[HIGH COURT OF AUSTRALIA.]

STUART-ROBERTSON . . ; . . APPELLANT;
RESPONDENT,

AND

LLOYD . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

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SYDNEY, *May* 12; *Aug.* 8.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

*Bankruptcy—Constitutional Law—Member of State Parliament—Allowance granted by State Act—Appropriation under Federal Act for benefit of creditors—Validity—"Pay, pension, salary, emoluments, profits, wages, earnings, or income"—Discretion of Court—Constitution Act* 1902 (*N.S.W.*) (*No.* 32 *of* 1902), *sec.* 28*—*Bankruptcy Act* 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *secs* 5, 101*—*The Constitution* (63 & 64 *Vict. c* 12), *secs.* 51 (XXXVII.), 106.

Sec. 101 of the *Bankruptcy Act* 1924-1930 applies to the allowance to which members of the Legislative Assembly of New South Wales are entitled under sec. 28 of the *Constitution Act* 1902 (N.S.W.): The proviso to sec. 101 of the *Bankruptcy Act* does not exclude such an allowance from the operation of the section.

* The *Constitution Act* 1902 (N.S.W.) provides, by sec. 28:—"Every member of the Legislative Assembly now serving or hereafter to serve therein shall . . . be entitled to receive, by way of re-imbursement for expenses incurred by him in the discharge of his parliamentary duties, an allowance at" a specified rate "per annum . . . Such allowance shall be charged on the Consolidated Revenue Fund, and shall be payable monthly at the rate aforesaid to every such member from the time of his taking his seat, and, in every case, until he resigns or his seat is vacated," &c.

The *Bankruptcy Act* 1924-1930 provides, by sec. 101:—"Subject to this Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the Court, on the application of the trustee, directs: Provided that this section shall not apply to any pay, pension, salary, or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged."

Sec. 101 of the *Bankruptcy Act* 1924-1930 in its application to allowances under sec. 28 of the *Constitution Act* 1902 (N.S.W.) is a valid exercise of the power vested in the Parliament of the Commonwealth by sec. 51 (XVII.) of the Constitution.

The estate of a member of the Legislative Assembly of New South Wales having been sequestrated, the Official Receiver applied for an order under sec. 101 of the *Bankruptcy Act* 1924-1930 in respect of the allowance to which the bankrupt was entitled under sec. 28 of the *Constitution Act* 1902 (N.S.W.). The Court of Bankruptcy, having regard to the circumstances of the case, including the nature of the allowance and its purpose, to the fact that the bankrupt was a married man with a wife and family dependent upon him, and on the assumption that he had no other source of income, ordered that out of his parliamentary allowance the bankrupt should contribute the sum of £4 per week to the trustee of his estate for distribution amongst his creditors.

*Held*, by *Gavan Duffy* C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the discretion conferred on the Court by sec. 101 of the *Bankruptcy Act* had been exercised according to law and the order should not be disturbed.

Decision of the Court of Bankruptcy affirmed.

APPEAL from the Court of Bankruptcy (District of New South Wales and the Territory for the Seat of Government).

A sequestration order was made on 9th April 1931 against Robert James Stuart-Robertson, a member of the Legislative Assembly of New South Wales, and his seat in such Assembly thereupon became vacant in accordance with the provisions of sec. 34 of the *Constitution Act* 1902 (N.S.W.), but at the ensuing election he was re-elected to the Assembly.

Charles Faixfax Waterloo Lloyd, the Official Receiver of the sequestrated estate, applied to the Court of Bankruptcy for an order under sec. 101 of the *Bankruptcy Act* 1924-1930 in respect of the parliamentary allowance to which the bankrupt was entitled under sec. 28 of the *Constitution Act* 1902 (N.S.W.). The Court of Bankruptcy was informed that the amount of the allowance was £576 8s. 2d. per annum. The Court ordered the bankrupt to contribute out of his parliamentary allowance the sum of £4 per week to Lloyd for distribution amongst the creditors of the bankrupt. In doing so, his Honor Judge *Lukin* pointed out that the bankrupt had offered no evidence on the question of the amount of the order; that it did not appear whether he earned anything outside or in addition to the

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moneys receivable by him for his parliamentary duties; and that the onus of proving how much of such moneys receivable should be retained by the bankrupt seemed to rest on the bankrupt. His Honor stated that, in his opinion, having regard to the whole of the circumstances of the matter, including the nature of the allowance and its purpose, to the fact that the bankrupt was a married man with a wife and family dependent upon him, and upon the assumption that he had no other source of income, it became the duty of his Honor to make the order as indicated above.

From this decision the bankrupt now appealed to the High Court on the grounds, (1) that so far as secs. 5 and 101 of the *Bankruptcy Act* 1924-1930 purported to deal with the rights and privileges of a member of a State Legislature they were *ultra vires*; (2) that the parliamentary allowance in question did not come within sec. 101 or any other section of the *Bankruptcy Act*, and (3) that such allowance was exempt from attachment, and, being incapable of being assigned or charged, came within the proviso to sec. 101.

*Loxton* K.C. (with him *Kinsella*), for the appellant. The money received by the appellant pursuant to sec. 28 of the *Constitution Act* 1902 (N.S.W.) is an allowance, and, therefore, does not come within the class of property dealt with in sec. 101 of the *Bankruptcy Act* 1924-1930. The allowance is given for a particular purpose, and so long as it remains simply an allowance it does not pass to the Official Receiver under sec. 60 of the *Bankruptcy Act*, nor is it covered by sec. 101. There is a distinction between an allowance and an emolument, the latter being what the recipient is able to save from an allowance after deducting therefrom his ordinary expenses (*R.* v. *Postmaster-General* (1)). An allowance is not salary. Salary is what is paid for services rendered, an allowance is something paid for the purpose of reimbursing charges incurred by the recipient. The Court must be satisfied that all the expenses and demands incurred and made in the performance of the bankrupt's parliamentary duties for which the allowance was made have been met or provided for, before it will order that any portion thereof be paid to the trustee under sec. 101. An allowance made

(1) (1878) 3 Q.B.D. 428.

to a member of Parliament cannot be attached (*Callaghan* v. *Hunter* (1)). In endeavouring to ascertain what the Legislature intended by the word " salary " consideration cannot be given to the purpose for which the remuneration was paid (*Hollinshead* v. *Hazleton* (2)). As the allowance is by way of reimbursement for expenses incurred it cannot be regarded as income. If sec. 101 confers a power as indicated in the order, then it is an interference by the Federal Parliament in the function of government of a State Legislature. The State Legislature never intended that the allowance, or any part of it, should be taken for the benefit of a member's creditors. The nature of the allowance shows that it is absolutely inalienable and therefore comes within the proviso to sec. 101. So far as Judge *Lukin's* order may be taken to proceed from the exercise of discretion, such discretion was manifestly exercised on a wrong principle.

*Moverley*, for the respondent. The descriptive words appearing in sec. 101 of the *Bankruptcy Act* should be given their fullest import. Although the allowance received by the appellant under sec. 28 of the *Constitution Act* 1902 (N.S.W.) is not necessarily " salary," it may be considered as an " emolument," or " profit," or " income " within the meaning of the section. The principle underlying the *Bankruptcy Act* is that of securing equal distribution of the moneys of a bankrupt. The definition of " property " in sec. 4 of the Act is indicative of the general object of the Act that wherever it is possible the property of a bankrupt shall go to his creditors. It cannot be said that the allowance is not the property of the appellant; therefore, under sec. 60 of the Act, it is vested in the respondent, as Official Receiver, and thereby becomes subject to all provisions of the Act relating thereto. As shown in *R.* v. *Postmaster-General* (3), " emolument " is regarded in law as being the difference between the expenses incurred and the sum received. The Federal Parliament properly exercised its powers in enacting that such a balance, at least, of the allowance is attachable for the purpose of distribution amongst the creditors of a bankrupt member of a State Legislature. All amounts received by the appellant are capable of being regarded

(1) (1889) 3 Q.L.J. 152.
(2) (1916) 1 A.C. 428.
(3) (1878) 3 Q.B.D. 428.

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as "income" within the meaning of the section. The allowance is recognized by the State Legislature as being income in sec. 19 (1) (*p*) of the *Income Tax (Management) Act* 1928-1929 (N.S.W.). The *Constitution Act* 1902 (N.S.W.) nowhere suggests the amount of the expenses incurred or likely to be incurred by a member of the Legislative Assembly. The onus is upon the appellant of showing to the Court, if he so desires, that there is no surplus available from his allowance for distribution amongst his creditors. The allowance received by the appellant by way of reimbursement falls within "income." The pension of a retired Judge of a Crown Colony has been held to be "income," and attachable (*Ex parte Huggins*; *In re Huggins* (1)). The allowance is one to which the appellant has a legal claim, and it is, therefore, attachable (*Ex parte Wicks*; *In re Wicks* (2)). An allowance granted under a superannuation Act to a retired civil servant has been held to come within the operation of sec. 53 of the *Bankruptcy Act* 1883 (Eng.), which is a provision similar to sec. 101 of the *Bankruptcy Act* 1924-1930 (*In re Lupton*; *Ex parte Official Receiver* (3)). The allowance does not come within the operation of the proviso to sec. 101. There is no Federal or State Act by reason of which the allowance is exempted from attachment or assignment or charge. Upon a review of the facts it is clear that the discretion conferred upon the Court by sec. 101 was properly exercised by the Judge in Bankruptcy and therefore his Honor's order should not be disturbed by this Court.

*Cur. adv. vult.*

Aug. 8.

The following written judgments were delivered:—

GAVAN DUFFY C.J. AND DIXON J. The order appealed from recites that it appears to the Court of Bankruptcy that the bankrupt is a member of the Legislative Assembly of New South Wales, and, as such, is in the enjoyment of the annual allowance of £576 8s. 2d., and directs that £4 a week, portion of such allowance, be paid to the Official Receiver by the bankrupt during his bankruptcy to be applied in payment of his debts.

(1) (1882) 21 Ch. D. 85. (2) (1881) 17 Ch. D. 70.
(3) (1912) 1 K.B. 107.

The question for decision is whether the allowance comes within the operation of sec. 101 of the *Bankruptcy Act* 1924-1930. To do so, the allowance must fall within the description " pay, pension, salary, emoluments, profits, wages, earnings, or income," and must not fall within the exception " pay, pension, salary, or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged." Further, the provision must be constitutionally capable of applying to State parliamentary allowances. The *Constitution Act* of New South Wales describes the nature of the payment. It provides that every member of the Legislative Assembly shall be entitled to receive by way of reimbursement for expenses incurred by him in the discharge of his parliamentary duties an allowance. It prescribes that the allowance shall be payable monthly to him from the time of taking his seat until he vacates his seat or the Parliament ends (sec. 28). For purposes of State income tax, the allowance forms part of the member's assessable income and a deduction is authorized of £100 in respect thereof (*Income Tax* (*Management*) *Act* 1928-1929, sec. 19 (1) (*p*) ). Although it is given the character of an indemnity for expenses, the allowance is payable regardless of the expenditure, if any, actually incurred and of the nature and extent of the duties which the member is called upon to discharge. The payment forms part of his general resources and may be applied as he thinks fit. It is, therefore, " income " of the bankrupt within the narrowest meaning of that word. Compare *Ex parte Benwell*; *In re Hutton* (1); *In re Shine*; *Ex parte Shine* (2); *Hollinshead* v. *Hazleton* (3).

The category stated in the exception includes a much smaller class of receipts than that contained in the positive enactment in sec. 101. As the allowance is given the character rather of reimbursement or indemnity than of remuneration, there is some difficulty in bringing it within the description " pay, pension, salary, or wages." But even if it fall within that description, the exception cannot cover it unless by a State Act it is made exempt from attachment or incapable of assignment or charge. It may be that it is inalienable according to the principles of the common law. The

(1) (1884) 14 Q.B.D. 301, at p. 307. (2) (1892) 1 Q.B. 522, at pp. 527, 529.
(3) (1916) 1 A.C., at p. 449.

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Gavan Duffy C.J. Dixon J.

application of these principles depends, no doubt, upon the character and purpose of the allowance, and these are matters which the *Constitution Act* (N.S.W.) describes. But the statute does not express or imply any legislative intention that the allowance shall be unassignable. Its unassignability must arise, if at all, from doctrines which are founded upon considerations of public policy, and do not depend for their application upon the intention of the Legislature. There is no other State enactment which can be relied upon, and it follows that the allowance does not fall within the exception contained in sec. 101. No good reason appears for denying to the Commonwealth Legislature power to enact such a law extending to State parliamentary allowances. It does not impose any burden upon legislators as such, and it does not attempt to take for creditors any payment which the laws of a State have not left at the disposal of the recipient. It gives power to appropriate for the benefit of the creditors the allowance because it is " income " of the member. Moreover, it respects legislation of a State which grants a " salary " and makes it inalienable. How much further the power of the Parliament enables it to go, it is unnecessary to consider, for it is clear that such a law is valid. It follows that the Judge in Bankruptcy possessed a discretion to make the order appealed from. In exercising that discretion he did not proceed upon any wrong principle, and we ought not to substitute our judgment for his.

The appeal should be dismissed with costs.

RICH J. I consider that the appellant's parliamentary allowance falls within sec. 101 of the *Bankruptcy Act* 1924-1930, which is a valid law of the Commonwealth, and that the primary Judge properly exercised his discretion in making the order appealed from.

In my opinion the appeal should be dismissed with costs.

STARKE J. The main question in this case is whether the allowance of £576 to members of the Legislative Assembly of New South Wales by way of reimbursement for expenses incurred by them in the discharge of their parliamentary duties is salary, emolument or income within the meaning of sec. 101 of the *Bankruptcy Act* 1924-1930.

Provisions such as are made in sec. 101 of the *Bankruptcy Act* have been applied to salaries that are inalienable at common law, and even to the payment of a sum of £400 per annum to members of Parliament under the resolution of the House of Commons (*Hollinshead* v. *Hazleton* (1) ). Such payments are salaries or income within the meaning of the law of bankruptcy. In the Australian *Bankruptcy Act* the words are "salary, emoluments, profits, wages, earnings, or income." The allowance under the New South Wales Act is expressed to be by way of reimbursement for expenses incurred in the discharge of parliamentary duties. But the sum is the same for all members whether expenses be incurred or not. And members are under no obligation to account in any way for the expenditure of the allowance. Moreover, it is payable monthly, at the rate of £576 per annum, and is charged upon the Consolidated Revenue Fund. We must, I suppose, take the Parliament at its word, and not treat "allowance," in the Act mentioned, as a euphemism for salary, but as meaning a reimbursement for expenses. But even so, the words "emoluments" or "income" in sec. 101 cover the allowance and bring the case within the principle of the decision in *Hollinshead* v. *Hazelton*.

Another question raised in this case is whether the proviso to sec. 101 excludes the allowance from the operation of that section: "Provided that this section shall not apply to any pay, pension, salary, or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged."

The proviso points to payments for services rendered, present or past, and the allowance as granted is not for such services, but is a reimbursement for expenses incurred (see *In re Shine*; *Ex parte Shine* (2) ). Assume, contrary to my view, that the allowance is within the words of the proviso "pay, pension, salary, or wages," and that by its nature it is incapable of being assigned or charged by reason of the rule of law based upon public policy prohibiting the assignment or charging of salaries, pensions or allowances attached to public offices or positions, does the State Act make the allowance incapable of being assigned or charged? This is a somewhat delicate question, because the proviso should be given a liberal construction; but on the whole

(1) (1916) 1 A.C. 428.

(2) (1892) 1 Q.B., at p. 531, per *Fry* L.J.

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Starke J.

I think the better construction of the proviso is that the prohibition must appear from the words of the Commonwealth or State Act, and not arise merely from some rule of law based upon public policy or other ground. The State Act in question in this case does not, in terms, make the allowance incapable of being assigned or charged.

Another ground raised by the notice of appeal is that sec. 101, in so far as it affects allowances to members of the State Parliaments such as are in question here, is beyond that competence of the Parliament of the Commonwealth. But the Parliament has plenary power to make laws for the peace, order and good government of the Commonwealth with respect to bankruptcy and insolvency. No limitation upon the power is found in the Constitution and unless such a limitation can be found there, then it does not exist (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1)). A provision such as sec. 101 is a law with respect to bankruptcy, and the Constitution does not forbid such a provision. The argument therefore fails.

The Bankruptcy Court, in the exercise of its discretionary power, directed that the sum of £4 per week, portion of the said allowance, should be paid by the bankrupt to the Official Receiver in Bankruptcy in order that the same might be applied in payment of his debts. The Court, before making the order, considered the position of the bankrupt and the expenses he necessarily incurred in the performance of his parliamentary duties, and, no doubt, made liberal allowance for those expenses. And with the Court's discretion, so exercised, we ought not to interfere.

The appeal should be dismissed.

EVATT J. By sec. 28 of the New South Wales *Constitution Act*, every member of the Legislative Assembly of that State is entitled to receive an allowance of £576 per annum "by way of reimbursement for expenses incurred by him in the discharge of his parliamentary duties." Does this allowance, which is payable monthly, come within the description of "pay, pension, salary, emoluments, profits, wages, earnings, or income" so as to be caught by the first paragraph of sec. 101 of the Federal *Bankruptcy Act* 1924-1930.

(1) (1920) 28 C.L.R. 129.

Acting under sec. 101, the Court of Bankruptcy has ordered a payment of £4 a week to the Official Receiver of the bankrupt, a member of the Assembly. In my opinion the decision of the House of Lords in *Hollinshead* v. *Hazleton* (1) clearly covers this part of the case, and the parliamentary allowance is part of the member's " income."

But the proviso to sec. 101 excludes from the operation of the first paragraph any " pay, pension, salary, or wages " which " by any Act or State Act " is made exempt from attachment or incapable of being assigned or charged. It was contended that the *Constitution Act* is a " State Act " having the described effect upon the allowance and therefore sec. 101 does not apply to it. The proviso, however, does not apply at all unless the allowance is " pay, pension, salary, or wages," and to none of such descriptions it really answers. Further, the *Constitution Act* does not seek to exempt the allowance from attachment or to render it incapable of being assigned or charged. The second ground of appeal therefore fails.

Then it is said that sec. 101 is not valid so far as it applies to the allowance of State members of the Legislative Assembly. It is the *Constitution Act* itself of the State which provides for the allowance in order to enable the functions of legislation to be effectively performed by the members. It is true that some parts of the *Constitution Act* are more easily capable of alteration than others, that no special formalities are needed for the amendment of sec. 28, and that amendments have been frequently passed. But occasionally the suggestion has been made that none of the Commonwealth legislative powers enumerated in sec. 51 of the Federal Constitution are capable of exercise so as to trench upon the provisions of the State Constitution, to which a special protection is said to be accorded by sec. 106 of the Federal Constitution. If so, does sec. 106 shield against the operation of Commonwealth legislation under sec. 51, every provision found in the *Constitution Act* of a State, or only those provisions or terms, wherever found, which really define and describe the framework and scheme of its government ?

All I need say in the present case is that I am of opinion that an enactment such as sec. 101, which applies to all bankrupts and does not discriminate against members of the Parliaments of the States,

(1) (1916) 1 A.C. 428.

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is valid, although it applies to allowances established by a provision contained in the *Constitution Act* of a State. It is a law with respect to bankruptcy and insolvency.

But I have come to the conclusion that in this case the Court of Bankruptcy should not have made any order against the bankrupt. Although all of the allowance is "income" within sec. 101, and jurisdiction was exercisable with respect to it, the nature and purpose of the allowance should have been recognized by the Court before it decided to distribute part of it amongst the bankrupt's creditors. By State law, a member of the Assembly who becomes bankrupt vacates his seat, so that the appellant must have done so and subsequently sought and obtained re-election to the Assembly. The law contained in the State Constitution treats the allowance as something given to meet expenses necessarily incurred in the performance of the member's duties, and the Court of Bankruptcy should, in my opinion, have deferred to such very clear expression of intention. It may well be that the time has come to treat the allowance merely as a "salary" for services rendered. But whilst the terms of the Constitution itself remain as they are, they are too plain to permit acceptance of the view that a member's allowance is to be assimilated to that of the salary of an ordinary servant of the Crown. It seems to me that it is not a relevant question for the Court of Bankruptcy to enquire how much of the allowance can reasonably be turned away from the sole purpose for which it exists and is granted, into the pockets of the bankrupt's creditors. The allowance can be subjected to an order under sec. 101 only by treating as of no moment the purpose for which the allowance is charged upon the Consolidated Revenue Fund.

In my opinion, the Court of Bankruptcy erroneously exercised its discretionary power under sec. 101 by not paying sufficient regard to the fact that the allowance, although "income" of the bankrupt, is deemed by the *Constitution Act* to be employed solely, and employed fully, in and about meeting the expenses incurred in the discharge by him of his parliamentary duties. In the circumstances, I am of opinion that no order should have been made.

Upon this ground, but upon it alone, I think that the appeal should succeed.

McTIERNAN J. The learned Judge in Bankruptcy, Judge *Lukin*, correctly described the characteristics of the appellant's allowance, payable to him as a member of the Legislative Assembly of New South Wales pursuant to sec. 28 of the *Constitution Act* 1902 of New South Wales, in these terms: "It is at present a definite fixed sum of £576, a proportionate part whereof is payable monthly. It is payable by force of a statute and is not a voluntary allowance. It is a regular payment to which the member is legally entitled. He is entitled to it whether the House is in session or not. It is a charge on the Consolidated Revenue Funds. It is payable to him whether he attends the House or not. It is payable to him whether he in fact incurs expenses or not. No condition whatever is attached to this payment."

In my opinion the allowance is "income" within the meaning of that word in sec. 101 (*In re Shine* (1); *Ex parte Benwell* (2); *Ex parte Huggins* (3); *Ex parte Webber*; *In re Webber* (4); *Hollinshead* v. *Hazleton* (5)). Sec. 51 of the *Bankruptcy* (*Ireland*) *Amendment Act* 1872 (35 & 36 Vict. c. 58), which was in question in the last-mentioned case, commenced in these terms: "When a bankrupt is in receipt of a salary or income . . . the Court may, from time to time, make such order as it thinks just for the payment of such salary or income . . . to the Official Assignee or the trustee." The resolution of the House of Commons, passed on 10th August 1911, in pursuance of which the salary of the bankrupt, in common with other members, was paid was in these terms: "Resolved, that in the opinion of this House provision should be made for the payment of a salary at the rate of £400 a year to every member of this House, excluding any member who is for the time being in receipt of a salary as an officer of the House, or as a Minister, or as an officer of His Majesty's Household." Lord *Atkinson* said in *Hollinshead* v. *Hazleton* (6):—"The question then remains, What is the character of these payments? They are not merely gratuities, or arbitrary voluntary payments, which the authority making them, the Crown, can at any moment stop. That is clear, I think. The

(1) (1892) 1 Q.B., at pp. 529, 531.
(2) (1884) 14 Q.B.D. 301.
(3) (1882) 21 Ch. D., at p 92.
(4) (1886) 18 Q.B.D. 111.
(5) (1916) 1 A.C., at pp. 449, 454, 461, 462-463.
(6) (1916) 1 A.C., at p. 449.

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Crown is bound by statute to make them. They are expressly styled, both in the resolution and the *Appropriation Act* 1911, salaries. In *In re Shine* (1) *Fry* L.J. endeavoured to give a definition of salary, which he admitted was not complete. He said: 'Whenever a sum of money has these four characteristics —first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time—I am inclined to think that it is a salary, and not the less so because it is liable to determination at the will of the payer, or that it is liable to deductions.' The word 'appointment' in this definition renders it a little difficult to apply it to the present case, unless the election of a member to serve in Parliament be considered an 'appointment.' But this is clear, I think, that this sum of £400 must necessarily be paid to members for one or other of four purposes:—(1) To keep up their dignity, and as a remuneration, in advance or otherwise, for the discharge of their duties. (2) To keep up their dignity, and enable them to discharge their duties. (3) To keep up their dignity, altogether irrespective of the discharge of their duties, or their ability to discharge them. (4) As a solatium for their membership, irrespective altogether of either their dignity or duties. That is exhaustive. If the first, I should be inclined to hold that the sum paid was a salary. If any one of the other three, I should be inclined to hold it was 'income' in the nature of a salary, but I think, as the Judges thought in *Shine's Case*, it must be either the one or the other."

In this case I think the appellant's allowance is covered by the term "income" in sec. 101, but in view of the characteristics with which sec. 28 of the *Constitution Act* 1902 impresses it, I do not think it is included in "pay, pension, salary, or wages," mentioned in the proviso to sec. 101. Moreover, that proviso does not apply to anything within that limited category unless such "pay, pension, salary, or wages" is by any Act or State Act made exempt from attachment or incapable of being assigned or charged. The appellant's allowance may well be incapable of being assigned by him upon grounds of public policy (*Hollinshead* v. *Hazleton* (2); *Wells* v. *Foster* (3)).

(1) (1892) 1 Q.B., at p. 531.
(2) (1916) 1 A.C., at p. 461.
(3) (1841) 8 M. & W. 149; 151 E.R. 987.

The objects and purposes for which an Act was passed, so far as they can be gathered from its contents, may disclose grounds of public policy upon which the assignment of any "pay, pension, salary, or wages" payable under such an Act would be unlawful. But I think that the language of the proviso shows that the Legislature intended to limit the immunity to any "pay, pension, salary, or wages" with respect to which there was some provision in an Act by which the things in that category are made exempt from attachment or incapable of being assigned or charged. In the view that the allowance is "income" within the meaning of sec. 101, and is not withdrawn from the operation of the section by the proviso, it is not necessary to decide, as was argued on behalf of the respondent, that the allowance passed to the trustee as property of the bankrupt upon the making of the sequestration order. The width of the definition given to property in the *Bankruptcy Act* is illustrated and explained by *Jessel* M.R. in *Ex parte Huggins* (1). Sec. 101 applies to property that vests in the trustee and to property not so vesting (*In re Shine* (2); *In re Garrett* (3)). If the true view is that the grant of the allowance did pass to the trustee, it must, upon the above view that it is within sec. 101, be dealt with by him subject to the power vested in the Court by sec. 101 (*Ex parte Huggins*; *In re Lupton* (4)). On the other hand, if the allowance did not pass to the trustee, and the true view is that it is within sec. 101, the present case is analogous to *In re Garrett*. In that case, sec. 14 (1) of the *Police Pensions Act* 1921 (11 & 12 Geo. V. c. 31), the statute under which the pension was payable, provided that the grant should not, upon the pensioner's bankruptcy, pass to the trustee or other person acting on the creditor's behalf. *Farwell* J. said (5):—"Sec. 14, sub-sec. 1, prevents the pension vesting in the trustee, but there is nothing in its language to prevent the trustee from making an application under sec. 51, sub-sec. 2, or to prevent the Court, if it thinks just, from acceding to that application. An order under sec. 51, sub-sec. 2, does not have the effect of passing any part of the pension to the trustee in the sense of vesting it in

(1) (1882) 21 Ch. D., at pp. 91-93.
(2) (1892) 1 Q.B. 522.
(3) (1930) 2 Ch. 137.
(4) (1912) 1 K.B. 107.
(5) (1930) 2 Ch., at pp. 141-142, per *Farwell* J.

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him. The only result of the order is that the Court directs that such portion of the pension as the Court thinks just shall be applied in paying the bankrupt's debts. That is a power in the Court quite consistent with sec. 14, sub-sec. 1, of the *Police Pensions Act* 1921, and there is nothing in that sub-section to exclude sec. 51, sub-sec. 2, of the *Bankruptcy Act* 1914." Sec. 51, sub-sec. 2, of that Act (*Bankruptcy Act* 1914 (4 & 5 Geo. V. c. 59)) corresponds with sec. 101 of the *Bankruptcy Act* of Australia. In *In re Shine* (1) Lord *Esher* M.R. said :—" But the Act assumes that there is some income of a bankrupt which is not part of his property so as to vest in the trustee in his bankruptcy. It follows, to my mind, that the income to which sec. 53 applies must be income in the nature of a salary." Sec. 53 of the *Bankruptcy Act* 1883 (46 & 47 Vict. c. 52) corresponds with sec. 51, sub-sec. 2, of the *Bankruptcy Act* of 1914.

The order of the learned Judge was also attacked on the ground that it is *ultra vires* the Parliament of the Commonwealth to pass a law under which the allowance payable to a member of a State Legislature, as such, may be made available in bankruptcy for the benefit of his creditors. The Parliament of the Commonwealth has power to make laws with respect to bankruptcy (sec. 51 (XVII.)). No provision of the Act affecting the appellant was attacked on the ground that it was not a law with respect to bankruptcy. The appellant is subject to these provisions of this Act as a debtor and the parliamentary allowance which he is receiving is made available to his creditors as " income " of which he is in receipt. Construing the Constitution by the rule in the *Engineers' Case* (2), it is not possible to discover that the power conferred by sec. 51 (XVII.) is subject to the limitation for which the appellant contends.

As the Judge had jurisdiction to make the order, and it is not shown that his discretion was exercised on any wrong principle, the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant, *E. R. Tracey & Co.*

Solicitors for the respondent, *Weaver & Allworth.*

J. B.

(1) (1892) 1 Q.B., at p. 527.

(2) (1920) 28 C.L.R. 129.