H. C. OF A. 1911.

WATERHOUSE v. THE KING.

Mack, in support of the application. The effect of secs. 19 and 20 of the *Police Offences Act* 1908 is that it is a criminal offence for a person not having a certificate to have possession of opium, and if such a person has possession of opium he has no title or right of property in it. Opium, therefore, cannot be the subject of theft, for it cannot be the subject of detinue or trover: *Doodeward* v. *Spence* (1). [He also referred to *R.* v. *Deakin* (2); *Gordon* v. *Chief Commissioner of Metropolitan Police* (3); *East's Pleas of the Crown*, pp. 419, 652.]

GRIFFITH C.J. delivered the judgment of the Court:—All that it is necessary to say is that the decision of the Full Court was clearly right. Leave to appeal will be refused.

Special leave to appeal refused.

Attorney, *R. H. Levien.*

B. L.

Dist *Campbell, Re; Ex parte Official Trustee* 13 FCR 326

Appl *Mickelberg* v *R* 167 CLR 259

Dist *Campbell, Re; Ex parte Official Trustee* 72 ALR 251

Foll *Edwards* v *R* (1993) 68 ACrimR 349

[HIGH COURT OF AUSTRALIA.]

SCOTT FELL . . . . . APPELLANT;

AND

LLOYD (OFFICIAL ASSIGNEE) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

SYDNEY, *August* 2, 3, 4, 7, 8.

Griffith C.J., Barton and O'Connor JJ.

Bankruptcy—Application for certificate of discharge—Misdemeanour not charged in Official Assignee's report or referred to in examination before Registrar—Onus of proof—Refusal of certificate—Appeal by bankrupt—Costs against Official Assignee—Appeal to High Court from State Court—Power to hear further evidence—Bankruptcy Act 1898 (*N.S. W.*) (*No.* 25), *s.* 39—*Bankruptcy rule* 301.

(1) 6 C.L.R., 406, at p. 410. (2) 2 Mod., 862.
(3) (1910) 2 K.B., 1900.

Sec. 39 of the *Bankruptcy Act* 1898 provides that an application by a bankrupt for a certificate of discharge shall be refused in all cases where the Court is satisfied that the bankrupt has been guilty of a misdemeanour under the Act, and that the certificate may be refused or suspended if the bankrupt has been guilty of certain specified acts of misconduct. Rule 130 requires that on an application for a certificate the Official Assignee's report shall afford the fullest possible information with regard to the bankrupt's conduct and affairs, and the cause of his bankruptcy, and that it shall be the duty of the Official Assignee to bring under the notice of the Court all facts which the Court ought to have in mind in considering whether a certificate should or should not be granted.

An application by a bankrupt for a certificate of discharge cannot be refused upon the ground that the bankrupt has been guilty of a misdemeanour under the Act, unless the evidence is sufficient to justify a conviction of the bankrupt by a jury for the same offence in a Criminal Court.

In dealing with the application for a certificate the Court is not restricted to the specific charges made in the Official Assignee's report. If upon the examination of the bankrupt there is evidence that he has been guilty of any offence, it is the duty of the Court to investigate the facts. But before doing so the bankrupt should be clearly informed of the charge made against him which it is proposed to investigate, and should be given a fair opportunity of answering it.

Decision of *Street* J., 8th December 1910, refusing an application for a certificate, upon the ground that the bankrupt had been guilty of a misdemeanour, reversed, and decision of the Registrar restored, upon the ground that the evidence was insufficient to support the charge made.

When a bankrupt successfully appealed against the decision of the Judge in Bankruptcy, reversing a decision of the Registrar by which the bankrupt had been granted a certificate of discharge, the Official Assignee was ordered to pay the costs of the appeal.

On an appeal from the Supreme Court of a State the High Court has no jurisdiction to admit further evidence.

Ronald v. *Harper*, 11 C.L.R., 63, followed.

Semble per Griffith C.J, If necessary in the interests of justice the High Court will remit a case to the Supreme Court to enable further evidence to be given.

APPEAL from the decision of *Street* J., Judge in Bankruptcy, reversing a decision of the Registrar in Bankruptcy, and refusing the appellant's application for a certificate of discharge.

The appellant was adjudged bankrupt on 26th October 1908,

H. C. OF A. 1911.

SCOTT FELL v. LLOYD.

and his public examination concluded on 8th March 1909. On 17th March 1909 he applied for a certificate of discharge.

In his report upon this application, dated 6th April 1909, the Official Assignee submitted that the bankrupt had brought himself within sec. 40, sub-secs. (*b*) (*c*) (*d*) (*g*) (*h*) (*i*) (*k*) of the *Bankruptcy Act* 1898 (No. 25), inasmuch as (1) he wilfully delayed surrendering his estate to benefit one creditor to the disadvantage of the rest; (2) he continued to trade after knowing himself to be insolvent; (3) he contracted the whole of the debts shown in his statement of affairs without having any reasonable expectation of being able to pay them; (4) within three months preceding the sequestration order, when unable to pay his debts as they became due, he gave undue preference to certain creditors; (5) on two previous occasions he made a composition with his creditors, and had not produced a certificate that such assignment was the result of misfortune only; (6) he did not disclose that the business of R. B. Wallace, Newcastle, was his property. The Official Assignee also submitted that the bankrupt had committed a misdemeanour under sec. 127, in that, with intent to defraud his creditors, or dishonestly to conceal the state of his affairs, he did not to the best of his knowledge and belief fully disclose on examination under the Act all his property, to wit, the business and assets of the firm of R. B. Wallace, Newcastle, and how, and to whom, and for what consideration, and when he had disposed thereof, except such part as had been disposed of in the ordinary way of business, or laid out in the ordinary expenses of his family.

Further supplementary reports were filed by the Official Assignee on 27th April 1910 and 18th May 1910, setting out additional facts in support of the charges already made.

At the hearing of the application before the Registrar counsel for the Official Assignee contended that the evidence showed that seven additional misdemeanours had been proved, and that, although these matters were not mentioned in the Official Assignee's report, they should be considered by the Registrar. The Registrar, following the opinion expressed by *Fry* L.J. in *In re Barker*; *Ex parte Constable* (1), held that he was bound to

(1) 7 Mor., 111, at p. 122.

consider the matters referred to by counsel for the Official Assignee as appearing upon the evidence, but that he ought not to hold misdemeanours so alleged to be proved unless the evidence in support of them was overwhelming.

The Registrar then, after referring to the evidence, found that the bankrupt had not been proved to have committed any misdemeanour under the Act, and granted a certificate, but subject to a suspension for twelve months upon the ground that the bankrupt had within three months preceding the sequestration order, when unable to pay his debts as they became due, given some undue preference to creditors (but without any intent to prefer) and had contracted some small debts without any reasonable expectation of being able to pay them, and had omitted to make certain entries in his books of account.

The Official Assignee appealed from this decision to *Street* J., the Judge in Bankruptcy. In the notice of appeal the misdemeanours relied on by counsel for the Official Assignee before the Registrar were set out. *Street* J. held that the bankrupt had committed a misdemeanour in not disclosing all his property, that is, the business and assets of Robert B. Wallace, and the contracts made by the bankrupt in his own name, or in the name of Robert B. Wallace with Graham & Co., Bombay. He also found that the bankrupt was guilty of misconduct in omitting to state in his supplementary statement of accounts the correct date of certain receipts and payments. He thereupon allowed the appeal, with costs, and refused the certificate of discharge. From this decision the bankrupt appealed to the High Court. The effect of the evidence is sufficiently stated in the judgment of *Griffith* C.J.

Innes and *Harper*, for the appellant, applied for leave to adduce further evidence upon the question whether the bankrupt had not orally disclosed to the official assignee the contracts with Graham & Co. This is a re-hearing, and the Court has all the powers of the Court from which the appeal is brought. Every Court has control over its own procedure. The Court of Appeal in England will allow further evidence to be given if necessary to do justice between the parties, and the same practice should be

H. C. OF A. 1911.

SCOTT FELL v. LLOYD.

adopted by this Court. They asked the Court to reconsider its previous decision on this point in *Ronald* v. *Harper* (1).

GRIFFITH C.J.—The Court of Appeal in England is a branch of the High Court of Judicature. This is not the same Court as the Supreme Court. The House of Lords has no power to hear further evidence on appeal. The Judicial Committee has by Statute express power to hear further evidence. If necessary in the interests of justice the Court could send the case back to the Supreme Court for the purpose of obtaining further evidence.

Per Curiam. The application must be refused.

Innes and *Harper.* The misdemeanour of which the bankrupt was found guilty was the non-disclosure of the contracts with Graham & Co.. This is not referred to in the report of the Official Assignee, and the bankrupt was not formally charged with this offence. It was mentioned for the first time at the close of the case before the Registrar, after the evidence of both sides had been given, and the bankrupt did not have his mind directed to this part of the case, and was not questioned about it. These contracts are in fact referred to in a statement of accounts put in evidence by the Official Assignee. It is impossible for the Official Assignee to say that he was misled in any way. The bankrupt himself sets up the particulars relating to these contracts in his affidavit, and says that the official assignee made a profit out of them for his estate. As to the business of R. B. Wallace, the evidence does not show that George was an agent for the bankrupt, or that that business ever belonged to the bankrupt. If fraud is alleged or charged it must be proved. It cannot be surmised: *Re Corby* (2). The misdemeanours relied upon must be charged in the Official Assignee's report: bankruptcy rule 130; or the Official Assignee must apply to the Registrar to amend the charge he has made. The bankrupt is not called upon to reply to allegations made for the first time by counsel for the Official Assignee at the close of the case. The bankrupt should be allowed his costs of the appeal out of the estate: *Re Nicholas* (3).

(1) 11 C.L.R., 63.
(2) 8 S.R. (N.S.W.), 252.
(3) 7 Mor., 54.

Loxton K.C. and *R. K. Manning*, for the respondent. The Registrar held that the Official Assignee was entitled to take further objections to the grant of the certificate which were not set out in his report; and all the matters inquired into by *Street* J. were set out in the notice of appeal from the Registrar's decision. The bankrupt had ample notice of the charge made against him for the purpose of depriving him of his certificate under sec. 39. Where offences are charged with the object of punishing the bankrupt by imprisonment under secs. 129, 130, the procedure is different. Sec. 39 merely provides that the Court on the hearing of the certificate application shall take into consideration the report of the Official Assignee, not that the report is to be regarded as the indictment or pleading in the case. The evidence shows that the business of R. B. Wallace was the property of the bankrupt. He bought this business for himself and put George in as a dummy. He lent George £500 with which George purchased this business. If this was merely a loan, it should appear in the bankrupt's books, but they contain no reference to it. Even if George's evidence is eliminated there are sufficient facts to show that this was the bankrupt's business, or at all events that he had a large interest in it, and in the contracts with Graham & Co. [They referred to *Re Gilchrist* (1); *In re Barker* (2); *In re Beall* (3).]

Innes, in reply.

GRIFFITH C.J. The relevant facts in this case, which has occupied a good deal of the time of the Court, lie in a very small compass, although they have been diluted and spread over a record comprising over seven hundred pages of foolscap. The appeal is from a judgment of *Street* J., reversing a decision of the Registrar of the Bankruptcy Court by which he granted a certificate to the appellant subject to a suspension of 12 months. The *Bankruptcy Act* of New South Wales provides that if it appears on an application for a certificate that the bankrupt has been guilty of a misdemeanour under the Act (certain misde-

(1) 1 B.C. (N.S.W.), 81. (2) 25 Q.B.D., 285.
(3) (1894) 2 Q.B., 135.

H. C. OF A. 1911.

SCOTT FELL v. LLOYD.

Griffith C.J.

meanours are enumerated) the certificate shall be refused, and, if he has been guilty of certain acts of misconduct, which are also enumerated, the certificate may be refused or suspended. An application was made by the bankrupt for his certificate. In accordance with the practice of the Court, the Official Assignee then made a report. By the Rules of Court he is required to make a report giving full information to the Court as to all matters material for the Court's consideration in dealing with the application. A most material fact to be reported, of course, is that the bankrupt has, if the fact be so, committed a misdemeanour under the Act. The Official Assignee stated in his report that he believed that the bankrupt had committed a misdemeanour, in that he had, with intent to defraud his creditors or dishonestly to conceal the state of his affairs, failed to the best of his knowledge and ability to fully disclose on examination under the Act or to his Official Assignee certain property, namely, the business and assets of the firm of Robert D. Wallace, which the Official Assignee said belonged to the bankrupt. This was the only charge of misdemeanour made against him in the report. The bankrupt in answer made an affidavit containing certain statements to which I will refer later, which have not been contradicted. After a long interval the application for a certificate came on to be heard before the Registrar. Witnesses were examined and cross-examined at great length, the question before the Court being whether the certificate should be granted upon the material before the Court. At that time the bankrupt stood charged with this misdemeanour, and with no other. He was cross-examined at great length with a view, I suppose, of proving that he was guilty of that misdemeanour. Then, when the evidence was closed, counsel for the bankrupt addressed the Registrar, and counsel for the Official Assignee then made a speech in reply, and in the course of that speech accused the bankrupt, for the first time, of several other misdemeanours which, it was said, could be gathered from his cross-examination.

When I heard that stated in the opening of this appeal, it struck me as something very strange. A man who is cross-examined in the witness-box on a particular issue before the Court, has his mind directed to that issue, and to the facts

relevant to it. Facts are elicited in his cross-examination which, it is said afterwards, are relevant to an entirely different issue, and which, if unexplained, would suggest that he was guilty of some other offence. I said during the argument of counsel that I hope that that is not the practice of the Supreme Court of New South Wales in Bankruptcy. There is nothing more unfair than to accuse a man of one piece of misconduct and to examine him upon that, and then, when his mind has been directed to that subject, to pick out from what he has said some statement which, if not explained, and which there was no reason to explain under the circumstances, would tend to suggest that he had been guilty of some other offence to which his mind was not directed. I am not suggesting that, if out of the cross-examination of a bankrupt any facts appeared which tended to show that he really had been guilty of offences which should result in his being deprived of his certificate, the Court ought not to investigate the facts and deal with them. But before doing so the bankrupt ought to have fair information, and be fairly informed of that with which he is charged, and have an opportunity of answering it. Moreover, as was very properly pointed out by the learned Registrar in his judgment, the application for a certificate is not the proper time to investigate the affairs of a bankrupt. The mind of the Court is directed to the matters brought before it, and, on the report of the Official Assignee and any objections made by the creditors, the certificate ought or ought not to be granted.

Counsel for the bankrupt naturally protested against these fresh charges being brought on in that way. I understand the Registrar to a certain extent dealt with them, but, as he came to the conclusion that there was nothing in the charges, it is not necessary for us to form any definite opinion about them. The Registrar came to the conclusion that the charge of misdemeanour made in the Official Assignee's report was not proved, but thought that the bankrupt had committed some acts of misconduct and irregularities in his accounts and other matters, which he thought of a comparatively trivial character, and thought that justice would be done by granting the certificate subject to a suspension for twelve months. Then the Official

H. C. OF A. 1911.

SCOTT FELL v. LLOYD.

Griffith C.J.

Assignee appealed to *Street* J., the Judge in Bankruptcy, and in the notice of appeal set out eight misdemeanours with which the bankrupt was definitely charged. The first included an extension of the charge made by the Official Assignee in his report to the Registrar. The third, fourth, fifth and sixth were mere variations of one charge of concealing assets and failing to disclose the bankrupt's interest in certain contracts with a firm called Graham & Co. of Bombay. The next one was a charge of making a material omission in his statement of affairs with intent to defraud his creditors, or to dishonestly conceal the state of affairs, or otherwise to violate or defeat the law. This charge, so far as can be discovered from these voluminous papers, was never suggested until the notice of appeal was given. At any rate, there is not a word in the judgment of the Registrar to suggest that his mind was ever directed to such a snbject.

When the matter came before *Street* J., counsel for the bankrupt again repeated the objection to bringing charges of this kind forward in such a manner and at such a stage. The learned Judge delivered a long judgment, reviewing the evidence in the case, and expressing opinions very unfavourable to the bankrupt in many particulars. But the appeal to the Court is not from the opinions his Honor expressed in his judgment, but from the judgment of the Court which was pronounced.

The rules of the Bankruptcy Court prescribe a form for the order granting a certificate, which recites that no misdemeanour has been proved against the bankrupt; because, as I have already said, if it has been proved that the bankrupt is guilty of a misdemeanour, the Court cannot grant a certificate. The order drawn up in this case, which I have no doubt follows the usual form (and, if it is not the usual form, I have no hesitation in saying that it ought to be), begins by reciting that it has been proved that the bankrupt has committed the following misdemeanours, namely—and sets them out. The first is concealment of property, and refers to two things:—"That the bankrupt with intent to defraud his creditors or dishonestly conceal the state of his affairs did not fully disclose on examination under the *Bankruptcy Act* or to his Official Assignee all his property real and personal, to wit, first, the business and assets of R. B.

Wallace, and secondly, contracts for the sale of coal made by the bankrupt in his own name or in the name of R. B. Wallace with Graham & Co., of Bombay."

Then it recites that the bankrupt was guilty of misconduct in omitting to state in his supplementary statement of accounts certain particulars, to which I will presently refer. That is the only finding which has been made against the bankrupt on the record, and it is from that finding of fact that this appeal is brought.

It was suggested for the respondent, to my amazement, that, on a charge of misdemeanour made against a bankrupt in the Bankruptcy Court, quite different principles are to be applied from those which apply when a man is charged with misdemeanour before a jury. I say "to my amazement." The principles upon which a man is to be convicted of an offence are the same in every branch of the Supreme Court. The case must be proved by positive evidence, and there must be a fit case to go to the jury, or other tribunal which decides the case—in this case, the Court hearing the application for a certificate. The question to be determined in this case is whether, on the evidence before us, the misdemeanours alleged were proved. I do not propose to refer in detail to the evidence. So far as it is material to that point, the relevant evidence is in a very small compass, and is almost entirely documentary. The bankrupt was the managing director of a firm called by his own name, in which he held nearly half the shares. It was what is called in the neighbouring State of Victoria a proprietary company. The company had incurred large liabilities, and the bankrupt as an individual had guaranteed certain liabilities of the company to the company's bank. In addition, he had carried on some small business transactions in his own name. In the beginning of 1908 the company fell into what may be described as some financial difficulty. The bankrupt appears to have been a person of a very sanguine disposition. He thought that the company would pull through, and he said, up to the last moment, that it would have done so, had it not been foolishly pressed by some creditors. But it was in difficulties. Some years before, the company had carried on a shipping agency business, and had a branch office at Newcastle,

H. C. OF A. 1911.

SCOTT FELL v. LLOYD.

Griffith C.J

which was conducted by a Mr. George. In 1908 it was found necessary to discontinue that business, but it was extremely desirable in the interests of the company that there should be somebody at Newcastle carrying on that kind of business who would be in touch and in sympathy with them. There was a business there carried on under the name of Robert B. Wallace, which, it occurred to the bankrupt and his co-director, Mr. Dawson, it was desirable to buy either entirely or in part. Negotiations were entered into between Dawson and the owner of the business, A. S. Wallace, which got so far that Dawson agreed provisionally to give £500 for the business. All this was done with the knowledge of the company's bank. At the last moment Dawson was not prepared to go on with the proposal. Communications then took place between the bankrupt and George, who had been in the service of the company for many years, and who no doubt knew all about Wallace's business; and in an interview over the telephone it was arranged that George should take the business himself as a purchaser, and that the bankrupt should advance him £500 to pay for it. An agreement was drawn up to that effect. Thereupon George assumed control of the business, A, S. Wallace, who was the real person trading under the name of R. B. Wallace, apparently retaining some sort of an interest in part of the business done by this firm. They informed their customers of the change in the firm. George, in accordance with the law in New South Wales, procured himself to be registered as the proprietor. Inquiries were made by various persons whether Wallace, who was the sole member of the old firm, had sold his business to Fell. They were always told "No," and that the business was George's. Correspondence took place between Fell and George from time to time, which, so far from showing that Fell was the master and George the servant, indicated that George had a will of his own, and did not acquiesce in what he was asked to do unless he thought it was to his own advantage to do it. All this, as I have said, appears in documents. The charge is that the business was Fell's. There is no doubt that the business was not disclosed to the Official Assignee as property of the bankrupt, and the reason the bankrupt gives is that the business was not his, that he could not

disclose a non-existing fact, and therefore the question to be determined is whether the business was his. There is no doubt about his paying the £500 to George, or that George with that money paid for the business. He applied half of it (£250) as part payment of the purchase money £500, and applied the other £250 as working capital. The £500 was advanced in cash. There is no doubt about that.

Now the suggestion is that the business was nevertheless Fell's. Without going in detail into all the evidence, my conclusion is this: There was no affirmative evidence fit to go to a jury on the issue whether it was or was not Fell's business. I go further, and say that there was no evidence fit to be considered in any Court of civil jurisdiction, which was asked to find in the affirmative that the business was Fell's. Possibly it was. I may be the owner of the Standard Oil Company's business, for aught anybody knows on the evidence in this case. But there was no evidence fit to be considered by any tribunal from which they could be asked to infer that that business was Fell's.

An argument has been set up, not for the first time in this Court since it has been established. I remember a case in another State, where a similar case was set up against a bankrupt and his wife, the evidence in the case consisting of a statement made by the bankrupt and his wife, which, if believed, emphatically negatived the case made against them. But it was set up against them: "These people are liars; you cannot believe them. Therefore the opposite of what they swear is true, and the case against them is therefore proved." The case now set up is very much of the same sort. It is said that in the course of a voluminous cross-examination bankrupt made certain statements which are not correct, and therefore it must be held that the contrary of all that he said is true. The party complaining, that is, the party asserting the fact, must prove it, and it is not sufficient to say that his opponent is a person unworthy of credit. I cannot too strongly deprecate that sort of argument being addressed to a Court. I confine myself here to saying that, so far as this business was concerned, there was no evidence fit to be considered by any tribunal in support of the affirmative of the proposition.

Therefore that charge of misdemeanour fails.

H. C. OF A. 1911.

SCOTT FELL v. LLOYD.

Griffith C.J.

Now, the other charge which was found by the learned Judge was one of these set up for the first time in the speech of counsel for the Official Assignee after the evidence was closed, and after the speech of counsel for the bankrupt upon the application for a certificate. It was that the bankrupt concealed, with intent, and so on, certain property consisting of contracts for the sale of coal made by him in his own name, or in the name of Wallace, with Graham & Co. of Bombay. I have already said something about the manner in which that was brought forward. It was not mentioned or suggested in the Official Assignee's report. But in an affidavit made by the bankrupt in answer to the Official Assignee's report, which I suppose is in accordance with the practice—it is a reasonable one at all events—he said, in paragraph 4, that he had sold coal to buyers in India. He mentions the ships. They are the ones now in question. He said that in the first he made a profit, which went through his books. As to the others he says, at page 18 of the record:—"In respect of the cargoes of the three last-mentioned vessels, each of these also resulted in a profit to my estate, and the said Official Assignee has received a considerable sum for the benefit of my creditors in respect of the said transactions. Had the said Bank of New South Wales not issued the said writ and forced my estate into bankruptcy my creditors would have derived a considerably larger benefit from the last-mentioned transactions inasmuch as the whole of the said profits would have come to my hands and been applied in payment of my creditors, for I would have carried through the transactions and not sold the benefit of the said contracts as was done by the Official Assignee at a price less than the said total profits."

I remark again that he had not been charged with concealing these contracts. He himself sets up the particulars of the contracts in that affidavit. There is not a scintilla of evidence, or, if there is, it has not been brought to our notice, to show that the statements in that affidavit are not strictly true. The only inference that can be drawn, under these circumstances, is that all the facts relating to those contracts were disclosed to the Official Assignee, and that he got the full benefit of them. But, even if that were not so, you cannot convict a man of concealing

assets unless you show that he did conceal them. The Official Assignee never suggested that they were concealed, and it is perfectly obvious, if the statement of the bankrupt is true,—and it is not contradicted—that, so far from concealing these assets from the Official Assignee, the latter had full information and got all the benefit of them. The documents relating to these contracts showing the nature of the bankrupt's interest in them were with the bankrupt's papers which went to the Official Assignee. I need say nothing more about that.

These are the only matters of which the bankrupt is found guilty in the judgment appealed from, and, for the reasons I have given, that finding cannot stand.

The learned Judge went on to say that the bankrupt was guilty of misconduct in omitting to state the correct dates of certain receipts for money. The omission was made in a supplementary statement. Some of the items had gone through his books regularly. The errors referred to were errors only in dates. No one sustained a farthing's loss by reason of them. Substantially, as I understand the facts, the statements were true, but the dates of the receipts were erroneous. The amounts said to be received were received, and from the persons named, and about the time stated, but not on the exact dates. The learned Registrar thought that for this and some other matters it was proper to suspend the certificate, and he suspended it for twelve months. As far as the acts of misconduct found by the learned Judge are concerned, I think that the suspension of the certificate for twelve months was ample punishment.

There are one or two other matters to which I should refer. The bankrupt has been subjected to a good deal of—shall I say—vilification. His character has been held up during argument as that of a person unworthy of credit in anything he says. The learned Registrar, before whom he was examined on several occasions, formed a different opinion. He came to the conclusion that he was a witness of truth. I should like to say that a witness may be a witness of truth, and yet may be quite untrustworthy. I have heard a most respectable person in the witness-box, a person of high character whom no one would suspect of intentionally telling a falsehood, give an elaborate

H. C. OF A. 1911.

SCOTT FELL v. LLOYD.

Griffith C.J.

account of an event which never happened, I know that, because I was presiding on the Bench at the time. What the witness said never happened, but he thought he was telling the truth. I understand the learned Registrar to mean this: That the bankrupt was trying to tell the truth to the best of his ability, and was not a person trying to conceal the true state of his affairs from the Court. But, from the point of view from which I regard the case, nothing turns here upon the credit of the witness. I see no reason to form any opinion different from that formed by the Registrar. It is not my duty, for the reasons I have given, to express any opinion as to whether the bankrupt is an inaccurate witness, or whether the Registrar was right in coming to the conclusion that he was trying to tell the truth to the best of his ability. It is sufficient to say that the case does not turn upon the credibility of witnesses, and we are not called upon to have recourse to the rule that a Court of Appeal is bound *primâ facie* to accept the view taken of the credibility of witnesses by the Judge of first instance.

For these reasons I am of opinion that there is no ground for refusing the certificate. The only matters which have been found against the appellant which can stand have been sufficiently dealt with by the suspension of the certificate. The result of my opinion is that the judgment of his Honor should be discharged, and the judgment of the Registrar in Bankruptcy should be restored.

As to the question of costs, when an Official Assignee becomes an active litigant he is exposed to the same risks as any other litigant. As I think that the appeal from the learned Registrar was unfounded, and prosecuted, moreover, in a manner which I think inconsistent with a due regard to justice, I see no reason why he should not be ordered to pay costs, or escape the ordinary incidents of want of success in this Court.

BARTON J. I am also of opinion that the appeal should be allowed, and with costs. I have nothing to add to what his Honor the Chief Justice has said on the essential questions of the case. As to whether additional charges can, under the Act, be dealt with when made, as they were in this instance, during the

final adjournment before the Registrar if they are made specifically, and if ample opportunity to answer them is afforded or offered, I prefer not to express an opinion until the question becomes essential to a determination of some kind. As to the credibility of the bankrupt I say nothing, because, in the absence of a *primâ facie* case against him, that is not a question we need determine. But I do not wish anything I say to be taken as an imputation against him.

O'CONNOR J. I am of the same opinion, and I entirely concur in the reasoning of my learned brother the Chief Justice. The facts with which we have to deal have been carefully and elaborately considered, by the Registrar, and by the Judge in Bankruptcy. With regard to the facts I do not think it necessary to say more than this, that I adopt the conclusions and the reasoning of the learned Registrar. I do not say that the case is not one in which the learned Judge in Bankruptcy was entitled, on his own view of the facts, to come to his own conclusion, notwithstanding that the Registrar had the advantage of seeing the witnesses and hearing them examined and cross-examined; but I do not agree with the learned Judge's view of the facts. Taking the whole of the evidence and the documents together, I see no reason for coming to any other conclusion than that at which the learned Registrar arrived.

An important question of procedure has been raised by Mr. *Innes*, as to the way in which a charge of misdemeanour, which is to be used as a ground for refusing a certificate, is to be brought to the notice of the bankrupt. The question arises only with respect to one of the branches of the finding of the learned Judge, for I agree that the only misdemeanours that we can consider in this appeal are those found by the learned Judge to have been committed. He finds that there was a dishonest concealment of the state of his affairs by the bankrupt as to two matters—first, as to the business and assets of R. B. Wallace; secondly, with regard to the contracts for the sale of coal made by the bankrupt in his own name, or in the name of R. B. Wallace, with Graham & Co., of Bombay.

The first is charged in the report of the Official Assignee. That

H. C. OF A. 1911.

SCOTT FELL v. LLOYD.

O'Connor J.

is the only misdemeanour which he does report. The other, the concealment of the contracts made by the bankrupt with Graham & Co., is not mentioned as a misdemeanour in the report. It appears to me that there is no ground for the contention that a misdemeanour cannot be made use of for the purpose of refusing a certificate unless it is stated in the Official Assignee's report. There is nothing either in rule 130, or in the Act, or in the practice of the Court which makes that necessary.

But I entirely agree that the finding of a Judge on a misdemeanour, which is to be used for the purpose of depriving a man of his certificate, must be based on the same grounds as would justify a jury in finding the bankrupt guilty in a prosecution for the same misdemeanour. In the case of a trial the criminal Courts provide a procedure by way of information by which the charge is brought in express terms to the notice of the accused. But where it is to be used as a ground for refusing a certificate, neither the Act nor the rules provide any method by which the misdemeanour relied on is to be brought to the notice of the bankrupt. It appears to me, having regard to the rules and practice of the Bankruptcy Court, to be impossible to lay down that there is any particular stage of the proceedings at which, or any particular method by which, the charge is to be brought to the notice of the accused. The only guide to be found is in the principles of natural justice, which require that, where a criminal charge is to be made the foundation of any action in any proceedings, for any purpose, there must be brought to the notice of the person charged a definite statement as to what he is called upon to meet at a time and in a manner which gives him a fair opportunity of meeting it. Now it appears in this case that the first notice which the bankrupt had of the second misdemeanour, found by the learned Judge to have been committed, was during the speech of Mr. *Loxton*, counsel for the Official Assignee. It was, entirely a matter in the discretion of the Judge to determine whether that was sufficient notice, both as to time and definiteness, to fairly warn the bankrupt of what was being charged against him, and to afford him a reasonable opportunity of defending himself. I say that, taking it for granted that Mr. *Loxton* offered on behalf of the Official Assignee an

adjournment at the time he made the charge so as to enable the bankrupt to have a full investigation of it if he so desired.

I am not taking that for granted on Mr. *Loxton's* statement only. It is admitted by Mr. *Innes* that the offer was made. I presume that the learned Judge—who no doubt was fully impressed with the necessity of giving a bankrupt, charged, in the course of an application for his certificate, with having committed a misdemeanour, full opportunity of answering the charge—considered that the bankrupt had been given full opportunity of meeting the charge and having it investigated. With that exercise of the Judge's discretion I see no reason to interfere. The learned Judge was certainly in the best possible position to determine what was a fair notice to the bankrupt under the circumstances. Having regard to the view which the Court takes of the case, it becomes immaterial to determine the question of procedure raised by Mr. *Innes*. I have put my view, now that the matter has been fully argued, merely because I do not wish it to be supposed that I assent to the contention that any hard and fast rule can or ought to be laid down either as to the form in which, or the time at which, the charge should be formulated. All that is necessary is that the charge should be made at such a time and in such a way as will fairly, according to the ordinary principles of natural justice, give the bankrupt an opportunity of meeting it. I concur therefore in the order of my brother the Chief Justice.

With regard to costs, my reason for deciding that the Official Assignee ought to pay the costs is in no way founded on any unfavourable view of his conduct. The view I take is that, having contested this matter, and having failed, he must be made subject to the penalty of paying costs just as any other unsuccessful litigant would be made subject.

Appeal allowed with costs.

Solicitors, for appellant, *Minter, Simpson & Co.*

Solicitors, for respondent, *Perkins, Stevenson & Co.*

C. E. W.