but not lost, and consequently, he was of the opinion that where there was a serious impairment to the society, an action would also lie. However, it would seem that while it might well be argued that an action will lie where services have been impaired, that argument does not support the proposition that an action will lie where society has been impaired. For if it is only "servitium" which is protected by the action for loss of consortium in this context, it is natural enough that an action should lie for partial loss of the one, but not partial loss of the other. Even a *total* loss of society would not ground an action.

Lords Porter and Goddard, on the other hand, were in agreement with the Court of Appeal that no action lies for an impairment to consortium. The real basis of their denial of such an action is to be found in the view they take as to the meaning of consortium. Lord Goddard, after saying no action lay for impairment to consortium, said: "In truth I think the only loss that the law can recognise is the loss of that part of the consortium that is called servitium, the loss of services."[27] Lord Porter said that at the present day damages for loss of consortium were confined to medical and domestic expenses "and little, if any, attention is paid to a loss of consortium which involves other considerations beyond those two".[28]

Briefly then, the views of Lords Porter and Goddard may be expressed thus: No action for loss of consortium lies for an impairment to society and, indeed, no action lies for its loss, for today consortium and servitium are synonymous in the eyes of the law. This is the view adopted in *Smee* v. *Tibbetts*.[29]
B. HILL, Case Editor —Fourth Year Student.

NATURE OF BANKRUPTCY REGISTRAR'S POWERS
THE QUEEN v. *DAVISON*

In 1929 s. 24 (1) (a) of the Bankruptcy Act, 1924-1950 (Cwlth.)[1] was amended to provide that the Registrar in Bankruptcy may exercise in addition to the powers, duties and functions which the Court under the provisions of the Act may direct or authorise him to exercise, the power to hear debtors' petitions and to make sequestration orders thereon, or to give leave to withdraw the petitions. Although Dixon and Rich, JJ. in *Bond* v. *George A. Bond & Co.*[2] expressed serious doubt as to the validity of this section, it remained unchallenged until recent case of *The Queen* v. *Davison*.[3]

It came before the High Court as a special case stated by the Judge of the Federal Court of Bankruptcy pursuant to sub-section (3) of s.20 of the Bankruptcy Act, 1924-1950. It appeared that the debtor had 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 by the Deputy Registrar (exercising the powers of the Registrar under sub-s.(6) of s.12 of the Act). At the hearing of a compulsory application made by the debtor pursuant to s.119 of the Act[4] for an order of discharge, the Judge ordered and directed that the debtor be charged with certain offences under the Act[5] and he tried summarily. The fact that the debtor was a bankrupt formed an essential element in each of the offences charged. It was contended on behalf of the debtor that he was not a bankrupt because the order for sequestration was void

[27] (1952) A.C., at 733.
[28] *Id.*, at 728.
[29] (1953) 53 S.R. (N.S.W.) 391.
[1] No. 37, 1924 — No. 80, 1950.
[2] (1930) 44 C.L.R. 11, 20-21.
[3] Unreported when this note was written. Decision of 10th Sept., 1954. Since reported in (1954) 28 *A.L.J.* 285.
[4] *Id.*
[5] *Id.*

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.

It is settled by *Waterside Workers' Federation* v. *Alexander*[6] 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). As the Deputy Registrar is not appointed for life, the whole case turned on the question whether the making of the sequestration order which the Deputy Registrar purported to make constituted an exercise of the judicial power of the Commonwealth.

The High Court (Dixon, C.J., McTiernan, Fullagar, Kitto and Taylor, JJ.; Webb, J. dissenting) held that the Deputy Registrar was purporting to exercise the judicial power of the Commonwealth under s.24(1)(a) of the Bankruptcy Act, 1924-1950 (Cwlth.). Insofar as he was doing so his action was *ultra vires*, with the result that the sequestration order was of no effect and that the debtor could not be said to be bankrupt and charged with offences under the Act.

In reaching this conclusion, three definitions of judicial power were first considered.[7] One was that of Griffith, C.J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead*[8], where the learned Chief Justice said:

> 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.

In relation to this definition Lord Simmonds, L.C., speaking for Their Lordships in the Privy Council in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*[9] after approving it, added:

> There are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive . . . , (and) 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.

Palles, C.B. in *The Queen* v. *Local Government Board*[10], gave another definition of judicial power:

> 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 effected 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.

In the United States Miller, J. in *Muskrat* v. *U.S.*[11] defined judicial power as "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".

It is evident that Griffith, C.J. emphasised that there should exist a

---

[6] (1918) 23 C.L.R. 433.

[7] Judgment in this case was handed down after this Review went to press. This Note, therefore, is interim merely, and it is not proposed to deal with the wider aspects of the holding as they affect judicial power of the Commonwealth generally.

[8] (1908) 8 C.L.R. 330, 357.

[9] (1949) A.C. 134, 149.

[10] (1902) 2 I.R. at 337.

[11] (1911) 219 U.S. 346, 356.

controversy between subjects or between the Crown and a subject; Palles, C.B. emphasised that there should be a determination of existing rights as distinguished from the creation of new ones; and Miller, J. emphasised that there should be an adjudication, the submission of parties of the case for adjudication, and enforcement of the judgment. Yet, with regard to these elements Dixon, C.J. and McTiernan, J. in their joint judgment said:

> 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.[12]

Thus it would appear that the definitions quoted above should be regarded as a general statement of those characteristics which present themselves in judicial power, bearing in mind that "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".[13] Hence one of the effects of the decision is the widening and not the limitation of the meaning of judicial power.

Then, examining the present case, the joint judgment of Dixon, C.J. and McTiernan, J. observed that:

> 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 . . . 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.

Section 54(1) of the Bankruptcy Act[14] provides that: "Subject to the provisions 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 a debtor, make an order, in this Act called a sequestration order". Section 57(1) 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 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, a sequestration order".

It clearly appears from these provisions that the primary power to make the sequestration order is entrusted to the *Court* and the power of the Registrar is secondary and in a sense derivative. But he would exercise that power in the same way and in the same form of instrument as would be used by the judge. "He is, in other words, the substitute for the judge."[15]

---

[12] See also the judgments of Fullagar and Kitto, JJ.; *In re Judiciary & Navigation Acts* (1921) 29 C.L.R. 257, 271, *per* Higgins, J.; and *Rola Company (Aust.) Pty. Ltd.* v. *The Commonwealth & anor.* (1944) 69 C.L.R. 185, 204, *per* Rich, J.

[13] *Per* Taylor, J.

[14] The Bankruptcy Act 1924-1950 (Cwlth.).

[15] *Per* Dixon, C.J. and McTiernan, J.

Fullager, J. thought that the debtor's petition and a creditor's petition were placed on the same footing by virtue of ss.54 and 57. His Honour remarked: "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."

Webb, J., in his dissenting judgment, treated the observations of Griffith, C.J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead*[16] as containing the definition and not merely the broad features of judicial power. In His Honour's view the absence of *controversy* prevented the power from being a judicial one.

On the whole, the effect of the decision is that sequestration orders, made by the Registrar or Deputy Registrar on the debtor's own petition, are void, and the Official Receiver was not entitled to any property of the debtors in such cases. Consequently he could not confer a good title on anyone. The problem becomes acute in the case of old system land,[17] and also where sums of money were paid to the Official Receiver under s.95 of the Act[18] relating to preferences. It would not, therefore, be surprising if the Commonwealth Parliament found it necessary to pass an Indemnity Act barring all actions against the Official Receiver. As creditors of such debtors could now sue them in respect of their old debts it is also interesting to speculate whether an Act of the Commonwealth Parliament can retrospectively declare that such sequestration orders are to be deemed validly made. After *Le Mesurier* v. *Connor*[19] held that such orders made on *creditors'* petitions were void, the invalidated sequestration orders were listed before the judge who pronounced them again. This course may also be followed in this instance. As to the future, it seems that sequestration orders on the debtor's own petition will be made by the judge. Alternatively, however, the Act may be so amended that upon a request by the debtor that his estate should be administered in bankruptcy, the Registrar will merely certify that the debtor's request is in order.

T. R. BERNFIELD, Case Editor — Third Year Student.

INVITOR'S LIABILITY FOR DEFAULT OF INDEPENDENT CONTRACTOR *THOMSON* v. *CREMIN AND OTHERS.*

The decision of the House of Lords in *Thomson* v. *Cremin*[1] raises again the question of the extent of the invitor's liability for the default of his independent contractors, especially in those cases where the work done by contractors is of an involved and highly technical nature, such as would not usually be done by an occupier for himself. The case is the more remarkable in that, though originally decided in 1941, it escaped all notice till 1952, when Mr. R. F. V. Heuston discovered it in the Lords Journals, "by good fortune alone", as he modestly affirmed in his preface to the 15th edition of Salmond's *Law of Torts*.

In that case the first Respondent was employed by the second Respondent, a stevedoring firm, as a stevedore's labourer. He was injured while engaged in discharging bulk grain from the Appellant's ship, the *S.S. Sithonia*, by a shore falling on his head. This shore had been fixed by Australian shipwrights at Fremantle, W.A., in accordance with regulations made under the Navigation Act 1912-1926 (Cwlth.)[2], and a Government Certificate had been issued to the

[16] (1908) 8 C.L.R. 330, 357.
[17] That is, land not yet brought under the Torrens system of registered titles. Indefeasibility of title would, under this system, ordinarily be assured after registration of a transfer from the Official Receiver.
[18] *Id.*
[19] (1929) 42 C.L.R. 481.
[1] (1953) 2 All E.R. 1185.
[2] No. 4 of 1913.