[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE FEDERAL COURT OF BANKRUPTCY AND ANOTHER;

EX PARTE LOWENSTEIN.

H. C. OF A. 1937-1938.

SYDNEY, 1937, *Nov.* 22, 23.

MELBOURNE, 1938, *Mar.* 7.

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

Bankruptcy—Offence—Failure to keep proper books of account—Period prior to bankruptcy—Summary trial without a jury—Validity of legislation—Separation of powers—Judicial power—Executive power—The Constitution (63 & 64 *Vict.* c. 12), *secs.* 51 (*xvii.*), (*xxxix.*), 61, 71, 80—*Bankruptcy Act* 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 209 (*g*), 217 (1) (*a*), (2), (3)*.

Sec. 209 (*g*) of the *Bankruptcy Act* 1924-1933 is not *ultra vires* of the Commonwealth Parliament.

So held by the whole court.

Held, further, by *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ. (*Dixon* and *Evatt* JJ. dissenting), that sub-secs. 1 (*a*), 2 and 3 of sec. 217 of the *Bankruptcy Act* 1924-1933 are not *ultra vires* of the Commonwealth Parliament.

Per Latham C.J. and *Starke* J.: No principle of absolute separation of powers is embodied in the constitution of the Commonwealth.

Per Latham C.J., *Starke* and *McTiernan* JJ. (*Dixon* and *Evatt* JJ. *contra*): The powers and functions conferred by sub-secs. 1 (*a*), 2 and 3 of sec. 217 of the *Bankruptcy Act* 1924-1933 are not at variance with the conception of judicial power so as to be incapable of being conferred upon a Federal court.

* The *Bankruptcy Act* 1924-1933 provides:—Sec. 209:—"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. Penalty: Three years' imprisonment." Sec. 217:—"(1) If the court, in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against this Act punishable by imprisonment, it may—(*a*) charge him with the offence and try him summarily; or (*b*) commit him for trial before any court of competent jurisdiction. (2) Where the court tries the bankrupt summarily it shall serve him with a copy of the charge and appoint a day

SPECIAL CASE.

In pursuance of a writ of mandamus directed to him by the High Court (*R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1)), Judge *Lukin* stated for the opinion of the High Court a special case which was substantially as follows :—

1. On 16th June 1936 in the Federal Court of Bankruptcy, District for the State of New South Wales and Territory for the Seat of Government (hereinafter referred to as " the court ") a sequestration order was made in respect of the estate of William John Lowenstein (hereinafter referred to as " the bankrupt ") pursuant to the *Bankruptcy Act* 1924-1933 (hereinafter referred to as " the Act ").

2. In accordance with an order made by the court on 19th March 1937 the bankrupt applied to the court on 14th May 1937 for an order of discharge releasing him from his debts.

3. Upon the hearing of the application for an order of discharge the court, having reason to believe that the bankrupt had been guilty of an offence against sec. 209 (*g*) of the Act, ordered and directed that the bankrupt be charged with and tried summarily for the offence, and appointed Thursday 27th May 1937 at the hour of ten thirty o'clock in the forenoon at the court for the bankrupt to answer the charge.

4. Upon the trial of the bankrupt coming on for hearing on 27th May 1937, a charge in the following terms was read over to the bankrupt :—" You are hereby charged that during the period between 25th May 1934 and 15th June 1936 at Sydney in the State of New South Wales you being a bankrupt did omit to keep such books of account as are usual and proper in the business, to wit, that of a ladies' hairdresser carried on by you and as sufficiently disclose your business transactions and financial position during the

for him to answer it. On the day so appointed, the court shall require the bankrupt to plead to the charge, and if the bankrupt admits the charge, or if after trial the court finds that the bankrupt is guilty of the offence, the court may sentence him to imprisonment for any period not exceeding six months. (3) At the summary trial, if the offence is not admitted, the court may cause to be read to the bankrupt the evidence taken before the court on which the charge is based, and that evidence shall thereupon be evidence in the trial; and the court may take further evidence in support of the charge, and shall allow evidence and argument to be adduced on behalf of the bankrupt."

(1) (1937) 57 C.L.R. 765.

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said period being a period within the five years immediately preceding the date of your bankruptcy, to wit, the sixteenth day of June 1936."

5. The bankrupt pleaded " not guilty " to the charge ; thereupon Mr. *Barwick* of counsel, who appeared for the bankrupt, took the following objections : (*a*) That the interpretation to be given to sec. 209 (*g*) of the Act requires that the person charged with the offence must be a bankrupt when he omits to keep books of account; (*b*) that in respect of such an offence it is necessary that an intent to defraud or to deceive creditors should be alleged against the person charged ; (*c*) that sec. 209 (*g*) of the Act is *ultra vires* of the Commonwealth Parliament ; and (*d*) that sec. 217 of the Act is *ultra vires* of the Commonwealth Parliament.

6. Discussion then ensued in relation to the objections, and counsel desired that the questions of law as mentioned in the objections be determined in the first instance in the High Court of Australia.

The questions for the determination of the High Court were as follows :—

1. 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.
2. Whether the indictment or charge is bad in so far as it does not allege an intent to defraud.
3. Whether sec. 209 (*g*) of the *Bankruptcy Act* 1924-1933 is *ultra vires* of the Commonwealth Parliament.
4. Whether the Court of Bankruptcy has jurisdiction to hear and try the charge.
5. 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.

Barwick (with him *Malor*), for the applicant. The applicant does not press objections *a* and *b* set forth in par. 5 of the special case and which form the basis of questions 1 and 2 respectively. The essence of the attack upon sec. 217 of the *Bankruptcy Act* is that, in effect, the Bankruptcy Court acts as prosecutor and judge in the particular matter. With respect to the particular subject matter, the section purports to divest the

executive of what is peculiarly an executive power, as those words are found in sec. 61 of the Constitution, that is to say, the Executive Government is entrusted with the power of maintaining the laws of the government. The section constitutes an attempt to invest a court with a non-judicial function inconsistent with its judicial function with respect to the same subject matter. Whether or not there is some separation of powers enjoined by the Constitution is primarily a matter of the construction of the Constitution itself. The cases in which was discussed the delegation of regulation-making power are not cases on the separation of powers, but are cases which impliedly and implicitly accept the principle of a separation of powers. The other class of case is where attempts have been made either to invest some tribunal, not a court, with Federal jurisdiction, or where this court has been asked to accept some non-judicial function. The principle of the separation of powers was recognized in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1), *In re the Judiciary and Navigation Acts* (2), *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (3) and *Federal Commissioner of Taxation* v. *Munro* (4). The argument that there cannot be an investing of a non-judicial function in a court to be exercised at the same time as a judicial function covers sec. 217 (1) (*a*) and also secs. 217 (2) and 217 (3) in so far as those sub-sections make the court a party and give it the carriage, as it were, of the prosecution. Thus those sub-sections are invalid. It is the function of the Executive Government to decide whether or not the law shall be put in motion against any particular individual (*R.* v. *Kidman* (5)). It is non-judicial and foreign to the concept of the judicial function that a judge should, at the one time, be a party to the proceedings and also the judge presiding therein (*In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (6); *R.* v. *London County Council* (7); *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (8); *Titheradge* v. *The King* (9); *R.* v. *Harris* (10)). As to whether or not a non-judicial function

(1) (1918) 25 C.L.R. 434.
(2) (1921) 29 C.L.R. 257.
(3) (1931) A.C. 275, at p. 295; 44 C.L.R. 530.
(4) (1926) 38 C.L.R. 153.
(5) (1915) 20 C.L.R. 425, at p. 438.
(6) (1910) 1 K.B. 327, at p. 332.
(7) (1892) 1 Q.B. 190.
(8) (1892) 1 Q.B. 431, at p. 452.
(9) (1917) 24 C.L.R. 107.
(10) (1927) 2 K.B. 587.

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may be reposed in a court, see *In re the Judiciary and Navigation Acts* (1); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2)). The power to commit for contempt is an inherent judicial function (*R.* v. *Lefroy* (3)) of which the court cannot be deprived. Par. *g* of sec. 209 of the *Bankruptcy Act*, unlike the other paragraphs of that section, is not a bankruptcy provision within the meaning of those words in the Constitution. A bankruptcy cannot extend any further back than the act of bankruptcy on the part of the bankrupt who, at that time, was either insolvent or had an intent to defeat his creditors or the bankruptcy law. Otherwise there is no bankruptcy "matter." Having regard to the length of the period specified it cannot be said that sec. 209 (*g*) is a provision which is incidental to securing a proper investigation of the bankrupt's affairs. The section catches within its scope a person who at the time he omitted to keep books was solvent, had no creditors and had no intent to defeat anybody or to defeat the law relating to bankruptcy. The power under bankruptcy law is not a power to prevent bankruptcy; it is a power to administer the law (*United States* v. *Fox* (4)). Sec. 94 of the Act is different from sec. 209 (*g*) inasmuch as it applies to everybody whereas sec. 209 (*g*) applies only to traders. There are material differences between the provisions of sec. 209 (*g*) and the relevant provisions of the bankruptcy and insolvency statutes of the various States and of the Dominion of New Zealand. Judicial definitions of bankruptcy and statements of what constitute the principal objects of bankruptcy are to be found in *L'Union St. Jacques de Montreal* v. *Bélisle* (5); *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (6); *Royal Bank of Canada* v. *Larue* (7); *Ex parte Walton*; *In re Levy* (8); *Le Mesurier* v. *Connor* (9); *Hill* v. *East and West India Dock Co.* (10); see also *Quick and Garran's Annotated Constitution of the Commonwealth of Australia* (1901), pp. 586 et seq.; *Blackstone's Commentaries*, vol. 2, c. 31.

(1) (1921) 29 C.L.R. 257.
(2) (1931) 46 C.L.R. 73, at pp. 97, 98.
(3) (1873) L.R. 8 Q.B. 134, at p. 137.
(4) (1877) 95 U.S. 670; 24 Law. Ed. 538.
(5) (1874) L.R. 6 P.C. 31, at p. 36.
(6) (1894) A.C. 189, at p. 200.
(7) (1928) A.C. 187.
(8) (1881) 17 Ch. D. 746, at p. 756.
(9) (1929) 42 C.L.R. 481.
(10) (1884) 9 App. Cas. 448, at p. 455.

[EVATT J. referred to *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1).]

E. M. Mitchell K.C. (with him *Bradley* K.C. and *S. G. O. Martin*), for the respondents. There is nothing in sec. 217 inconsistent with the concept of judicial power, because, for very many years prior to Federation, a more extensive power was contained in the bankruptcy systems of the then colonies and also in New Zealand. That is a circumstance the court should take into consideration in determining whether or not sec. 217 and sec. 209 (*g*) transgress the constitutional limit (*Croft* v. *Dunphy* (2)). It is an inherent part of every judicial system that there should be no procedure other than that indicated in the particular statute. Under the bankruptcy systems prevailing in Australia at the time of Federation, and also in New Zealand, the court, on the refusal of a certificate of discharge, had the power there and then to inflict punishment upon the bankrupt (*Re Sampson* (3)).

[MCTIERNAN J. referred to *R.* v. *Hughes* (4).]

The word " charge " in sec. 217 means " notify." Under sec. 217 the court can only act when an application for discharge has been brought before it and it is then a function of the court to determine whether or not an offence has been committed. If the court is of opinion that a prima facie case has been established on the evidence, it must notify the applicant accordingly. At that stage the provisions of sec. 217 mitigate the bankruptcy procedure which had been in operation in the other States prior to Federation, and debar the court from continuing in the matter without formulating with precision for the benefit of the bankrupt the prima facie case established by the evidence. And, contrary to the position which obtained in the legislation of the various States, under sec. 217 the bankrupt must be given a full opportunity to meet the charge. In respect of an offence so notified, the Attorney-General, not the court, is, by virtue of sec. 9, the prosecutor. The real gist and substance of sec. 217 is the protection of the bankrupt, to give him a fair opportunity of furnishing his defence. It must be regarded not as

(1) (1937) A.C. 391.
(2) (1933) A.C. 156, at p. 165.
(3) (1894) 20 V.L.R. 105; 15 A.L.T. 233.
(4) (1879) 4 Q.B.D. 615, at pp. 617 et seq.

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executive action by the court, but as part of the judicial powers and duties of the court. It is not inconsistent with judicial powers for a court to take cognizance of an illegality disclosed in the course of proceedings before it (*Montefiore* v. *Menday Motor Components Co. Ltd.* (1)). The fact that the court takes cognizance of such an illegality does not make the court a party to the proceedings. It is the duty of the court under sec. 119 to ascertain whether an offence has been committed in order that it may properly exercise its discretion under sub-sec. 5 of that section. The procedure provided by sec. 217 is mere procedure to the proper discharge of the duties cast upon the court by sec. 119, and is incidental to the determination of an application for a certificate of discharge. There is no hard and fast rule that only judicial power can be vested in the court; the Constitution does not imply the restriction of other powers which may be called administrative powers (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2)). The doctrine of separation of powers does not extend to the question of the determination of the procedure to be followed in connexion with the institution of a prosecution. Apart from legislative determination the right to institute a prosecution is not peculiarly either executive or judicial in its character. The position is correctly stated in *Willoughby* on the *Constitution of the United States*, 2nd ed. (1929), vol. 3, p. 1619. Sec. 217 does not expressly or impliedly empower the court to call evidence. The relation of the court to the proceedings and the bankrupt is purely an official one; therefore there can be no suggestion of bias on the part of the court (*Allinson* v. *General Council of Medical Education and Registration* (3); *R.* v. *Allan* (4); *R.* v. *Bath Compensation Authority* (5); *Frome United Breweries Co. Ltd.* v. *Bath Justices* (6); *R.* v. *Handsley* (7); *R.* v. *Bishop of St. Albans* (8); *Wildes* v. *Russell* (9)). The court has power to commit for trial, e.g., in the case of perjury. Also, by sec. 6 of the Charter of Justice (9 Geo. IV. c. 83) the court has power to overrule the determination of the Attorney-General to file a bill.

(1) (1918) 2 K.B. 241, at pp. 244, 245.
(2) (1931) 46 C.L.R., at pp. 89 et seq.
(3) (1894) 1 Q.B. 750, at pp. 758-760.
(4) (1864) 4 B. & S. 915, at p. 926; 122 E.R. 702, at p. 706.
(5) (1925) 1 K.B. 685, at pp. 694, 714.
(6) (1926) A.C. 586.
(7) (1881) 8 Q.B.D. 383.
(8) (1882) 9 Q.B.D. 454.
(9) (1866) 1 C.P. 722, at pp. 740, 745.

That section was considered in *Ex parte Little* (1); *R.* v. *McKaye* (2). Sec. 209 (*g*) of the *Bankruptcy Act* 1924-1933 is a proper exercise of the bankruptcy power.

LATHAM C.J. The court does not desire to hear you on sec. 209 (*g*).

Barwick, in reply. It is not suggested that in any matters under sec. 217 the court would be biased. A judge should not be prosecutor and judge at the same time whether or not he is biased. It is not essential to a system of bankruptcy that there should be a bankruptcy court to try offences by bankrupts, because bankruptcy begins with administration (*Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (3)). Nowhere in sec. 217 is there any provision made for notifying the Attorney-General or requiring him to attend on a prosecution under that section.

Cur. adv. vult.

1938, Mar. 7.

The following written judgments were delivered :—

LATHAM C.J. This special case stated by the judge of the Court of Bankruptcy under sec. 20 of the *Bankruptcy Act* 1924-1933 raises two questions. The first question is whether certain provisions in sec. 217 of the *Bankruptcy Act* 1924-1933 are within the powers of the Commonwealth Parliament, and the second question is whether sec. 209 (*g*) of the Act is valid.

Sec. 217 is as follows :—" (1) If the court, in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against this Act punishable by imprisonment, it may—(*a*) charge him with the offence and try him summarily; or (*b*) commit him for trial before any court of competent jurisdiction. (2) Where the court tries the bankrupt summarily it shall serve him with a copy of the charge and appoint a day for him to answer it. On the day so appointed, the court shall require the bankrupt to plead to the

(1) (1896) 17 L.R. (N.S.W.) 177; 12 W.N. (N.S.W.) 136.

(2) (1885) 6 L.R. (N.S.W.) 123; 1 W.N. (N.S.W.) 158.

(3) (1909) 8 C.L.R. 330, at p. 384.

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charge, and if the bankrupt admits the charge, or if after trial the court finds that the bankrupt is guilty of the offence, the court may sentence him to imprisonment for any period not exceeding six months. (3) At the summary trial, if the offence is not admitted, the court may cause to be read to the bankrupt the evidence taken before the court on which the charge is based, and that evidence shall thereupon be evidence in the trial; and the court may take further evidence in support of the charge, and shall allow evidence and argument to be adduced on behalf of the bankrupt. (4) For the purpose of committing the bankrupt for trial, the court shall have all the necessary powers as to taking depositions, binding over witnesses to appear, admitting the accused to bail, and otherwise."

It is contended on behalf of William John Lowenstein, a bankrupt, that sub-secs. 1 (*a*), 2 and 3 are invalid. The objection is that these provisions, if valid, enable the Court of Bankruptcy both to charge a prisoner with an offence and then itself to prosecute and try him for the offence with which the court has already charged him. It is contended that, while the Commonwealth Parliament may have power to authorize the court to commit a prisoner for trial before another tribunal (sec. 217 (1) (*b*)), it has no power to authorize the court to charge the prisoner and, as it is put, to conduct the trial as prosecutor as well as judge. It is urged that the endeavour to vest such functions as these in a court involves attaching non-judicial functions to a Federal court and that this is prohibited by the Constitution. The Constitution declares in sec. 71 that the judicial power of the Commonwealth shall be vested in certain courts, and also in sec. 61 that the executive power of the Commonwealth is vested in the Crown and is exercisable by the Governor-General as the King's representative. It is contended that the institution of a prosecution is an incident of executive power and not of judicial power, and that there is a principle of separation of powers embodied in the Constitution which makes it impossible to confer upon any court other than strictly judicial functions.

It is desirable first to deal with the latter contention because of its general significance. The subject of separation of powers has been examined in a number of cases, for example, in *Waterside*

Workers' Federation of Australia v. *J. W. Alexander Ltd.* (1) and *Federal Commissioner of Taxation* v. *Munro* (2). A full examination of the question is contained in the judgments in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3); see especially per *Dixon* J. (4) and per *Evatt* J. (5). The result of these decisions is that it cannot be said that there is involved in the Constitution a strict doctrine of separation of powers. There are many features of the Constitution, either obvious upon the face of the Constitution or elucidated by judicial decisions, which show that such a principle cannot be accepted. The members of the Federal Executive Council, who advise the Governor-General in the government of the Commonwealth (Constitution, sec. 62), must (sec. 64) be members of the legislature if they hold their office for a longer period than three months. Thus the Executive Government and the legislature are not in Australia, as they are in the United States of America, kept separate from each other.

Again, it has been held in a series of cases, beginning with *Baxter* v. *Ah Way* (6), that sec. 1 of the Constitution, which provides that the legislative power of the Commonwealth shall be vested in the Federal Parliament, does not prevent that Parliament from authorizing the Executive Government or some subordinate body to make rules which have the force of law. So also a court can be authorized by a Federal statute to make rules which have legislative effect.

In the case of *In re Judiciary and Navigation Acts* (7) the court laid down the proposition that a judicial function the exercise of which was not the exercise of a part of the judicial power of the Commonwealth was not competent to the High Court. The principle of this decision is that the only judicial power which can be conferred upon courts under chapter III. of the Constitution is Commonwealth judicial power of the original or appellate character therein specified. The case does not appear to me to decide that functions which are not strictly judicial cannot be given to a court constituted under Federal law. This is, I think, made clear by the statement of five

(1) (1918) 25 C.L.R. 434.
(2) (1926) 38 C.L.R., especially at pp. 175, 178, 179.
(3) (1931) 46 C.L.R. 73.
(4) (1931) 46 C.L.R., at pp. 91-93.
(5) (1931) 46 C.L.R. at pp. 115-118.
(6) (1909) 8 C.L.R. 626.
(7) (1921) 29 C.L.R., at p. 264.

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justices in *In re the Judiciary and Navigation Acts* (1), following upon the proposition to which I have referred, that: "If this be so, it is not within our province in this case to inquire whether Parliament can impose on this court or on its members any, and if so what, duties other than judicial duties, and we refrain from expressing any opinion on that question." *Higgins* J., who dissented from the five other justices in that case, expressed the definite opinion that "there is nothing in the Constitution to prohibit Parliament from giving other functions to the High Court than the exercise of 'the judicial power' referred to in chapter III." of the Constitution, and said that the court was not justified in implying such a prohibition (2). Thus, no justice held that such a prohibition existed. Indeed it would have been difficult to hold that there was such a prohibition, because in *Alexander's Case* (3) the court, in holding that the provisions in the *Commonwealth Conciliation and Arbitration Act* which purported to enable the Court of Conciliation and Arbitration to enforce its awards were invalid, drew a distinction, which is seen in many other decisions of the court, between judicial functions and arbitral functions—the latter being not judicial in character. The court did not, however, hold that the appointment of a justice of the High Court to perform non-judicial functions was invalid (See per *Evatt* J. in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (4)). For many years judges appointed as judges have exercised the functions of the Arbitration Court, although these functions in the making of awards are more akin to legislative than to judicial action, and although the function of industrial conciliation, also exercised by the judges of the Arbitration Court, is neither legislative nor judicial, but rather administrative in character.

Thus, in my opinion, it is not possible to rely upon any doctrine of absolute separation of powers for the purpose of establishing a universal proposition that no court or person who discharges Federal judicial functions can lawfully discharge any other function which has been entrusted to him by statute. This proposition, however, does not involve the further proposition that any powers or duties,

(1) (1921) 29 C.L.R., at p. 264.
(2) (1921) 29 C.L.R., at p. 276.
(3) (1918) 25 C.L.R. 434.
(4) (1931) 46 C.L.R., at pp. 116, 117.

of any description whatsoever, may be conferred or imposed upon Federal courts or Federal judges. If a power or duty were in its nature such as to be inconsistent with the co-existence of judicial power, it might well be held that a statutory provision purporting to confer or impose such a power or duty could not stand with the creation of the judicial tribunal or the appointment of a person to act as a member of it. It is unnecessary to examine or speculate upon such a possibility in the present case because, as will be seen, the powers conferred upon the Court of Bankruptcy by sec. 217 are not inconsistent with the co-existence of judicial power, as a number of illustrations will, I think, demonstrate.

There is, however, a further particular contention that the institution of prosecutions is so peculiarly a function of the Executive Government that at least this function cannot be removed from the executive (with which it is said to rest under sec. 61 of the Constitution) and vested in a judicial tribunal. The simplest answer to this contention is that it cannot properly be said that the institution of prosecutions and the conduct of prosecutions is essentially a function of the Executive Government. In the absence of some special statutory restriction any person is at liberty to institute and conduct a prosecution for a breach of the law.

It is further urged that the vesting of power in a court to determine that there is a prima facie case against a person and to initiate a criminal proceeding is inconsistent with the existence in that court of a power to try the alleged offender for the offence for which the court has already decided that he should be prosecuted. In so far as this allegation depends upon a suggestion of bias in the judge, it is met by the fact that parliament has declared that the judge shall have the powers set forth in the section, and it is impossible for any court to hold that a specific tribunal appointed under statutory authority is necessarily biased so that it necessarily cannot lawfully perform the functions entrusted to it by parliament (See *Wildes* v. *Russell* (1)). It has long been a common practice for a judge to grant an order nisi, thus determining that a prima facie case for consideration has been made out, and then to deal with the order nisi upon its return, discharging it or making it absolute. It

(1) (1866) L.R. 1 C.P., at p. 747.

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has never been held, nor, I think, even suggested, that there is anything inconsistent with recognized principles relating to the nature or the exercise of judicial power in a procedure under which one and the same judge first reaches a preliminary determination that the prosecutor in proceedings by way of order nisi has what may be called a prima facie case and then finally determining whether or not he has a good case.

But it is pointed out that under sec. 217 (1) the court actually initiates the proceedings and does not merely act for the purpose of determining at different stages questions which arise in proceedings instituted by some person as complainant or informant or plaintiff. It is contended that though a court may, in a sense, initiate proceedings by committing a prisoner for trial before another court, a court cannot be said to be exercising judicial power when it first directs a prosecution and then actually prosecutes the alleged offender in a trial before itself. It is said that, under sec. 217 (1) (*a*), (2) and (3), the court is directed to act as a prosecutor. It is pointed out that when the Court of Bankruptcy, acting under sec. 217, commits a bankrupt for trial before another court, sec. 222 of the *Bankruptcy Act* requires the Attorney-General to institute and carry out the prosecution, but that that section does not apply to trials under sec. 217 before the Court of Bankruptcy itself. But there are other provisions in the Act which fill the alleged gap. Sec. 9 provides that the Attorney-General shall be charged with the administration of the Act and sec. 15 (*d*) provides that it shall be the duty of the official receiver to take such part and give such assistance in relation to the prosecution of any bankrupt who is deemed to have been guilty of an offence against the Act as the court or the Attorney-General directs. Accordingly adequate provision is made in the Act for a prosecutor, and it is to be presumed that these provisions will be utilized.

Sec. 217 (2) provides that the court shall serve the bankrupt with a copy of the charge. The court can, through an officer, comply with this provision. It is unusual in form, but I am unable to see any reason based on principle why the inclusion of this particular provision should make the section invalid. It is an ordinary procedure for a court to give directions as to the service of writs and

other documents. Sec. 217 (2) also provides that the court shall require the bankrupt to plead to the charge. For a court to require an accused person to plead is common practice in all courts exercising criminal jurisdiction. Sub-sec. 3 provides that if the offence is not admitted the court may cause to be read to the bankrupt evidence which has already been taken. Sec. 119 of the Act provides for the taking of such evidence upon an application for a discharge at which the bankrupt will have been present. It is provided that further evidence may be heard and that evidence may be given on behalf of the bankrupt. Accordingly, there is no failure to provide the means for a fair trial. All these provisions relate to procedure and the fact that some of them may be unusual does not affect their validity.

The well-known procedure for contempt in the face of the court which has existed for some centuries provides an example of the same court charging and actually trying a prisoner for an offence and imposing a penalty for the offence. This single instance is sufficient to show that the nature of judicial power as understood in England and in Australia is not such as to exclude the possibility of the initiation by a judge of proceedings in relation to an offence and the trial for that offence by the same judge. Counsel has referred to State statutes which existed before the Commonwealth was established, which provided a procedure (sometimes less favourable to the bankrupt) similar to that provided in sec. 217 (See *Insolvency Statute* 1871 (Vict.), sec. 137 ; *Insolvency Act* 1890 (Vict.), sec. 140 ; *Bankruptcy Act* 1892 (W.A.), sec. 26 (5)).

Finally, it may be added that justices of the peace, who originally had no judicial functions, now exercise many judicial functions. It has never been thought that there is anything abnormal in a system under which a justice issues process and subsequently tries an accused person when he appears before him in a court of petty sessions. Similarly, a justice may conduct a preliminary inquiry into an alleged offence for the purpose of determining whether there should be a trial before a higher tribunal. This, it is well recognized, is not a judicial function (See *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1), where the history of this matter is set out by *Griffith* C.J., who

(1) (1909) 8 C.L.R., at pp. 356, 357.

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concludes that a preliminary inquiry by magistrates "cannot be regarded as an exercise of judicial power"). If the argument submitted for the bankrupt in this case were correct, it would be impossible for the Commonwealth to appoint justices of the peace and to allow them to exercise in relation to Federal law the functions which are normally and habitually exercised by State justices of the peace in relation to State law.

It is suggested that a trial by the Court of Bankruptcy itself in pursuance of sec. 217 of the *Bankruptcy Act* is a trial on indictment and that therefore the trial must be by jury by reason of sec. 80 of the Constitution: that sec. 217 does not provide for a trial by jury, and is therefore invalid. Sec. 80 provides that "trial on indictment of any offence against any law of the Commonwealth shall be by jury." As to the meaning of "indictment," see *Byrne, Law Dictionary* (1923), and *Stroud, Judicial Dictionary*, 2nd ed. (1903), *sub* "indictment," and cases there cited. I have been unable to find any authority to the effect that any prosecution initiated or directed by a court or some public authority is, because it is so initiated or directed, a proceeding upon indictment. Sec. 80 could easily have been better expressed if it was intended that it should have the effect of preventing or limiting the possibility of the Commonwealth Parliament providing for the summary trial of all, or any particular, offences (See *Quick and Garran's Annotated Constitution of the Australian Commonwealth* (1901), p. 808—reference to Convention). But the section was in fact adopted in a form which led the High Court, consisting of six justices, to decide in *R.* v. *Archdall* (1), that sec. 80 did not prevent the Commonwealth Parliament from determining whether any particular offence should be prosecuted on indictment or summarily. It was held that sec. 80 relates only to trials which are in fact trials on indictment. Such trials must be by jury—that is the meaning of the section.

The offences referred to in sec. 217 of the *Bankruptcy Act* might also be tried on indictment. This would be the case if the Court of Bankruptcy, acting under sec. 217 (1) (*b*), committed the bankrupt for trial before another court. But this fact does not afford support for any argument that they are therefore indictable offences, and

(1) (1928) 41 C.L.R. 128.

must therefore be tried on indictment, and therefore by a jury, by reason of sec. 80. The Commonwealth Parliament can, at its discretion, provide that offences shall be triable summarily or on indictment. It is only when the trial takes place on indictment (not when the offence is an offence which might have been prosecuted on indictment) that sec. 80 applies. No argument based upon sec. 80 was addressed to the court in these proceedings. The case of *R.* v. *Archdall* (1) is an authority for the propositions just stated, and in my opinion it should be followed in accordance with ordinary principles.

I am of opinion that none of the objections made to the validity of sec. 217 have been shown to be well founded.

The next question which is raised by the case relates to the validity of sec. 209 (*g*) of the *Bankruptcy Act* 1924-1933. This section provides:—"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. Penalty: Three years' imprisonment."

The objection to this section is that it is not really bankruptcy legislation, because it purports to make the bankrupt guilty of an offence if he failed to keep the required books of account at a time before he was a bankrupt, namely, during a period of five years immediately preceding his bankruptcy. It is therefore said that there is no power to pass such a provision under the power to make laws with respect to bankruptcy and insolvency, and that the provision is really a provision designed to promote general business morality or efficiency. In my opinion this contention cannot be supported.

The power to make laws with respect to bankruptcy and insolvency includes a power to make laws with respect to matters which are frequently in fact connected with the production of a state of bankruptcy or insolvency. Failure to keep books is in itself often a cause of bankruptcy or insolvency. It has not been suggested that a court of bankruptcy may not be authorized to refuse a certificate

(1) (1928) 41 C.L.R. 128.

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or order of discharge to a bankrupt if he has not kept proper books. This provision is to be found in the Commonwealth *Bankruptcy Act* in sec. 119 (7) (*b*), and it has appeared in one form or another in various State bankruptcy Acts which were replaced by the Commonwealth Act. Thus it has generally been recognized by parliaments that the failure to keep proper books is a matter which may properly be inquired into and dealt with by a court of bankruptcy.

It has been urged that the section might have been valid if it had provided that an intent to defraud should be a necessary element of the offence. In my opinion this is entirely a matter for parliament and not for a court to consider. In any event, I do not see how the addition of such an element could bring the provision within the powers of the Commonwealth Parliament if it were otherwise beyond those powers. The Commonwealth Parliament has no general power to legislate with respect to fraud.

An example of a well-known form of bankruptcy legislation which deals with matters preceding bankruptcy is to be found in provisions which appear in all bankruptcy legislation and which are to be found in the Federal Act in sec. 94, relating to avoidance of settlements and contracts for settlements. Sec. 94 provides that certain settlements are void as against the trustee in bankruptcy if the settlor becomes bankrupt within two years after the date of the settlement, and that they are void against the trustee if the settlor becomes bankrupt within five years after the date of the settlement unless the parties claiming under the settlement discharge a specified onus of proof as to the ability of the bankrupt to pay his debts. In the case of this provision it could be argued that it relates to settlements made before the person in question had become bankrupt and not necessarily connected causally with the bankruptcy, and that therefore the provision is invalid. But such provisions have universally been recognized as a natural and normal part of bankruptcy law (Cf. *Cushing* v. *Dupuy* (1); *Royal Bank of Canada* v. *Larue* (2)).

It may be added that provisions similar to sec. 209 (*g*) are to be found in many pre-federation State Bankruptcy Acts which have been cited by counsel.

(1) (1880) 5 App. Cas. 409, at pp. 415, 416. (2) (1928) A.C. 187.

It has been argued that the period of five years referred to in sec. 209 (*g*) is too long and that if it had been a shorter period, perhaps of two years, the provision might have been valid. In my opinion it is not possible for the court to hold that a provision which would have been valid if it had referred to a period of two or three years is invalid because it applies to a period of five years. The court would, I think, be undertaking an impossible task if it endeavoured to decide a question of the validity of a statutory provision upon such a ground.

For the reasons which I have given the answers in the special case should, in my opinion, be answered as follows :—1. No ; 2. No ; 3. No ; 4. Yes ; 5. Yes.

The special case was stated at the instance of the bankrupt and he has failed upon the argument. He should, therefore, pay the costs. The costs of other proceedings by the bankrupt for mandamus were reserved to be dealt with upon the hearing of this case. The bankrupt succeeded upon the proceedings for mandamus and should have his costs out of the estate. The other parties should have their costs of those proceedings out of the estate.

RICH J. I agree that the questions submitted by the special case should be answered in the manner stated by the Chief Justice.

STARKE J. Special case stated by the judge of the Federal Court of Bankruptcy for the opinion and determination of this court.

On 16th June 1936 an order for the sequestration of Lowenstein's estate was made pursuant to the *Bankruptcy Act* 1924-1933. The bankrupt was summarily charged with an offence under sec. 209 (*g*) of the Act that being a bankrupt he had omitted to keep such books of account as were usual and proper in the business carried on by him and as sufficiently disclosed his business transactions and financial position during a period within five years immediately proceeding the date of the bankruptcy. The points of law stated for the opinion and determination of this court were :—

1. 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.

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2. Whether the indictment or charge is bad in so far as it does not allege an intent to defraud.

3. Whether sec. 209 (*g*) of the *Bankruptcy Act* 1924-1933 is *ultra vires* of the Commonwealth Parliament.

4. Whether the Court of Bankruptcy has jurisdiction to hear and try the charge.

5. Whether sec. 217 (1) (*a*) and sec. 217 (2) and sec. 217 (3) of the *Bankruptcy Act* 1924-1933 are within the powers of the Commonwealth Parliament.

The learned counsel for the bankrupt did not argue the first and second questions and it is unnecessary therefore to say more than that questions 1 and 2 should both be answered in the negative. I pass accordingly to the third question.

The Constitution confers upon the Parliament plenary powers to make laws for the peace, order and good government of the Commonwealth with respect to bankruptcy and insolvency (sec. 51 (xvii.)). The object of sec. 209 (*g*) is to compel a person who carries on business to keep such books of account as are usual and proper in the business so that the court and his creditors in case of bankruptcy may ascertain what his transactions have been, and what has become of his assets, and to force upon him the contemplation of his position and deprive him of the excuse that he was not aware of it. Such a provision in various forms has long been found in laws relating to bankruptcy and, in my opinion, is clearly a *law* with respect to bankruptcy. It is for the legislature and not for this court to say what provisions are necessary to achieve the objects sought and for what period of time books of account should be kept.

The third question should also be answered in the negative.

The fourth and fifth questions may be taken together. Sec. 217 provides that on an application for an order of discharge releasing a bankrupt from his debts the court, if it has reason to believe that the bankrupt has been guilty of an offence against the Act punishable by imprisonment, may charge him with the offence and try him summarily or commit him for trial before any court of competent jurisdiction. Where the court tries the bankrupt summarily it shall serve him with a copy of the charge and appoint a day for him to answer. On the day appointed the court shall require the

bankrupt to plead to the charge and if the bankrupt admits the charge or if after trial the court finds him guilty of the offence the court may sentence him to imprisonment.

At the summary trial, if the offence is not admitted the court may cause to be read to the bankrupt the evidence taken before the court on which the charge is based and that evidence shall thereupon be evidence upon the trial and the court may take further evidence in support of the charge and shall allow evidence and argument to be adduced on behalf of the bankrupt. The section has been in force many years and no doubt of its validity appears to have excited this court until recently (See *House* v. *The King* (1); *In re Burley* (2)). However, pursuant to the order of this court, the learned judge in bankruptcy has now stated the question of the validity of the section for the opinion of this court.

The power of the Parliament with respect to bankruptcy is, as I have said, plenary. It has power in respect of that subject matter to declare what acts shall constitute acts of bankruptcy, to divest the bankrupt of his assets, to provide for the administration thereof and distribution amongst creditors; it may create offences in relation to the subject matter and attach sanctions to those offences; it may also create courts with jurisdiction in bankruptcy matters and prescribe the procedure and powers of those courts. But it is said that the provisions of sec. 217 constitute the Court of Bankruptcy the accuser, prosecutor, and judge of the bankrupt, which is so contrary to the concept of judicial power that it is beyond the power of the Parliament. The argument is untenable unless it can be established that the section is in contravention of the Constitution. But it is said that the Constitution is based upon a separation of the functions of government; that the powers it confers are divided into three classes, legislative, executive and judicial and that the judicial power is vested in the High Court and in the other courts mentioned. And, adopting the words of *Griffith* C.J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (3) and cited with approval by the Judicial Committee of the Privy Council in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (4), "the words

(1) (1936) 55 C.L.R. 499.
(2) (1932) 47 C.L.R. 53.
(3) (1908) 8 C.L.R., at p. 357.
(4) (1931) A.C., at p. 295.

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'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has a power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

By a separation of functions or powers of government I take the argument to mean that each department has its own powers which are not and cannot be conferred upon any other department. Consequently the argument concluded that sec. 217 was invalid because charging a bankrupt with an offence and committing him for summary trial was not an exercise of judicial power but rather belonged to the executive department of the Commonwealth. And *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) and *In re the Judiciary and Navigation Acts* (2) were relied upon in support of the argument. But in this absolute sense the doctrine of the separation of powers would render the Constitution inefficient and unworkable, which is a fairly strong reason for concluding that the argument is fallacious. It has not been adopted by the Supreme Court of the United States, its chief expounder (See *Willis* on *Constitutional Law*, pp. 130-137). And it has been denied in this court. Thus, as regards the legislative function of the Commonwealth the grant of power to subordinate bodies and authorities to make regulations and rules has been upheld (*Roche* v. *Kronheimer* (3); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (4)). As regards the executive functions of the government, powers in their nature judicial or quasi-judicial have been conferred upon executive officers, and the validity of the legislation is undoubted (*Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (5)). Thus assessments to income tax may be made by the Commissioner of Taxation and his assessment is conclusive, except in proceedings on appeal (*Income Tax Assessment Act* 1922-1934, sec. 39). As regards the judicial power, arbitral and judicial powers have been conferred upon the Commonwealth Court of

(1) (1918) 25 C.L.R. 434.
(2) (1921) 29 C.L.R. 257.
(3) (1921) 29 C.L.R. 329.
(4) (1931) 46 C.L.R. 73.
(5) (1931) A.C. 275; 44 C.L.R. 530.

Conciliation and Arbitration, and power has been conferred upon this court which is not the judicial power of the Commonwealth under sec. 71 (*Porter* v. *The King*; *Ex parte Yee* (1)).

The argument that the separation of powers in the Constitution prohibits absolutely the performance by one department of the powers of any other department of the government is incorrect. The truth is that there is not and never was any clear line of demarcation between legislative, executive and judicial powers, nor can there be if efficient and practical government is to be maintained. "Rather," says *Willoughby* on the *Constitution of the United States*, 2nd ed. (1929), vol. 3, p. 1619, the correct statement of the principle of the separation of powers "is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions." Thus the determination of controversies between the sovereign and its subjects, and between subjects, is part of the judicial power of the Commonwealth which from its nature does not fall within the powers of the other departments of government. But this does not involve, nor in my opinion is there any constitutional prohibition against, conferring upon the judicial department all powers connected with and incidental to the performance by it of its own functions.

In my opinion the provisions of sec. 217 of the *Bankruptcy Act* 1924-1933 are clearly connected with and incidental to judicial power and to the functions of a court of bankruptcy.

Questions Nos. 1, 2 and 3 should be answered in the negative and questions 4 and 5 in the affirmative.

DIXON AND EVATT JJ. The chief question raised by the special case is whether so much of sec. 217 of the Federal *Bankruptcy Act* 1924-1933 as relates to summary proceedings by or before Courts of Bankruptcy for offences against the Act constitutes a valid law of the Commonwealth. The section refers to "the court." This

(1) (1926) 37 C.L.R. 432.

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expression means any court having jurisdiction in bankruptcy or a judge thereof. The courts having jurisdiction in bankruptcy are the Federal Court of Bankruptcy and a court of each State, leaving aside the courts of the Territories.

Sub-sec. 1 of sec. 217 directs what alternative courses a court having jurisdiction in bankruptcy may take if in any application by a bankrupt for his discharge the court "has reason to believe" that he has been guilty of an offence against the Act punishable by imprisonment. An application by a bankrupt for an order for his discharge may be voluntary or compulsory. It is thus assumed that, when a bankrupt is either compelled or elects to seek his discharge, the court may in the course of the proceedings find reason to believe him guilty of an offence against the Federal bankruptcy laws. The sub-section provides in that event alternative powers. The court may charge him with the offence and try him summarily. That is the power given by par. *a* of sub-sec.1. On the other hand, under *b*, the court may commit him for trial before any court of competent jurisdiction. In the case of a committal, it becomes the duty of the Attorney-General to institute and carry on the prosecution (sec. 222). The courts exercising bankruptcy jurisdiction have not, in that capacity, jurisdiction to entertain a prosecution so instituted. Their jurisdiction over offences against the Act punishable by imprisonment committed by the bankrupt is limited to that given by par. *a*, namely, of charging the bankrupt and trying him summarily.

Sub-secs. 2 and 3 direct how the court is to proceed if it adopts this course. To begin with the court "shall serve the bankrupt with a copy of the charge and appoint a day for him to answer it." Exactly how the court is to serve the notice is not stated. There is no office of apparitor or summoner expressly set up in the court and, owing to the manner in which sec. 12 was amended after *Le Mesurier* v. *Connor* (1), the registrar and other officers mentioned in that section instead of forming part of the court's official system and exercising the authority of an office in the court are now strangers to the court and its organization (*Bond* v. *George A. Bond & Co. Ltd.* (2)). "Such a scheme has the strange result of making the office

(1) (1929) 42 C.L.R. 481.

(2) (1930) 44 C.L.R. 11, at p. 20.

of Registrar in Bankruptcy an office which, in spite of its name, is not attached to a court at all" (1). But the registrar is controlled by the court and "is amenable to the court's orders and directions, if it choose to give him any" (1). Perhaps sub-sec. 2 of sec. 217 does not require service by an officer of the court and, if not, a direction to the registrar to serve the bankrupt would suffice. However, the sub-section in terms says that the court shall serve the bankrupt. As will appear, the real significance of the form of expression is that it emphasizes the fact that the court is to promote the proceedings, formulate the charge and undertake the service of the process whether by one of its officers or by an agent. The sub-section goes on to direct that, on the day appointed, the court shall require the bankrupt to plead to the charge. If he admits it, or if after trial the court finds him guilty, the court may sentence him to imprisonment for not more than six months.

Sub-sec. 3 then prescribes the procedure to be followed, if the offence is not admitted. The court is first authorized to cause to be read to the bankrupt the evidence taken before the court on which the charge is based. If this is done, "that evidence shall thereupon be evidence in the trial." There is some ambiguity in the expression "evidence taken before the court"; for under sec. 119 (5) (*a*) on an application for discharge the court must take into consideration any depositions of the bankrupt and a report in writing of the trustee as well as "any other evidence produced or received." Probably the trustee's report is not included in the expression "evidence taken before the court." But whatever material gave rise to the court's original "reason to believe," apparently it is to be read as admissible evidence in proof of the charge unless it falls outside the description "evidence taken before the court." The sub-section goes on to provide that "the court may take further evidence in support of the charge." Then follows a concluding direction that the court "shall allow evidence and argument to be adduced on behalf of the bankrupt." To "take evidence in support of the charge" must mean to examine witnesses and to procure the production of documents. There is no informant or other actor to adduce or offer the evidence. It is probably because of the absence

(1) (1930) 44 C.L.R., at p. 20.

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of any party promoting and supporting the charge that it was thought necessary or desirable expressly to require that the court should hear evidence and argument offered on behalf of the only party, the accused.

The enactment in question thus places the court in the position, first, of forming an opinion that there is enough reason to believe the bankrupt guilty to make it proper to put him on his trial, then of deciding to try him summarily, next of framing and preferring the charge, of causing the process to be served on its behalf, and of securing his appearance. If he pleads not guilty, the court must adduce the evidence against him in proof of the charge and, finally, after hearing the evidence for the defence, proceed to consider whether the accused's guilt has been established.

The validity of a provision authorizing or requiring a court to assume in this manner the double role of prosecutor and judge is denied on grounds which depend upon a detailed examination of the combined effect of several provisions of the Constitution but which may, perhaps, be reduced to the contention that it is not incidental to or consistent with the exercise of judicial power to undertake the two functions of actor and judex.

The Commonwealth Constitution contains no guarantee against deprivation of life, liberty or property without due process of law, like the fifth and fourteenth amendments of the United States Constitution. To establish personal liberty by constitutional restrictions upon the exercise of governmental power was not a guiding purpose in framing the Australian instrument, which in this respect departs widely from its American model. It is true that checks against legislative encroachment on individual freedom are not completely absent from the Australian Constitution. There are two or three ; and one of them, that contained in sec. 80 relating to trial by jury, cannot be dismissed from consideration. But, apart from sec. 80, the validity or invalidity of the enactment confiding the functions of prosecutor and judge to the same tribunal in bankruptcy offences depends simply upon the question whether such a provision, according to its true nature and character, falls under a description of legislative power belonging to the Commonwealth. This does not mean that no more is involved than the question

whether the enactment answers the description, "a law with respect to bankruptcy and insolvency", contained in sec. 51 (xvii.). Express and particular powers with respect to the judicature are given by the Constitution, and these, or some of them, are material to the present case. The grant of express and particular powers with respect to judicial matters necessarily means that a construction of the general legislative powers of the Parliament is excluded which would allow in virtue of the latter powers alone the creation by statute of judicial powers and authorities differing from or going beyond those authorized by the special provisions relating to the judicature. But, before entering upon a consideration of the extent of the positive powers of the Parliament, it is desirable to deal with the effect of sec. 80.

Having before them the provisions contained in art. III. (2) of the American Constitution and in the fifth, sixth and seventh amendments upon the subject of trial by jury, the framers of our Constitution thought fit for some reason to include in the instrument an adaptation from the original article, although their faith in the palladium of justice was not strong enough to induce them to complete its shrine by transcribing the provisions of the amendments. The third paragraph of art. III. (2) of the United States Constitution contains the words: "The trial of all crimes, except in cases of impeachment, shall be by jury." The definition of the words "all crimes" in this sweeping declaration had proved no easy matter (See *Callan* v. *Wilson* (1); *Harvard Law Review*, vol. 39, p. 917). Whether for this or some more subtle reason, when the provision was written into the Commonwealth Constitution, where it stands as sec. 80, the corresponding declaration was given the form following, viz., "The trial on indictment of any offence against any law of the Commonwealth shall be by jury." In this formula the difficulty lies not in the words "any offence" but in the words "trial on indictment." In *R.* v. *Archdall* (2) *Higgins* J. paraphrases the words as meaning—"if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment." It is a queer intention to ascribe to a constitution; for it supposes that the concern of the framers of the

(1) (1888) 127 U.S. 540.

(2) (1928) 41 C.L.R., at pp. 139, 140.

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provision was not to ensure that no one should be held guilty of a serious offence against the laws of the Commonwealth except by the verdict of a jury, but to prevent a procedural solecism, namely, the use of an indictment in cases where the legislature might think fit to authorize the court itself to pass upon the guilt or innocence of the prisoner. There is high authority for the proposition that "the Constitution is not to be mocked." A cynic might, perhaps, suggest the possibility that sec. 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory. No court could countenance such a suggestion, and, if this explanation is rejected and an intention to produce some real operative effect is conceded to the section, then to say that its application can always be avoided by authorizing the substitution of some other form of charge for an indictment seems but to mock at the provision. But, even if this means of avoidance be allowable, what is meant by an indictment? In English law it is a bill of accusation preferred before a grand jury and found true by the oaths of at least twelve men whereupon it is to be prosecuted at the suit of the King. But in Australia the word has inevitably been used in a wider sense. Since 9 Geo. IV. c. 83, the means of putting a prisoner upon his trial before a petit jury has been by an accusation under the hand of a law officer or prosecutor for the King. Grand juries have been little used. The accusation at different times and in different States has been variously called an information, an indictment and a presentment.

The power of the Court of King's Bench to give leave to file an information for misdemeanour in the name of the King's coroner and attorney has devolved upon the Supreme Courts of the States and has occasionally been exercised. The inquisition of a coroner's jury and, under statute, of the coroner without a jury, has had the same effect as a common-law indictment. The expression "trial on indictment" under the usage which arose in Australia would appear to cover all these methods of prosecution. The methods differ not only in respect of the person who may originate the prosecution or prefer the charge, but in respect of the authority who takes the responsibility of formulating or approving it so as to put the accused upon his trial. A private prosecutor may prefer a bill of

indictment to the grand jury; that jury by finding a true bill places the accused on his trial. The coroner's inquisition at once originates the charge and puts the prisoner on his trial. The law officer usually fulfils the functions of a grand jury, but his information or presentment may be the first step in a prosecution. Informations filed by leave of the court were obtained on the application of a private prosecutor, but the responsibility of allowing or approving the accusation rested with the court. It is not easy to suppose that the form in which the instrument is expressed determines whether it is an " indictment " within sec. 80. The form is a matter of pleading, and a long course of change and improvement was, so to speak, in progress at the time when the Constitution was framed and continued right up to the adoption in various States of forms of indictment similar to those of the English *Indictments Act* 1915. What then is the essence of a " trial upon indictment " which sec. 80 insists shall be by jury ? For ourselves we should have thought that to find an answer it was necessary to look for the substantial elements common to the recognized forms of procedure so called and going to make up the conception of prosecution upon indictment. We think that the first of them would be seen to be that some authority constituted under the law to represent the public interest for the purpose took the responsibility of the step which put the accused on his trial; the grand jury, the coroner's jury or the coroner, the law officer or the court. A second element, we think, would be found in the liability of the offender to a term of imprisonment or to some graver form of punishment. We should not have taken the view that sec. 80 was intended to impose no real restriction upon the legislative power to provide what kind of tribunal shall decide the guilt or innocence on a criminal charge.

Sec. 217 of the *Bankruptcy Act* covers offences of a serious character which, apart from the special provision in par. *a* of sub-sec. 1, could under the general law of the Commonwealth be tried only on indictment. The offender is in every case liable to imprisonment. The court itself is the authority which undertakes the responsibility for the prosecution. There are two further characteristics found in offences indictable at common law which may not be essential to the conception but, at all events, exist in the offences dealt with by

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sec. 217 of the *Bankruptcy Act*. They fall within the jurisdiction of a superior court and they are pleas of the Crown. It is, perhaps, incorrect to say that under sec. 217 (1) (*a*) the proceedings would run in the King's name. But they do not run in any other name, and the court which promotes them is an organ of government. In these circumstances we should ourselves have thought that sec. 80 did not allow the proceeding which sub-secs. 1 (*a*), 2 and 3 of sec. 217 attempt to authorize. We say "for ourselves" because we are aware that it is a question whether it is possible to reconcile the view we have expressed with the decision of the court in *R.* v. *Archdall* (1). The offence there under consideration was punishable by twelve months imprisonment, and it fell within a description which the statute made punishable either on indictment or on summary conviction. It was held that sec. 80 had no application. *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Powers* JJ. dismissed the contrary contention with the observation that the suggestion that the Parliament by reason of sec. 80 of the Constitution could not validly make the offence punishable summarily had no foundation and its rejection needed no exposition. It may be said that it was unnecessary in that case to consider what did amount to an indictment or a trial upon indictment: and that what the court considered so clear was simply that sec. 80 involved no restriction upon the power of the legislature to say that there should be no jury when the trial was not in fact of that description. But this conclusion in itself may well have been based on a general view that sec. 80 was not a real constitutional guarantee at all.

We admit the difficulties which the form of sec. 80 creates, but to treat such a constitutional provision as producing no substantial effect seems rather to defeat than to ascertain its intention. We think, however, that we have sufficiently stated our own views upon sec. 80 and we do not think it is useful to pursue the question how far they are consistent with the earlier decision because, in the first place, no reasons are given for that decision, and, in the second place, independently of sec. 80 we are of opinion that sub-secs. 1 (*a*), 2 and 3 of sec. 217 of the *Bankruptcy Act* are invalid. We, therefore, proceed to state our reasons for thinking that the legislative power

(1) (1928) 41 C.L.R. 128.

affirmatively granted to the Commonwealth does not authorize those sub-sections.

Many of the general legislative powers conferred by sec. 51 are of such a nature that, if there was no judiciary chapter in the Constitution, the creation and regulation of a court or courts might be considered to fall within their scope as incidental or conducive to the purpose or subject matter of such powers. Upon the terms of sec. 51 (xxxix.) the supposition that there was no judiciary chapter can scarcely be applied to it; but, of course, an express legislative power in respect of matters incidental to the other legislative powers making no reference to the judicature might be regarded as enough to support legislation for the enforcement of the laws of the Commonwealth by judicial or other process. But, in our opinion, the existence in the Constitution of chapter III. dealing with the judicature and the express reference in sec. 51 (xxxix.) to matters incidental to the execution of any power vested by the Constitution in the Federal judicature make it impossible to treat the powers expressed in sec. 51 as, so to speak, containing within themselves an authority covering the same ground as, but independent of and collateral to, the carefully defined and regulated powers conferred by chapter III.

Sec. 71 describes the courts which are or may be repositories of the judicial power of the Commonwealth. It expressly includes "such . . . Federal courts as the Parliament creates." Sec. 72 states how the judges of such courts shall be appointed, remunerated and removed. It is, in our opinion, clearly established by *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) and by *New South Wales* v. *Commonwealth* (2) and *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (3) that judicial power cannot be given to courts or tribunals unless they are established pursuant to and in conformity with these provisions. It is decided also that no kind of judicial power outside the categories or descriptions of such power covered by chapter III. can be conferred on the High Court. It is so decided by *In re the Judiciary and Navigation Acts* (4). No distinction in this respect is discernible between the High Court and other Federal courts established under that chapter.

(1) (1918) 25 C.L.R. 434.
(2) (1915) 20 C.L.R. 54.
(3) (1925) 35 C.L.R. 422.
(4) (1921) 29 C.L.R. 257

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Secs. 75 and 76 enumerate nine matters in which original jurisdiction is conferred upon the High Court by the Constitution or may be conferred upon it by the Parliament. The power of the Parliament to confer jurisdiction upon other Federal courts is limited to the same nine subjects. Sec. 77 (i.) says that with respect to any of the matters mentioned in secs. 75 and 76 the Parliament may make laws defining the jurisdiction of any Federal court other than the High Court, and although this form of expression is not the same as that of sec. 76, which speaks of "conferring" jurisdiction, or as that of sec. 77 (iii.), which speaks of "investing" jurisdiction, it is clear enough that the source of Federal legislative power to create Federal courts and to confer jurisdiction upon them is to be found in sec. 71 and in sec. 77 (i.) considered with secs. 75 and 76.

The sole source of power to confer Federal jurisdiction on State courts lies in sec. 77 (iii.).

It is in virtue of these powers that the Parliament has created the Federal Court of Bankruptcy and has conferred jurisdiction in bankruptcy upon that court and upon a court of each of the six States.

The legislative power in respect of bankruptcy and insolvency is ample enough to enable the Parliament to regulate all matters which fairly fall within that subject and its comprehensive nature needs no elaboration. Further, like every other legislative power over a subject matter, its extent is amplified by the principle that everything incidental to the main purpose of the power is contained within the grant itself. But, however far this particular head of legislative power might otherwise have been considered to go towards authorizing the Parliament to create courts of bankruptcy and to invest them with judicial power, an examination of the explicit grant of legislative powers contained in the judicature chapter shows that for such a purpose the Parliament cannot go outside the latter powers and must conform to whatever limitations they import.

Before turning to the specific application which these constitutional provisions have to the present question, it is necessary to refer to the important power conferred by sec. 51 (xxxix.), the power to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Federal judicature.

The matters upon which the Parliament is thus given authority to legislate are those which arise in the course of executing the judicial power, that is to say matters which attend or are incident to the exercise of jurisdiction or any of the powers of the judicature. It has never been decided whether State courts exercising Federal jurisdiction are comprehended under the expression Federal judicature nor whether the words " vested by this Constitution " restrict the application of sec. 51 (xxxix.) to matters incidental to the execution of powers directly conferred by the Constitution itself as distinguished from powers called into operation by legislation under the Constitution. The powers which sec. 217 of the *Bankruptcy Act* purports to create are to be vested in State courts as well as in the Federal Court of Bankruptcy and they are powers which do not arise unless as a result of legislation, that is, legislation under sec. 77 with respect to matters of the class referred to in sec. 76 (ii.). The application of sec. 51 (xxxix.), therefore, depends upon both questions we have described as undecided. But, assuming that it does apply to Federal and State courts exercising jurisdiction in bankruptcy in respect of offences against the bankruptcy laws, it would not authorize the Parliament to make a provision which departed from or was at variance with the purpose of the main power, the power vested in the Federal judicature. In other words, a law with respect to a matter incidental to the execution of judicial power, must, in order to answer that description, deal with something arising in the course of exercising judicial power, something attendant upon or incidental to the fulfilment of powers truly belonging to the judicature.

From the foregoing general statement of the powers of the Parliament in relation to jurisdiction in bankruptcy, it will be seen that, according to our view, it is not enough that a law such as sec. 217 giving authority to punish bankruptcy offences should be relevant to the subject of bankruptcy. It must fall within the power to confer jurisdiction upon courts exercising part of the judicial power of the Commonwealth or be incidental to that jurisdiction. It is here that the dual character of the function imposed upon or reposed in the courts of bankruptcy jurisdiction creates a difficulty. No

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one doubts that a law directing the mode of investigating the question whether offences have been committed against the bankruptcy laws is within the legislative power over bankruptcy and insolvency. Nor is there any doubt that laws prescribing the manner in which prosecutions are to be instituted and conducted are within that power. Doubtless, it is competent also to deal with such matter as the admissibility of evidence and the burden and mode of proof. It may be conceded further that a power of committing for trial a person who, upon evidence tendered for other purposes before the court, appears to have been guilty of an offence may be bestowed upon a court of bankruptcy jurisdiction as a matter incidental to the exercise of its judicial power. All these are matters relevant to the subject of bankruptcy and consistent with the exercise of judicial power by the courts of bankruptcy jurisdiction. But when the legislature confers on the courts, as inseparable functions, the duties of prosecutor and judge, the question at once arises whether this is not outside the conception of judicial power. The question is not one of the wisdom, propriety or justice of the course laid down by the provision. It is entirely a question of the nature of the legislative power. If the provision is in conformity with the power its validity cannot be impugned on any such ground. But if the inherent character of the function reposed in the courts is at variance with the conception of judicial power, then, in our opinion, it must fail even if the mode of proceeding has been found so convenient, speedy and satisfactory as to overcome the traditional objection expressed in the maxim *nemo potest esse simul actor et judex*. But, in our opinion, the authority given to the courts by sec. 217 (1) (*a*), (2) and (3) does not fall within the conception of judicial power. The maxim quoted does not express a mere caution against human frailty. It epitomizes part of the English notion of the judicial function. A long course of development produced a conception of the judicial process which placed the court in the position of a detached tribunal entertaining and determining civil and criminal pleas brought before it. It is true that in relation to contempt of court the courts of justice are armed with powers of summary punishment, at all events for contempts *in facie curiae*

exercisable *ex mero motu*. But this has always been regarded as an exceptional power based on the necessity of keeping order and of preserving the court from actual interference in the discharge of its duties. The discussion of the power has proceeded since *R.* v. *Almon* (1) upon a basis which may well be thought to illustrate the use of an exception to prove the existence and strength of a rule. The judicial power does not include the promotion, prosecution and proof of criminal charges by a court for its own determination.

We do not think that a legislative power to create courts, to invest them with jurisdiction and to make laws upon all matters incidental to the exercise of the judicial power extends to the kind of power which sec. 217 (1) (*a*), (2) and (3) attempt to give. However it may be described, whether as a combination of functions, as a course of procedure, or as a jurisdiction or authority, it terminates in an act which under the Constitution can be done only in the exercise of judicial power, namely, the conviction of an offender and the passing of judgment upon him; yet the duty is to be performed in a manner at variance with the conception of judicial power. The general power to make laws with respect to bankruptcy does not authorize the imposition of such duties upon the court, because the presence of the judiciary chapter prevents a construction which would extend so far, and neither the provisions of that chapter nor sec. 51 (xxxix.) enable it, because to impose such duties cannot be to legislate upon a matter ancillary to the judicial power or incidental to its exercise.

The reasoning which has led us to this conclusion applies alike to Federal courts and to State courts exercising Federal jurisdiction. But it is perhaps proper to add that, unless the latter courts are part of the Federal judicature within the meaning of sec. 51 (xxxix.), Federal power or authority must be conferred upon them pursuant to sec. 77 (iii.) of the Constitution. Sec. 217 of the *Bankruptcy Act* includes Federal and State courts without discrimination.

In our opinion the fourth and fifth questions in the special case should be answered: No. This answer means that the first, second

(1) (1765) Wilm. 243; 97 E.R. 94.

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and third questions do not arise. But, if they did arise, we should not be prepared to answer them in favour of the bankrupt.

McTIERNAN J. In my opinion all the questions in the special case should be answered against the bankrupt. I propose to add some observations on the fourth and fifth questions, which ask in effect whether sub-secs. 1 (*a*), 2, and 3 of sec. 217 of the *Bankruptcy Act* 1924-1933 are valid.

The powers of the Parliament under placita xvii. and xxxix. of sec. 51 of the Constitution clearly extend to the enactment of these provisions, and they are valid unless in enacting them Parliament has contravened sec. 61 or sec. 71 of the Constitution. The argument that the provisions of sec. 217 mentioned in the fourth and fifth questions infringe sec. 61 because they vest elsewhere than in the executive the power to charge the bankrupt with an offence against the *Bankruptcy Act* must fail, as it depends upon an assumption, which is not supported by anything in the Constitution, that sec. 61 operates to commit the power to charge a person with an offence against Federal law exclusively to the executive.

Sec. 71 of the Constitution requires the judicial power of the Commonwealth to be vested in courts. The power to try a bankrupt summarily for an offence against the Act is clearly judicial and must therefore be exercised by a court. The argument that the provisions of sec. 217 mentioned in the fourth and fifth questions infringe sec. 71 of the Constitution raises the question whether the court would by exercising any of the powers expressed in those provisions take any part in the proceedings other than that of a judge. If the answer to that question is yes, it would not be correct to say that the bankrupt was being tried by a court which sec. 71 intended to exercise the judicial power of the Commonwealth, and it would follow that the provisions of sec. 217 which brought about that result would be invalid. But I cannot agree that sec. 217 gives to "the court" any power that is inconsistent with the due exercise of its judicial power. The extent of the power intended to be given to the court by the words "it may charge him with the offence" appears from the whole section. It is clear that the court is empowered to determine whether the bankrupt is to be prosecuted or not, for

what offence he is to be prosecuted, to formulate the charge and to order a copy of it to be served upon him. But it is equally clear that the section does not intend to make the court a party to the proceedings. In my opinion the exercise of these powers does not give the court any interest in the proceedings that is inconsistent with the due exercise of its judicial power (Cf. *Wildes* v. *Russell* (1)). Upon the exercise by the court of its power to charge the bankrupt a criminal proceeding is instituted to which the Crown and the accused, but not the court, become parties. The provision in sub-sec. 3 that the court may cause to be read to the bankrupt the evidence taken before the court on which the charge is based does not, in my opinion, give any support to the contention that the court is acting other than as a judge presiding at a judicial trial. This provision merely enables evidence that was adduced on another occasion to be read and allowed as competent evidence just as if the witnesses had been examined and the documentary evidence put in again. Further, it is erroneous to say that the words " and the court may take further evidence to support the charge " mean any more than that the court is to receive further evidence if the Crown tenders it. In a summary trial under sec. 217 I think that upon the true construction of the section the court is *judex*, the Crown is the actor. The section vests in the court the power to decide the issues of fact and law joined between the parties. Its duties are essentially judicial and it is not inconsistent with those duties that the court may ask questions during the trial. In my opinion it is a misconstruction of the section to say that upon the summary trial of a bankrupt Parliament has assumed to make the court a judge in a case in which it is at the same time the prosecutor, and to enact that the court shall as prosecutor obtain and supply to itself as judge the materials upon which it is to adjudge whether the bankrupt is guilty.

The question whether there is any conflict between sec. 217 of the *Bankruptcy Act* and sec. 80 of the Constitution was not argued, and on that question I do not propose to say any more than that I consider that I am bound by the previous decisions of the court.

(1) (1866) L.R. 1 C.P., at p. 740.

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Questions in special case answered as follows:—1. *No.* 2. *No.* 3. *No.* 4. *Yes.* 5. *Yes. Proceedings remitted to the Court of Bankruptcy. The judge in bankruptcy, the Commonwealth Attorney-General and the bankrupt to have their costs of mandamus proceedings out of bankrupt's estate. Bankrupt to pay the costs of the judge in bankruptcy and of the Commonwealth Attorney-General of and incidental to the special case. The judge in bankruptcy and the Commonwealth Attorney-General to have out of the estate any deficiency in such costs not recovered by the judge in bankruptcy and by the Commonwealth Attorney-General from the bankrupt. Costs payable to and by the bankrupt to be set off.*

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

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

J. B.