[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE FEDERAL COURT OF BANKRUPTCY AND ANOTHER; Ex parte LOWENSTEIN.

H. C. of A. 1937.

SYDNEY, *Aug.* 18, 19; *Sept.* 3.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Case stated—Statement of case at any stage of bankruptcy proceedings —Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *sec.* 20 (3).

A case may be stated under sec. 20 (3) of the *Bankruptcy Act* 1924-1933 on a particular question of law arising in a proceeding although the hearing of the proceeding has not been completed and all the facts relevant to the proceeding have not been ascertained. The case need state only such facts as are relevant to the particular question of law.

Merchant Service Guild of Australasia v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1], (1913) 16 C.L.R. 591, and *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia*, (1925) 36 C.L.R. 442, at p. 450, referred to.

ORDER NISI for prohibition or mandamus.

The estate of William John Lowenstein, who carried on the business of ladies' hairdresser, was sequestrated on 16th June 1936 on the petition of a creditor. Upon a compulsory application made by the bankrupt under sec. 119 of the *Bankruptcy Act* 1924-1933 for a certificate of discharge, Judge *Lukin*, pursuant to sec. 217 (1) (*a*) of the Act, after taking into consideration a report made by the official receiver, ordered and directed that the bankrupt be charged and tried summarily for an offence against sec. 209 (*g*) of the Act. He accordingly was charged before Judge *Lukin* on 27th May 1937 "that during the period between the twenty-fifth day of May 1934 and the fifteenth day of June 1936, at Sydney

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. . . you being a bankrupt did omit to keep such books of account as are usual and proper in the business to wit that of ladies' hairdresser carried on by you and as sufficiently disclose your business transactions and financial position during the said period being a period within the five years immediately preceding the date of your bankruptcy, to wit the sixteenth day of June 1936." The bankrupt pleaded not guilty. Counsel for the bankrupt thereupon objected to the charge on the grounds (*a*) that upon the true construction of the charge and of sec. 209 (*g*) on which it was founded the offence was committed only if the bankrupt were a bankrupt at the time of the omission to keep books; (*b*) that the charge was bad in so far as it did not allege an intent to defraud; (*c*) that sec. 209 (*g*) was *ultra vires* the Commonwealth Parliament; and (*d*) that sec. 217 was *ultra vires* the Commonwealth Parliament. During the course of argument which then ensued, counsel for the bankrupt and counsel for the Crown agreed that the points of law raised ought to be determined by the High Court, and, for that purpose, the judge was requested to state a special case pursuant to sec. 20 (3) of the Act. In pursuance of a suggestion by the judge that the parties should agree upon and prepare a draft special case, a draft, prepared by counsel for the bankrupt, was received by the Crown Solicitor for the Commonwealth. On 22nd June 1937, upon an appointment taken out by the Crown Solicitor, the judge, in his chambers, informed counsel for the parties that he had given further consideration to the question of stating a special case pursuant to sec. 20 (3), and that he had come to the conclusion that he could not take that course for the reason that he was required to state the facts in the form of a special case and these would have to be either found and determined by him or agreed upon by the parties. Counsel for the bankrupt said that he was not prepared to make any admissions, whereupon he was informed by the judge that, in the circumstances, the case required under sec. 20 (3) could not be stated and transmitted, and that the only course remaining would be to restore the matter to the list for determination of the facts, whereupon the special case could be stated if the parties then so desired. The judge then ordered that the matter be restored to the list for hearing.

On the application of the bankrupt, *Evatt* J. ordered the judge and the Attorney-General for the Commonwealth to show cause before the Full Court of the High Court (*a*) why a writ of prohibition should not be issued to prohibit them and each of them from further proceeding on the charge, on the grounds (i.) that the Court of Bankruptcy had no jurisdiction to hear and try the charge; and (ii.) that sec. 217 of the *Bankruptcy Act* 1924-1933, was *ultra vires* the Commonwealth Parliament; or, in the alternative, (*b*) why a writ of mandamus should not be issued directed to the judge calling upon him to state the facts in the form of a special case for the opinion and determination of the High Court, upon the following points of law: (i.) Whether upon the true construction of the charge and of the section on which it was founded the offence was only committed if the defendant was a bankrupt at the time of the omission to keep books; (ii.) whether the indictment or charge is bad in so far as it does not allege an intent to defraud; and (iii.) whether sec. 209 (*g*) is *ultra vires* the Commonwealth Parliament—upon the ground that all the parties desired the said points of law determined in the first instance by the High Court.

Upon being informed of this order nisi, Judge *Lukin* adjourned the trial of the bankrupt to a date to be fixed after the determination of the several questions by the High Court.

The order nisi came on for hearing before the Full Court of the High Court.

Barwick (with him *Malor*), for the applicant. Sec. 209 (*g*) is not a bankruptcy or insolvency provision within the meaning of sec. 51 (xvii.) of the Constitution, and, therefore, was beyond the competence of the Commonwealth Parliament. Parliament, under the guise of a bankruptcy law, has required every trader to keep books. The sub-section relates to the keeping by a person of books of account at a time when that person was neither bankrupt nor insolvent. The charge did not allege on the part of the applicant an intention to defraud. Sec. 217 is *ultra vires* in that it purports to confer on the court executive powers as distinct from judicial powers. The power to give judicial functions to the court involves (*a*) that the judicial power itself shall not be repugnant to the

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concept of a judicial function that was current, and (*b*) that in giving judicial power the Parliament cannot at the same time give to that repository of the judicial function an inconsistent executive function. The making of the charge and the raising of the foregoing objections were all the facts necessary for a decision on the point and to enable the judge, under sec. 20 (3) of the *Bankruptcy Act*, to state a special case for the opinion of this court. The points of law which arose are (*a*) whether the charge was sufficient, that is, whether it disclosed an offence; (*b*) whether or not sec. 209 (*g*) of the Act is *ultra vires*; and (*c*) whether the proceedings under sec. 217 were competent. All the "ultimate facts" for the determination of those points of law were before the court (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1); *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (2)). Facts pertaining to the guilt or otherwise of the applicant are irrelevant to the stating of a case for the determination of those points of law.

[LATHAM C.J. referred to *Coughlin* v. *Thompson* (3) and *Jones* v. *Donovan* (4).]

The view that a judge may state a case under sec. 20 (3) before the termination of the whole of the proceedings is supported by the provisions of sec. 26 (2), which confers a right of appeal as distinct from the stating of a special case.

Bradley K.C. (with him *S. G. O. Martin*), for the respondents. The judge was never in a position in these proceedings to state any special case to this court. He had not found the facts, nor had the parties agreed upon the facts. The questions of law can be determined on the prohibition. The draft stated case as prepared on behalf of the applicant is not a stated case within the meaning of sec. 20 (3). It does not set forth any facts. At the stage reached in these proceedings in the court below there had not been given in evidence facts which are both necessary and relevant to the determination of the points of law raised. There was no sufficient foundation of fact on which to invoke the opinion of this court

(1) (1925) 36 C.L.R. 442, at p. 450.
(2) (1913) 16 C.L.R. 591.
(3) (1913) V.L.R. 304; 35 A.L.T. 1.
(4) (1927) V.L.R. 322; 49 A.L.T. 1.

(*Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1); *Schumacher Mill Furnishing Works Pty. Ltd.* v. *Smail* (2); *Boese* v. *Farleigh Estate Sugar Co. Ltd.* (3); *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (4)); therefore, in that imperfect state of the facts the judge had no power to state a special case. In the circumstances a mandamus will not lie. All parties were in agreement that the questions should be determined by this court, but they did not agree as to the form in which those questions should come before the court. The matter of the overlapping of judicial and executive powers and functions was dealt with in *Federal Commissioner of Taxation* v. *Munro*; *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (5). (See also *McIntosh* v. *Shashoua* (6) and *Croft* v. *Dunphy* (7).) It is not uncommon, nor lacking in propriety, that a judge should have the power to commit a person and also to preside at his trial and to punish him (*In re Sampson* (8)). The provisions of secs. 209 (*g*) and 217 are "bankruptcy and insolvency" provisions and are within the power conferred by sec. 51 (xvii.) of the Constitution. Also, those provisions are in accordance with statutory provisions in force in the various States prior to the passing of the *Bankruptcy Act* 1924-1933.

Barwick, in reply. The powers conferred by sec. 51 of the Constitution are exercisable only subject to the Constitution; therefore the power relating to bankruptcy and insolvency conferred by placitum xvii. of sec. 51 is subject to sec. 71. It is repugnant to the concept of judicial function that the court should be at the one time prosecutor and judge; the concept of judicial function involves that the court shall not be a party. The important distinction between a case stated during proceedings, and a case stated after the termination of proceedings was dealt with in *Smith* v. *Mann* (9). The fact that there has been a charge is the

(1) (1913) 16 C.L.R., at pp. 606, 607, 609.
(2) (1916) 21 C.L.R. 149, at p. 151.
(3) (1919) 26 C.L.R. 477, at pp. 483, 484.
(4) (1925) 36 C.L.R., at pp. 450, 451.
(5) (1926) 38 C.L.R. 153, at pp. 175-177.
(6) (1931) 46 C.L.R. 494, at p. 520.
(7) (1933) A.C. 156, at p. 165.
(8) (1894) 20 V.L.R. 105; 15 A.L.T. 233.
(9) (1932) 47 C.L.R. 426, at pp. 445, 446.

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"ultimate" and only fact necessary for the determination of the questions.

Cur. adv. vult.

The COURT delivered the following written judgment:—

A bankrupt, William John Lowenstein, applied for an order of discharge from bankruptcy under sec. 119 of the *Bankruptcy Act* 1924-1933. The Federal Court of Bankruptcy, acting under sec. 217 of the Act, having reason to believe that the bankrupt had been guilty of an offence against sec. 209 (*g*) of the Act, charged him with the offence and proceeded to try him summarily. When the charge was called the defendant pleaded not guilty and objected that sec. 217 was invalid in so far as it authorized the court to make a charge, serve a copy of the charge and to prosecute the bankrupt, as well as to conduct the trial, because it attempted to confer other than judicial power upon a Federal court. This, it was contended, was prevented by sec. 71 of the Constitution, which vests only judicial power in Federal courts. It was also objected that the charge made did not disclose an offence and that sec. 209 (*g*) is invalid. Sec. 209 provides that "whoever . . . (*g*) being a bankrupt, has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position during any period within the five years immediately preceding the date of his bankruptcy . . . shall be guilty of an offence." The objections were that the offence could be committed only if the defendant was a bankrupt at the time of the omission to keep books; that the charge did not allege an intent to defraud, and that such an intent was a necessary element in the offence; and that sec. 209 (*g*) was invalid because it was not bankruptcy legislation, being really legislation relating to the general conduct of business. Both parties joined in asking the judge to state a case under sec. 20 (3) of the *Bankruptcy Act* for the opinion of the High Court upon the questions raised. The learned judge took the view that he could only state a case after he had determined "the ultimate facts" in the proceedings, that is, after he had heard the evidence upon the trial and decided all questions of fact arising. Reference was made to such

cases as *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1), *Schumacher Mill Furnishing Works Pty. Ltd.* v. *Smail* (2) and *Boese* v. *Farleigh Estate Sugar Co. Ltd.* (3). The bankrupt obtained an order nisi for a mandamus directing the judge to state a case and an order nisi for prohibition to prevent the continuance of the proceeding under sec. 217.

Sec. 20 of the *Bankruptcy Act* contains the following provisions: "(3) If in any bankruptcy proceeding in a court any question of law arises which all the parties thereto desire, or which one of them and the judge of the court desire, to have determined in the first instance in the High Court, the judge shall—(*a*) state the facts in the form of a special case for the opinion of the High Court; and (*b*) transmit the special case and the proceedings, or such of them as are required, to the High Court for the purposes of the determination."

It will be observed that the section provides that the High Court shall give an "opinion" upon the "question of law" which it may be asked to "determine." The High Court does not under this provision receive the whole matter into its jurisdiction. Only such of the proceedings as are required are transmitted to the High Court "for the purposes of the determination." Thus the High Court does not give the decisive judgment or make the decisive order as if the whole proceeding had been transferred to it from the Court of Bankruptcy. Accordingly, there is nothing in the frame of the section which would prevent the High Court from determining a question arising at the beginning of or during the course of the bankruptcy proceeding.

It was argued, however, that the requirement that the judge should "state the facts" means that he should state the whole of the facts in relation to which a decision has to be reached before the bankruptcy proceeding in which the question of law arises can be completed. But it is not necessary to construe the words "state the facts" in such a manner. They are satisfied by the statement of only such facts as are required to enable

(1) (1913) 16 C.L.R. 591.
(2) (1916) 21 C.L.R. 149.
(3) (1919) 26 C.L.R. 477.

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the High Court to determine the question of law which has arisen. Sometimes a statute expressly authorizes the statement of a case "at any stage" in proceedings: for example, *Commonwealth Conciliation and Arbitration Act* 1904-1934, sec. 31 (2). There are no such express words in sec. 20 of the *Bankruptcy Act*. But the words of the section do not exclude the possibility of the statement of a case during the course of proceedings and before all the facts have been determined if it is possible to state facts upon which the question of law arises in respect to which it is desired to obtain the opinion of the High Court. There is no rule that to "state the facts" must mean to state all the facts. The facts which must be stated are the facts which it is necessary to know in order to decide the question of law: "It is absolutely settled law both in England and in Australia that the expression 'state a case' involves stating facts, that is, the ultimate facts, requiring only the certainty of some point of law applied to those facts to determine either the whole case or some particular stage of it—the stage at which the case is stated" (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1)). Under sec. 20 of the *Bankruptcy Act* the facts to be stated must be "ultimate facts" in the sense explained in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (2). But it is sufficient to state such facts as require only a binding legal opinion for the determination, not of the whole proceeding, but of the question of law which arises.

In the present case, the question of law arose when the charge was made and the accused pleaded not guilty and raised the objections mentioned. It is sufficient to state these facts, which are ultimate facts for the relevant purpose, in order to raise the questions of law. Sec. 20 provides that if both parties desire a question of law to be determined by the High Court, the judge "shall" state a case. This provision does not mean, in our opinion, that the parties are entitled to insist upon the judge making piecemeal decisions upon partial evidence, but this has not been done in the present case, where the necessary facts mentioned are already ascertained beyond dispute. The order for mandamus to state a case should therefore be made absolute.

(1) (1925) 36 C.L.R., at p. 450. (2) (1913) 16 C.L.R. 591.

The court has heard argument upon the application for prohibition, which is based upon the contention that sec. 217 is invalid for the reasons indicated. A decision upon the prohibition proceedings would not really determine the questions which arise in this matter, because, if it were held that the Court of Bankruptcy could not itself try the bankrupt under sec. 217 (1) (*a*), it may reasonably be presumed that the judge would simply commit him for trial before a court of competent jurisdiction under sec. 217 (1) (*b*), the validity of which is not attacked. The questions which arise upon the mandamus proceedings would still have to be determined. The contention that sec. 217 (1) (*a*), sec. 217 (2) and sec. 217 (3) are invalid raises an important question. As it will be necessary for the parties to appear again before this court upon the argument of the special case, it is desirable to mould the grounds of the order nisi for mandamus so that the whole matter will be before this court for argument upon the special case.

Grounds of application for order nisi for writ of mandamus amended by adding the following:—(*a*) *Whether the Court of Bankruptcy has jurisdiction to hear and try the said charge.* (*b*) *Whether sec.* 217 (1) (*a*), *sec.* 217 (2) *and sec.* 217 (3) *of the Bankruptcy Act* 1924-1933 *are within the powers of the Commonwealth Parliament. Order nisi for writ of mandamus made absolute. Application for writ of prohibition adjourned and all questions of costs reserved till hearing of special case.*

Solicitor for the applicant, *B. J. Tier*, Orange, by *H. R. Bushby*.

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.