THE COMMONWEALTH BANKRUPTCY ACT.

By His Honour, the Federal Judge in Bankruptcy, Mr. Justice Clyne.

The Commonwealth Parliament in the exercise of its powers under the Constitution to make laws with respect to bankruptcy and insolvency passed a Bankruptcy Act in 1924 and another in 1927 and these two Acts pursuant to proclamation commenced on the 1st day of August, 1928.

Since these Acts came into force there have been many amendments some of which were obviously intended to repair omissions in the Principal Act. One important amendment had a different purpose. By the *Bankruptcy Act* 1930 Parliament pursuant to the power conferred on it by s. 71 of the Constitution created a Federal Court of Bankruptcy.

In the limited space at my disposal I propose to refer briefly to the foundations of the Commonwealth *Bankruptcy Act*: to say something about its interpretation and to indicate the need for at least a revision of its text and an amendment of some of its procedural provisions.

It is perhaps not inappropriate to mention that since the Commonwealth legislation first came into being in August, 1928 the bankruptcy and insolvency legislation of the various States is gradually approaching a state of desuetude and in the State of New South Wales this approach has been hastened by an amendment made in March, 1947 to the *Bankruptcy Act* 1898 of that State: this amendment provided that notwithstanding anything contained in the *Bankruptcy Act* 1898 no claim should, in any case where twenty years or more have elapsed since the sequestration of the estate of a bankrupt, be made after the commencement of the amendment by the Official Assignee or trustee of the estate of any such bankrupt to any estate or interest in any realty or personalty which is part of the property of such bankrupt, and that estate or interest should, subject to the rights, if any, of any person in possession of such property, be deemed to be vested in such bankrupt or any person claiming through or under him as the case may be. While this amendment could, I think, have been more fitly expressed, it has to a substantial extent accelerated the end of bankruptcy administration under the law of New South Wales.

The Commonwealth Act can fairly be described as a legislative mixture: much of it is modelled on the English Act of 1914: it includes various "cuttings" from the bankruptcy and insolvency laws of the States and also includes two Parts (Parts XI. and XII.) which contain provisions dealing with arrangements between debtors and creditors which are not ordinarily regarded as coming within the law of bankruptcy in its normal meaning.

While the English Act of 1914 and the Rules made thereunder form a substantial basis for the Commonwealth Act, this Act of 1914 had its foundation in the English Act of 1883 and this Act of 1883 represented the latest of the experiments made during the nineteenth century to find a satisfactory bankruptcy code. These experiments exhibited from time to time an alternation between the principle of a creditor's administration and that of an official administration.

The general scheme of the English legislation (and also of the Commonwealth legislation) has been to provide a more effective official

control over bankruptcy administration and at the same time to ensure that in respect of judicial proceedings the Court should have complete control.

There is one important feature of the Commonwealth legislation to which some reference should be made. In Australia the organization and functions of Courts having jurisdiction in bankruptcy under Commonwealth legislation are subject to constitutional limitations.

In 1929, in the case of *Le Mesurier v. Connor*[1] the High Court had to consider various sections of the *Bankruptcy Act* 1924-1928. Section 12 (5) thereof enacted that Registrars and Deputy Registrars should be officers of the Court—i.e. a Court having jurisdiction in bankruptcy or a Judge thereof—and should have such duties as the Attorney-General directed or as were prescribed, and s. 18 (1) enacted that the Courts having jurisdiction in Bankruptcy should be :—

(*a*) such Federal Courts (if any) as the Parliament created to be Courts of Bankruptcy ; and

(*b*) such State Courts or Courts of a Territory as were specially authorized by the Governor-General by proclamation to exercise that jurisdiction.

The High Court declared these provisions to be *ultra vires* and void, holding that the creation of the Office of Registrar as part of the organization of a State Court was beyond the power of the Commonwealth Parliament and that it was also beyond the power of the Commonwealth Parliament to confer upon the Governor-General a discretionary power to authorize any State Court to exercise Federal jurisdiction.

The Principal Act was then amended by the *Bankruptcy Act* 1929 and amongst these amendments were the omission from sub-s. (5) of s. 12 of the Principal Act of the words " officers of the Court " and the insertion in their stead of the words " controlled by the Court," and the omission from s. 18 of paragraph (*b*) of sub-s. (1) thereof and the insertion in its stead of a paragraph which invested with Federal jurisdiction in bankruptcy the State Courts and Courts of Territories specifically mentioned therein. While Registrars and Deputy Registrars appointed under the Act may not be officers of State Courts having jurisdiction in bankruptcy, there appears to be no reason why Registrars and Deputy Registrars " attached " to the Federal Court should not be made officers of that Court.

Since *Le Mesurier v. Connor* the High Court has had occasion to consider from time to time the constitutional validity of other provisions of the *Bankruptcy Act* relating to the powers of Courts having jurisdiction in bankruptcy. An interesting and important case dealing with this question was that of *R. v. The Federal Court of Bankruptcy* ; *Ex parte Lowenstein*[2].

Under the *Bankruptcy Act* the Court on an application for discharge made by a bankrupt may, if it has reason to believe that the bankrupt has been guilty of an offence against the Act punishable by imprisonment, charge him with the offence and try him summarily. This power conferred upon the Court to charge a bankrupt was contested in the *Lowen-*

1. (1929) 42 C.L.R. 481.
2. (1938) 59 C.L.R. 556.

stein Case. The High Court by a majority held that this function of the Court was not *ultra vires* the Commonwealth Parliament. It appears from this decision that a Bankruptcy Court acting under Commonwealth legislation is not restricted to the exercise of strictly judicial functions.

There are other provisions of the Act relating to the powers and functions of Bankruptcy Courts which have not yet been challenged but which have I think a doubtful constitutional ancestry.

Having sketched briefly the origins of the Act with some reference to the constitutional trammels upon the Courts exercising bankruptcy jurisdiction thereunder, I propose in the next place to say something about the interpretation of the Act.

Before dealing with this question of interpretation it is I think not out of place to make a digression into a matter which has some bearing on the question.

It has been said that bankruptcy law in England and in Australia is now substantially the creation of Statute, but, while this is so, much law administered by Courts of Bankruptcy is not to be found in the written law.

Section 25 (1) of the Commonwealth Act (which substantially corresponds with a provision in s. 105 (1) of the English Act of 1914) enacts that the Court shall, in any proceedings in bankruptcy, have full power to decide all questions of priorities and all other questions whether of law or of fact which arise in any case of bankruptcy coming within the cognizance of the Court and which the Court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete realization and distribution of property in the case. Notwithstanding this wide and rather vague provision, it is often necessary to have recourse to what has been called the common law of bankruptcy as a means of supplementing the Statute law.

The description " common law of bankruptcy " is, I think, not a happy one, because during the long history of bankruptcy the Chancellor has played a predominating part and the rules of equity have had a material bearing in the development of bankruptcy law.

As long ago as the *Statute* 5 *Geo. II. c.* 30 (1731-1732), which was a consolidation of the law with some minor amendments, it was enacted that all proceedings in bankruptcy were to be " entred of Record in his Majesty's Court of Record in Chancery."

In *Re Townsend* ; *Ex parte Bradley*[3] Lord Eldon expressed the opinion that it was the intention of the legislature in giving jurisdiction to the Chancellor in bankruptcy to give him power to use in bankruptcy the authority used in causes in Chancery where no specific authority was given by the Statute.

In the case of *In re Hart* ; *Ex parte Green*[4] Cozens-Hardy M.R. said the Court of Bankruptcy has always been regarded as a Court of Equity.

Quite recently this reliance on the part of the Court of Bankruptcy on the Court of Chancery has been recognized.

3. (1812) 1 Rose 202.
4. [1912] 3 K.B. 6.

In *Mathieson's Trustee v. Burrup Mathieson & Co.*[5] it was pointed out that the *Bankruptcy Act* was an Act regulating the proceedings on equitable principles, recognizing equitable debts, subject of course to such infirmities as are sometimes present, but drawing no such distinction between equitable and legal rights for purposes of administering the estate of the bankrupt.

It would therefore seem that what is called the common law of bankruptcy should be called the equity of bankruptcy.

Apart from the application of equitable doctrines by Courts having jurisdiction in bankruptcy, the statutory code has also as a supplement some judge-made law of a humane or ameliorative character. For example, while statute enacts that, subject to some specified exceptions, all property which belongs to or is vested in the bankrupt at the commencement of bankruptcy or is acquired by or devolves upon him before his discharge is property divisible amongst creditors, the rule has been well established that the personal earnings made by a bankrupt during his bankruptcy, so far as reasonably necessary for the support of himself and his family, do not pass to the trustee. *Re Roberts*[6].

In the case of *Re Sinclair*; *Ex parte Payne*[7] it was decided that though a payment by a debtor between the commencement of his bankruptcy and the order of adjudication against him is protected, if the person who receives the money has no notice at the time of the presentation of a petition against the debtor and the transaction is *bona fide*, yet money paid by a debtor to his solicitor to meet the legal expenses of opposing a petition for adjudication cannot, if the debtor is adjudged a bankrupt, be recovered back by the trustee.

A further striking illustration of this humane or ameliorative jurisdiction is to be found in the established rule that a trustee in bankruptcy as an officer of the Court is required in the exercise of his duties to act in an honest and straight-forward manner, though to do so might not be consistent with his strict legal or equitable rights. Thus a trustee will be ordered to repay money paid to him under a mistake of law. *Re Condon*; *Ex parte James*[8].

These considerations must be borne in mind in the interpretation of the Commonwealth Act.

When we come to the interpretation of the Commonwealth Act, it must I think be said that its draftsmanship is not a satisfactory job, but it should be mentioned that some of its defects in this respect have been inherited from the English Act of 1914. I give a few illustrations. Section 124 (1) (*b*) of the Commonwealth Act provides, as does s. 29 of the English Act, that a bankruptcy may be annulled where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full.

Under this provision it has been held that the debts to be paid in full include the debts of the bankrupt which have not been proved as well as those which have. See *Re Gay*[9].

5. [1927] 1 Ch. 562.
6. [1900] 1 Q.B. 122.
7. (1885) 15 Q.B.D. 616.
8. (1874) 9 Ch. App. 609.
9. (1946) 13 A.B.C. 134.

Under s. 69 of the English Act of 1914, which corresponds substantially with s. 118 of the Commonwealth Act, it is provided that a bankrupt shall be entitled to any surplus after payment in full of his creditors with interest, as by the Act provided, and of the costs charges and expenses of the proceedings under the bankruptcy petition.

In the case of *Re Ward*[10] the Court decided that the word " creditors " in s. 69 meant the creditors who had proved their debts. It would have been better if under these provisions it had been made clear whether the creditors to be paid in full were all the creditors of the bankrupt or those creditors only who had proved their debts.

Under s. 68 (4) of the Commonwealth Act any creditor whose proof has been admitted, or his representative authorized in writing, may question the debtor at his public examination concerning his affairs and the causes of his failure. Section 15 (4) of the English Act 1914 also provides that any creditor who has tendered a proof or his representative authorized in writing may question the debtor concerning his affairs and the causes of his failure.

Mr. Registrar Hazlitt decided in *In re G. G. Landrock*[11] that a solicitor appearing for a creditor at the public examination of a bankrupt for the purpose of examining the bankrupt as to his affairs need not be authorized in writing; but in the case of *R. v. Registrar of Greenwich C. C.*[12] the Court of Appeal held that a solicitor appearing for a creditor must have written authority. The Court also held that Counsel did not require any such authority.

The question might well be asked whether under the Commonwealth Act a Solicitor or a Barrister and Solicitor is required to be authorized in writing to enable him to appear for a creditor on a public examination.

This lack of clarity in the provisions to which I have referred by way of illustration is common both to the English Act and the Commonwealth Act, but the appearance in the latter of Parts XI. and XII. has increased the difficulties of construction inasmuch as it is often not easy to determine whether the purely bankruptcy provisions of the Act are or are not applicable to these Parts.

I mention one illustration. In 1946 in the case of *Re J. and W. S. Buchan*[13] the question arose whether, when the trustee of a deed of arrangement under Part XII. ceased to be a trustee, the official receiver could act in his place. Section 131 of the Commonwealth Act enacts that during any vacancy in the office of trustee of a bankrupt's estate the official receiver shall be the trustee for the purposes of the Act. It was held however that an official receiver could not be appointed the trustee of a deed of arrangement. An amendment of the Act has however remedied this state of affairs[14].

Another illustration can be found in the case of *Re Ridley; Ex parte The Official Receiver*[15], and there are others. In one case before the High Court dealing with Part XI. of the Act the decision in which is

10. [1942] Ch. 294.
11. (1884) 1 Morrell 21.
12. (1885) 15 Q.B.D. 54.
13. (1946) 13 A.B.C. 283.
14. *Bankruptcy Act* 1946, s. 5.
15. (1937) 9 A.B.C. 242.

not now material, Rich, Dixon and McTiernan JJ. made the following comment[16]: "In this case however the provision does no more than show that the draftsman thought a petition might possibly be presented in circumstances which could not arise if the other provisions received their natural interpretation."

It has at times been suggested that the Act should receive a liberal construction—whatever that might mean—but however wishful one may be to arrive at a convenient result one cannot disregard the ordinary meanings of words and the normal rules of grammatical construction.

I turn now to various anomalies and defects in the Commonwealth Act: these defects and anomalies are of a minor character and might readily be removed. I will briefly refer to some of them.

Section 4 of the Act provides, *inter alia*, that the word "debtor" includes any person whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—

(*a*) was personally present in Australia; or
(*b*) ordinarily resided or had a place of residence in Australia; or
(*c*) was carrying on business in Australia, personally or by means of an agent or manager; or
(*d*) was a member of a firm or partnership which carried on business in Australia.

Under s. 55 (1) (*d*) a creditor shall not be entitled to present a petition against a debtor, unless amongst other things, the debtor is domiciled in Australia; or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in Australia, or has carried on business in Australia, personally or by means of an agent or manager, or is or within the said period has been a member of a firm or partnership which has carried on business in Australia by means of a partner or partners, or an agent or manager.

These two provisions appear to me to contain a "cumbrous cargo of words."

Whether or not the extended meaning given to the word "debtor" in s. 4—a provision taken from the English Act of 1913—was intended to provide or make it clear that other than British subjects should be amenable to the Act, the effect of the provisions of the Act which I have mentioned could be expressed in a much more concise form.

In any event, owing to recent developments, the words "British subject" in s. 4 may eventually have no constitutional or legal meaning.

Another illustration of the need for some textual revision of the Act and its Rules I mention. Form 25 in the Schedule to the Rules provides that where a sequestration order is made on a debtor's petition, an official receiver is to be constituted the receiver of the debtor's estate. This form, which is a copy of a form prescribed under the English Act, is inconsistent with the provisions of the Commonwealth Act. Under English law, provision is made for a receiving order as a half-way step to an adjudication order, but a receiving order is neither an adjudication order nor a sequestration order, inasmuch as it does not make the

16. *Bridge v. Great Western Portland Cement & Lime Ltd.*, (1932) 42 C.L.R. 522, at p. 528.

debtor a bankrupt or divest him of his property; when such an order is made the official receiver is constituted an interim receiver of the debtor's property. There is no such thing as a receiving order under the Commonwealth Act. By s. 60 of this Act, when a sequestration order is made, the property of the bankrupt vests in the official receiver named in the order and becomes divisible amongst his creditors in accordance with the provisions of the Act.

I mention some other anomalies.

Under English law it is expressly provided that an application by a bankrupt for a discharge shall not be heard until his public examination is concluded. While it may be a reasonable implication that the Commonwealth Act also so provides, I think that express provision to this end should be made, because it appears absurd that a bankrupt should be entitled to apply for his discharge before the public examination as to his dealings and conduct has been concluded.

Under s. 209 (*g*), when a bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position during any period within the five years immediately preceding the date of his bankruptcy, he shall be guilty of an offence. Under s. 213, however, if any person who has on any previous occasion been a bankrupt becomes a bankrupt he shall be guilty of an offence, if, having during the whole or any part of the two years immediately preceding the date of the presentation of the bankruptcy petition been engaged in any trade or business, he has not kept proper books of account throughout those two years or part thereof as the case may be, and if so engaged at the date of presentation of the petition, thereafter, whilst so engaged, up to the date of the sequestration order or has not preserved all books of account so kept. This inelegant clause has a proviso that a person who has not kept or has not preserved those books of account shall not be convicted of an offence under this section if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable.

It seems odd that a person who becomes bankrupt a second time and has not kept proper books of account should have an express provision made for his exculpation whilst no such provision is made in the case of a person who becomes bankrupt for the first time.

I might mention a few more matters which I think require to be reconsidered and rectified. I think that s. 68 (4) could be altered with advantage. At present any creditor may question a bankrupt on his public examination, if his proof has been admitted. It would be better if the creditor were given this right when his proof has been tendered as is the case under the English Act. Very often at the time when the public examination of a bankrupt takes place the official receiver or trustee is not in a position to determine the amount for which the creditor is entitled to prove.

I think also that some of the provisions relating to discharge are unsatisfactory. For example, under s. 69 (11) the Court is empowered to determine when and subject to what conditions a discharge should be granted and for this purpose to exercise the same powers and jurisdiction

as in the case of an application therefor by the bankrupt. This provision is I think unnecessary, and if not unnecessary, it appears to be out of place because one part of the Act—Part VII.—is mainly devoted to the discharge of a bankrupt.

The provisions relating to compulsory applications for discharge could, I think, be amended with advantage to the procedural provisions of the Act. I mention one other provision in the Act which I regard as an anomaly. Where a person dies insolvent and an order is made for the administration of his estate in bankruptcy, s. 155 (9) provides that if any surplus remains in the hands of the official receiver or trustee after payment in full of all the debts due from the debtor together with the costs of the administration the surplus shall be paid over to the legal personal representative of the deceased debtor's estate. It is difficult to find any substantial reason why a deceased debtor's estate should not be released from bankruptcy not only on the ground that the debts of the deceased debtor have been paid in full, but also on the ground that his legal personal representative has obtained a legal acquittance of these debts. Under s. 124 a living bankrupt may have his bankruptcy annulled where it is proved to the Court's satisfaction that his debts are paid in full or that he has obtained a legal acquittance of his debts.

I have dealt with what I regard as some defects and anomalies in the Commonwealth *Bankruptcy Act* and I think there are many more. It is no doubt easy to be critical, but I believe that I have said enough to indicate that the text of the Act and many of its procedural provisions ought to be reviewed by Parliament.

There are a few important questions of bankruptcy policy which I have not dealt with, but these must of course be left for the consideration of Parliament.

To obtain a completely satisfactory bankruptcy code such as will satisfy debtors and creditors, the business community and the public at large is perhaps an unending quest, but it must, I think, be said that, like the corresponding English law, the Commonwealth law in its underlying principles and with all its minor imperfections represents a substantial achievement in the endeavour to reconcile the conflicting interests arising out of bankruptcy.

Despite the cynical observation that modern bankruptcy legislation is a white-washing expedient, the Commonwealth Act, like its English counterpart, represents also, I think, the fulfilment of that change in the attitude of the law towards bankrupts which commenced in the reign of Queen Anne, whereby bankrupts were not as a matter of course regarded as criminals.

Though it is at times difficult to discriminate between the fraudulent and the unfortunate debtor, it is better to make sure that the latter will not be regarded as a criminal.

Of the bankruptcy law in force in England when Queen Victoria began to reign, Lord Bowen said, "The great commercial world, alienated and scared by the divergence of the English bankruptcy law from their own habits and notions of right and wrong, avoided the court of bankruptcy as they would the plague. The important insolvencies which have been brought about by pure mercantile misfortune were

administered to a large extent under private deeds and voluntary compositions, which, since they might be disturbed by the caprice or malice of a single outstanding creditor, were always liable to be made the instruments of extortion. 'To the honest insolvent the bankruptcy court was a terror.' To the evil-doer it afforded means of endlessly delaying his creditors, while the enormous expenses of bankruptcy administrations rendered it the interest of few to resort to the remedy, except with the object of punishing the fraudulent or vexing the unfortunate."

It would be strange indeed if in our present age there were any persons who could wish for a return to the days when under a Statute of James I. the penalty for non-disclosure of his property by a bankrupt was that he was to be " set upon the Pillory in some publick place for the space of two hours and to have one of his or her ears nailed to the Pillory and cut off."[17]

17. 21 *Jac.* I. *c.* 19.