THE QUEEN

AGAINST

DAVISON.

H. C. OF A. 1954.

SYDNEY, *April* 23, *Sept.* 10.

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

Bankruptcy—Constitutional law (Cth.)—Powers of Federal Parliament—Powers conferred upon registrar—Deputy registrar—Direction by Attorney-General—Debtor's petition—Sequestration order—Power of registrar or deputy registrar to make—Judicial power of Commonwealth—Order—Statutory provisions—Validity—Offences—"Bankrupt"—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 71, 72, 76, 77 (*iii*)—*Bankruptcy Act* 1924-1950, *ss.* 4, 12 (2) (5) (6), 18, 20 (3), 24 (1) (*a*), 52 (*i*), 54, 57, 119, 209 (*g*), 214 (1), 217 (1).

Section 24 (1) (*a*) of the *Bankruptcy Act* 1924-1950, considered with the definition of "the Court" in s. 4 and with ss. 54 and 57, amounts to an attempt to confer upon a registrar the power of making a judicial order operating as an order of the Bankruptcy Court and is void as purporting to authorize a person not constituting a court under ss. 71 and 72 of the Constitution to exercise part of the judicial power of the Commonwealth.

So *held* by *Dixon* C.J., *McTiernan*, *Fullagar*, *Kitto* and *Taylor* JJ. (*Webb* J. dissenting).

A deputy registrar purported to make a sequestration order upon a debtor's petition and, later, upon a compulsory application for discharge, the debtor was charged with certain offences under ss. 209 (*g*) and 214 (1) of the *Bankruptcy Act* 1924-1950.

Held, by *Dixon* C.J., *McTiernan*, *Fullagar*, *Kitto* and *Taylor* JJ. (*Webb* J. dissenting), that as the deputy registrar was not authorized and empowered to make the sequestration order, the order was void and the debtor was not a "bankrupt" within the meaning of ss. 209 (*g*) and 214 (1).

Per *Dixon* C.J., *McTiernan*, *Fullagar* and *Kitto* JJ.: Registrars and deputy registrars are not "officers" of the Bankruptcy Court.

CASE STATED.

This was a special case stated by *Clyne* J., Judge of the Federal Court of Bankruptcy, for the opinion of the High Court under s. 20 (3) of the *Bankruptcy Act* 1924-1950.

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The special case was substantially as follows :—

1. On 12th March 1952, Zedekiah Hartstein, an officer of the bankruptcy administration, was appointed to be Deputy Registrar in Bankruptcy in the Bankruptcy District of New South Wales and the Australian Capital Territory, such appointment to be on and from that date and to be during the pleasure of the Governor-General. The said appointment was notified in the Commonwealth *Gazette* No. 25 of 27th March 1952. A copy of such notification was annexed.

2. On 14th March 1952, the Attorney-General for the Commonwealth of Australia directed that the said Zedekiah Hartstein, a Deputy Registrar in Bankruptcy, in the Bankruptcy District of New South Wales and the Australian Capital Territory, should have, and might exercise and perform, any or all of the powers of the Registrar in Bankruptcy in that Bankruptcy District as on and from 12th March 1952, pursuant to s. 12 (6) of the *Bankruptcy Act* 1924-1950. That direction was notified in the Commonwealth *Gazette* No. 25 of 27th March 1952. A copy of the notification was annexed.

3. On 2nd May 1952, Bruce William Davison presented in the Federal Court of Bankruptcy a debtor's petition in which he requested that a sequestration order be made in respect of his estate. A copy of the petition was annexed. (The petition was signed by Davison in the presence of a solicitor who signed the petition as witness.)

4. On 2nd May 1952, Hartstein, Deputy Registrar in Bankruptcy as aforesaid, purported to make a sequestration order upon that petition against the estate of Davison, and appointed Arnold Victor Richardson to be official receiver. A copy of that order was annexed.

5. On 1st October 1952, upon a compulsory application by Davison under s. 119 of the *Bankruptcy Act* 1924-1950 for an order of discharge, *Clyne* J., judge of the Federal Court of Bankruptcy, ordered and directed that Davison be charged and tried summarily for certain offences against ss. 209 (*g*) and 214 (1) of the Act.

6. On 6th February 1953, Davison was charged before *Clyne* J. with the following offences :—

(a) that being a bankrupt he omitted to keep such books of account as are usual and proper in the business of a canteen proprietor carried on by him and as sufficiently disclose his business transactions and financial position during the period between December 1949 and June 1951, being a period within the five years immediately preceding the date of his bankruptcy ;

(b) that being a bankrupt he omitted to keep such books of account as are usual and proper in the business of a pastry-cook

carried on by him, and as sufficiently disclose his business transactions and financial position during the period between May 1950 and June 1951, being a period within the five years immediately preceding the date of his bankruptcy; and

(c) that being a bankrupt he did contribute to his bankruptcy by gambling.

7. Before being called upon to plead, Davison, being desirous of having certain questions of law determined in the first instance in the High Court of Australia, by his counsel, requested the judge to state a special case under the provisions of s. 20 (3) of the *Bankruptcy Act* 1924-1950, for the opinion of the High Court upon the following questions:—

(1) whether the said Zedekiah Hartstein was authorized and empowered to make the said sequestration order by virtue of the said direction of the Attorney-General for the Commonwealth of Australia dated 14th March 1952, pursuant to s. 12 (6) of the Act, and the provisions of s. 24 (1) (*a*) of the Act;

(2) whether Davison is "a bankrupt" within the meaning of ss. 209 (*g*) and 214 (1) of the Act.

8. The judge was desirous of having these questions of law determined in the first instance in the High Court.

9. Accordingly, his Honour reserved for the opinion of the High Court the following questions of law:—

(1) whether the said Zedekiah Hartstein was authorized and empowered to make the said sequestration order by virtue of the said direction of the Attorney-General for the Commonwealth of Australia dated 14th March 1952, pursuant to s. 12 (6) of the Act, and the provisions of s. 24 (1) (*a*) of the Act;

(2) whether Davison is "a bankrupt" within the meaning of ss. 209 (*g*) and 214 (1) of the Act.

A. F. Mason, for the debtor. Each of the offences with which the debtor was charged involves the allegation that he is a bankrupt. Whether or not he is a bankrupt depends on the order made by the Deputy Registrar in Bankruptcy, and also on whether or not the making of a sequestration order by the deputy registrar is an exercise of Federal judicial power. The deputy registrar was not appointed for life. Accordingly, under ss. 71 and 72 of the Constitution, there has been a purported conferring of Federal judicial power on a person who is not a court and on a person who was not appointed for life (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1); *New South Wales* v. *The Commonwealth* (2)).

(1) (1918) 25 C.L.R. 434. (2) (1915) 20 C.L.R. 54.

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[DIXON C.J. referred to *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1).]

The real question in this case is whether or not the making of a sequestration order upon a debtor's petition involves the exercise of Federal judicial power. If it does, then the provisions of the *Bankruptcy Act* which authorize the registrar to carry out that Act must be invalid. The provisions of s. 12 and s. 18 of the *Bankruptcy Act* which vest jurisdiction in the court and in the officers of the court, show that neither the registrar nor the deputy registrar is an officer of the court but each is a stranger to the court. An examination of s. 24 of the Act, which deals with the making of sequestration orders, both on creditors' petitions and debtors' petitions, indicates that the function of the registrar or the deputy registrar must be a judicial function, in the sense that he is exercising judicial power. The consequences of a sequestration order support the view that the making of the order is an exercise of judicial power. In *Le Mesurier* v. *Connor* (2) sub-s. (5) of s. 12, which was then differently framed, was held to be invalid. By the amendment subsequent to that decision the significant change was that the registrar and deputy registrars became, not officers of the court, but merely persons who are controlled by the court and, under sub-s. (6), have such duties as the Attorney-General may by order direct or as are prescribed. The function, or the relation of the registrar and deputy registrars to the court itself was considered in *Bond* v. *George A. Bond & Co. Ltd.* (3). The statement in that case that the registrar and deputy registrars are strangers to, and not officers of, the court is repeated and expanded in *Ex parte Lowenstein* (4). In this case the Attorney-General did, under s. 12 (6), make an order or direction in respect of the deputy registrar who made the sequestration order. Section 23 was considered by the court in *Le Mesurier* v. *Connor* (2) and also in *Bond* v. *George A. Bond & Co. Ltd.* (3) after amendment had been made. If the deputy registrar, exercising the functions of a registrar, has power to make a sequestration order on a debtor's petition, that can be found only in s. 24 (1) (*a*). In s. 23 there is a delegation of administrative powers and in s. 24 some powers which appear to be administrative. Under s. 23 there is not a delegation *per se*; it contemplates a delegation by the court. It is clear from those sections and also s. 54 that the power to make sequestration orders is conferred upon a court in the first place. The registrar's jurisdiction to make sequestration orders on debtors' petitions is secondary

(1) (1931) A.C. 275; (1930) 44 C.L.R. 530.
(2) (1929) 42 C.L.R. 481.
(3) (1930) 44 C.L.R. 11.
(4) (1938) 59 C.L.R. 556.

only to the jurisdiction of the court. With the exception of ss. 55 and 56, the making of sequestration orders on debtors' and creditors' petitions is dealt with in the same sections being, *inter alia*, ss. 54, 57, 60, 62 and 63. The making of a sequestration order involves a determination which has the effect of depriving the bankrupt of his property, and, also, depriving the creditors of the bankrupt of rights that they would otherwise be able to pursue but which become merged in the bankruptcy. It affects the status of the person against whom a sequestration order is made, and it exposes him to criminal prosecution to which he would not have been liable had the sequestration order not been made. It is therefore submitted that the effect of the order is one which would involve the exercise of judicial power; it is a judicial function. The hearing of a creditor's petition and the making of a sequestration order thereon is an exercise of judicial power. Even the hearing of a debtor's petition must in some cases involve a decision of a contest between the parties. There is nothing to prevent an *ex parte* determination from amounting in itself to an exercise of judicial power. On the hearing of a debtor's petition and the making of a sequestration order thereon, there must be an act of bankruptcy because the mere filing of the petition amounts to an act of bankruptcy; there must be an allegation that the debtor is unable to pay his debts. On the hearing of a debtor's petition the court must consider whether or not the petition amounts to an abuse of the process of the court (*Re Betts* (1)). The court must determine that question in the light of well-recognized principles and is a further matter that indicates that the function of the court is a judicial one. Even on the hearing of a debtor's petition, especially if presented by the debtor's attorney, there can be a contest between opposing parties (*Re J. A. Bagley* (2); *Re Shead* (3)). Thus such a hearing must, in some cases at least, involve the exercise of judicial power. There are other functions which are performed at times by courts that are *ex parte* in their nature and without any contest between opposing parties, but nevertheless amount to an exercise of judicial power. An *ex parte* application partakes of the judicial function (*In re Clook* (4)). The matter was dealt with in the dissenting judgment of *Higgins* J. in *In re Judiciary and Navigation Acts* (5). "Judicial power" was defined in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (6); *Shell Co. of Australia Ltd.* v. *Federal Commis-*

(1) (1901) 2 K.B. 39.
(2) (1929) 29 S.R. (N.S.W.) 333; 1 A.B.C. 28.
(3) (1954) 16 A.B.C. 188.
(4) (1890) 15 P.D. 132.
(5) (1921) 29 C.L.R. 257.
(6) (1908) 8 C.L.R. 330, at pp. 357, 381.

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sioner of Taxation (1); *Prentis* v. *Atlantic Coast Line Co.* (2); *R.* v. *Local Government Board* (3) and *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (4). The hearing of the petition does involve in some cases a contest between the parties, but in any event the matters to be taken into consideration by the court on the hearing of such a petition do involve a judicial function. The consequences that flow from such an order indicate that the determination that is made is one that is judicial in its nature. The absence or presence of consent cannot turn what is otherwise a judicial function into an administrative function. Section 24 (1) (*a*) should be read distributively.

B. P. Macfarlan Q.C. (with him *R. G. Reynolds*), for the Attorney-General of the Commonwealth. There is not any provision in the *Bankruptcy Act* or the rules thereunder either for giving notice to creditors or for advertising. Nor is there any provision for summoning any person before the registrar who may be constituted a party to answer the summons. The question for this Court is whether the functions conferred upon the registrar by the Act, properly construed, fall within the judicial power of the Commonwealth as defined in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (5) and approved in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (6) and *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (7). A declaration of legitimacy, ceremonies of marriage, the fact of marriage, and the ceremony of divorce, are not judicial. Whatever be the definition of judicial power, the element of controversy is an essential element, and there must be a *lis* or contest before a court which has the authority to remake a conclusive determination of that *lis* and the determination is measured in relation to a pre-existing standard or state of law (*Blackstone's Commentaries*, vol. III, p. 25; *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (8); *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (9); *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (10)). There must be the contest, and there must be the right of one party to resort to a tribunal, and the right of that person so resorting to compel another person to answer to that tribunal, and the right of that

(1) (1931) A.C. 275; (1930) 44 C.L.R. 530.
(2) (1908) 211 U.S. 210, at pp. 226, 227 [53 Law. Ed. 150, at pp. 158, 159].
(3) (1902) 2 I.R. 349, at p. 373.
(4) (1944) 69 C.L.R. 185, at p. 199.
(5) (1908) 8 C.L.R., at p. 357.
(6) (1931) A.C. 275, at p. 295; (1930) 44 C.L.R. 530, at pp. 540, 542, 543.
(7) (1949) A.C. 134, at p. 149.
(8) (1908) 8 C.L.R., at p. 383.
(9) (1918) 25 C.L.R., at pp. 450-453.
(10) (1949) A.C., at p. 149.

tribunal to give a binding determination. The subject matter is not vital.

Registrars in New South Wales made sequestration orders before 1900 (*Re Grant*; *Ex parte Edgely* (1)). Definitions of judicial power are also to be found in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (2) ; *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (3) and *Local Government Board* v. *Arlidge* (4). *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (5) shows what kind of functions may be administrative functions but not necessarily judicial, and it emphasizes that the problem is to construe the relevant legislation and apply a concept and definition of judicial power to it. A tribunal set up for the purpose of ascertaining facts as between contestants could make a binding decision as to those facts, and may not be exercising judicial power (*Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (6)). The absence of a legislative provision making a determination final and conclusive supports the view that the functions of that tribunal are administrative only. The fact that the determination is not final and conclusive in the finding is an indication that the function must be administrative. *In re Clook* (7) does not establish that because the Court of Appeal entertained an appeal from the order of the judge below made on an *ex parte* application, therefore it was a judicial power. That there is an appeal is not indicative, and is certainly not conclusive, that it was within judicial power (*British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (5)). *In re Judiciary and Navigation Acts* (8) supports the submissions now made to the Court. [He referred to *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (9), and *Peacock* v. *Newtown Marrickville & General Co-operative Building Society No. 4 Ltd.* (10).] The basis of the decision in *Boulter* v. *Kent Justices* (11) is that justices, in determining whether a man was to hold a licence or not, were not exercising a judicial function, although they may be required to act judicially. The existence of a controversy is essential to the recognition of a judicial function. Reference to general administrative powers in relation to the judicial power of the Commonwealth was made in *Queen Victoria Memorial Hospital* v. *Thornton* (12).

(1) (1928) 29 S.R. (N.S.W.) 31 ; 45 W.N. 168.
(2) (1925) 35 C.L.R. 422, at pp. 435, 436.
(3) (1926) 38 C.L.R. 153, at pp. 175-181.
(4) (1915) A.C. 120.
(5) (1926) 38 C.L.R. 153.
(6) (1944) 69 C.L.R., at p. 199.
(7) (1890) 15 P.D. 132.
(8) (1921) 29 C.L.R. 257.
(9) (1943) 67 C.L.R. 1, at pp. 9, 21.
(10) (1943) 67 C.L.R. 25.
(11) (1897) A.C. 556, at p. 568.
(12) (1953) 87 C.L.R. 144, at p. 151.

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Consideration of s. 57 and other sections of the Act shows a complete absence of controversy in the proceedings before the deputy registrar. That absence determines the matter. The status of bankruptcy was considered in *R.* v. *Adams* (1). The effect of adding sub-s. (2) to s. 24 simply makes an order made by the registrar subject to a condition subsequent, that is, a review of the proceedings on summary application. The argument that the regulations there under consideration were invalid because they conflicted with the provisions of ss. 71 and 72 of the Constitution was rejected in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (2). All the members of the Court who sat in that case and expressed a view on the point, held that an Act or a law providing for the dissolution of a body and the condemnation and seizure of its property was not an exercise of the judicial power of the Commonwealth. In this case there was not an exercise of judicial power. Property may be vested or divested by a legislative enactment, or by an executive act done under the authority of the legislature as well as by a legislative act (*Roche* v. *Kronheimer* (3)).

A. F. Mason, in reply.

Cur. adv. vult.

Sept. 10.

The following written judgments were delivered :—

DIXON C.J. AND MCTIERNAN J. This is a special case stated by the Judge of the Federal Court of Bankruptcy pursuant to sub-s. (3) of s. 20 of the *Bankruptcy Act* 1924-1950.

It appears from the special case that on 2nd May 1952, Bruce William Davison, whom it is convenient to call the debtor, presented a petition for the sequestration of his estate, stating therein that he was unable to pay his debts. On the same day an order for sequestration was made. On 1st October 1952, the debtor made pursuant to s. 119 of the Act a compulsory application for an order of discharge. On the hearing of the compulsory application, the learned Judge ordered and directed that the debtor be charged with certain offences and tried summarily. This was done as under s. 217 (1) ; cf. *R.* v. *Federal Court of Bankruptcy ; Ex parte Lowenstein* (4). The offences charged were three. The first was that, being a bankrupt, he omitted to keep such books of account as are usual and proper in the business of a canteen proprietor carried on by him and as sufficiently disclose his business transactions and financial position

(1) (1935) 53 C.L.R. 563.
(2) (1943) 67 C.L.R. 116, at pp. 138, 141, 155, 167, 168.
(3) (1921) 29 C.L.R. 329, at pp. 337, 340.
(4) (1938) 59 C.L.R. 556.

during a specified period within five years immediately preceding the date of his bankruptcy. That is an offence against s. 209 (*g*). The second charge was of the same description but it specified a different period, also within the five years immediately preceding the date of his bankruptcy. The third charge was that being a bankrupt he did contribute to his bankruptcy by gambling. Section 214 (1) provides, *inter alia*, that a bankrupt who brings about or contributes to his bankruptcy by gambling shall be guilty of an offence and names one year's imprisonment as the penalty. It will be seen that the fact that the debtor was a bankrupt formed an essential element in each of the offences charged.

When the debtor was brought before the learned judge to plead to the charges, it was objected by his counsel that the debtor was not a bankrupt because the order of sequestration was void. The order was void, so it was contended, for the reason that it was not made by the court but by a deputy registrar in bankruptcy who could not constitutionally be empowered to make judicial orders. As will appear there are certain provisions of the *Bankruptcy Act* which if valid would authorize the deputy registrar to make the order impugned. In substance the question raised by the special case is whether, to the extent they would do so, these provisions are constitutionally valid. Inspection of the order in fact made shows that it is entitled " In the Court of Bankruptcy District of New South Wales and the Australian Capital Territory. re Bruce William Davison ex parte The Debtor ". The operative words of the order are " a sequestration order is hereby made against " the debtor. It is also ordered that a named " Official Receiver of this Court is hereby constituted Official Receiver of the estate of the said debtor ". The caption runs " Dated this second day of May 1952. By the Court Z. Hartstein Deputy Registrar ". The order bears the seal of the Federal Bankruptcy Court. In this it conforms with r. 42 of the *Bankruptcy Rules* (S.R. 1934 No. 77) which provides that all orders of the court shall be signed and sealed by the registrar unless the court otherwise orders or the Act and the Rules otherwise provide.

It appears from the facts stated in the special case that in spite of its form, the order was made by the deputy registrar and not by the court or judge or under the actual authority of the court or judge. The circumstance that Mr. Hartstein was a deputy-registrar and not the registrar of the district is of no importance. Section 12 (2) says that in each district there shall be a district registrar and such deputy registrars, official receivers and other officers as are necessary. Sub-section (6) of s. 12 says that the

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Attorney-General may by order direct that any specified deputy registrar shall have and exercise any or all of the powers and functions of a registrar. The Attorney-General made an order which though it did not exactly follow the words of the sub-section may be taken to have conferred on Mr. Hartstein the powers and functions of a registrar. It must not be supposed, however, that the registrar or the deputy-registrar are officers of the Federal Court of Bankruptcy or form part of the staff or organization of the court. In its first form sub-s. (5) of s. 12 did provide that the registrars and deputy registrars should be officers of the court and should have such duties as the Attorney-General directed or as were prescribed. The expression " the Court " was defined to mean any court having jurisdiction in bankruptcy or a judge thereof: s. 4. An attempt was made under s. 18 as it then stood to confer jurisdiction in bankruptcy on a number of courts of the States. In *Le Mesurier* v. *Connor* (1), it was held in this Court that s. 77 (iii) of the Constitution does not enable the Parliament to make a commonwealth officer a functionary of a state court and to authorize him to act on its behalf and administer part of its jurisdiction and that s. 51 (xxxix) does not authorize the reconstitution of a state court invested with federal jurisdiction under s. 77 (iii) or of the organization through which its powers and jurisdiction are exercised. Accordingly s. 12 (5) and ss. 23 and 24 as they then stood, were held ultra vires and void. After that decision s. 12 (5) was amended to read " the registrars and deputy registrars shall be controlled by the Court and shall have such duties as the Attorney-General directs or as are prescribed ". Section 23 was amended to read: " The Registrar may exercise such of the powers, duties and functions of an administrative nature exercisable by the Court as the Court directs or authorizes him to exercise ". The introductory part of s. 24 (1) was amended so as to provide that, subject to rules, a registrar may exercise in addition to the powers, duties and functions which the court under the provisions of the Act may direct or authorize him to exercise the following powers, duties and functions. Then followed a long list of things he may do. The validity of the legislation in this amended form was attacked in *Bond* v. *George A. Bond & Co. Ltd.* (2), but unsuccessfully. In upholding the validity of the legislation as amended *Rich* and *Dixon* JJ. said:— " The provisions of secs. 12 (5), 23 and 24 as amended are now attacked as *ultra vires* upon the ground that they do no more than repeat in other language the substance of the enactment contained

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

(2) (1930) 44 C.L.R. 11.

in these sections before they were amended, and therefore remain open to the objection which the majority of the Court in *Le Mesurier* v. *Connor* (1) thought fatal to them. In the case of sec. 24 there is much to be said, no doubt, for the view that its provisions are *ultra vires*, because they are an attempt, however disguised, to authorize the Registrar to exercise powers which belong to the Court and to attach to his acts and orders the same efficacy and the same consequences as the law gives to judicial acts and orders. But sec. 12 (5) appears to have been amended for the purpose of changing entirely the Registrar's relation to the Court. It is not easy to get a clear appreciation of the meaning and legal effect of the indefinite expression 'controlled by the Court', but it seems to amount to no more than requiring the Registrar to comply with the Court's orders and directions. Instead of forming part of its official system and exercising the authority of an office in the Court, the Registrar is now to be a stranger to the Court and its organization. But the Registrar is, nevertheless, to be amenable to the Court's orders and directions, if it choose to give him any. The purpose of the amendment of sec. 12 (5) and of sec. 23 appears to have been to put the Registrar at the disposal of the Court as a person bound by law to comply with its requirements. Such a scheme has the strange result of making the office of Registrar in Bankruptcy an office which, in spite of its name, is not attached to a Court at all. Unlikely as otherwise it might seem that the Legislature should mean that there should be Registrars who did not belong to Courts, it must yet be remembered that sec. 12 (2) of the *Bankruptcy Act* 1924-1928, when it constituted the Registrars in Bankruptcy, did so not in respect of Courts, but in respect of Districts. Moreover, the amendments were evidently drawn to remove the vice found in the provisions to be amended, and it must have been plain that this could not be done if, either in substance or in form, the Registrar were given an official position in a State Court. When it appeared that it was beyond the power of the Parliament to make the Registrar an officer of State Courts exercising the authority and jurisdiction of those Courts, it seems to have been thought that it was possible at least to utilize that official for the purpose of executing such commands and exercising such authority as the Courts might lay upon or commit to him " (2).

In considering the validity of the provisions with reference to the power of a registrar to make an order of sequestration it is necessary to bear in mind the peculiar relation of the registrar, or want of relation, to the court. It is not, and could not be, a

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

(2) (1930) 44 C.L.R., at pp. 20, 21.

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case of a court proceeding through its own officers or a judge acting by a deputy or delegate, subject either to confirmation or to recall of the order made. The validity of the material provisions of the statute must be justified on the footing that the registrar is no part of the court. Ostensibly the authority of the registrar to make an order of sequestration on a debtor's petition depends on the combined effect of several provisions. To begin with there is the definition of the expression " the Court " in s. 4 as amended by Act No. 31 of 1932. " The Court " according to the definition means any court having jurisdiction in bankruptcy or a judge thereof and includes a registrar when exercising the powers of the court conferred upon him by or under the Act. Then s. 54 (1) provides that if a debtor commits an act of bankruptcy the court may on a bankruptcy petition presented either by a creditor or by the debtor make an order, in this Act called a sequestration order. Sub-section (2) provides that by the sequestration order the debtor becomes bankrupt and continues bankrupt until a discharge has been issued to him or the order has been annulled. Section 52 (i) makes it an act of bankruptcy if a debtor presents a bankruptcy petition against himself. Section 57 provides that a debtor's petition shall allege that he is unable to pay his debts and the presentation thereof shall be deemed an act of bankruptcy without any declaration of inability to pay his debts and the court may thereupon make, or refuse for good and sufficient cause to make, a sequestration order. The section goes on to require that the debtor shall, at the time of the presentation of his petition, file with the registrar a statement of his affairs and furnish a copy to the official receiver. The first of the functions which s. 24 (1) provides that the registrar may exercise is:—"(a) To hear debtor's petitions and to make sequestration orders thereon or to give leave to withdraw the petitions." It is upon this provision, that is s. 24 (1) (*a*), that reliance is placed to support the order of sequestration in the present case. For the debtor its validity was attacked on the ground that it attempted to repose in the registrar part of the judicial power of the Commonwealth.

It is, of course, settled by *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1), that Chapter III of the Constitution means that the judicial power of the Commonwealth shall not be exercisable except by Federal courts consisting of judges appointed for life or by State courts in which federal jurisdiction is invested pursuant to s. 77 (iii). Where the legislative power

(1) (1918) 25 C.L.R. 434.

conferred by a given paragraph of s. 51 might otherwise be interpreted as extending to the conferring of jurisdiction of a judicial nature, the law must be made under s. 76 or s. 77 of the Constitution and must give jurisdiction to one or other of the courts mentioned in s. 71, namely, the High Court, such other Federal courts as the Parliament creates and such other courts as it invests with federal jurisdiction. If the Parliament creates a court the justices must be appointed upon the tenure prescribed by s. 72. A court is composed of the judges which form it, but courts are provided with officers and, under a unitary system of government, it is not uncommon to find that certain duties falling upon a court are executed, subject to judicial confirmation or review, by an officer of the court, such as a master. There is no distinct decision of this Court that under Chapter III no authority can be given by statute for the discharge in this way of the duties of a Federal court, although there are dicta to that effect: cf. per *Isaacs* J. and *Starke* J. in *Le Mesurier* v. *Connor* (1). The decision of *Long Innes* J. in *Re Malcolm Fraser Grant*; *Ex parte Edgley* (2), perhaps necessarily implies it. But the registrars and deputy registrars are not officers of the court but functionaries placed under the "control of the Court" in the peculiar manner described in the passage already quoted from *Bond's Case* (3). In the United States it has been held in not a few States that judicial power may not be delegated by a court itself, that is by the judges, to a master, or other officer of the court, though consistently with this doctrine an order may be made that a Master in Chancery take evidence and report his conclusions or that specific matters of fact be referred for determination to a referee: *Willis, Constitutional Law of the United States* (1936).

In the now long history of the English law of bankruptcy the process by which a compulsory sequestration has been brought about has always been of a description which may properly be called judicial: see *Holdsworth, History of English Law*, vol. 8, pp. 238 et seqq. It is unnecessary to trace the history of voluntary sequestration but for a very long time it has been the subject of judicial order. There is nothing, however, inherent in the nature of voluntary sequestrations to make it impossible for the legislature to provide some other means than a judicial order for the purpose. No doubt it is imperative that some public or overt fact or event should mark the commencement of a voluntary sequestration. The power conferred by s. 51 (xvii) upon the Parliament to make

(1) (1929) 42 C.L.R., at pp. 511, 512, 522-525.
(2) (1928) 29 S.R. (N.S.W.) 31.
(3) (1930) 44 C.L.R. 11.

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laws with respect to bankruptcy and insolvency is wide and there is no reason for doubting that under it the commencement of a voluntary sequestration might be made to depend on any act, matter or thing that might be chosen as appropriate. For example, it would be open to the legislature to provide that upon making a declaration of his inability to pay his debts and publishing it in the *Gazette* a debtor should become bankrupt, and thereupon his estate should vest in an official receiver. But if the legislature chooses a judicial order as the means of effecting a voluntary sequestration, then Chapter III of the Constitution, relating to the Judicature, comes into play. By judicial order is meant an order which by its nature or description or the character given to it by the legislation involves an exercise of the judicial power of the Commonwealth. It is beyond the constitutional powers of the Parliament to authorize any person or body to make such an order except a court constituted under ss. 71 and 72 of the Constitution.

Subject to one possible qualification the question for decision may be defined as being whether the *Bankruptcy Act* makes a voluntary sequestration depend upon a judicial order of such a description. The possible qualification is that the order in fact made by Mr. Hartstein as deputy registrar may go beyond the statute. Upon its face it certainly bears all the appearance of a judicial order of a description falling within the judicial power of the Commonwealth. If, therefore, s. 24 (1) (*a*) does not contemplate the making of such a judicial order or sequestration by a registrar, the order actually made may be void as falling outside what the legislature has authorized or indeed constitutionally could authorize.

Many attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive. In *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (1), Lord *Simonds*, L.C., speaking for their Lordships of the Privy Council says, "Without attempting to give a comprehensive definition of judicial power, they accept the view that its broad features are accurately stated in that part of the judgment of *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (2), which was approved by this Board in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (3). Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish

(1) (1949) A.C. 134.
(2) (1909) 8 C.L.R., at p. 357.
(3) (1931) A.C. 275.

a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also " (1). The definition given by *Griffith* C.J. to which Lord *Simonds* refers is as follows :—" I am of opinion that the words ' judicial power ' as used in s. 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 power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action " (2). Another well known definition is that given by *Palles* C.B. In *The Queen* v. *Local Government Board* (3), the learned Chief Baron said : " I have always thought that to erect a tribunal into a ' Court ' or ' jurisdiction ', so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the *power* authorizing it is judicial " (4).

In the United States some very brief definitions of judicial power have gained currency. For example, it has been described simply as that power vested in courts to enable them to administer justice according to law : *Sutherland* J., *Adkins* v. *Children's Hospital* (5). More widely quoted is the statement of *Miller* J. that it is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision : see *Muskrat* v. *United States* (6).

It will be seen that the element which Sir *Samuel Griffith* emphasized is that a controversy should exist between subjects or

(1) (1949) A.C., at p. 149.
(2) (1909) 8 C.L.R., at p. 357.
(3) (1902) 2 I.R. 349.
(4) (1902) 2 I.R., at p. 373.
(5) (1923) 261 U.S. 525, at p. 544 [67 Law. Ed. 785, at pp. 790, 791].
(6) (1911) 219 U.S. 346, at p. 356 [55 Law. Ed. 246, at p. 250].

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between the Crown and a subject, that which *Palles* C.B. emphasized is the determination of existing rights as distinguished from the creation of new ones, and those elements emphasized by *Miller* J. are adjudication, the submission by parties of the case for adjudication and enforcement of the judgment. It may be said of each of these various elements that it is entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English law. In the administration of assets or of trusts the Court of Chancery made many orders involving no *lis inter partes*, no adjudication of rights and sometimes self-executing. Orders relating to the maintenance and guardianship of infants, the exercise of a power of sale by way of family arrangement and the consent to the marriage of a ward of court are all conceived as forming part of the exercise of judicial power as understood in the tradition of English law. Recently courts have been called upon to administer enemy property. In England declarations of legitimacy may be made. To wind up companies may involve many orders that have none of the elements upon which these definitions insist. Yet all these things have long fallen to the courts of justice. To grant probate of a will or letters of administration is a judicial function and could not be excluded from the judicial power of a country governed by English law. Again the enforcement of a judgment or judicial decree by the court itself cannot be a necessary attribute of a court exercising judicial power. The power to award execution might not belong to a tribunal, and yet its determinations might clearly amount to an exercise of the judicial power. Indeed it may be said that an order of a court of petty sessions for the payment of money is an example. For warrants for the execution of such an order are granted by a justice of the peace as an independent administrative act. But to say that a thing may be done in the course of the exercise of judicial power is not to say that it may not be done without the exercise of judicial power. The legislature may commit some functions to courts falling within Chapter III although much the same function might be performed administratively. In the judgment of this Court in *Queen Victoria Memorial Hospital* v. *Thornton* (1), the observation occurs :—" Many functions perhaps may be committed to a court which are not themselves exclusively judicial, that is to say which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers " (2).

(1) (1953) 87 C.L.R. 144.

(2) (1953) 87 C.L.R., at p. 151.

It is this double aspect which some acts or functions may bear that makes it so difficult to define the judicial power. The appointment of a new trustee may be regarded as something to be done in the course of the judicial administration of trusts or assets. But there is no reason why it should not be treated from another point of view and regarded as an act to be done by an administrative body authorized to exercise some governmental control, for example over public charities. An extreme example of a function that may be given to courts as an incident of judicial power or dealt with directly as an exercise of legislative power is that of making procedural rules of court. The proper attribution of this power is a matter that has received much attention in the United States: cf. *Wayman* v. *Southard* (1); *Bank of United States* v. *Halstead* (2); *United States* v. *Union Pacific Railroad Co.* (3); *Ex parte City Bank* (4); *Livingston* v. *Story* (5); *Fidelity & Deposit Co. of Maryland* v. *United States* (6), and *The Rule Making Power*, 12 American Bar Ass. 599, by *Dean Pound*, whose thesis is that historically and even analytically it is the function of the courts to regulate their procedure. The learned writer places more reliance in all matters of judicial power upon history than upon juristic analysis: "In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our constitutions were adopted, the power in question was exercised by the Crown, by Parliament, or by the judges. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided chiefly by the historical criterion". Nevertheless it is clear enough that making rules of procedure may in one point of view be regarded as a legislative function, though in another point of view it may be considered as an incident of judicial power. The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss. 71 and 72 of the Constitution and this may be true also of some duties or powers hitherto invariably discharged by courts under our system of jurisprudence but not exactly of the foregoing description. But there are many functions or duties that are not necessarily of a judicial character but may be performed judicially, whether because they are incidental

(1) (1825) 10 Wheat. 1 [6 Law. Ed. 253].
(2) (1825) 10 Wheat. 51 [6 Law. Ed. 264].
(3) (1878) 98 U.S. 569, at p. 604 [25 Law. Ed. 143, at p. 151].
(4) (1845) 3 Howard 291, at p. 317 [11 Law. Ed. 603, at p. 614].
(5) (1835) 9 Peters 632, at p. 655 [9 Law. Ed. 255, at p. 263].
(6) (1902) 187 U.S. 315 [47 Law. Ed. 194].

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to the exercise of judicial power or because they are proper subjects of its exercise. How a particular act or thing of this kind is treated by legislation may determine its character. If the legislature prescribes a judicial process, it may mean that an exercise of the judicial power is indispensable. It is at that point that the character of the proceeding or of the thing to be done becomes all important. Where the difficulty is to distinguish between a legislative and a judicial proceeding, the end accomplished may be decisive. This was the point made by *Holmes* J. in *Prentis* v. *Atlantic Coast Line Co.* (1): "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power . . . And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it is determined by the nature of the act to which the inquiry and decision lead up . . . The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case" (2). Though the purpose to which this test was put by *Holmes* J. was to distinguish a judicial from a legislative function it may usefully be applied by analogy to ascertain whether a thing is done administratively or as an exercise of judicial power.

In the present case the thing done is the making of an order characteristic of courts. The primary power to make the very order is entrusted to the court established under ss. 71 and 72. The power of the registrar is secondary and in a sense derivative. Further by the definition of the expression "the Court" the legislature has made it clear that for certain purposes he is to enjoy the very powers conferred upon the court and is to act exactly as the court. This he is to do, although under the peculiar arrangements adopted to meet the decision in *Le Mesurier* v. *Connor* (3), the registrar is no part of the court and is not an officer of the court. It is clear that s. 24 (1) (*a*) of the *Bankruptcy Act* confers upon the registrar a power which is also exercisable by the court

(1) (1908) 211 U.S. 210 [53 Law. Ed. 150].

(2) (1908) 211 U.S. 210, at pp. 226-227 [53 Law. Ed. 150, at pp. 158, 159].

(3) (1929) 42 C.L.R. 481.

and a power to be exercised by him in the same way and by the same form of instrument as would be used by the judge. He is, in other words, the substitute for the judge. Within the meaning of s. 54 he is by definition " the Court ". By definition also he is the court within the meaning of s. 57. It is therefore his function to decide whether good and sufficient cause exists for refusing to make a sequestration order. Although no doubt it is exceptional for difficulties to arise under this heading, they are by no means unknown; see *Re Bachelor* (1); *Re Betts*; *Ex parte Official Receiver* (2); *Re Hancock* (3). When s. 24 (1) is construed with the definition of " the Court " and applied to ss. 54 and 57, it becomes clear that the function of making an order of sequestration is treated as judicial and is confided to the registrar in the same character as it is confided to the court. In other words it is the intention of the legislature that the registrar should make an order operating as an order of the court. That is exactly what in fact he did in the present case. For upon its face the order is one which could not be made except by a court constituted as it is in conformity with s. 71 and s. 72 of the Constitution.

It follows that what has been done is an attempt to authorize a person not constituting a court under ss. 71 and 72 of the Constitution to exercise part of the judicial power of the Commonwealth and is not authorized by the Constitution. The order of sequestration so made is void. The questions in the special case should therefore be answered (1) No, (2) No.

WEBB J. This is a special case stated under s. 20 (3) of the *Bankruptcy Act* 1924-1950 by his Honour the Federal Judge in Bankruptcy (*Clyne* J.) for the opinion of this Court.

On 12th March 1952, Zedekiah Hartstein was appointed to be deputy registrar in the Bankruptcy District of New South Wales and the Australian Capital Territory, the appointment to be during the pleasure of the Governor-General. On 14th March 1952, the Attorney-General of the Commonwealth directed under s. 12 (6) of the Act that the deputy registrar should have the powers of the Registrar in Bankruptcy. On 2nd May 1952, the appellant Davison presented in the Federal Court of Bankruptcy a debtor's petition for a sequestration order, and on the same day Mr. Hartstein as such deputy registrar made the order. On 10th October 1952, upon a compulsory application by Davison under s. 119 of the Act for an order for discharge, his Honour the Federal Judge in Bankruptcy ordered that Davison be charged and tried summarily

(1) (1855) 25 T.L. (O.S.) 248.
(2) (1901) 2 K.B. 39.
(3) (1904) 1 K.B. 585.

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for offences against ss. 209 (*g*) and 214 (1) of the Act; and on 6th February 1953, he was charged with that, being a bankrupt, (1) he failed to keep proper books of account (a) as a canteen proprietor and (b) as a pastry-cook and, (2) he had contributed to his bankruptcy by gambling. Before being called upon to plead Davison requested that there should be stated for this Court's opinion the following questions (1) whether the deputy registrar was authorized to make the sequestration order; and (2) whether Davison was a bankrupt.

The sequestration order is signed "By the Court Z. Hartstein Deputy Registrar".

Briefly the submission for Davison is that the making of a sequestration order involves the exercise of the judicial power of the Commonwealth, and that as Mr. Hartstein was neither a judge nor a court of the kind referred to in ss. 71 and 72 of the Commonwealth Constitution, or in s. 18 of the *Bankruptcy Act*, the sequestration order is invalid; and therefore that Davison is not a bankrupt within the meaning of the Act, and more particularly ss. 209 and 214, and so cannot be convicted of the offences charged.

Section 57 of the Act provides:

"(1) A debtor's petition shall allege that he is unable to pay his debts, and the presentation thereof shall be deemed to be an act of bankruptcy . . . and the Court may thereupon make, or refuse for good and sufficient cause to make, a sequestration order".

Section 54 provides:

"(2) When a sequestration order has been made the debtor thereupon becomes a bankrupt".

Section 23 provides:

"The Registrar may exercise such of the powers, duties and functions of an administrative nature exercisable by the Court as the Court directs or authorizes him to exercise".

Section 24 provides:

"(1) Subject to rules, a Registrar may exercise in addition to the powers, duties and functions which the Court . . . may direct and authorize him to exercise the following powers, duties and functions, namely:—

(a) To hear debtors' petitions and make sequestration orders thereon, or to give leave to withdraw the petitions . . .

(2) Any order or direction made or given or act done by the Registrar in pursuance of this Act shall be as valid and effectual to all intents and purposes and may be enforced as if it were an order, direction or act of the Court, subject nevertheless to review on summary application to the Court".

Although the Act does not expressly provide, as it does in the case of the court, that the registrar may refuse to grant an order, still I think he would impliedly have authority to refrain from making an order, e.g. when an abuse of process would otherwise result. But it does not follow that he could dismiss a petition. Before a registrar or deputy registrar there would be no controversy between parties. Neither would make a final order, but only one subject to be summarily reviewed by the court. Neither could nor need take any steps to enforce the order, which is automatic in its operation and consequences. There is no provision for giving notice of the petition by a debtor to any creditor or other person, whether by advertisement or otherwise. The petition can be dealt with as soon as it is lodged, as was the case here. If a person should happen to give convincing information to the registrar or deputy registrar that the debtor was able to pay his debts no doubt the registrar or deputy could act on that and refrain from making the order. But that would not make the informant a party or create a controversy.

Now I think it is essential to the exercise of judicial power that there should be a controversy between parties; and indeed not only that but also authority to make a final and binding order against one or more of the parties, and in addition, power to take steps to enforce the order. That is indicated I think by the Privy Council's approval in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1) and *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (2) of the definition of "judicial power" given by *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3) and the explanation of that definition by *Latham* C.J. in *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (4), where his Honour relies on the words "is called upon to take action" in the definition as showing that the power to enforce the decision is an essential element of judicial power. *Starke* J. seems to take the same view, as, after quoting the definition, his Honour proceeds to quote from *Prentis* v. *Atlantic Coast Line Co.* (5), per *Holmes* J. as follows: "A judicial enquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end" (6). *McTiernan* J. (7) agreed with *Latham* C.J. We were not invited to reconsider the *Rola* decision. In that case it might well be

(1) (1931) A.C., at p. 295.
(2) (1949) A.C., at p. 149.
(3) (1908) 8 C.L.R. 330, at p. 357.
(4) (1944) 69 C.L.R. 185, at pp. 198, 199.
(5) (1908) 211 U.S. 210, at p. 226 [53 Law. Ed. 150, at pp. 158, 159].
(6) (1944) 69 C.L.R., at p. 211.
(7) (1944) 69 C.L.R., at p. 213.

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that the facts found by the committee of reference were not constitutive or antecedent facts, but remedial facts; but that did not affect the view of the majority, who relied not merely on the absence of a power to make a binding order in the sense that it could not be challenged in another jurisdiction by a female claiming under the award, but also on the absence of a power in the committee or Women's Employment Board to enforce the award. This power to enforce the order, i.e. "to apply the remedy" is also an essential element of judicial power as defined by *Blackstone* in vol. III, p. 25 and cited by *Isaacs* J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1). *Blackstone's* definition is as follows: "In every Court there must be at least three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or *judicial power*, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy". Presumably in the light of this definition *Isaacs* J. in *Federal Commissioner of Taxation* v. *Munro* (2) declared that "the concept of judicial power includes enforcement". Later in *Le Mesurier* v. *Connor* (3) his Honour said that the term "judicial power" expressed a totality and was used in a strict sense in the Commonwealth Constitution.

It is, I think, beside the question to say that if judicial power is what *Isaacs* J. said it was, then Parliament by a division of authority can defeat ss. 71 and 72 of the Constitution. That may well be the case; but it does not justify the adoption of a different meaning of "judicial power" from what it had in 1900, that is to say, the meaning assigned to it by *Blackstone* which, after all, is not substantially different from that given by *Griffith* C.J. as understood by *Latham* C.J. Then if Parliament should see fit to give to a body or person all the powers of a court to make a binding order in a controversy between parties but not the power to enforce the order, it might seem that judicial power would not be conferred. Yet, I do not venture to forecast what would be this Court's attitude if Parliament in say, bankruptcy matters, should purport to give this Court power to make but not to enforce orders. As to this, however, see *In re Judiciary and Navigation Acts* (4).

There are expressions in the judgment of *Holmes* J. in *Prentis* v. *Atlantic Coast Line Co.* (5) which may appear to suggest that

(1) (1908) 8 C.L.R., at p. 383.
(2) (1926) 38 C.L.R. 153, at p. 176.
(3) (1929) 42 C.L.R. 481, at p. 515.
(4) (1921) 29 C.L.R. 257.
(5) (1908) 211 U.S., at p. 229 [53 Law. Ed. 150, at p. 160].

the power to make a final and binding order and not necessarily the power to enforce it is the real rest of judicial power, but "the final act" to which *Holmes* J. refers could well include the steps to enforce the order, as is indeed suggested by the other passage from his judgment (1) quoted by *Starke* J.

In my opinion the registrar or deputy registrar in making a sequestration order does not exercise the judicial power of the Commonwealth according to any view of the definition given by *Griffith* C.J. and twice approved by the Privy Council.

Since writing this I have had the opportunity of reading the majority judgments. Naturally I have grave misgivings as a result. It may well be that what I term the historical approach is correct. But I find myself unable to disregard the definition of "judicial power" given by *Griffith* C.J. as I understand it. After all the Privy Council called it a definition, or the accurate statement of the broad features of a comprehensive definition, and not a mere illustration. To take a part of the totality "the judicial power" as so defined and confer it on committees of reference under the Women's Employment Regulations was held in the *Rola Case* (2) not to amount to the conferring of judicial power on these committees, although their procedure resembled somewhat that of ordinary courts of law and led to determinations binding on individuals. It appears to me that the reasons given by the majority of the Court in that case for upholding such determinations also sustain the validity of sequestration orders made by the registrars or deputy registrars on debtors' petitions. Indeed, this case is *a fortiori*. As already stated, the soundness of the decision in the *Rola Case* (2) was not attacked on the hearing of this matter, although it is, I think, clear enough that the majority in that case regarded "judicial power" as expressing a totality; and the concept of "judicial power", as used in the Commonwealth Constitution, as including enforcement.

Accordingly I would answer both questions in the special case "Yes".

FULLAGAR J. I agree generally with the judgment of the Chief Justice, but I wish to add a few words.

Bankruptcy, as we know it, is the creation of statute law. It was originally devised for a twofold purpose, the protection of the honest debtor and the circumvention of the dishonest debtor. The essential features of a bankruptcy system are sequestration and distribution—an initial taking into custody of an insolvent

(1) (1908) 211 U.S., at p. 226 [53 Law. Ed. 150, at pp. 158-159].

(2) (1944) 69 C.L.R. 185.

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debtor's property, and the subsequent realization and division among creditors.

Both sequestration and distribution, and all the steps involved in both, are themselves matters of a purely executive or administrative character, and no judicial element is at any stage involved. A complete bankruptcy system could be established by statute without any conferring of any judicial function or power on any special person or body. This seems indeed in substance to have been done by the earliest English bankruptcy statutes, the earliest of which was enacted in 1542 : see *Holdsworth, History of English Law*, vol. viii, pp. 236, 237. From beginning to end of the process. however, questions of infinite variety must inevitably arise which require judicial determination. In the first place, the statute must lay down the conditions on which the debtor's estate may be taken into custody, and questions inevitably arise as to whether those conditions have been fulfilled. Such questions may depend on matters of fact or matters of law or both. Then, assuming the estate to have been lawfully taken into custody, all sorts of questions will arise in the course of the administration of the estate—as to the assets available for distribution, as to priorities of creditors, as to the rights of sureties, and so on.

If the legislation merely provides the executive machinery for sequestration and distribution, all such questions, including questions affecting the liability of the debtor's estate to be sequestrated, must be determined by the ordinary courts. So in England, in early times, such questions were determined in the courts of common law and the Court of Chancery. In determining them those courts were acting in the ordinary course of their functions, and were of course, exercising judicial power. The statute gives rights, expressly or by implication, in prescribed circumstances. The courts, exercising jurisdiction at common law or in equity, are deciding whether a right exists and whether effect should be given to it. The process of so deciding is a process which has all the characteristics commonly associated with judicial power. The decision is a decision on a matter of legal or equitable right, it is conclusive subject to appeal, it carries immediate legal consequences, and it is enforceable.

If a bankruptcy statute takes the course, which the earliest English statutes seem to have taken, of authorizing a person or body, in specified circumstances and on specified conditions, to seize a debtor's property, and leaves to the ordinary courts the function of determining whether the circumstances exist or the conditions have been fulfilled, it seems obvious that the ordinary

courts, when they exercise that function, are exercising judicial power. But there is a degree of inconvenience and circumlocution about such a system. Accordingly modern bankruptcy statutes provide for the determination, before actual sequestration or taking into custody, of all questions which may arise as to whether the circumstances exist or the conditions have been fulfilled. To use the language of the English legislation, there can be no " receiving " of the debtor's property until a " receiving order " has been obtained : to use the language of the Australian legislation, there can be no " sequestration " of the debtor's property until a " sequestration order " has been obtained. Special jurisdiction to make the order may be conferred upon existing courts, as in England, where the High Court of Justice and the County Courts are made " courts having jurisdiction in bankruptcy ". Or it may be conferred upon a court specially created to exercise jurisdiction in all matters relating to bankruptcy. In Australia, we have a special court so created under the name of the Federal Court of Bankruptcy, while a similar jurisdiction is at the same time conferred upon certain existing courts. But the point is that these courts are exercising exactly the same kind of function as that which would be exercised by the ordinary courts of law and equity if power to " seize " or " sequestrate " the debtor's property were given to an executive authority, and those courts were called upon to determine whether a particular seizure or receiving or sequestration was lawful or unlawful. In fact, an ultimate discretion as to the making of an order is superadded, but this does not alter the nature of the function performed. The exercise of the discretion is a judicial function, just as is the exercise of discretion by a court of equity in granting or refusing specific performance or an injunction. Nor does it, of course, make any difference if, in a particular case, no actual controversy between persons interested arises. An order which would otherwise be a judicial order does not lose that character through being made without opposition or even by consent.

The making or refusing of a sequestration order under the *Bankruptcy Act* of the Commonwealth appears to me plainly to involve an exercise of the judicial power of the Commonwealth. I can see no reason for drawing any distinction between an order made on a creditor's petition and an order made on a debtor's petition. A creditor's application is more likely to be controversial than a debtor's application, but the nature and effect of the application and of the order are precisely the same in both cases, and the court is exercising precisely the same function in both cases. Section 54 (1) of the Act provides : " Subject to the provisions

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hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a sequestration order". Section 57 provides: "(1) A debtor's petition shall allege that he is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing of any declaration of inability to pay his debts, and the Court may thereupon make, or refuse for good and sufficient cause to make, a sequestration order. (2) A debtor shall, at the time of the presentation of his petition, file with the Registrar a statement of his affairs, and furnish a copy thereof to the official receiver, in like manner as is provided in sub-section (1) of section sixty-six of this Act". A creditor's petition and a debtor's petition are placed on exactly the same footing.

In England, the nature of the function performed in the making of a receiving order is a matter of no importance. The fact that the statute makes it a judicial function does not preclude its performance being entrusted to any person or body chosen by the legislature for the purpose. The person chosen may be appointed on any terms thought fit, and the body may be constituted in any manner thought fit. But the fact that the statute makes the function judicial is of great importance in Australia. For it means that it can only be validly entrusted to a court constituted in the manner provided by Chapter III of the Constitution. The registrar is not a court so constituted. Section 24 (1) (*a*), therefore, which purports to empower the registrar "to hear debtors' petitions and to make sequestration orders thereon" is unconstitutional and invalid. It follows that a similar power cannot be conferred by the Attorney-General upon a deputy registrar under s. 12 (6).

Each of the questions submitted by the case stated should, in my opinion, be answered: "No".

KITTO J. The Parliament of the Commonwealth has power under s. 51 (xvii) of the Constitution to make laws with respect to "bankruptcy and insolvency", an expression "describing in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation and the effect of its operation": *L'Union St. Jacques de Montreal* v. *Bélisle* (1); *Royal Bank of Canada* v. *Larue* (2).

(1) (1874) L.R. 6 P.C. 31, at p. 36. (2) (1928) A.C. 187, at p. 197.

The question before us concerns the manner in which the Parliament has seen fit to prescribe that a law of this character, contained in the *Bankruptcy Act* 1924-1950, may be brought into operation in relation to an individual debtor at his own instance. The validity of certain provisions made in this connection is denied by the appellant upon the ground that they attempt, inconsistently with s. 71 of the Constitution, to invest an officer of the executive government with an authority which falls within the judicial power of the Commonwealth. Section 71 vests that power in the High Court of Australia, such other federal courts as the Parliament creates, and such other courts as it invests with federal jurisdiction. With s. 1 which vests the legislative power of the Commonwealth in the Parliament, and s. 61 which vests the executive power of the Commonwealth in the Queen, and makes it exercisable by the Governor-General as the Queen's representative, s. 71 completes the scheme by which the Constitution gives effect to the principle of the separation of powers.

The impugned provisions are contained in sub-ss. (1) (*a*) and (2) of s. 24 of the *Bankruptcy Act* 1924-1950 (Cth.), which need to be considered together with s. 57 and the definition of " the Court " is s. 4. Section 57, after providing for the presentation of a debtor's petition, empowers the court thereupon to make, or to refuse for good and sufficient cause to make, a sequestration order. The effect of such an order is that the debtor becomes a bankrupt (see definition of " bankrupt " in s. 4), that the property of the bankrupt (defined in s. 91) vests in the official receiver named in the order and becomes divisible among the creditors of the bankrupt in accordance with the provisions of the Act (s. 60), and that other consequences ensue which need not be mentioned in detail. The definition of " the Court " in s. 4 falls into two parts. By the first part, the expression is defined to mean any court having jurisdiction in bankruptcy or a judge thereof; and s. 18 designates as courts having jurisdiction in bankruptcy such federal courts as the Parliament creates to be Courts of Bankruptcy (and a Federal Court of Bankruptcy has been created by s. 18A which was enacted in 1930), and certain specified state courts and courts of Territories which are invested by the section with federal jurisdiction in bankruptcy. By the second part of the definition, however, " the Court " includes a registrar when exercising the powers of the court conferred upon him by and under the Act. Finally, s. 24 (1) (*a*) purports to authorize a registrar, subject to rules, to exercise the power of hearing debtors' petitions and making sequestration orders thereon, or to give leave to withdraw the petitions, and s. 24 (2), so far as material, provides

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that any order made by the registrar in pursuance of the Act shall be as valid and effectual as if it were an order of the court, subject, nevertheless, to review on summary application to the court.

A registrar is not a court officer, for the amendments made to the Act in consequence of the decision in *Le Mesurier* v. *Connor* (1) succeeded in making him " a stranger to the Court and its organization " : *Bond* v. *George A. Bond & Co. Ltd.* (2). Though he is under the control of the court, his duties are those which the Attorney-General directs or the Governor-General prescribes : s. 12 (5). He is an officer of the executive government, and that being so it is constitutionally impossible to invest him with any form of judicial power. So much is clear from the decisions of this Court by which it appears, as *Dixon* J. said in *Victorian Stevedoring & General Contracting Co. Pty. Ltd. & Meakes* v. *Dignan* (3), " that, because of the distribution of the functions of government and the manner in which the Constitution describes the tribunals to be invested with the judicial power of the Commonwealth, and defines the judicial power to be invested in them, the Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals " (4).

In so far as the Act empowers the designated courts or judges to make sequestration orders on debtors' petitions, I should think it quite clear that it invests them with judicial power of the Commonwealth. This conclusion, I appreciate, treats as not definitive, despite the use of the word " mean ", the dictum of *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (5) that " the words ' judicial power ' as used in s. 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 " (6). But it is only as an accurate statement of the " broad features " of judicial power that this passage has the approval of the Privy Council : *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (7), and it would not be possible to maintain that, except where there is a controversy to be decided, there can never be a manifestation of the power to which these broad features belong.

It is well to remember that the framers of the Constitution, in distributing the functions of government amongst separate organs,

(1) (1929) 42 C.L.R. 481.
(2) (1930) 44 C.L.R., at p. 20.
(3) (1931) 46 C.L.R. 73.
(4) (1931) 46 C.L.R., at pp. 97, 98.
(5) (1909) 8 C.L.R. 330.
(6) (1909) 8 C.L.R., at p. 357.
(7) (1949) A.C. 134, at p. 149.

were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed. As an assertion of the two propositions that government is in its nature divisible into law-making, executive action and judicial decision, and that it is necessary for the protection of the individual liberty of the citizen that these three functions should be to some extent dispersed rather than concentrated in one set of hands, the doctrine of the separation of powers as developed in political philosophy was based upon observation of the experience of democratic states, and particularly upon observation of the development and working of the system of government which had grown up in England. Even in England, however, there had never been a complete dissociation of the legislature, the executive and the judiciary from one another, and it is safe to say that neither in England nor elsewhere had any precise tests by which the respective functions of the three organs might be distinguished ever come to be generally accepted. The reason, I think, is not far to seek. In an article in *Chambers's Encyclopaedia* (1950 ed.), vol. XI, pp. 153-155, Mr. *C. H. Wilson* points out that the separation of powers doctrine is properly speaking a doctrine not so much about the separation of functions as about the separation of functionaries. He refers to the fact that legislation, administration and judicial decision are different stages of the same power or function, namely the making of rules which regulate the behaviour of citizens, in that broadly (though by no means exactly) the legislature makes the laws of most general application and with sovereign authority, the civil departments make laws of more concrete application and with a limited and derived authority, and the courts make laws of the most concrete kind of all, namely judicial rulings binding upon specific persons, within an authority still more strictly circumscribed. Then he goes on to say: "If, then, the agents of this process are, in most forms of constitutional government, divided into three main classes the division must be, not a fundamental functional one, but one for either technical or precautionary purposes. For it still remains true firstly, that different skills and professional habits are needed at the different levels of law-making, and, secondly, that concern for individual liberty will always see one of its chief safeguards in the precautionary dispersal of law-making power".

It may accordingly be said that when the Constitution of the Commonwealth prescribes as a safeguard of individual liberty a distribution of the functions of government amongst separate bodies, and does so by requiring a distinction to be maintained

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between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different "skills and professional habits" in the authorities entrusted with their exercise.

For this reason it seems to me that where the Parliament makes a general law which needs specified action to be taken to bring about its application in particular cases, and the question arises whether the Constitution requires that the power to take that action shall be committed to the judiciary to the exclusion of the executive, or to the executive to the exclusion of the judiciary, the answer may often be found by considering how similar or comparable powers were in fact treated in this country at the time when the Constitution was prepared. Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it.

The subject of bankruptcy provides an illustration in point. As a matter of practical necessity, it is by means of a general law that the legislature provides for the acquisition of the status of bankruptcy and for the consequences of its acquisition. While it may be considered that in that status and those consequences, considered by themselves, there is nothing which imperatively requires a judicial act for the inception of the status, it is certain that in 1900, both in England and in the Australian Colonies, it was and had long been an established branch of judicial activity to subject debtors to the operation of the bankruptcy law, by the particular method of making sequestration orders upon the hearing of petitions presented to a court either by creditors or by debtors themselves. An essentially judicial procedure, a curial proceeding initiated by petition, had been prescribed from early times, and had always been dealt with in accordance with the basic principles by which courts of justice governed themselves in disposing of judicial business. In so far, for instance, as evidence was required, only legally admissible evidence was receivable: *Re Cohen*; *Ex parte The Bankrupt* v. *Inland Revenue Commissioner* (1); *Parsons* v. *Bunge* (2) per *Starke* J. The petition was heard by a judge (or

(1) (1950) 2 All E.R. 36.

(2) (1941) 64 C.L.R. 421, at p. 430.

other judicial officer) of a court: cf. *Ryalls* v. *Leader* (1), and it was granted or refused, adjourned or allowed to be withdrawn, by the application of legal principles to proved states of fact and not upon considerations of policy or expediency.

That the judicial method had come to be so completely accepted as the natural mode of serving the end in view may be accounted for by reference both to the history and the nature of the subject. It must be remembered that bankruptcy was originally a criminal conception: *Clough* v. *Samuel* (2), the earliest bankruptcy laws having been directed to the punishment of fraudulent traders: *Encyclopaedia of the Laws of England*, 3rd ed. (1938), vol. 2, p. 81, and even after the scope of the legislation had become much wider the description of bankruptcy proceedings as in some sense criminal continued to be found, as *Vaughan Williams* L.J. said in *In re X. Y.*; *Ex parte Haes* (3) not only in cases in the Bankruptcy Court, but in cases in the Common Law Courts and in the Court of Chancery. In England, after 1869 it was difficult to continue to regard bankruptcy proceedings as in any sense criminal (4); but even so, the seriousness of the consequences flowing from the change of status which bankruptcy involves has led the courts to apply, with respect to such matters as discovery and interrogatories, the principles governing penal actions: *In re a Debtor* (5). Apart altogether from these considerations, it could never have been overlooked that even though in many cases there might be no controversy to be resolved, a decision to make a man bankrupt affects the relative positions of persons whose interests are opposed, and that between those opposing interests there is as much reason for insisting upon an impartial adjudication according to law as there is in the case of litigation *inter partes*. If bankruptcy is decreed, the debtor gains the advantage of relief from most kinds of liabilities to his creditors, but he loses his property (with a few exceptions), and becomes subject to a number of disabilities and duties and liable to certain punitive proceedings. The unsecured creditors, on the other hand, gain the advantage of having the debtor's property fairly divided amongst them, including property of other persons which is to be treated as his for a variety of reasons, and they have the benefit of special methods of discovering what and where that propery is and of securing its realization; but each, broadly speaking, loses his antecedent rights against the person and property of the debtor.

(1) (1866) L.R. 1 Exch. 296.
(2) (1905) A.C. 442, at p. 444.
(3) (1902) 1 K.B. 98, at p. 102.
(4) (1902) 1 K.B., at p. 104.
(5) (1910) 2 K.B. 59, at p. 66.

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All this is true of voluntary sequestrations no less than of compulsory, and although issues seldom arise for decision on the hearing of debtors' petitions, questions calling for judicial solution can arise in an acute form, as may be seen by consideration of such cases as *Ex parte Painter*; *In re Painter* (1) and *In re Harry Dunn*; *Ex parte The Official Receiver* v. *Harry Dunn* (2). And not only may there be a question as to whether the presentation of the petition is an abuse of the process of the court (a topic upon which the judgment of *Isaacs* J. in *Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (3) is instructive), but there may even be a necessity to decide whether the petition is in truth the debtor's, as where it is presented by an attorney under power and his authority is questioned: cf. *Re J. A. Bagley* (4). The scope for occasions to arise requiring adjudication in a strict sense on the hearing of a debtor's petition was increased by the amendment of s. 57 by the Act No. 31 of 1932 which deleted the provision that "the Court shall thereupon make a sequestration order" and substituted the words "the Court may thereupon make, or refuse for good and sufficient cause to make, a sequestration order".

These considerations lead me to conclude that, while it may well not be correct to say of a power to bring into operation with respect to a debtor statutory provisions such as are contained in the *Bankruptcy Act* 1924-1950 (Cth.) that it is necessarily judicial in character simply because it has that result, yet it is certainly true that the grant to a court of a power to produce that result by the particular process of receiving a debtor's petition for the sequestration of his estate, hearing the petition in conformity with the settled principles governing judicial proceedings, and granting the prayer of the petition by making a sequestration order, is a grant of judicial power within the meaning of s. 71 of the Constitution.

From this, it follows that while it may be that a provision would be constitutionally valid which enabled a debtor to bring about his own bankruptcy by applying to an executive officer such as a Registrar in Bankruptcy for the performance of some purely administrative act, that proposition does not support the provision which we have here to consider. The *Bankruptcy Act* provides no way by which a debtor may be made a bankrupt except by means of an order made in the exercise of judicial power upon the hearing of a petition presented to a court. But it purports to authorize the registrars, the very officials whose office for constitutional reasons has been completely excluded from the organization of

(1) (1895) 1 Q.B. 85.
(2) (1949) 1 Ch. 640.
(3) (1915) 20 C.L.R. 509.
(4) (1929) 29 S.R. (N.S.W.) 333.

the several courts, to come, as it were, into the courts, to take into their own hands proceedings which they find pending upon debtors' petitions presented to those courts, to perform in place of the judges of those courts the function of hearing such petitions, and to dispose of the proceedings by means of orders taking effect, by virtue of s. 24 (2), as if they were orders of the courts made in exercise of judicial power. Because of the peculiar position of the registrars, their proceedings under the authority thus in terms given to them cannot be considered proceedings of the courts themselves, even in the sense in which proceedings before masters or registrars of courts have been so regarded, as for instance in *Re Auto Import Co. (Australia) Ltd.* (1); *Re J. (An Applicant)* (2).

I see no escape from the conclusion that with respect to a debtor's petition the Act purports to allow an exercise of judicial power of the Commonwealth otherwise than by the courts to which that power is confined by s. 71 of the Constitution. The attempt to do so is necessarily void.

For these reasons I am of opinion that the *Bankruptcy Act* does not validly authorize registrars to make sequestration orders on debtors' petitions, and I agree that the questions in the stated case should each be answered, No.

TAYLOR J. On 2nd May 1952, the Deputy Registrar in Bankruptcy at Sydney purported to make a sequestration order upon a debtor's petition presented by the defendant pursuant to s. 57 of the *Bankruptcy Act* 1924-1950. In accordance with the provisions of that section the petition alleged that the defendant was unable to pay his debts and, since no person attended upon the registrar for the purpose of representing, and there was nothing to suggest, that there was any good or sufficient cause for refusing to make such an order, an order was, virtually, made as of course. It should perhaps be observed that neither the Act nor the rules thereunder make any provision for the giving of notice to any person on the presentation of such a petition or for any procedure in any manner resembling a hearing.

Some five months later, namely on 1st October 1952, the defendant, pursuant to an order of the Federal Court of Bankruptcy so directing him, made an application to the Court for an order of discharge. Upon this application the court directed that the defendant be charged with the commission of certain offences under the *Bankruptcy Act* and that he be tried summarily upon those

(1) (1925) 25 S.R. (N.S.W.) 587, at pp. 590, 591.

(2) (1928) 29 S.R. (N.S.W.) 20, at p. 21.

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charges. The charges upon which the defendant's trial was directed were :—

" (a) that being a bankrupt he omitted to keep such books of account as are usual and proper in the business of a canteen proprietor carried on by him and as sufficiently disclose his business transactions and financial position during the period between December 1949 and June 1951 being a period within the five years immediately preceding the date of his bankruptcy ;

(b) that being a bankrupt he omitted to keep such books of account as are usual and proper in the business of a pastry cook carried on by him and as sufficiently disclose his business transactions and financial position during the period between May 1950 and June 1951, being a period within the five years immediately preceding the date of his bankruptcy ; and

(c) that being a bankrupt he did contribute to his bankruptcy by gambling ".

Upon his trial the objection was raised that the deputy registrar had no lawful authority to make the sequestration order referred to and that, accordingly, the defendant was not a " bankrupt ". Upon taking this objection the defendant requested the Court, pursuant to the provisions of s. 20 (3) of the Act, to state a case for the opinion of this Court and, a case having been duly stated, the matter is now before us for a determination of the questions thereby raised.

The fundamental question is, of course, whether the making of the sequestration order which the deputy registrar purported to make constituted an exercise of part of the judicial power of the Commonwealth. If so, then the sequestration order is of no effect and the defendant cannot be said to be a bankrupt.

The broad distinction between judicial and executive acts is capable of precise statement and appreciation. It is expressed in the words of *Marshall* C.J. in *Wayman* v. *Southard* (1) : " The difference . . . undoubtedly is that the legislature makes, the executive executes, and the judiciary construes, the law " (2). But, as it has been observed, " though the distinction between the three departments is broad and fundamental, it is difficult to define their powers exactly. Judicial acts have, of necessity, points of contact with both executive and legislative acts " (*Quick and Garrans' Annotated Constitution of the Australian Commonwealth* (1901), p. 720). The difficulty is particularly apparent upon an examination of the many cases in which it has been necessary for this Court to pronounce upon particular activities unrelated in

(1) (1825) 10 Wheat. 1 [6 Law. Ed. 253].

(2) (1825) 10 Wheat., at p. 46 [6 Law. Ed., at p. 263].

themselves and presenting such diverse aspects as to make it abundantly clear that the vital question cannot be resolved in the case of what may be called border-line activities by the application of any one simple or comprehensive formula.

The observations of *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1) " that the words 'judicial power' as used in s. 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 " and that: " The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action " has come to be accepted as a classic statement of the characteristics of judicial authority (see *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2); per *Latham* C.J. in *Silk Bros. Ltd.* v. *State Electricity Commission of Victoria* (3) and *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (4)). In the last-mentioned case their Lordships accepted the view that the broad features of judicial power are accurately stated in the observations of *Griffith* C.J., but having done so, they went on to say that they did not doubt that " there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also ". The latter part of these observations was, as no doubt was intended, peculiarly apposite to the circumstances then under review and immediately suggests the possibility of the creation of non-judicial functions in the performance of which a tribunal other than a court may be called upon to decide, authoritatively and in binding form, controversies between parties. Perhaps it may be doubted whether the arbitral powers of the Commonwealth Court of Conciliation and Arbitration, which were under discussion in the *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (5), are concerned with controversies relating to " life, liberty or *property* " but less reason exists for thinking that certain fact-finding functions committed to the tribunal erected by the Women's Employment

(1) (1909) 8 C.L.R., at p. 357.
(2) (1931) A.C., at p. 295; (1930) 44 C.L.R., at p. 542.
(3) (1943) 67 C.L.R. 1, at p. 9.
(4) (1949) A.C., at p. 149.
(5) (1918) 25 C.L.R. 434.

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Regulations in 1943 did not fall fairly and squarely within the broad conception of judicial power enunciated by *Griffith* C.J. (cf. *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (1)). Nevertheless, those functions were held not to be judicial in their nature. These are but two of many references which might be made to the difficulty of endeavouring to solve the problem whether any particular function is part of the judicial power of the Commonwealth merely by the application of some broad conception of the content of that power. These brief observations are not intended as a criticism of the observations of *Griffith* C.J.; on the contrary I would, with respect, wish to adopt them entirely as a general statement of those characteristics which present themselves in judicial power. But particular cases raise their own particular problems and these must be individually examined with such assistance as can be derived from general statements on the nature of such power.

Many functions may, of course, readily be recognized as aspects of judicial power whilst the true character of others appears only after a careful examination and analysis (cf. *Peacock* v. *Newtown Marrickville & General Co-operative Building Society No. 4 Ltd.* (2)). Others achieve ultimate recognition as aspects of the judicial power, not so much because of their inherent nature or characteristics, but because their performance has been committed to a court in the strict sense. For instance, fact-finding functions for particular purposes may be committed to administrative bodies which may not, constitutionally, exercise judicial power; but such functions if committed to a court in the strict sense may well constitute judicial power (cf. *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (3) and *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (4)).

With these matters in mind the position of the deputy registrar —which expression is defined by the Act to include "a Deputy Registrar in Bankruptcy when exercising any of the powers or functions of the Registrar"—in making a sequestration order on a debtor's petition may be approached. The making of the order marks the initial stage of the administration in bankruptcy of the debtor's estate. Upon its making the property of the bankrupt vests in the official receiver named in the order, the bankrupt assumes obligations to make full disclosure of his property and affairs, the ordinary rights of his creditors are restrained and in substitution for those rights a right to prove in the bankruptcy is given. Many

(1) (1944) 69 C.L.R. 185.
(2) (1943) 67 C.L.R. 25.
(3) (1925) 35 C.L.R. 422.
(4) (1930) 44 C.L.R. 530.

other consequences, of course, follow including a change in the status of the debtor concerned. But there is no reason why, constitutionally, the application of the many provisions of the *Bankruptcy Act* to both the person and the estate of a debtor should not be made to depend upon a simple declaration by him of his inability to pay his debts or upon the filing of a request by him that his estate be administered in bankruptcy. Indeed, consequences, in many respects similar, flow from the execution of a deed under Pt. XI of the Act. Considerations such as these are involved in the contention that the power to make a sequestration order on the petition of a debtor is not essentially a judicial function. In essence, it is said, a debtor's petition is little, if anything, more than a request that his estate should be administered in bankruptcy and the order is nothing more nor less than a certification that the debtor's request is in order. If this were so, there would be good reason for supposing that the function of making a sequestration order is purely ministerial (cf. *Roche* v. *Kronheimer* (1); the *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (2) and *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (3)). But this brief description of the nature of such orders does scant justice to the statutory provisions which authorize the making of them.

To support the statutory provisions which purport to confer upon the registrar a power to make such orders, the argument is really put in two ways. Firstly, it is said, the making of a sequestration order on a debtor's petition is a purely ministerial function and the essential nature of this function remains unchanged whether committed to a court in the strict sense or not. Secondly, it is contended, that even if the exercise by a court of the power to make such an order ought properly to be regarded as an exercise of judicial power, yet the function of initiating the administration of an estate in bankruptcy is not exclusively a matter for the exercise of judicial power and, accordingly, it may properly be committed to a registrar or deputy registrar. The argument of the defendant, however, gains considerable strength from the circumstance that in modern times the tendency of bankruptcy legislation has been, in general, to provide for curial proceedings to mark the beginning of an administration in bankruptcy and this is a feature of the Act with which we are concerned. Consideration of the provisions of the Act leaves me with no doubt that the exercise by the Court of the power to make a sequestration order on a debtor's

(1) (1921) 29 C.L.R. 329.
(2) (1925) 36 C.L.R. 442.
(3) (1943) 67 C.L.R. 116.

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petition—in the course of which it may, on some occasions, be necessary to make binding determinations of questions of fact or law (cf. *Re Bachelor* (1); *Re Betts*; *Ex parte Official Receiver* (2); *Re Hancock* (3) and *Re Harry Dunn*; *Ex parte The Official Receiver* v. *Harry Dunn* (4))—constitutes an exercise of the judicial power of the Commonwealth. The jurisdiction to make the order is invoked by a proceeding in the Court and it is by force of the order that the rights of the debtor and his creditors are affected, whilst the question whether or not the order should be made may depend upon a binding determination of questions of fact or law. In these circumstances I am unable to appreciate how the exercise by the Court of its power to make such orders can be regarded as other than the exercise of part of the judicial power of the Commonwealth. The fact that questions of law or fact will not always arise is of no consequence in seeking to determine the real character of the power. The same considerations obtrude themselves upon a consideration of the power committed to the registrar. His function in this respect is not merely of an administrative nature. The jurisdiction which s. 24 purports to confer upon him is invoked by curial proceedings and is exercisable in precisely the same manner and with the same incidents as that of the Court. In these circumstances it is not to the point to say that the same result might have been achieved by clothing the registrar with purely administrative authority to initiate a bankruptcy administration by, for instance, the receipt of a request by the debtor or of a declaration of his inability to pay his debts.

For the reasons which I have given I am of opinion that s. 24, in so far as it purports to confer upon the registrar the power to make sequestration orders on debtors' petitions, constitutes an attempt to invest him with judicial power and, accordingly, I am of opinion that both questions raised by the special case should be answered in the negative.

Questions in special case answered:—1. *No*; 2. *No. The bankrupt's costs of the special case to be paid by the Commonwealth.*

Solicitors for the debtor, *Clifton R. Penny & Davies.*

Solicitor for the Attorney-General, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1855) 25 T.L. (O.S.) 248.
(2) (1901) 2 K.B. 39.
(3) (1904) 1 K.B. 585.
(4) (1949) 1 Ch. 640.