O'Flaherty deceased the plaintiff as trustee of his will should distribute the residuary estate amongst the following persons in equal one-thirteenth shares: Shirley Irene Schell, Daniel D'Arcy Sheehy, Patricia Muriel Bray, Patricia Margaret Ford, D'Arcy Hubert Ford, Patrick King, Thomas King, John King, Michael King, Brigid King, Edward King, Mary A. Hill, Perpetual Trustee Co. (Ltd.) as administrator of the estate of Thomas Flaherty deceased. Costs of all parties of the appeal to be paid out of the estate as between solicitor and client.

Solicitors for the appellants, *Murphy & Moloney.*

Solicitors for the respondents other than Mary A. Hill, *Purves, Moodie & Storey.*

Solicitors for the respondent Mary A. Hill, *Pisk, Stokes & Co.*

R. A. H.

[HIGH COURT OF AUSTRALIA.]

SACHTER . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR THE COMMONWEALTH . . . . . } RESPONDENT.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

H. C. OF A. 1954.

SYDNEY, *Aug.* 24, 31; *Sept.* 1.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Bankruptcy—Offences—Statement relating to bankrupt's affairs—Material omission—Failure to keep proper books of account—Summary trial without jury—The Constitution (63 & 64 *Vict. c.* 12), *s.* 80—*Bankruptcy Act* 1924-1950, *ss.* 209 (*g*), 210 (1) (*d*), (2) (*c*), 217.

Held that the facts that certain charges laid under ss. 210 (1) (*d*) and 210 (2) (*c*) of the *Bankruptcy Act* 1924-1950 were amended at the hearing, and were not exactly those upon which the court directed that the bankrupt should be tried summarily under s. 217, and that the Attorney-General appeared by counsel to conduct the prosecution did not support the view that the proceedings took the form of a prosecution on indictment under s. 80 of the Constitution so as to require a jury.

R. v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1938) 59 C.L.R. 556, applied.

Subject to the quashing of a conviction and sentence on a charge under s. 210 (1) (*d*) of the *Bankruptcy Act* 1924-1950, the decision of the Federal Court of Bankruptcy affirmed.

APPEAL from the Federal Court of Bankruptcy.

The facts are sufficiently set out in the judgment hereunder.

N. D. McIntosh Q.C. (with him *C. Shannon*), for the appellant. The judge below amended one of the charges by striking out the words "conceal, falsify and false entries and omissions". If there be an indictment there must be a jury (*R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1); *R.* v. *Archdall and Roskruge*; *Ex parte Carrigan and Brown* (2)). The procedure in this case was an indictment. The original charges upon which the trial judge directed that the accused should be tried are different from the charges upon which he was in fact charged. Section 217 of

(1) (1938) 59 C.L.R. 556, at pp. 570, 582.

(2) (1928) 41 C.L.R. 128.

the *Bankruptcy Act* 1924-1950 requires that the accused should be tried summarily upon the charges that the bankruptcy judge has directed that he should not be tried upon charges formulated by the Attorney-General. The judge has power to direct trial summarily on the charges a copy of which was or should be delivered to the accused when he is told of the appointed day. The requirements of s. 217 as to procedural methods have not been complied with. If the Attorney-General, in effect, signs or directs or delivers or makes the charge, as here, that charge is in fact an indictment. It is only when the trial takes place on indictment that s. 80 of the Constitution applies. Section 222 deals with the Attorney-General conducting the matters in certain instances. The trial judge did not apply his mind to the new charge. The amendment of the charge was not by the judge but was by another person. The meaning of " indictment " was dealt with in *Munday* v. *Gill* (1); *Reg.* v. *Ingham* (2); *Stroud*, 3rd ed. (1952), vol. 2, pp. 1435, 1436.

[DIXON C.J. Does not *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (3) mean that the Attorney-General is the proper person to appear ?]

Yes, but not the proper person to charge.

[DIXON C.J. referred to sub-s. (3) of s. 217 of the *Bankruptcy Act* 1924-1950.]

The moneys written off were irrecoverable debts. As to one charge the judge convicted the appellant on only one ingredient thereof.

J. K. Manning Q.C. (with him *C. Darvall*), for the respondent. The second charge preferred against the bankrupt is " make a material omission from his statement of affairs ", the matters set out as having been omitted being: (a) his beneficial interest in shares of the company; (b) his beneficial interest in some premises; and (c) the receipt of moneys from Parimax Pty. Ltd. The money received from that company in respect of these transactions was used in part in acquiring shares in another company and part thereof was paid to the credit of an account or loan account in the name of the appellant's son. It was, in effect, converted from the firm's money to the son's money. It might be difficult to determine how the receipt of moneys from the said company could be said to be something omitted from the appellant's statement of affairs. The mere fact that prior to bankruptcy the appellant had received that money would not necessarily mean that he had made an omis-

(1) (1930) 44 C.L.R. 38, at p. 86.
(2) (1864) 33 L.J. Q.B. 183, at pp. 187-189.
(3) (1938) 59 C.L.R., at pp. 568, 591.

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SACHTER v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

sion from his statement of affairs. A part of the judgment appealed from depended entirely upon the judge below being unprepared to find that certain shares in another company were the beneficial property of the appellant. That conviction is of doubtful validity. On the whole of the matter before the court there were circumstances which justified the judge below in awarding the sentence which he did. Money was not written off in the sense of being irrecoverable. The most charitable view to take of the evidence is that certain sundry loan debtors never existed and were items brought into a balance sheet to show that loan moneys were available in the nature of capital for the working of the business when the moneys were not in fact available at all. Clearly, some of the entries are false. Devious methods were used to take out of the books what up to that stage had been shown to be assets of the firm. The judge below was justified in regarding this case as a serious case. The original charge was merely a charge that was amended by the Court. The charge from which the words "falsify and conceal" etc., were struck out was in fact amended before the hearing of the charge as amended, as the charge with which the appellant was charged at his summary trial. An application therefor had been made to the judge in chambers between the making of the first order and the day of the hearing, and the appellant had been notified before his trial of that amendment. Submissions of fact made on behalf of the appellant are not admitted. The court should not interfere with the order of the trial judge.

N. McIntosh Q.C., in reply.

DIXON C.J. delivered the judgment of the Court as follows :—

This is an appeal from three convictions before a judge in bankruptcy, and from sentences which were imposed by his Honour in respect of those convictions. The proceedings before the Court of Bankruptcy took place under s. 217 of the *Bankruptcy Act* 1924-1950. That section authorizes a summary trial.

The section has been considered by this Court in *Lowenstein's Case* (1). By that decision the majority of the Court decided that s. 217 was a valid exercise of the legislative power of the Commonwealth.

We have at this sittings declined to allow the correctness of that decision to be canvassed ; we have declined to reconsider it.

As a first point in support of the appeal Mr. *McIntosh* endeavoured to show that in the particular circumstances of this case the pro-

(1) (1938) 59 C.L.R. 556.

ceedings had developed into a case in which there was in fact a trial upon indictment contrary to s. 80 of the Constitution. To support that view he laid hold of the fact that the charges had been amended so that they were not exactly those upon which the Court directed the bankrupt should be charged under s. 217 of the *Bankruptcy Act*. He also laid hold of the further fact that the Attorney-General appeared by counsel to conduct the prosecution. We think that there is no substance in the contention.

In the judgment of *Latham* C.J. in *Lowenstein's Case* (1), there is the passage which was read during the course of the argument. It shows that his Honour contemplated an appearance for or at the direction of the Attorney-General to prosecute a charge made in pursuance of s. 217 of the *Bankruptcy Act*.

In the judgment of *McTiernan* J. there appears a passage which explicitly says: "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" (2).

Therefore there is nothing in the fact that counsel appeared for the Attorney-General and obtained amendments of the charges which in any way supports the view that the proceedings did take the form of a prosecution on indictment so as to require a jury.

Actually the charges which were made against the bankrupt were four. On one he was acquitted at the hearing. On another, made under s. 210 (1) (*d*) of the Act, it appears clearly enough from what has been said on behalf of the Crown that the charge was misconceived. The charge was that he made a material omission in a statement relating to his affairs in omitting to state certain matters which are now immaterial, and what is material, in omitting therefrom the receipt of certain moneys from Parimax Pty. Ltd. in the name of Sachter. It is conceded frankly on behalf of the Crown that that particular receipt would not naturally have taken a place in the bankrupt's statement of his affairs.

That charge therefore fails and we must quash the conviction upon that charge and the sentence thereon, which was a sentence of one month's imprisonment concurrent with the other sentences.

Of the two remaining charges, one was made under s. 209 (*g*) and was that the bankrupt omitted to keep such books of account as are usual and proper in the business carried on by him—it was a business of importer and exporter of textiles—and as sufficiently disclose his business transactions and financial position during the period from 1st July 1951 to 20th March 1953. The other charge was made under s. 210 (2) (*c*).

(1) (1938) 59 C.L.R., at p. 568.

(2) (1938) 59 C.L.R., at p. 591.