[HIGH COURT OF AUSTRALIA.]

JAMES . . . . . APPELLANT;

AND

DEPUTY COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1957.

SYDNEY, *April* 15, 16; MELBOURNE, *June* 10.

Dixon C.J., Fullagar and Kitto JJ.

Bankruptcy—Bankruptcy notice—Time limited for service—Order extending—Made by registrar—Invalidity—Commissioner of Taxation—Deputy commissioner——Competency to issue bankruptcy notice on judgment for income tax and to proceed to sequestration thereon—Income Tax and Social Services Contribution Assessment Act 1936-1955, *ss.* 208, 209—*Bankruptcy Act* 1924-1955, *ss.* 4, 27 (2) (*c*), 52 (*j*), 54, 55—*Bankruptcy Rules*, *r.* 148.

Section 27 (2) of the *Bankruptcy Act* 1924-1955 provides:—"The Court may— . . . (*c*) extend, either before or after its expiration, or abridge any time limited by this Act for doing any act or thing". Rule 148 of the *Bankruptcy Rules* provides:—"Subject to the power of the Court to extend the time, a bankruptcy notice shall be served within one month after the issue thereof." Pursuant to the above-mentioned sub-section and rule a registrar in bankruptcy purported on 23rd February 1956 to extend the time for service of a bankruptcy notice issued on 18th January 1956 to 23rd April 1956. The notice was served on the debtor on 7th April 1956.

Held: (1) The power conferred by s. 27 (2) (*c*) on the court is conferred as and for judicial power exercisable as part of the judicial power of the Commonwealth; (2) the registrar not being an officer of the court and entitled to exercise such power, the attempt by him to extend the time for service of the bankruptcy notice was nugatory.

Reg. v. *Davison* (1954) 90 C.L.R. 353, at pp. 369, 370, 378, applied.

The conditions of par. (*j*) of s. 52 of the *Bankruptcy Act* 1924-1955 cannot be regarded as satisfied if before service of the bankruptcy notice it has expired and the time for service has never been extended.

The Commissioner of Taxation or a deputy commissioner is empowered to take proceedings in bankruptcy for the recovery of income tax as a Crown debt.

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APPEAL.

On 18th January 1956 pursuant to an order made by *Mansfield* S.P.J. of the Supreme Court of Queensland on the application of the Deputy Commissioner of Taxation a bankruptcy notice was issued addressed to Frank James of South Brisbane, Queensland, requiring him to pay to the deputy commissioner within ten days after service upon him of the said notice, excluding the day of such service, the sum of £13,524 15s. 0d. being the balance due on a final judgment obtained by the deputy commissioner against him in the Supreme Court of Queensland on 22nd June 1955. The bankruptcy notice was in the form prescribed by the first schedule to the *Bankruptcy Rules*, the time for filing an affidavit to set aside the said notice on the ground of counter-claim, set-off or cross-demand being fixed at seven days, and such notice need not here be set out. The notice was not served upon James within one month after its issue and, on 23rd February 1956, on the application of the deputy commissioner a registrar in bankruptcy ordered that the time for service of such notice be extended to 23rd April 1946. The notice was served upon James on 7th April 1956.

James not having complied with the terms of the notice or taken any steps to set the same aside, the deputy commissioner on 13th September 1956, issued a petition for the sequestration of his estate, the ground of such petition being the failure of James to comply on or before 19th April 1957 with the provisions of the bankruptcy notice served as aforesaid. On 25th January 1957 James by a notice of intention to oppose the petition disputed the alleged act of bankruptcy and the right of the deputy commissioner to take action under the *Bankruptcy Act* 1924-1955 on constitutional and other grounds. On 27th February 1957 an order for the sequestration of James's estate was made upon the petition of the deputy commissioner by *Moynihan* A.J., at a hearing at which James did not appear.

All documents in the proceedings were intituled " In the Court of Bankruptcy District of Southern Queensland ".

From this order James appealed to the High Court, his notice of appeal dated 11th March 1957 setting out the following grounds :— (1.) That the court and/or judge had no jurisdiction to pronounce the said judgment and/or to make the said order; (2.) that the Deputy Commissioner of Taxation is not a creditor of the appellant; (3.) that there was no debt owing by the appellant to the Deputy Commissioner of Taxation ; (4.) that there was no evidence before his Honour of any debt owing by the appellant to the Deputy Commissioner of Taxation ; (5.) that there was no act of bankruptcy

available to the petitioner-respondent; (6.) that the judgment and/or the said order is contrary to law and/or bad in law.

Sir *Garfield Barwick* Q.C. (with him *P. J. Kenny*), for the appellant. The deputy commissioner is not a person who can cause the issue of a bankruptcy notice in the form of the notice here in question. A bankruptcy notice has always been construed strictly and when a creditor gives such a notice it must be possible for a debtor to take advantage of the various alternatives of the notice. [He referred to the *Income Tax and Social Services Contribution Assessment Act* 1936-1955, ss. 206, 208, 209, 265.] The debt for tax is due to the Crown not to the commissioner or deputy commissioner, and there is no power in the commissioner or deputy commissioner to accept security for tax or to compound for the tax, nor would there appear to be any power in a court to force security for tax on the Crown or to compound the tax for the Crown. This being so, although these officers may obtain a final judgment for tax they cannot issue a bankruptcy notice because the alternatives of the notice are not within their powers. [He referred to the *Income Tax and Social Services Contribution Regulations*, regs. 47, 48; *Taxation Administration Act* 1953, ss. 2 (3), 7, 8; *Bankruptcy Act* 1924-1955, ss. 7, 12, 18, 18A, 20, 49, 52 (*j*), 53-55; *Bankruptcy Rules*, rr. 144, 145, 148, 473.] We find support for this proposition in *In re Cristobal Murrieta*; *Ex parte South American & Mexican Co. Ltd.* (1); *In re a Debtor* (2); *In re a Debtor*; *Ex parte The Debtor* v. *Hunter* (*Liquidator of Marvel Paper Products Ltd.*) (3). The case lastly mentioned (4) requires that any set-off etc. must be against the Crown, one against the deputy commissioner as stipulated by the present notice being irrelevant. Thus the present notice is inefficacious because it does not afford the debtor the opportunity of avoiding the act of bankruptcy by doing any of the various alternatives permitted by the notice as prescribed. There was here no valid extension of the time for service of the notice, which had accordingly lapsed before service, and there was thus no available act of bankruptcy upon which to found the petition. [He referred to s. 27 (2) (*c*) of the *Bankruptcy Act* and *Bankruptcy Rules*, r. 148.] The powers conferred by s. 27 (2) (*c*) are judicial powers and cannot be exercised by a registrar in bankruptcy. [He referred to *Reg.* v. *Davison* (5).] In so far as *Re McDonald* (6) may be to contrary effect

(1) (1896) 3 Manson 35, at p. 40; 12 T.L.R. 238, at p. 238.
(2) (1912) 2 K.B. 533, at pp. 537, 538, 541.
(3) (1952) 1 Ch. 192, at pp. 193, 195.
(4) (1952) 1 Ch., at p. 196.
(5) (1954) 90 C.L.R. 353, at pp. 369-371, 373, 374, 378, 384, 390.
(6) (1934) 8 A.B.C. 184.

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it cannot stand in view of *Reg.* v. *Davison* (1). The deputy commissioner is not a creditor within ss. 54 and 55 of the *Bankruptcy Act*. Although he may obtain a judgment it is not correct to say that it was payable to him or was a debt of his. [He referred to *In re a Debtor* (2); *In re McGreavy* (3).] The matter must be looked at not from the point of view of the power to sue and recover in the *Assessment Act* but from the point of view that the *Bankruptcy Act* requires a petition to be presented by a creditor in respect of a debt due and payable to him. Section 208 of the *Assessment Act* provides that income tax shall be payable to the commissioner. This is not a " function or power " of the commissioner which can be delegated to his deputy. *Re W. Carter Smith*; *Ex parte Commissioner of Taxation* (4) is distinguishable for there the petitioning creditor was the person to whom under the statute the money was payable. If that distinction is not adequate, then it is submitted that the case is wrongly decided. The petition here is intituled " In the Court of Bankruptcy District of Southern Queensland ". There is no such court. Either the petition here was presented to a federal court and the judge of the Supreme Court of Queensland who purported to make the order could not sit as a federal court or if the judge purported to sit as the Supreme Court of Queensland there was no matter before him because no petition had been presented to that court. There is thus no valid order.

C. G. Wanstall Q.C. (with him *E. J. Moynahan*), for the respondent. The appellant's last argument depends upon the name of the court put upon the document rather than upon the reality of the court which exercised the functions. The sequestration was made by *Moynihan* A.J. as a judge of the Supreme Court, the only commission which he has ever held. The question of the seal or the name at the top of the document cannot detract from the validity of the act done. The petition was in fact presented to the Supreme Court of Queensland. The incorrect intitulement of the document is a mere procedural irregularity which is curable; see *Le Mesurier* v. *Connor* (5); *Bond* v. *George A. Bond & Co. Ltd.* (6); *Maslen* v. *Official Receiver* (7). In the last-mentioned case there was an interlocutory application to this Court for bail, which is not reported. The documents were intituled " On appeal from the Court of Bankruptcy District of Western Australia " and *Latham* C.J.

(1) (1954) 90 C.L.R. 353.
(2) (1929) 2 Ch. 146, at pp. 152, 153.
(3) (1950) 1 Ch. 269, at p. 279.
(4) (1908) 8 S.R. (N.S.W.) 246, at pp. 248, 249; 25 W.N. 92.
(5) (1929) 42 C.L.R. 481, at pp. 483, 493.
(6) (1930) 44 C.L.R. 11, at pp. 12, 13, 15, 18, 20, 23.
(7) (1947) 74 C.L.R. 602, at pp. 607, 608.

pointed out that the appeal was from the Supreme Court of Western Australia. Bail was granted, the Court treating the intitulement as in no way destructive of the substantive point. [He referred to the decision of the Court in *Bell* v. *Official Receiver* (No. 10 of 1954) (1).] The extension of time for serving a bankruptcy notice is a purely ministerial act as is the issue of such a notice in the first place (*Bond* v. *George A. Bond & Co. Ltd.* (2)). No help can be gained from cases such as *Re McDonald* (3) which are concerned with extensions of time for compliance with bankruptcy notices, where the act of extension may or may not be judicial. The act being ministerial it does not matter that the court may direct the registrar to do it; the latter nevertheless falls within r. 148. A person performing a ministerial act is nevertheless not exercising judicial power because he acts in a manner in which a court frequently acts. The act of the registrar here does not answer any of the tests of the exercise of judicial power mentioned by *Isaacs* J. in *Le Mesurier* v. *Connor* (4). If the registrar's act is not purely ministerial then it is one of those ministerial functions or duties incidental to the judicial power and comes within the rule stated in *Le Mesurier* v. *Connor* (5). The power conferred by s. 27 (2) (*c*) is wide enough to authorise both judicial and ministerial acts, and the extension of time referred to if done by the court is a ministerial act and remains so when done by the registrar as the court's delegate. [He referred to *Re a Debtor* (6).] If the extension of time is a nullity, the case cited shows that it does not follow that the notice itself is a nullity. It remains on foot and the obtaining of an extension is purely a procedural matter. [He referred to *Re Connor* (7).] If the registrar's order is a judicial act, then it is at most a mere nullity and does not affect the validity of the bankruptcy notice. The notice having been served and no point having been taken that the service was out of time, the appellant has waived any irregularity arising from such service. [On this point he referred also to *Re McGregor*; *Ex parte Anderson* (*Townley* J.) (8) and *Re Kay*; *Ex parte Goldbrough Mort Ltd.* (*Stanley* J.) (9).] The terms of ss. 208 and 209 of the *Assessment Act* enable either the commissioner or deputy commissioner to issue a bankruptcy notice and to be a petitioning creditor in bankruptcy. The payment to the commissioner referred to in s. 208 is to be made " in the manner and at the place

(1) (Unreported.)
(2) (1930) 44 C.L.R., at p. 22.
(3) (1934) 8 A.B.C. 184.
(4) (1929) 42 C.L.R., at p. 516.
(5) (1929) 42 C.L.R., at pp. 516, 524, 525.
(6) (1943) 1 All E.R. 125, at p. 126; (1943) W.N. (Eng.) 35, 36.
(7) (1949) 15 A.B.C. 13, at pp. 16, 17.
(8) (14th August 1952—unreported.)
(9) (20th May 1954—unreported.)

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prescribed" which means as prescribed by regulation (s. 266). The regulations authorise payment to a deputy commissioner: see regs. 44-47, 50. In these circumstances he can petition in bankruptcy. The deputy commissioner here is a judgment creditor and he has all the rights of such a creditor one of which is to issue a bankruptcy notice. Even if the deputy commissioner has no power to compound, which is not conceded, he may nevertheless resort to bankruptcy. There is no distinction to be drawn between unwillingness on the one hand and incapacity on the other in a creditor, because at the most the requirement of the notice is to draw the debtor's attention to his right to such a composition. Nothing can compel the creditor to concede a composition, though the court might in its discretion decline to treat the now compliance as an act of bankruptcy. That, however, is another question. The deputy commissioner or the commissioner may compound in a number of ways, as by contracting to give time or remitting penalties. A creditor is not required to be able to compound in every conceivable way before the notice can be good: see e.g. *Ex parte Culley*; *In re Adams* (1). The only person against whom any counter-claim etc. is relevant here is the deputy commissioner in his official capacity and the bankruptcy notice is in proper form and follows the terms of the judgment. [He referred to *James* v. *Federal Commissioner of Taxation* (2).] Cases such as *Guthrie* v. *Fisk* (3); *In re Nance*; *Ex parte Ashmead* (4) and *Ex parte Dearle*; *In re Hastings* (5) have no application because here the deputy commissioner is a person entitled to receive payment and give a discharge therefor. As to the meaning of creditor in relation to the presentation of a bankruptcy petition: see *In re Sacker* (6) and *Re Macoun* (7). In *Murrieta's Case* (8) there was a limited power to compound yet the bankruptcy notice was good. If the Court considers that the notice here is defective, such defect can be amended: see *Growden* v. *Wiltshire* (9) and *In re a Debtor* (10). *In re a Debtor*; *Ex parte The Debtor* v. *Hunter* (*Liquidator of Marvel Paper Products Ltd.*) (11) does not assist as there the bankruptcy notice did not follow the terms of the judgment (12). The deputy commissioner does not need to rely upon the second paragraph of s. 52 (*j*) of the *Bankruptcy*

(1) (1878) 9 Ch. D. 307, at pp. 310, 311.
(2) (1955) 93 C.L.R. 631, at pp. 643, 644.
(3) (1824) 3 B. & C. 178 [107 E.R. 700].
(4) (1893) 1 Q.B. 590.
(5) (1884) 14 Q.B.D. 184.
(6) (1889) 22 Q.B.D. 179, at pp. 183, 184.
(7) (1904) 2 K.B. 700, at p. 703.
(8) (1896) 3 Manson 35; (1896) 12 T.L.R. 238.
(9) (1935) 52 C.L.R. 286, at pp. 289, 290.
(10) (1912) 2 K.B. 533, at p. 540.
(11) (1952) 1 Ch. 192.
(12) (1952) 1 Ch., at pp. 193, 195.

Act in order to issue a bankruptcy notice. Even if he had to rely upon that paragraph, the word " creditor " in ss. 54 and 55 is wide enough to include him and to enable him to proceed to sequestration. To hold otherwise would be to destroy the effect of the paragraph entirely. [He referred to *Williams* on *Bankruptcy*, 16th ed. (1949), pp. 30, 31.]

Sir *Garfield Barwick* Q.C., in reply. Regulations 44-47 of the *Tax Regulations* have not the effect contended for, but emphasise rather that payment is to be made to the commissioner though it might be done by sending a cheque for the commissioner to his deputy. A remission of additional tax is not a composition but an extinguishment of liability altogether. To compound is to take less for what is truly owing. There is here no contention of a power to take security. A counter-claim etc. wider than against the deputy commissioner in his official capacity or otherwise must be available to a debtor, e.g. a claim against the Crown for compensation for acquisition of property. At the stage of petition the true creditor must be the petitioner. The words " sued for and recovered " in s. 209 are inapt to make either the commissioner or his deputy a creditor for the purposes of the *Bankruptcy Act*. A debtor cannot waive a deficiency in service. The authorities to the contrary cited by the respondent overlook that persons other than the debtor are affected by a bankruptcy notice. The statute has been careful to say that a bankruptcy notice shall be served within the time prescribed subject to the one exception of an order extending time. Short of such an order, after one month the notice is merely a document the service of which ceases to be significant. Section 52 (*j*) and r. 148 are mandatory provisions. The views expressed in *In re McPhail*; *Ex parte Holt* (1) and *Re Mott*; *Ex parte Morton* (2) are preferable to those expressed in *Re Connor* (3) and in *Re McGregor*; *Ex parte Anderson* (*Townley* J.) (4).

Cur. adv. vult.

June 10.

THE COURT delivered the following written judgment :—

This is an appeal from an order pronounced on 27th February 1957 in the Supreme Court of Queensland by *Moynihan* A.J. The order, which was drawn up, in accordance with the *Bankruptcy Rules* (S.R. 1934 No. 77 as amended to S.R. 1956 No. 61), under the caption " In the Court of Bankruptcy District of Southern

(1) (1929) N.Z.L.R. 426.
(2) (1930) 2 A.B.C. 251.
(3) (1949) 15 A.B.C. 13.
(4) (Unreported.)

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Queensland" was an order for sequestration. The appellant is the debtor and the order was made against him on the petition of the Deputy Commissioner of Taxation based upon the unpaid balance of £13,524 15s. 0d. of a final judgment for £13,923 3s. 0d. which he had recovered for income tax and costs. The act of bankruptcy alleged was failure to comply with a bankruptcy notice. The appellant filed a notice of opposition to the petition disputing, among other things, the alleged act of bankruptcy. We have come to the conclusion that the bankruptcy notice was served out of time so that failure to comply with it did not amount to an act of bankruptcy. Subject to the power of the court exercising jurisdiction in bankruptcy to extend the time the bankruptcy notice must be served within one month of its issue. The notice was issued on 18th January and served on 7th April 1956. On 23rd February 1956 there was endorsed upon the notice what purported to be an order of "the Court" made pursuant to s. 27 (2) (*c*) of the *Bankruptcy Act* 1924-1955 and r. 148 of the *Bankruptcy Rules* extending the time for service to 23rd April 1956. The purported order of extension was not in fact made by any court but by a "registrar in bankruptcy". For reasons which we shall give it appears to us to have no legal effect. It was said for the respondent that even on the footing that service of the bankruptcy notice was out of time, the appellant had waived service within due time. Of this contention it is enough to say that no foundation of fact can be found for it. It is true that the exact legal ground for concluding that no act of bankruptcy had been committed was not raised before the Supreme Court of Queensland but it arose on the face of the proceedings and the commission of the act of bankruptcy was in issue. We cannot regard the conditions of par. (*j*) of s. 52 as satisfied if before service of the bankruptcy notice it has expired and the time for service has never been extended.

Section 27 (2) (*c*) of the *Bankruptcy Act*, under which the registrar purported to extend time for service of the notice, provides that "the Court may . . . (*c*) extend, either before or after its expiration, or abridge any time limited by the Act for doing any act or thing." "The Court" is defined to mean any court having jurisdiction in bankruptcy or a judge thereof (s. 4). Rule 148 provides: ". . . Subject to the power of the Court to extend the time, a bankruptcy notice shall be served within one month after the issue thereof". It seems clear enough that the power to which r. 148 refers is that conferred by s. 27 (2) (*c*) on "the Court" and that means any court with bankruptcy jurisdiction or a judge of such a court. Clearly enough the Supreme Court of Queensland or a

judge thereof might have made an order extending the time for service of the bankruptcy notice, but that did not happen. Instead an order, purporting on its face to be a judicial order, was made in fact by a registrar in bankruptcy and in form " By the Court " and sealed with a seal of " The Court of Bankruptcy District of Southern Queensland." There is in fact no such court ; the name " Court of Bankruptcy " is a description adopted by the *Rules* and the forms to the *Rules*, a description intended to apply indifferently and in a distributive manner to all the courts covered by s. 18 of the Act. The *Rules* have been made by the Governor-General in Council as under s. 223 of the Act. Rule 12 (1) provides that every proceeding before the Court . . . shall be entitled " In the Court of Bankruptcy " with the name of the District in which it is taken, and r. 6 provides that the forms in the schedules, where applicable, and where they are not applicable forms of the like character, with such variations as circumstances require, shall be used. The first form is a general title " In the Court of Bankruptcy District of ". The succeeding forms indicate that the title is to be used. Rule 473 provides that the seal to be used by any court having jurisdiction in bankruptcy under the Act shall describe the court as " The Court of Bankruptcy " and the name of the district shall be added thereto. The districts are now set out and named by r. 481. The result is that the seal does not necessarily identify the court, though probably that was part of the purpose of the requirement in s. 49. It is possible that Mr. Johnstone, the registrar who inscribed the order on the bankruptcy notice and caused it to be sealed and tested it with his signature, conceived himself to be making or recording an order of the Supreme Court of Queensland exercising its bankruptcy jurisdiction. But no one but a judge could make such an order or cause it to be recorded. It is equally possible, however, such is the power of words, that he supposed a court of bankruptcy existed bearing that precise name. A registrar in bankruptcy is not, in that capacity, an officer of any court. He is a federal officer who is not attached to a court although, by s. 12A, he is controlled by " the Court ", that is any court corresponding with the defined description. " 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

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directions, if it choose to give him any " : *Bond* v. *George A. Bond & Co. Ltd.* (1). Considered as a judicial order, as it purports to be, the order authenticated by the seal and Mr. Johnstone's signature is without authority and void. There is, we think, no other light in which it can be considered. One may concede that the issue of a bankruptcy notice is ministerial (cf. *Bond* v. *George A. Bond & Co. Ltd.* (2)), and it may well follow that a power to extend time for service of such a notice might be committed by the Parliament to administrative hands. But that is not what Parliament has done. Section 27 (2) (*c*) confides to the court as part of its judicial power the extension of any time limited by " this Act ", an expression defined to include the *Rules*. Some of the times limited by the Act are of a character going to substantive rights and it would be strange if there were an attempt to entrust the power of abridgement and extension to anybody but " the Court ". Even if, however, it would be possible constitutionally to confer power to abridge or enlarge administratively all the times to which s. 27 (2) (*c*) applies, it is exactly the opposite of what the legislature has done. " . . . there are many functions or duties that are not necessarily of a judicial character but may be performed judicially, whether because they are incidental 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 " : *Reg.* v. *Davison* (3). In the same case, speaking of a receiving order made on the debtor's own petition, *Fullagar* J. said : " 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 " (4). The order made by Mr. Johnstone cannot be

(1) (1930) 44 C.L.R. 11, at p. 20.
(2) (1930) 44 C.L.R., at p. 22.
(3) (1954) 90 C.L.R. 353, at pp. 369, 370.
(4) (1954) 90 C.L.R., at p. 378.

supported under s. 12A (3), which says that a registrar may exercise such of the powers, duties and functions of an administrative nature exercisable by the court as the court directs or authorises him to exercise. The power conferred by s. 27 (2) (*c*) is conferred as and for a judicial power exercisable as part of the judicial power of the Commonwealth. In *Bond* v. *George A. Bond & Co. Ltd.* (1) the meaning and validity of a power of delegation contained in s. 23 and similarly expressed was discussed and it was upheld on the footing that it was confined to "strictly ministerial functions". It is perhaps right to add that in any case the actual delegation on which reliance was placed by Mr. Johnstone (a document handed up at the end of the argument) by no means carries upon its face an assurance of regularity and efficacy. It does not purport to be a direction or authorisation of a court but of a number of gentlemen, two only of whom are described as judges of the Supreme Court of Queensland, though we know all of them hold or have held that office. Two of those mentioned in the document have ceased to fill the office and one of them did not execute the instrument. It does not bear a seal of the Supreme Court of Queensland.

For the foregoing reasons the attempt to extend the time for service of the bankruptcy notice was nugatory and there was no act of bankruptcy in failing to comply with it after it was served out of time.

Other objections were raised in support of the appeal against the order of sequestration. They fell under two descriptions. There were objections, or at all events an objection, basis for which was discovered in the anomalous confusion of the identity of different State and federal courts exercising bankruptcy jurisdiction which the *Rules* and forms produce and in the equally anomalous situation with reference to bankruptcy officials created by the provisions upheld in *Bond's Case* (2). No doubt so long as the statute and statutory rules adhere to a system depending on comprehending these two anomalies constitutional and other difficulties will continue to arise and all the courts can do is to decide them as and when it is necessary and in the form they actually take. Little or no advantage can accrue from any attempt to solve such questions in advance of strict necessity. So it seems better to put aside the other objections mentioned which fit under this heading. The second description of objections, however, depends entirely on the relation of the Commissioner of Taxation and his deputies to s. 52 (*j*) and ss. 54 and 55 of the *Bankruptcy Act* 1924-1955. These provisions

(1) (1930) 44 C.L.R., at pp. 21, 22.

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

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relate respectively to the act of bankruptcy founded on a bankruptcy notice and to the petition by a creditor. The objections made under this head must be open almost daily in proceedings in which the commissioner or one of his deputies is seeking to make taxpayers bankrupt for unpaid income tax. In the view we have taken of this case and have expressed above nothing we say can amount to a decision of any of these objections but it would be undesirable if by passing them by without observation we created the impression that we think they may be well founded and desire to reserve them for consideration on some other occasion. In the present case the deputy commissioner recovered judgment against the appellant for the tax forming the debt. It may be taken for present purposes that a delegation to him by the commissioner under s. 8 of the *Taxation Administration Act* 1953 existed enabling the deputy commissioner to exercise the powers of the commissioner with respect to the enforcement of the relevant liability and the recovery of tax. Under s. 208 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1955 the tax is a debt due to the Crown on behalf of the Commonwealth and payable to the commissioner, that is to say the deputy commissioner: cf. s. 13 (*b*). By s. 209 any tax unpaid may be sued for and recovered in any court of competent jurisdiction by the commissioner or a deputy commissioner suing in his official name. Under s. 52 (*j*) of the *Bankruptcy Act* the person causing the bankruptcy notice to be served must be a creditor and must have obtained a final judgment or order. A second paragraph of s. 52 (*j*) enlarges the meaning of creditor but we do not think the respondent can safely place reliance upon it to answer the appellant's objection nor does s. 53 assist him. Section 54 requires simply that the petition be presented by a creditor. The notice served called on the appellant to pay the judgment debt to the deputy commissioner (*scil.* the plaintiff who had recovered judgment) or to secure or compound for the sum to his satisfaction or that of the court or to satisfy the court that the appellant had a counter-claim, set-off or cross-demand against him (of the required amount).

The substantial points taken are (1) that the Crown is the creditor not the deputy commissioner; (2) that a set-off etc. against the Crown must be enough and certainly this requirement of the notice should not be limited to one against the deputy commissioner; (3) that the deputy could not compound the debt or take security; and (4) that his satisfaction in any case would be irrelevant. All these difficulties arise out of incongruities of, on the one hand, the form supplied by the rules, the rules themselves and expressions

in the text of s. 52 (*j*) and s. 54 of the Act with, on the other hand, the situation which ss. 208 and 209 of the *Income Tax and Social Services Contribution Assessment Act* produce, a situation which verbally the language of the form, the rules and the sections does not aptly fit. We agree, however, in the general view of provisions like ss. 208 and 209 which *Street* J. took in *Re W. Carter Smith*; *Ex parte Commissioner of Taxation* (1). We think that the commissioner or deputy commissioner is empowered to take proceedings in bankruptcy for the recovery of the tax as a Crown debt. The officer may proceed in his own name but he sues for the Crown and as plaintiff or actor it is not in his own right but that of the Crown that he proceeds. If he has no statutory power himself to compound, nevertheless a composition in his name may no doubt be made by the Government of the day. His is but an official name, but it is the correct name in which the Crown sues. This is not the occasion to consider what if any descriptions of set-off might be available to the judgment debtor. It is enough to indicate our general view of the position. It is unnecessary in this case to consider whether as a matter of expression the notice should be amended to conform with that view. It is enough to say that in substance we think the contentions mentioned should fail. For the reasons given earlier, however, we would allow the appeal.

Order that the appeal from the order of sequestration of 27th February 1957 *be allowed with costs and that the said order be set aside and in lieu thereof that the petition of the respondent be dismissed with costs. Execution for costs not to issue without the order of the court or judge. The question whether such costs should be set off against the claim of the commissioner reserved. Liberty to apply.*

Solicitors for the appellant, *Bergin, Papi & Finn*, Brisbane, by *Williams, Ryman & Co.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

R. A. H.

(1) (1908) 8 S.R. (N.S.W.) 246, at pp. 248-250; 25 W.N. 92.