daylight to insist that no scheme of bankruptcy legislation, as known and understood in 1900, would be imaginable without Registrars and other officers of the Court.

In considering the identical expression, "bankruptcy and insolvency," in the Canadian Act, Lord *Herschell* L.C. in *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (1) said it would not be expedient to define what is covered by those words. He added, however: "But it will be seen that it is a feature common to all systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be ratably distributed amongst his creditors whether he is willing that they should be so distributed or not." And then his Lordship points out that some power of compulsion by law to secure this is a common feature. Again: "A system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated." It is incontestable that the Act in all respects—apart from questions of judicial power—was quite within sec. 51 (XVII.) and (XXXIX.) of the Constitution. The Act accordingly made provision for Registrars and other officers of the Court—that is, whichever Court it should be wherein the duties were required. I should think no one would suggest the purposes of such legislation are possible of achievement without an official staff. If such a suggestion were made, it would be met by a reference to *Cushing* v. *Dupuy* (2), where the Privy Council says:—"It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without . . . providing some mode of special procedure for the vesting, realization and distribution of the estate, and the settlement of the liabilities of the

(1) (1894) A.C. 189, at p. 200.

(2) (1880) 5 App. Cas. 409, at p. 415.

insolvent. *Procedure must necessarily form an essential part of any law dealing with insolvency.*" Be it observed, this is all, so far, within sec. 51 (XVII.), as part of a law respecting "bankruptcy and insolvency," and independently of any selection of a tribunal to enforce the law.

Then, under sec. 77 (III.) of the Constitution, the Parliament enacted that State Courts could exercise the jurisdiction. Plainly, unless the vast expenditure necessary to create Federal Courts for the purpose was to be undertaken, either State Courts were to be availed of or the project of a national Bankruptcy Act must be abandoned. The power extends to any State Court that the Commonwealth Parliament thinks proper to select. It may be the Supreme Court in the capitals, the District or County Courts in the country cities and towns, or, for more or less limited purposes, inferior Courts in less closely populated districts. The choice of State Courts, however constituted, however equipped, perhaps with no officer but a clerk, is unqualified. But for further economy, under sec. 78 of the *Commonwealth Public Service Act*, an arrangement was then made for permitting the Registrar of the State Supreme Court to be appointed by the Attorney-General of the Commonwealth to perform the duties of the Registrar in Bankruptcy when that Court was exercising its Federal jurisdiction, and to hold the office during the pleasure of the Attorney-General and the concurrence of the State Minister of Justice, and without salary, and equitable payments being made by the Commonwealth to the State for the services of "officers of that State." The Attorney-General then appointed the State Registrar to perform the duties. It is amazing to me that the conjoint force of the Commonwealth and State Constitutions are considered inadequate to permit of so simple, economical and effective an arrangement being made between the two Governments. I should not hesitate to hold that the arrangement alone is sufficient warrant for the legality of the appointment. If not, the question could not present itself more appropriately than with respect to bankruptcy. I do not, however, think the matter should be allowed to rest on the permission of any State to the Commonwealth to enable it to discharge a great national function entrusted to it by the Constitution. A bankruptcy law concerns

H. C. OF A. 1929. LE MESURIER v. CONNOR. Isaacs J.

not merely the repression of fraudulent conduct of debtors, but also the just and equitable treatment of creditors. It, moreover, is a means of enabling citizens weighed down by debts regaining their capacity to perform the ordinary duties of citizenship. Further, it conduces to a higher standard of commercial morality. And lastly, a Commonwealth law of that nature is essentially of import nationally, and, as ultimately affecting inter-State trade and commerce, must, on its procedural incidents, if of use at all, be under the control of the Federal Parliament. I would refer those who desire the authority for this, except the last characteristic mentioned—if authority is needed—to the observations of *Vaughan Williams* J. in *Ex parte Painter* (1) and of Mr. *Manson* in the *Encyclopædia of the Laws of England, sub verb.* Bankruptcy (2nd ed., vol. II., at p. 4). These considerations make it very clear that the incidents of the relevant powers in the Constitution are comprehensive. One of those powers is that contained in sec. 77 (III.), namely, a legislative power of the Parliament with respect to matters arising under Commonwealth laws: "Investing any Court of a State with Federal jurisdiction." Although it seems almost like forcing an open door to enter upon the inquiry, it will, I think, conduce to facility of construction generally if we first arrive at a clear understanding of what the Constitution means by the expression "Court of a State." It means some organ as constituted by the State to exercise judicially some portion of the King's judicial power. All judicial jurisdiction in this Empire proceeds from the King, and his officers for dispensing the Royal justice are the Judges. *Blackstone* (vol. I., at pp. 266, 267) observes: "The original power of judicature . . . in England . . . has immemorially been exercised by the King or his substitutes." And again: "Our Kings have delegated their whole judicial power to the Judges of their several Courts." (And per *Willes* J. in *Mayor &c. of London* v. *Cox* (2).) *Holdsworth's History of English Law* (vol. I., p. 207), in connection with the fact of the King ceasing to be present in the Court, says of the Courts of common law: "The Judges formed the Court." At p. 246 we find reference to the "official staffs" of the Courts, which were distinct from the Judges, who are the judicial staff, some "officials" being appointed by the

(1) (1895) 1 Q.B. 85, at p. 88.

(2) (1867) L.R. 2 H.L. 239, at p. 254.

Chief Justice. It was a curious and instructive survival which was preserved in sec. 62 of the English *Bankruptcy Act* of 1869, in providing that the "Registrars, clerks, ushers, and other subordinate officers," subject to certain provisions as to the London Court, were to be appointed and removed by the Chief Judge. A Court consists, then, of the Judges, and of them only. They are the only judicial officers of the King. This High Court, as the Constitution (sec. 71) declares, shall "*consist* of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes." That was the constitutional creation of the High Court, its personnel and activity being dependent on provision being made by Parliament in conformity with the Constitution. That is the first conception which it is necessary to fix upon firmly. Officers of the Court are not part of the "Court" in the strict sense. The distinction is indicated, for instance, in *Holdsworth's History of English Law* (vol. I., p. 203), which speaks of the Court's "jurisdiction over its own officials." So closely is the term "Court" restricted to the body of Judges constituting the Court, that even a Judge sitting at Nisi Prius under a commission to try the issue does not constitute the Court, and cannot give judgment (see *Wilson* v. *Hood* (1), per *Bramwell B.*).

It needs but little reflection to see how utterly impossible it is to regard the State Court for the purposes of sec. 77 (III.) as including all the official staff, from the Clerk of the Court to the bailiff and doorkeeper. If that were the case, the "Federal jurisdiction" invested would fall upon the whole indivisible body, from Chief Justice to doorkeeper alike, for sec. 77 (III.) makes no distinction. And once that is done, then, as will be presently seen, sec. 71 would vest in the whole staff, considered as one body, the judicial power of the Commonwealth with undiscriminating completeness. There would certainly remain one crowning difficulty. While sec. 79 enables the Parliament to prescribe the number of Judges to exercise the jurisdiction, nothing is said about bailiffs and ushers and doorkeepers. Apparently they would all have to form part of the tribunal. But, in truth, the official staff of Courts are no more part of the Court than the parliamentary official staff are part of Parliament.

(1) (1864) 3 H. & C. 148, at p. 152.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Isaacs J.

We may now turn to the Western Australian statutes to see which conception fits the facts in the present case. By the Act of 1880 (44 Vict. No. 10) it is enacted by sec. 4 that "The Supreme Court shall be constituted of one Judge who shall be called 'The Chief Justice of Western Australia'; and such other Judge or Judges as Her Majesty shall from time to time appoint." Sec. 30 provides for "officers" to be "attached to the Supreme Court," and who are to perform such duties in relation to the business of the Court as may be directed by rules of Court, or, in cases not provided for by rules of Court, as such Court shall direct. Obviously, the "business" referred to is whatever business the Western Australian Legislature under its State Constitution may regulate. But it is plain that the Court is constituted by the Judges only, and it directs the official staff. It follows, therefore, that sec. 77 (III.), in permitting the Parliament to invest Federal jurisdiction in a State Court has reference only to the "Court" itself, and not to the official staff, and that in the case of Western Australia that is all to which the invested jurisdiction could attach.

Having thus cleared away some possibly hampering misconceptions from the ground, the building of the structure of affirmative reasoning is simplicity itself. The Constitution, to use an expression in an occasionally forgotten case—*Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1)—*lucet ipsa per se.* There are, according to that case, no implied constitutional prohibitions. There are, of course, some implications, such as would arise in the ordinary process of construction, and such as, without inconsistency, spring from the fabric of the common law upon which all British statutory constitutions are superimposed. But one thing is clear: there can never be implications as to matters expressly dealt with. "*Express enactment* shuts the door to further implication. '*Expressio unius est exclusio alterius*'" (per Lord *Dunedin* in *Whiteman* v. *Sadler* (2); see also per *Blackburn* J. in *Fowkes* v. *Manchester and London Assurance Association* (3)). That is necessarily invariable where the express enactment covers the very ground which the suggested implication would have occupied. "It is, indeed, a

(1) (1920) 28 C.L.R. 129, at p. 152. (2) (1910) A.C. 514, at p. 527.
(3) (1863) 3 B. & S. 917, at p. 930.

principle of logic and of common sense, and not merely a technical rule of construction," to use the words of *Broom's Maxims* (9th ed., at p. 430), that where the framers of a document have expressed their intentions as to a given subject, it cannot be said they have left their intentions on that subject to implication. Such a position is self-contradictory.

The express language of the Constitution applied to the subject matter with which we are concerned, namely, bankruptcy legislation and its judicial enforcement, supports the Act with a simplicity and directness that before the argument in this case I thought could not be surpassed. Let me state the position in logically successive steps, which are amplified later: (1) The State Constitution continues, but "subject to this Constitution" (sec. 106); (2) when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail (sec. 109); (3) the Parliament may with respect to "matters" arising under a Commonwealth law of bankruptcy and insolvency, make a law "investing any Court of a State with *Federal jurisdiction*" (sec. 77 (III.)); (4) the judicial power of the Commonwealth shall be *vested* (that is, by the Constitution itself) in (a) the High Court, (b) any Federal Court, and (c) in State Courts that are invested with Federal jurisdiction, these all being included under the head "the Judicature"; (5) sec. 51 (XXXIX.) empowers the Parliament to make laws with respect to "matters incidental to the execution of any power *vested by this Constitution* in . . . the Federal Judicature." There needs but one step more, which is rather a self-evident one, namely, that the furnishing, either by creation or adoption of an official staff to enable an invested State Court to exercise its Federal jurisdiction, with which the State has no concern and no right of interference, is incidental to the execution by the Court of that portion of the Commonwealth judicial power it now possesses.

Now, as to each of these steps:—The first is decisive that it is fatally wrong to assume that interference with State Courts must be wrong. The exercise of its constitutional powers by the Commonwealth, whatever that power may be, cannot be wrong, whatever interference may result. Covering sec. 5 is explicit as to this. The second represents the overriding force of the Commonwealth

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Isaacs J.

legislation, and in this case applies, unless the *Bankruptcy Act* in sec. 12 is *ultra vires* the Commonwealth Parliament. The third is not disputable, and, as I understand, is undisputed. If sec. 18 were limited to Federal and Territorial Courts, there would be no challenge of sub-secs. 2 and 5 of sec. 12. Let us assume then that those sub-sections were omitted, and that the State Supreme Courts were invested with the Federal jurisdiction. The present point would disappear, and the investment would be complete, but without adequate provision for effectuating the scheme of the Act. The fourth step is that to which no effect is given by the objection in hand. The moment the legislative investing is complete, the State Court becomes *ipso facto* one of the Courts described in sec. 71 of the Constitution, and, *pro hac vice*, a component part of the Federal Judicature. True, it is and always remains a State Court, but by virtue of sec. 71 it becomes an integral part of the "Judicature," that is, that portion of the political organism called the Commonwealth of Australia to which, as distinguished from the Legislature and the Executive, the Constitution has entrusted the "judicial power," that is, the power to construe the laws of the Commonwealth and to determine certain justiciable controversies.

Chapter I. of the Constitution vests the legislative power in "The Parliament" as defined. The term "legislative power" is a generic expression, and does not indicate its extent. It is the specification of subjects and conditions of legislation that marks out the limits of the legislative jurisdiction. Chapter II. vests the executive power of the Commonwealth in the Sovereign, and is again a generic term. Its specific limits have to be determined *aliunde*. Chapter III. is emphatic in declaring that the judicial power, also a generic term, shall be vested—that is (see sec. 51 (xxxix.)), a mandatory self-executing declaration of *vesting*—in certain Courts, one named, the others described—and whatever Courts at a given moment answer the description, they are by the Constitution directly made depositaries of the "power" to the exclusion of both the other departments of government. But again something further is necessary to mark out the extent of jurisdiction of each individual Court within the total area of Commonwealth judicial power. That is to say, in those Courts

identifiable by name or description, and nowhere else, there is by the Constitution lodged the whole of the King's judicial power in right of the Commonwealth. The distribution of that power among the Courts is, subject to definite constitutional provisions, left to Parliament. The term " judicial power " expresses a totality, and is, moreover, used in a strict sense. Its meaning is well expressed by *Nelson* J. in 1851, with reference to the same expression in the American Constitution, in his charge to the grand jury when sitting as Circuit Justice in New York. His charge is reported in *Blatchford's Reports* (1) and *Federal Cases* (2), and the passage I quote is at p. 644 of the first and p. 1011 of the second report. *Nelson* J. said : —" The judicial power mentioned in the Constitution and vested in the Courts, means the power conferred upon *Courts* ordained and established by and under the Constitution in the strict and appropriate sense of that term—Courts that compose one of the three great departments of the government prescribed by the fundamental law, the same as the other two, the legislative and the executive. But besides *this mass of judicial power* belonging to *the established Courts of a government,* there is no inconsiderable portion of power, in its nature judicial—*quasi*-judicial—invested from time to time by legislative authority in individuals, separately or collectively, for a particular purpose and limited time. This distinction in respect to judicial power, will be found running through the administration of all governments, and has been acted upon in this country since its foundation. A familiar case occurs in the institution of commissions for settling land claims and other claims against the government." The distinction is clearly marked in *Robertson* v. *Baldwin* (3), where it is pointed out that though true " judicial power " may not in America be lawfully conferred on State officers, yet that, as that power extends only to the trial and determination of " cases," Congress may authorize judicial officers of States to perform duties that " may be regarded as incidental to the judicial power rather than a part of the judicial power itself." The investing a State Court with Federal jurisdiction is the act of the Legislature, and is part of the process of

(1) (1851) 1 Blatch. 635. (2) (1851) 30 Fed. Cas., No. 18261.
(3) (1897) 165 U.S., at p. 279.

H. C. OF A. 1929. LE MESURIER v. CONNOR. Isaacs J.

distributing the authority to exercise judicial power by assigning to the Court its share in that exercise. That may be done by reference to parties, or subject matter, or amount, and so on. That authority so delimited is the Court's "Federal jurisdiction." But, again, "Federal jurisdiction" is used in a strict sense. Being the right to exercise part of the judicial power, it is necessarily employed in a strict sense, namely, the authority to entertain a justiciable controversy judicially, to ascertain the various circumstances affecting the rights of the parties, and to determine those rights by a decision binding by its own force. To effect the distribution of Federal jurisdiction is the function of secs. 73 to 77 of the Constitution, together with whatever statutes are necessary to complement them. We thus reach a point to which the unequivocal language of the Constitution leads us, at which we recognize every Court indicated in sec. 71, when engaged in Federal jurisdiction, as a judicial organ acting on behalf of the Commonwealth and doing the King's business in right of the Commonwealth. No other view is possible.

But there still remains the question of the necessary *means* of exercising the conferred authority, and that brings us to the fifth step, namely, the scope and effect of sec. 51 (XXXIX.). In secs. 71 and 77, the words "creates," "invests" and "investing" are, when literally read, exhausted when the Federal Court is created by the appointment of Judges and the State Court is declared to be invested with the given authority. To do more in either case needs recourse to some incidental power. That incidental power is found, not in any implication, but in a direct and express clause of the Constitution as direct and express as sec. 77 (III.) conferring one of the main powers. The clause which is its prototype in the American Constitution has from the moment of its existence been regarded as the sole repository of this incidental power. As to this, since the reasoning of American jurists proceeds on a fundamental common principle of interpretation permeating the jurisprudence of both countries, the opinions expressed are valuable; none the less so that our own Constitution was in this respect fashioned with the knowledge of that line of reasoning. In 1819, in *M'Culloch* v. *Maryland* (1),

(1) (1819) 4 Wheat. 316, at pp. 411 *et seqq.*

Marshall C.J. expounds the section. That great Judge first observes that the power of creating a corporation, as a direct mode of executing an expressed power, might well pass as incidental to the power expressed. "But," says the Chief Justice, "the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper'" &c. That establishes the exclusion of implication in the presence of expression. Then *Marshall* C.J. proceeds to consider its extent. At p. 415 he says:—"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end." At p. 420: "It purports to be an additional power." *Story* J., in his work on the Constitution (vol. II. par. 1254), says it "makes an *express* power what would otherwise be merely an *implied* power." In *Ruppert* v. *Caffey* (1) *Brandeis* J., speaking for the majority of the Court, including *White* C.J. and *Holmes* J., says of the clause in question:—"Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the terms express and implied, the terms specific and general had been used. For the power conferred by clause 18 of sec. 8 'to make all laws which shall be necessary and proper for carrying into execution' powers specifically enumerated is also an express power."

It remains only to be considered whether, having chosen a given State Court as a suitable tribunal for bankruptcy jurisdiction, the Parliament can or cannot attach to the Court for that purpose, and that purpose only, Commonwealth officers to assist the tribunal in doing what is incidental to the exclusively judicial function. For no other than a Federal purpose can such officials be attached to the Court. Apart from bankruptcy and other Federal jurisdiction,

(1) (1920) 251 U.S. 264, at p. 301.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Isaacs J.

the Court in the State jurisdiction remains unaltered and knows nothing of the Commonwealth official staff. But for Federal purposes, unless the Commonwealth, notwithstanding sub-sec. XXXIX. of sec. 51, must be dependent on the will of the State, and of every State, for the execution of the Commonwealth judicial power by State Courts, the Parliament must have the power to supply the ministerial staff required. Even some of the acts done by the Judge are ministerial (see *Assets Co.* v. *Mere Roihi* (1)). But if the Commonwealth is to be so dependent, then the power of utilizing State Courts in a scheme of bankruptcy, and others also, is quite illusory. At best, it would not be uniform, and at every instant might at the will of the State be frustrated. Consequences are not unimportant in the construction of statutes, unless the words are so plain as to be incapable of more than one construction (per Lord *Parker of Waddington* for the Privy Council in *Brunton* v. *Commissioner of Stamp Duties* (2)). If, therefore, sub-sec. XXXIX. were even ambiguous, the consequences I have mentioned would be formidable reasons for not defeating an express power in an instrument of self-government. But the words of the sub-section seem to me to leave no room for hesitation. What are " matters incidental to the execution of " the portion of the judicial power vested by the Constitution in the Supreme Court of Western Australia on the investing of Federal bankruptcy jurisdiction in that Court by the Commonwealth Parliament ? If the scheme is a permitted scheme, the appointment of a Registrar and his official attachment to that Court are so closely incidental as almost to provoke impatience should it ever be questioned. The power granted by sub-sec. XXXIX. is in this connection not only a power to regulate the incidents of the main legislative power exercised by Parliament under sub-sec. XVII., but is also a power to regulate, consistently with sec. 71, the incidents of the execution of the judicial power by the Court itself. Preparatory steps by officials of the Court leading up to the exercise of exclusive judicial functions, assistance in the course of adjudication, and acts consequential on adjudication, all being under judicial guidance and control, are manifestly incidental. In my opinion the enactments

(1) (1905) A.C. 176, at p. 201.

(2) (1913) A.C. 747, at p. 759.

in secs. 12 (2) and 12 (5) are even in relation to a State Court perfectly valid, and as if they were in relation to any other Court adopted by the paramount law of the Constitution as a judicial organ of the Commonwealth.

4. *The arrangement under sec.* 78 *and the appointment to duties under sec.* 12.—Apart from the objection already dealt with, the only reason advanced for denying the validity of the arrangement under sec. 78 was that the Registrar's duty was judicial, and therefore his appointment must be for life, and under sec. 72 of the Constitution. There is no substance in this objection. A Court, though strictly consisting merely of Judges, cannot function without assistance. Neither history nor reason tolerates the opposite notion for an instant. A Court is a place where controversies are determined judicially. But as necessary adjuncts of the tribunal, and to perform acts antecedent and subsequent to, and even synchronously with, the actual hearing and determination, officers are appointed. It is altogether a mistaken notion that because the Constitution distinguishes between the legislative and the executive and the judicial departments of the Commonwealth, there can ever in the practical working of any Constitution be a rigid demarcation placing each class of acts in an exclusive section. As containing some illustrations of this truth, I refer to what I said as to the Board of Review in *Federal Commissioner of Taxation* v. *Munro* (1) at pp. 174 *et seqq.* I refer to these, but do not repeat them here. The separation of the powers must be understood, as *Story* J. says in his work on the *Constitution* in sec. 525, "in a limited sense." In sec. 529 he says: "A perfect separation is occasionally found supported by the opinions of ingenious minds, dazzled by theory, and extravagantly attached to the notion of simplicity in government." Then he refers to the refutation of the idea by "the illustrious statesmen who formed the Constitution," since they maintained the proposition that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." Indeed, if our

(1) (1926) 38 C.L.R. 153.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Isaacs J.

Constitution is to be a working apparatus, such a rigid and undeviating segregation as the argument for invalidity requires, is quite impossible.

5. The remaining objections are comparatively unimportant. Beyond observing that in my opinion they are unsustainable, I say nothing as to them.

For the reasons stated this appeal should, in my opinion, be dismissed.

STARKE J. The main questions argued in this case were whether jurisdiction in bankruptcy was properly invested in the Supreme Court of Western Australia, and whether the appointment of an officer to execute the duties of Registrar in Bankruptcy in the State of Western Australia was valid.

The former question ought in my opinion to be resolved in the affirmative. Under sec. 77 of the Constitution the Parliament may, with respect to any of the matters mentioned in secs. 75 and 76, make laws investing any Court of a State with Federal jurisdiction. This power gives authority to the Parliament as plenary and ample, within the limits prescribed by sec. 77, as the Imperial Parliament in the plenitude of its power possessed or could bestow. The Parliament, pursuant to this power, made a law as follows: "The Courts having jurisdiction in bankruptcy shall be . . . (*b*) such State Courts or Courts of a Territory as are specially authorized by the Governor-General by proclamation to exercise that jurisdiction" (*Bankruptcy Act* 1924, sec. 18). This Act, pursuant to sec. 2 thereof, was by proclamation fixed to commence on 1st August 1928. The Governor-General, acting with the advice of the Executive Council, subsequently issued a proclamation whereby he specially authorized the Supreme Court of the State of Western Australia to exercise jurisdiction in bankruptcy on and after the commencement of the *Bankruptcy Act* 1924. It was said that the law made by the Parliament did not invest the State Court with any jurisdiction, but empowered the Governor-General to invest State Courts with bankruptcy jurisdiction. The proclamation of the Governor-General has, however, no force apart from the *Bankruptcy Act*: it operates and takes effect only by reason of the law made by the Parliament.

The jurisdiction in the State Court is invested by the authority of the Act under which the proclamation was issued. Since the decision of the Judicial Committee in *Powell* v. *Apollo Candle Co.* (1), the position seems to me clear and beyond doubt, and the contrary view seems to conflict with the decision of this Court in *Lorenzo* v. *Carey* (2).

The second question argued requires for its determination some reference to the provision made by the Parliament and the Executive Government for Registrars in Bankruptcy. The Act provides that the Governor-General may by proclamation declare any part of the Commonwealth to be a District, and, pursuant to this power, the State of Western Australia has been declared a District. Next, the Act provides that in each District there shall be a Registrar in Bankruptcy and such other officers as are necessary, and that the Registrars shall be officers of the Court and have such duties as the Attorney-General directs or as are prescribed. As applied to Federal Courts created by the Parliament to be Courts of Bankruptcy, these provisions are not, I think, open to objection. But a difficulty arises in their application as to Registrars and other officers in the case of State Courts invested with Federal jurisdiction. Under the *Commonwealth Public Service Act* 1922, secs. 78 and 79, it is provided that the Governor-General may arrange with the Governor in Council of any State for the performance or execution by an officer in the Public Service of the State, for the Government of the Commonwealth, of any work or services or of the duties of any office in the Commonwealth Service, and, in such case, may also arrange for the rate of payment to be made by the Government of the Commonwealth for the performance of such work or services or the execution of such duties, and for the determination of any matters which may require to be adjusted with regard to the performance of such work or services or the execution of such duties. Pursuant to these provisions arrangements were made between the Governor-General in Council and the Governors in Council of the States for the execution in those States, by the officers of the States, of the duties of certain officers under the *Bankruptcy Act*, and Thomas Frederick Davies, an officer of the State of Western Australia, was appointed by the

(1) (1885) 10 App. Cas. 282. (2) (1921) 29 C.L.R. 243.

H. C. OF A. 1929. LE MESURIER v. CONNOR. Starke J.

Attorney-General to execute the duties of Registrar in Bankruptcy in the State of Western Australia, and to hold office during the pleasure of the Attorney-General of the Commonwealth, and without salary from the Commonwealth.

Now, it was argued that, while the Commonwealth might invest a State Court with bankruptcy jurisdiction, it must take the Court, in structure, in form and in organization, as it exists, and has no power to alter in any way that structure, form or organization, or even to appoint officers to aid or assist the Court in the exercise of the Federal jurisdiction invested in it. The argument depends upon the true interpretation of secs. 51 (XVII.), (XXXIX.), 71 and 77 of the Constitution. Secs. 51 (XVII.) and 71 lend but little assistance: the former deals with a subject matter of legislation, and by itself would not warrant a law investing a State Court with jurisdiction; whilst the latter describes the tribunals in which the judicial power of the Commonwealth is vested. Consequently, it is upon the express powers conferred upon the Parliament by secs. 77 and 51 (XXXIX.) that the question really turns. Standing alone, sec. 77 would carry " with it the grant of all proper means, not expressly forbidden, to effectuate " the power itself (*Baxter* v. *Commissioners of Taxation* (*N.S.W*) (1)). But, in addition, the Constitution in sec. 51 (XXXIX.) expressly empowers the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to " matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." This clause is placed among the powers of Parliament—an additional and not a restrictive power. The Judicial Committee, in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (2), observed that " these words do not seem . . . to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by statute or . . . common law." And in *In re Judiciary and Navigation Acts* (3) this Court said: —" Sec. 51 (XXXIX.) does not extend the power to confer original

(1) (1907) 4 C.L.R. 1087, at p. 1157.
(2) (1914) A.C., at p. 256; 17 C.L.R., at p. 655.
(3) (1921) 29 C.L.R., at p. 265.

jurisdiction on the High Court contained in sec. 76. It enables Parliament to provide for the effective exercise by the Legislature, the Executive and the Judiciary, of the powers conferred by the Constitution on those bodies respectively, but does not enable it to extend the ambit of any such power." Any law, I apprehend, which will aid in executing the power of investing a State Court with Federal jurisdiction is within the authority of the Parliament. Now, there are many administrative and ministerial functions incident to the exercise of judicial power which in no wise require the exercise of that power, and which may be performed by various officers and clerks attached to the Court (cf. *Robertson* v. *Baldwin* (1)). It cannot be doubted, in my opinion, that provisions relating to the staff of a Court invested with Federal jurisdiction, and conferring upon that staff powers and functions that do not involve the exercise of the judicial power, are well within the authority of the Parliament. Such, for instance, would be the duty of keeping and preserving records, the issue of process, the taking of affidavits, the examination of a bankrupt, and other similar administrative and ministerial functions and duties. So too, in my opinion, the Parliament might authorize the appointment of Commonwealth officers for the performance of such functions and duties. I agree that the power of investment and the incidental power would not warrant any alteration in the structure of the Court, or the investment of judicial power in such officers. By judicial power I mean the power which can only be exerted by the tribunals named or indicated in the Constitution (see sec. 71).

Some reliance was also placed during the argument upon the power to legislate in respect to matters incidental to the execution of any power vested by the Constitution in the Federal Judicature. If a State Court invested with Federal jurisdiction form part of the Federal Judicature, the position is considerably strengthened; but that is a point upon which doubt has been expressed, and, without joining in that doubt, I prefer to reserve my opinion upon the matter until it calls for decision.

The question, therefore, narrows itself into a somewhat fine point, namely, What is the true effect of the *Bankruptcy Act* 1924 and the

(1) (1897) 165 U.S., at p. 279.

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Starke J.

executive acts purporting to have been done pursuant to its provisions? If the views I have expressed are right, then, standing alone, the provisions of sec. 12, sub-secs. 2 and 5, would be unobjectionable: they simply provide a method of appointing administrative and ministerial officers or staff in aid and assistance of Courts having bankruptcy jurisdiction. But sec. 24 provides that in addition to powers which may be delegated to him by the Court (having bankruptcy jurisdiction) under the provisions of the Act, the Registrar shall have "the following powers, duties and jurisdiction of the Court" (which are set out in detail), and "any order made or act done by a Registrar in the exercise of his power and jurisdiction shall be deemed the order or act of the Court, subject nevertheless to review on summary application to the Court." And by sec. 23 "the Court may delegate to the Registrar such of the powers of an administrative nature vested in the Court (except this power of delegation) as the Court deems expedient to be delegated to him." Consequently, it is argued, the Registrar is in some way incorporated in and forms part of the organization of the Court, and exercises his functions as and for the Court. Too much stress is laid, I think, on the contention that the Registrar is part of the organization of the Court: in a sense, all officers of the Court form part of its organization, including even its messengers; but the Court itself consists and can consist only of the Judges thereof.

With regard to sec. 24, however, a more difficult question arises. That section provides that the Registrar shall have certain powers, duties and jurisdiction of the Court, and that his orders and acts shall be deemed the orders and acts of the Court. The State Court is invested with Federal jurisdiction in bankruptcy, and thus exercises portion of the judicial power of the Commonwealth. But if there are many functions and duties "as incidental to the judicial power," which may be exercised as well by administrative or ministerial officers as by the Court itself, there is no reason why the Parliament should not authorize their performance by officers other than the Judges of the Court. It is quite immaterial, to my mind, that the orders and acts of the officer, in performance of such functions and duties, are deemed to be acts and orders of the Court itself. If these functions and duties were conferred upon some officer attached

by a State to a State Court invested with Federal jurisdiction, then a provision making his acts and orders the acts and orders of the Court itself would be within the competence of the Parliament and perfectly valid. And if the Parliament can lawfully authorize the appointment of Commonwealth officers in aid and assistance of Courts invested with Federal jurisdiction, as in my opinion it can, then such functions and duties as it may confer upon them, as incidental to and not as portion of the judicial power, may equally be declared to be acts and orders of the Court and within the competence of the Parliament. Most, perhaps all, of the powers conferred upon Registrars by sec. 24 are incidental to the exercise of judicial power, and legitimately conferred upon officers who are not judicial officers. It is not necessary to examine all these powers in detail, but the issue of a bankruptcy notice pursuant to secs. 52 and 53 of the *Bankruptcy Act* is clearly incidental to the exercise of judicial power and within the lawful functions and duties of the Registrar.

Some minor objections were also taken in this case—one to the provisions of sec. 20 of the Act, and another to the delegation, by three of the learned Judges of the Supreme Court of Western Australia to the Registrar, of the powers of a Judge of that Court to issue bankruptcy notices. I agree with my brother *Isaacs* as to the construction of sec. 20. The objection to the delegation was that it was made, not by the Court, but by three only of the Judges thereof. Under sec. 23 of the Act, the Court may delegate to the Registrar certain powers of an administrative nature vested in the Court. "The Court" means any Court having jurisdiction in bankruptcy or a Judge thereof. The Supreme Court of Western Australia, which was invested with bankruptcy jurisdiction, is, for the purposes of this case, the Court referred to in sec. 23. It consists of a Chief Justice and three other Judges. These three Judges executed a document purporting to delegate to the Registrar the powers of a Judge of the Supreme Court of Western Australia to issue bankruptcy notices. Their act was the act of the Court invested with bankruptcy jurisdiction, or of a Judge thereof, and the matter delegated was an act of an administrative nature vested in "the

H. C. OF A. 1929.

LE MESURIER v. CONNOR.

Court," as already defined. The objection is not easy to follow, and is in my opinion untenable.

In the result, my opinion is that the bankruptcy notice in this case was rightly issued, and that the appeal should be dismissed.

Appeal allowed. The Commonwealth (intervening) shall pay to each of the parties his or its taxed costs occasioned by the transfer of this cause to Melbourne and the rehearing there. Otherwise the parties to abide their own costs of the appeal. Order of the Supreme Court of Western Australia refusing the appellant's application with costs discharged. In lieu thereof declare that the bankruptcy notice served upon the appellant was irregular and void. The respondent to pay the appellant's costs of such application in the Supreme Court.

Solicitor for the appellant, *C. J. R. Le Mesurier*, Perth, by *àBeckett, Chomley & Henderson.*

Solicitor for the respondent, *Christopher Ewing*, Perth, by *Moule, Hamilton & Kiddle.*

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

H. D. W.