[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;

AND

GRAHAM AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1916.

MELBOURNE, *May* 16, 17, 18.

Barton, Isaacs, Gavan Duffy and Rich JJ.

Insolvency—Offence—Certificate—Compulsory application—Conviction—Order—Particularity—Appeal—Variation—Supreme Court, power of—Insolvency Act 1915 (*Vict.*) (*No.* 2671), *secs.* 31, 230, 275.

Sec. 31 of the *Insolvency Act* 1915 (Vict.) provides that "Any person desirous of appealing from any order of the Court" of Insolvency "shall be entitled to appeal against such order to the Full Court of the Supreme Court . . . and the Full Court may on such appeal confirm reverse or vary such order," &c. Sec. 230 provides that "If the insolvent has not within six months after sequestration applied for his certificate a Judge may on the application of the trustee or any creditor require the said insolvent . . . to appear before the Court; and thereupon and thenceforth the Court may grant refuse or suspend his certificate and punish or otherwise deal with such insolvent as if the certificate had been applied for by him." Sec. 275 provides that "Any person shall in each of the cases following be guilty of a misdemeanour, and shall be liable to imprisonment with or without hard labour for a term of not more than one year:—(1.) If incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud," &c.

On a proceeding under sec. 230 of the *Insolvency Act* 1915 the Judge of the Court of Insolvency after hearing evidence made an order stating that the Court was of opinion and adjudged that the insolvent had been guilty of two misdemeanours under sec. 275 (1.) of the Act "each namely—that the insolvent

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incurring a debt or liability to the C. Bank has obtained credit from the said C. Bank by means of fraud," and ordering that the insolvent's certificate should be refused and that he should be imprisoned for one year.

Held, that the order did not sufficiently set out the misdemeanours of which the insolvent was convicted; that the Full Court of the Supreme Court had jurisdiction under sec. 31 of the Act to vary the order by setting out therein specific instances in which according to the evidence the insolvent, incurring a debt or liability to the C. Bank, had obtained credit from the C. Bank by means of fraud; but that in setting out the specific instances the Full Court should not group together several items of advance by the C. Bank to the insolvent and treat them as the incurring of one debt or liability.

Decision of the Supreme Court of Victoria: *In re Smith*, (1916) V.L.R., 119; 37 A.L.T., 185, varied.

APPEAL from the Supreme Court of Victoria.

A compulsory application for a certificate of discharge by William Smith, an insolvent, was opposed by the trustees of his estate, James Moffit Graham and Alexander Hubert Outhwaite. The grounds of opposition included the ground that in incurring debts and liabilities the insolvent obtained credit by means of fraud. Particulars of this ground were given to the insolvent, and included the following:—(1) Incurring a liability to the Colonial Bank of Australasia Ltd. by obtaining an advance from such bank by the frauds set forth in the insolvent's depositions and in a certain writing by the insolvent to the said bank dated 24th August 1914, which was an exhibit to those depositions. Amount of special advance, £393. Date, 24th August 1914. (2) Incurring liabilities to the Colonial Bank of Australasia Ltd. by obtaining advances and credits from such bank by fraudulently valuing and describing goods referred to in certain storage certificates set forth in the insolvent's depositions and by cheating the said bank with the same. Date, from 5th August 1914 to 29th March 1915.

After hearing evidence the Judge of the Court of Insolvency, on 8th November 1915, made an order the material part of which was as follows:—"This Court having considered the evidence is of opinion and doth adjudge that the said insolvent has been guilty of two misdemeanours under sec. 275 (I.) of the *Insolvency Act* 1915, each namely—that the insolvent incurring a debt or liability to the Colonial Bank of Australasia Ltd. has obtained credit from

the said Colonial Bank of Australasia Ltd. by means of fraud And doth order that the certificate of the said insolvent be and the same is hereby refused And that the said insolvent be imprisoned in His Majesty's gaol at Melbourne for a period of one year with hard labour And further this Court having considered the evidence is of opinion and doth adjudge that the said insolvent has been guilty of an offence under the provisions of sec. 235 of the *Insolvency Act* 1915 namely that he the said insolvent appropriated to his own use cartridges the property of Dalgety & Co. Ltd. of which he the said insolvent had at the time charge or disposition as agent factor or broker only and not in any other capacity."

The insolvent appealed from that order to the Supreme Court, and the Full Court made an order dismissing the appeal and varying the order of the Court of Insolvency by striking out the words "that the insolvent incurring a debt or liability to the Colonial Bank of Australasia Ltd. has obtained credit from the said Colonial Bank of Australasia Ltd. by means of fraud" and substituting therefore the following words :—"(1) That the insolvent on 24th August 1914 incurring a debt and liability to the Colonial Bank of Australasia Ltd. to the amount of £204 1s. obtained credit to the amount of the said debt and liability from the said Colonial Bank of Australasia Ltd. by means of fraud—to wit lodging with the Colonial Bank of Australasia Ltd. fraudulent securities for the said debt and liability against the form of the Statute in such case made and provided and against the peace of our Lord the King His Crown and Dignity and (2) That the insolvent on 28th August 1914 incurring a debt and liability to the Colonial Bank of Australasia Ltd. to the amount of £34 14s. 6d. obtained credit to the amount of the said debt and liability from the said Colonial Bank of Australasia Ltd. by means of fraud to wit lodging with the Colonial Bank of Australasia Ltd. fraudulent securities for the said debt and liability against the form of the Statute in such case made and provided and against the peace of our Lord the King His Crown and Dignity" : *In re Smith* (1).

From that decision the insolvent now, by special leave, appealed to the High Court.

(1) (1916) V.L.R., 119 ; 37 A.L.T., 185.

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Starke (with him *Morley*), for the appellant. The order made by the Court of Insolvency is bad. As to the charge in respect of £393 mentioned in the particulars, that, on the evidence, was not within sec. 275 (I.) of the *Insolvency Act* 1915. As to the second charge mentioned in the particulars, it covers a series of dates, and is too general. The order of the Court of Insolvency is too vague and general. The order made by the Full Court substantially convicts the insolvent of an offence different from either of those with which he was charged and from either of those of which the Court of Insolvency convicted him. Under the power conferred by sec. 31 to " confirm reverse or vary " an order of the Court of Insolvency there was no power to make the variation which was in fact made. The Supreme Court cannot convict of a new offence even although it be included in the offence found by the Court of Insolvency. The finding of the Court of Insolvency was a nullity by reason of the unlawful inclusion of certain items which were improperly charged: *R.* v. *Justices of Tyrone* (1); *O'Connell* v. *The Queen* (2). Being a nullity, the Supreme Court could not by "varying" the order make a good conviction. The facts constituting the offence must be found by the Court of Insolvency. [Counsel also referred to *In re Hearty* (3); *R.* v. *Peters* (4); *Scott Fell* v. *Lloyd* (5); *In re Caulfield* (6); *R.* v. *King* (7).]

[RICH J. referred to *Re Corby* (8); *Re Riley* (9); *R.* v. *Pierce* (10).]

S. R. Lewis, for the respondents. The special leave to appeal should be rescinded, for on the evidence the appellant had a fair trial and no substantial injustice was done to him.

[Counsel was stopped.]

The judgment of the COURT, which was delivered by BARTON J., was as follows:—

This is a case in which, under sec. 230 of the *Insolvency Act* 1915, there was a compulsory application for a certificate—if, indeed, a proceeding which is compulsory can be called an

(1) (1906) 2 I.R., 165.
(2) 1 Cox C.C., 413.
(3) 1 A.L.T., 160.
(4) 16 Q.B.D., 636.
(5) 13 C.L.R., 230.
(6) 10 V.L.R. (I.), 73; 6 A.L.T., 58.
(7) 75 L.T., 392.
(8) 8 S.R. (N.S.W.), 252, at p. 257.
(9) 15 N.S.W.L.R. (B. & P.), 54, at p. 61.
(10) 56 L.T., 532.

application. After a long and apparently very careful hearing before the Judge of the Court of Insolvency an order was made by which it was stated that the Court was of opinion and adjudged that the insolvent "has been guilty of two misdemeanours under sec. 275 (I.) of the *Insolvency Act* 1915, each namely—that the insolvent incurring a debt or liability to the Colonial Bank of Australasia Ltd. has obtained credit from the said Colonial Bank of Australasia Ltd. by means of fraud." Upon that, the two separate misdemeanours not being further delineated in any way, there was an order that the certificate should be refused absolutely, and that the insolvent should be imprisoned for one year with hard labour. The order further stated that the Court was of opinion and adjudged that the insolvent had been guilty of an offence under sec. 235 of the Act, namely, that he appropriated to his own use cartridges the property of Dalgety & Co. Ltd. of which he had at the time charge or disposition as agent, factor or broker only and not in any other capacity. On that the Court of Insolvency did not award any punishment.

The matter then came before the Supreme Court, whose judgment was a dismissal of the appeal with a variation of the order in regard to the two misdemeanours there referred to. The variation consisted mainly, as to one misdemeanour, of grouping together a number of items of debt incurred on 24th August 1914 so as to make up a sum of £204 1s., and as to the other misdemeanour, of inserting a sum of £34 14s. 6d. which represented the cashing of a cheque on 28th August 1914.

Special leave was granted to appeal to this Court, the real reason for granting it being that the true ground of objection both to the order as varied and to it as originally made was as to the sentence of imprisonment. That does not now constitute the decision one as to status. It is unnecessary to determine whether an appeal as of right would still lie to this Court in the event of the refusal of the certificate being sustained.

One contention urged before the Supreme Court and repeated here is that in the order of the Court of Insolvency the misdemeanours were too vaguely stated and that the Supreme Court had grouped together several items of advance and called them one

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advance. We agree that that was wrong and that each separate advance must be treated as a separate incurring of a debt for the purpose of sec. 275 (I.). Treating them as separate advances there is evidence before us, which we may treat as accurate, that they were only made on the faith of security being given. This giving of security by the appellant involves, on any possible interpretation of sec. 275 (I.), that credit was in turn given to him, the debtor, in respect of that security, inasmuch as the giving of it involved the giving of time or forbearance and therefore of credit. Therefore, in incurring the several debts the insolvent committed a breach of sec. 275 (I.), inasmuch as this credit was obtained by fraud. The order, therefore, should be varied by stating the debts individually and separately, instead of grouping them all together.

We entertain no doubt that the insolvent, as he himself admits, was deliberately and systematically dishonest, and also, putting technicalities aside, that he had full opportunity of meeting the substance of the charges made against him, and, so far as the proceedings are concerned, that in substance the technicalities necessary were complied with.

The order of the Court of Insolvency will therefore be varied so as to read as follows :—This Court having considered the evidence is of opinion and doth adjudge that the said insolvent hath been guilty of certain misdemeanours under sec. 275 (I.) of the *Insolvency Act* 1915, namely, that in respect of each and every of the following sums advanced to him by the Colonial Bank of Australasia Ltd. on 24th August 1914, that is to say, £8 14s., £4, £7 1s. 11d., £26 15s. 2d., £40 10s. 2d., £29 1s. 7d., and £28 18s. 2d., he did, incurring a debt or liability, obtain credit by means of fraud, and this Court doth further adjudge that the said insolvent hath been guilty of an offence under the provisions of sec. 235 of the said Act, namely, that he the said insolvent appropriated to his own use cartridges the property of Dalgety & Co. Ltd. of which he the said insolvent had at the time charge or disposition as agent, factor or broker only and not in any other capacity, and doth order that the certificate of the said insolvent be and the same is hereby refused, and that the said insolvent be imprisoned in His Majesty's gaol at Melbourne for the period of one year with hard labour.

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Appeal allowed. Order appealed from discharged and order of Court of Insolvency varied as above mentioned.

Solicitor for the appellant, *J. W. McComas.*

Solicitors for the respondents, *Blake & Riggall.*

B. L.

[HIGH COURT OF AUSTRALIA.]

GRAY . . . . . APPELLANT;
PLAINTIFF,

AND

DALGETY & CO. LTD. . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1916.

MELBOURNE, *March* 15, 16, 17, 20, 21, 22; *June* 2.

Griffith C.J., Barton, Isaacs Higgins, Gavan Duffy, Powers and Rich JJ.

Contract—Agency—Agreement to procure loan on mortgage—Validity—Contract concerning interest in land—Evidence—Exoneration—Judgment ordering new trial—Determination of questions of law—Res judicata—Estoppel—Instruments Act 1890 (*Vict.*) (*No.* 1103), *sec.* 208 (*Statute of Frauds* (29 *Car. II., c.* 3), *sec.* 4).

In an action tried with a jury in which the plaintiff alleged an oral contract by which the defendants agreed to raise for the plaintiff the sum of £84,000 upon the security of the plaintiff's land, of which £72,000 or thereabouts was to be secured upon first mortgage of the land at 4 per cent., and £12,000 upon second mortgage of the land at 5 per cent., and that the defendants had not raised that sum or any part thereof,

Held, by *Isaacs, Higgins, Gavan Duffy, Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting on all points), (1) that upon the evidence reasonable men might have come to the conclusion that the defendants for valuable consideration had undertaken to find some person or persons able and willing to lend to the plaintiff £72,000 at 4 per cent. on first mortgage, and £12,000 at