LEGAL LANDMARKS OF 1949

From the point of view of the lawyer, whether academic or practising, the most important developments which took place in 1949 in the law applicable in Queensland occurred through the medium of judicial decision rather than legislation. In one sphere, however, legislation played an important part in bringing the judicial machinery into operation, viz., in the sphere of Federal Constitutional Law. The courts and the constitutional lawyers were once again, as in the several preceding years, working overtime as legislation of Australian Parliaments, particularly that of a very active Federal Parliament, was repeatedly challenged as *ultra vires* under the Constitution. Many of the resultant judicial decisions are of vital importance, not only to lawyers but also to the general public.

BANKRUPTCY

Life Insurance Policy taken out after Sequestration.

Policies of life insurance on the life of a bankrupt taken out before sequestration are, of course, protected in the event of sequestration, subject in certain cases to a charge on the policy as provided by section 91 (*b*) of the *Bankruptcy Act*, 1924-1946.

It has been generally assumed that protection applied to policies taken out by an undischarged bankrupt, that is, after the date of the sequestration. However, the decision of Clyne J. in ***In Re O'Brien***[1] has confounded this assumption.

His Honour held that section 91 (*b*) applies only to policies taken out before sequestration, and accordingly policies issued after sequestration are not protected in any way.

The result is that if an undischarged bankrupt insures his life and the insurance matures before the bankrupt obtains his discharge, the proceeds will pass to the trustee. Likewise, the trustee (if he becomes aware of the existence of the policy of insurance) can enforce its surrender before maturity. It will be interesting to see whether the legislature will amend section 91 to cover such policies. There is much which could be urged against such an amendment.

Estate of Testator bequeathed to wife who is undischarged bankrupt—jurisdiction of court to make provision for children under the Testators' Family Maintenance Acts.

C. died in 1948 having, by his will made in 1927, disposed of his whole estate in favour of his wife. C.'s widow at the date of his death was an undischarged bankrupt. On an application under the *Testators' Family Maintenance Acts*, 1914-1943, by four children of C. for provision out of the estate, it was submitted on behalf of the Official Receiver in bankruptcy that the estate of the deceased had vested in the Official Receiver by virtue of section 91 (1) of the *Bankruptcy Act*, 1924-1946, and that the Court had no jurisdiction to make an order, which would have the effect of divesting the estate from the Official Receiver. It was also submitted on behalf of the Official Receiver that so far as the

1. Noted 23 A.L.J. 91.

Testators' Family Maintenance Acts purported to give the Court such a power, it was inconsistent with the *Bankruptcy Act*, and that the latter prevailed (section 109 of the Constitution).

Stanley J.[2] rejected both submissions on two grounds. The first ground (as far as the real estate of the testator was concerned) was that a will is an instrument, and by section 43 of the *Real Property Acts*, 1861-1946, an instrument is not effectual to vest any estate or interest in the land until it is registered (no such steps had been taken). Accordingly, the real estate had not vested in the beneficiary, nor through her in the Official Receiver.

The second ground of His Honour's decision was that even assuming any right to any of the property is vested in the Official Receiver, he gets no better right than the bankrupt had in the property, namely, a right to such property if the Supreme Court of Queensland exercising its jurisdiction under the *Testators' Family Maintenance Acts* did not deprive her of that right.

So far as concerns the first ground, *Holt* v. *The Deputy Federal Commissioner of Land Tax (N.S.W.)*,[3] which may possibly have affected His Honour's decision (on that ground only), was not referred to.

M.B.H.

CONSTITUTIONAL LAW

Most of the numerous important judgments delivered during the year on constitutional law were concerned with interpretation of the Federal Constitution, particularly in relation to the legislative powers of the Federal Parliament.

Defence Power.

The extent of the defence power (Constitution, section 51 (vi)), in the immediate post-war period again came up for consideration by the High Court in *Hume* v. *Higgins*,[4] *R.* v. *Foster*;[5] *Wagner* v. *Gall*,[5] and *Collins* v. *Hunter*.[5] The last three of these cases made history—most welcome history to student and practitioner alike—in that a single consolidated judgment, expressing the unanimous opinion of six judges, was delivered in respect of all three. This judgment demonstrated unmistakeably that the rate of diminution of the extent of the defence power rapidly accelerates as the termination of hostilities recedes further into the past. Although Williams J. was able to say in *Hume* v. *Higgins*,[6] in which the war-time *National Security* (*Economic Organisation*) *Regulations*, as extended by the *Defence* (*Transitional Provisions*) *Act*, 1946, were held to be still valid in 1947, that "the Executive must be accorded a wide latitude of discretion in determining when that period [*i.e.*, the period of transition from war to peace] has come to an end," the Court was satisfied in the three later cases that that period had come to an end in 1949 so far as the continuing *Women's Employment Regulations*, *Liquid Fuel Regulations*, and *National Security* (*War Service Moratorium*) *Regulations* 30A-30AF were concerned, and those Regulations were declared no longer valid. The Court followed the principles expressed by it in earlier cases on the extent of the defence power in the post-war

2. *Re Crowley*, [1949] St. R. Qd. 189.
3. (1914) 17 C.L.R. 720.
4. 78 C.L.R. 116; [1949] A.L.R. 273.
5. [1949] A.L.R. 493.