[HIGH COURT OF AUSTRALIA.]

NASSOOR . . . . . APPELLANT;
APPLICANT,

AND

NETTE AND OTHERS . . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

H. C. OF A. 1937.

SYDNEY, *May* 5-7, 10; *Sept.* 1.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Discharge—Application—Offence—Establishment of guilt—Procedure—Necessity for conviction by competent court—"Has committed any offence"—"Does not to the best of his knowledge and belief fully and truly declare to the trustee all his property"—Property vested in bankrupt—False statement that he is a trustee thereof—Whether an offence—Onus of proof—Imposition of condition as to consenting to judgment—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 119 (5) (*b*), (6) (c), (7) (*a*), (*c*), (*d*), (*f*), 210 (1) (*a*), (6), 217.

Upon the proper interpretation of sec. 217 and the proviso to sec. 119 (5) (*b*) of the *Bankruptcy Act* 1924-1933 considered in combination, the duty and power of the Court of Bankruptcy to act under the proviso to sec. 119 (5) (*b*) depend upon the guilt of the bankrupt having been ascertained according to sec. 217.

So *held* by *Rich, Dixon, Evatt* and *McTiernan* JJ. (*Latham* C.J. dissenting).

Per Rich, Dixon, Evatt and *McTiernan* JJ.:—*Quære* whether a bankrupt who falsely asserts in his statement of affairs that property vested in him is held on trust commits an offence under sec. 210 (1) (*a*) of the *Bankruptcy Act* 1924-1933 in that he "does not to the best of his knowledge and belief fully and truly discover to the trustee all his property." If such conduct of the bankrupt is to be brought within that provision at all, affirmative proof must be forthcoming establishing beyond reasonable doubt that the bankrupt was not a trustee and knew that he was not when he included in his statement of affairs the assertion that he was a trustee.

The granting of a discharge to a bankrupt made conditional upon his consenting to judgment for part of the unsatisfied balance of his provable debts,

the costs of the bankrupt, who was successful on appeal, being taken into consideration in fixing the amount.

Decision of the Court of Bankruptcy: *Re Nassoor* [*No.* 2], (1936) 8 A.B.C. 194, reversed.

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APPEAL from the Court of Bankruptcy (District of New South Wales and the Territory for the Seat of Government).

George Nassoor, against whom a sequestration order was made on 8th October 1934, applied, on 4th March 1935, under sec. 119 of the *Bankruptcy Act* 1924-1933, for an order of discharge.

At the hearing of the application the bankrupt appeared by counsel; two creditors appeared by counsel to oppose; and the official receiver, Percy William Nette, appeared in person.

The evidence before the court consisted of:—(*a*) The report of the official receiver and two supplementary reports; (*b*) affidavits by the bankrupt and by creditors in respect of his application, and by other persons; (*c*) shorthand notes of evidence taken on a motion, by the official receiver, for a declaration that certain furniture in the bankrupt's house had been his property, wherein the bankrupt gave evidence; (*d*) shorthand notes taken on a motion that certain shares, standing in his name in a company of which he was the manager, were not held by him in trust for Washington Laurence Nassoor, the respondent to that motion, but for himself, wherein the bankrupt and others gave evidence; (*e*) certain exhibits; and (*f*) evidence given by the bankrupt.

Judge *Lukin*, on 8th April 1936, made an order which, so far as material to this report, was as follows:—" And whereas it has been proved that the bankrupt has committed the following offence under sec. 210 (1) (*a*):—That the bankrupt did not to the best of his knowledge and belief fully and truly discover all his property in that contrary to the fact he represented that one thousand (1,000) shares of a company of which he was the manager standing in his name, were held by him in trust and were not his property. And whereas proof has been made of the following facts under section 119 sub-section (7) of the said Act, namely:—(*a*) That the bankrupt's assets are not of a value equal to ten shillings (10s.) in the pound on the amount of his unsecured liabilities. . . . (*c*) That the bankrupt has after knowing himself to be insolvent, obtained credit

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to the amount of Fifty pounds (£50) or upwards. (*d*) That the bankrupt has contracted debts provable in the bankruptcy without having at the time of contracting them any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay them after taking into consideration his other liabilities at the time. . . . (*f*) That the bankrupt has contributed to his bankruptcy by unjustifiable extravagance in living. It is ordered that he be and he hereby is discharged but that its operation be suspended until a dividend of not less than twelve shillings and sixpence (12s. 6d.) in the pound has been paid to the creditors. And it is further ordered that the costs of the opposing creditors when taxed and certified be paid by the bankrupt": *Re Nassoor* [*No.* 2] (1).

From that decision the bankrupt appealed, on various grounds, to the High Court against so much of the judgment as suspended the order of discharge granted to him until a dividend of not less than twelve shillings and sixpence in the pound had been paid to his creditors, and as ordered the bankrupt to pay the opposing creditors' costs of the application.

After the appeal had been instituted Judge *Lukin* again placed the application in his list and made an order in the following terms: "It is of this court's own motion but without prejudice to the appeal instituted by the bankrupt herein that the said order of the eighth day of April last be varied by substituting the words 'Ten shillings in the pound' for the words 'Twelve shillings and sixpence in the pound' in the said order appearing."

The appeal was argued before the High Court but was subsequently restored to the list to be re-argued. Upon the matter coming on to be re-argued the court was informed that the two opposing creditors who had been joined as respondents would not be represented at the hearing.

Further material facts appear in the judgments hereunder.

Loxton, for the appellant. It is a condition precedent to the right of the Court of Bankruptcy to find a person guilty of misdemeanour that the procedure provided by sec. 217 of the *Bankruptcy Act* should have been followed. The appellant should either have been

(1) (1936) 8 A.B.C. 194.

committed for trial before a jury or charged and dealt with summarily by the judge in the court below. The appellant was not charged. Even if the Act does not expressly provide that one or other of those alternative proceedings should be followed, it is a condition imposed by common law that no bankrupt should be found guilty of misdemeanour without his having been charged, and without his having proper notice of the matters on which he is charged, and a proper opportunity of defending himself (*Henderson* v. *Main* (1); *Scott Fell* v. *Lloyd* (2)). There was no evidence before the court upon which the court could find the appellant guilty of a misdemeanour under sec. 210 (1) (*a*) of the Act. Secs. 119 and 217 must be read together. The court is not entitled to permanently suspend a bankrupt's certificate of discharge on the mere suspicion that he is guilty of a misdemeanour under the Act. The offence must be proved by positive evidence beyond reasonable doubt.

The proviso to sec. 119 (5) (*b*) does not apply unless the bankrupt has been convicted of an offence under the Act. The words, "has committed," in the proviso mean "has been convicted of" (*Re Wood* (3)). That case must be taken as having overruled *In re Peel* (4).

[McTIERNAN J. referred to sec. 117 of the *Crimes Act* 1900 (N.S.W.).

[LATHAM C.J. referred to *Re Cranston* (5); *Re Friezer* (6); *Re Sampson* (7); *Re Nancarrow* (8).]

The decisions in those cases depend upon the construction of the particular Acts involved. Judge *Lukin* should not have relied upon the official receiver's report; there was no evidence to support that report. The appellant made a full disclosure of his property. The shares referred to by the official receiver were not, as the evidence shows, the property of the appellant. The allegations made by the official receiver are based upon a small piece of evidence taken out of its context. Admissions, if relied upon, must be taken from the evidence as a whole and not from portions selected therefrom (*Jack* v. *Smail* (9)). The official receiver's report is of no effect if

(1) (1918) 25 C.L.R. 358, at p. 367.
(2) (1911) 13 C.L.R. 230, at p. 239.
(3) (1915) H.B.R. 53, at p. 54.
(4) (1903) 19 T.L.R. 207.
(5) (1892) 8 T.L.R. 564.
(6) (1901) 27 V.L.R. 335, at p. 338.
(7) (1894) 20 V.L.R. 105.
(8) (1916) S.A.L.R. 198.
(9) (1905) 2 C.L.R. 684, at p. 695.

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disputed; in cases where the report is in dispute the court is bound to go behind it, if circumstances require it, to ascertain the actual facts. The court, not the official receiver, has to be satisfied. Misdemeanours under the Act must be proved to the same extent as a criminal charge (*Re Corby* (1); *Re Todd* (2); *Jack* v. *Smail* (3); *Scott Fell* v. *Lloyd* (4)). The official receiver has not negatived the existence of a trust in respect of the shares. On the contrary, a number of witnesses, whose evidence should have been accepted, affirm the existence of a trust.

[RICH J. referred to *Re Finlayson* (5).]

The evidence was in the nature of depositions and the appellant had no opportunity of examining, or disclaiming, or clarifying any portion of it. If the appellant honestly believed that he had made a full disclosure, even though in fact he had not done so, he would not be guilty of an offence under the Act. The official receiver has not proved that the appellant's assets are not sufficient to pay ten shillings in the pound (See sec. 119 (6), (7)).

The court is not bound by the official receiver's report. It was not for the appellant to show that the report was wrong; the onus was upon the official receiver of satisfying the court (*In re Van Laun* (6)). All the assets of the appellant were disclosed by him in his statement of affairs. The official receiver has failed to take into consideration the prospective value of those assets; therefore there is nothing before the court from which it can be satisfied that the estate is not sufficient to pay ten shillings in the pound. The appellant has done nothing to disentitle him to a complete and unconditional discharge; his insolvency was referable entirely to the then widespread and lengthy financial depression (*In re J. B. Davies* (7)). The charge that the appellant incurred debts of an amount of fifty pounds and upwards after knowing himself to be insolvent is not sustained on the evidence. [He was stopped on this point.] Nor does the evidence prove the charge under sec. 119 (7) (*d*) that he contracted debts without any reasonable expectation of being able to pay. The appellant did not induce any person

(1) (1908) 8 S.R. (N.S.W.) 252, at p. 256; 25 W.N. (N.S.W.) 76.
(2) (1910) 10 S.R. (N.S W.) 281, 490; 27 W.N. (N.S.W.) 59, 110.
(3) (1905) 2 C.L.R. 684.
(4) (1911) 13 C.L.R. 230.
(5) (1891) 1 B.C. (N.S.W.) 79.
(6) (1907) 14 Mans. 281.
(7) (1896) 22 V.L.R. 40.

to act to his or her detriment (*In re Sultzberger* (1)). The appellant is entitled to an unconditional order of discharge from bankruptcy and also to an order for costs in accordance with *Scott Fell's Case* (2). The order, made conditional upon the payment by the appellant of not less than twelve shillings and sixpence in the pound, was void.

Sugerman, for the respondent official receiver. There was positive evidence that the appellant was the owner, and not the trustee, of the shares referred to by the official receiver. Although the onus of proof was not on the appellant, that evidence called for some explanation on his part; an explanation which the judge was not bound to accept, but which he was entitled to accept or reject as he thought proper. The appellant's version of the matter involved so much explanation that the judge was justified in regarding it as improbable, and not accepting it. The appellant merely disclosed the existence of the shares; he did not disclose his beneficial interest therein as, according to the evidence, he should have done. The word "property" in sec. 210 (1) (*a*) means the full extent of the bankrupt's interest therein. The appellant's statement of affairs was false, and it must necessarily have been false to his knowledge. The statute 13 Elizabeth does not apply. The appellant was properly charged. In *Scott Fell's Case* (3), the court did not attempt to lay down the particular way of giving notice. The appellant had all he was entitled to at common law. He had a fair notice of what was intended to be alleged against him, a fair opportunity of answering those allegations and a fair hearing. Throughout, the appellant by his conduct showed that he regarded the notice as sufficient but that he wanted also the benefit of the machinery of sec. 217. The court below did not act under sec. 119 (5) (*b*). By that section, the court is empowered to grant, refuse, or suspend, for a specified time, a certificate of discharge. What the court did here was to grant a certificate of discharge with a particular suspension. The appellant has in no way suffered the punishment which is provided by the proviso to sec. 119 (5) (*b*). The discretion under sec. 119 (6) is exercisable only if and when findings of fact are made under sec.

(1) (1887) 4 Morr. 82.
(2) (1911) 13 C.L.R., at p. 239.
(3) (1911) 13 C.L.R. 230.

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119 (7). In the circumstances, having regard to what was obviously a family arrangement, the court, in making the order, was entitled to act upon a reasonable degree of conjecture, that is, that, in the circumstances, the court was entitled to assume that upon receiving his certificate of discharge the appellant would speedily acquire or re-acquire from his relatives an interest in the various assets referred to by the official receiver (*In re Barker* (1)). Although not bound to act upon the official receiver's report, the judge was entitled to do so. The procedure provided by sec. 119 (5) (*b*) and that provided by sec. 217 are alternatives. Sec. 119 (5) (*b*) should be read rather with sec. 119 (5) (*a*), as part of one scheme, than with sec. 217. The legislature did not intend that the only way of dealing with a bankrupt who had committed an offence was by punishing him under sec. 217. Any other view requires that the words " has committed " in the proviso to sec. 119 (5) (*b*) be given the meaning " has been convicted of " which is not the natural and ordinary meaning of those words. Those words mean " has in fact committed," and the determination as to whether a bankrupt has in fact committed an offence is left for the decision of the judge on an application for a certificate of discharge, and not under sec. 217. Upon such an application the judge must take into consideration certain things, and having taken those things into consideration may either grant or refuse the order but, in a certain case, shall refuse the order unless in his discretion he otherwise determines. That is a scheme quite independent of sec. 217. As explained in *Nancarrow's Case* (2), the dicta in *Re Wood* (3) were based upon the necessity of the jury establishing the commission of a felony or misdemeanour. The *Bankruptcy Act* refers only to an offence against the Act. An offence against the Act is committed when it is done, not upon conviction. The evidence shows that the assets of the appellant are insufficient to pay ten shillings in the pound. Reference to the widespread financial depression is irrelevant if in fact, as it is submitted, the appellant's estate was never worth ten shillings in the pound. It was for the appellant to show the contrary. [He referred to *In re Huggins* (4) and *Re Rush* (5).]

Loxton, in reply.

Cur. adv. vult.

(1) (1890) 25 Q.B.D. 285, at p. 294.
(2) (1916) S.A.L.R. 198.
(3) (1915) H.B.R. at p. 54.
(4) (1889) 22 Q.B.D. 277.
(5) (1898) 19 L.R. (N.S.W.) B. & P. 65 ; 9 B.C. (N.S.W.) 16.

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The following written judgments were delivered :—

LATHAM C.J. This is an appeal by a bankrupt from an order of the Federal Court of Bankruptcy made under sec. 119 of the *Bankruptcy Act* 1924-1933 discharging the bankrupt but suspending the operation of the order of discharge until a dividend of not less than 12s. 6d. in the pound has been paid to the creditors. The order was subsequently amended by substituting 10s. for 12s. 6d. The order (following the words of the proviso in sec. 119 (5) (*b*) of the Act) declared that it had been proved that the bankrupt had committed an offence under sec. 210 (1) (*a*) of the *Bankruptcy Act* 1924-1933 and also that proof had been made of facts referred to in sec. 119 (7) of the Act under heads *a*, *c*, *d* and *f* of that section. The bankrupt had not been convicted of an offence under sec. 210 (1) (*a*), and it is contended on his behalf that either he should have been convicted before the court could, upon an application for an order of discharge under sec. 119, determine that he had committed the alleged offence, or that, even if a conviction was not a necessary element in the evidence against him, the standard required for proof in a criminal court applied, namely, that there should be evidence showing beyond reasonable doubt that he had committed the offence. It is contended that the evidence does not satisfy this criterion. It is further contended that, upon any standard of proof, the court should not have held that he committed the offence, and that the court should not have found that the facts referred to under sec. 119, sub-sec. 7, had been proved.

The Court of Bankruptcy in this case determined that the bankrupt had committed an offence under the Act, but nevertheless did not refuse the discharge and, therefore, exercised in the bankrupt's favour the discretion conferred upon the court to " determine otherwise " under the proviso to sub-sec. 5 (*b*), but the order made did not either grant or refuse the discharge absolutely, or impose any of the terms or conditions specified in sec. 119 (5) (*b*). In the view which I ultimately take of this case, it is not necessary for me to enter into the question of evidence, and my judgment will therefore be limited to the consideration of certain questions of law.

The first question which arises is whether the court was entitled to hold that the bankrupt had committed an offence under the Act, in the absence of any conviction by any court for that offence.

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The argument for the bankrupt rests upon the contention that the words, " the bankrupt has committed any offence ", should be read as meaning " the bankrupt has been convicted of any offence." The case of *In re Wood*; *Ex parte Leslie & Co. Ltd.* (1) is cited as authority for that proposition. In that case the Court of Appeal had before it an order suspending the discharge of a debtor for two years. The order was made under sec. 8 of the *Bankruptcy Act* 1890 which contains provisions very similar to those of sec. 119 of the Commonwealth Act. *In arguendo Phillimore* L.J., speaking of the words " has committed " a felony or misdemeanour, said: " The legislature, I think, means to say convicted of a felony or misdemeanour." There was no argument upon the point, which has apparently never been the subject of a considered decision.

The words in sec. 119 are clear. They are: " the bankrupt has committed any offence." There is a plain distinction between committing an offence and being convicted of committing an offence. A conviction is the act of a court which follows upon proof of the acts or omissions of the accused person which constitute the offence. Many offences are committed in respect of which no persons are convicted. The terms of the Act clearly recognize the distinction between committing an offence and being convicted of committing an offence. The penal sections of the Act contained in Part XIV. are all framed upon the same plan. They all contain provisions to the effect that persons who do or fail to do certain acts shall be guilty of offences. Such persons have then " committed " the offences. The sections then provide a penalty in the form specified by the *Acts Interpretation Act* 1904-1934, sec. 3, which provides that the statement of a penalty at the foot of a section shall indicate " that any contravention of the section, . . . whether by act or omission, shall be an offence against the Act, punishable upon conviction " by a penalty not exceeding the penalty mentioned. This section plainly distinguishes between the act or omission constituting an offence and the conviction for the offence. Thus the words " has committed any offence " do not in themselves mean " has been convicted of any offence."

(1) (1915) H.B.R. 53.

It has been suggested, however, that the only way of proving that an offence has been committed is by proving a conviction. This proposition cannot be supported. Remarkable results would follow from the adoption of any such principle. One result of the strict application of such a principle would be that, if a person who had committed a crime disappeared, the facts constituting the crime could never be proved in any court for any purpose in proceedings between any parties. The question whether a criminal offence has been committed may arise in civil proceedings, as, for example, in an action on a fire policy, where wilful burning amounting to arson is alleged, or in an action for libel imputing forgery or bribery or some other crime. Questions have arisen as to the standard of proof to be required where such an issue has to be determined; see, for example, *Phipson* on *Evidence*, 7th ed. (1930), p. 11. The fact that such questions arise shows in itself that there is no rule that the commission of a criminal offence can only be proved by proving a conviction for it. Indeed, there has been much discussion as to whether a conviction for a crime is even admissible in evidence in other proceedings. In *Castrique* v. *Imrie* (1), *Blackburn* J., delivering to the House of Lords the opinion of the judges, said: "A judgment in an English court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged." This rule, however, has been much modified as a result of the changes in the law allowing parties to give evidence. The question was discussed in *Re Crippen* (2), where it was held that where a felon or anyone claiming under him was a party to proceedings for the purpose of obtaining a benefit resulting from the crime, the conviction of the felon was admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime. This is as far as the authorities go. Thus, where a conviction is admissible as evidence, it is only prima facie proof of the commission of the crime.

(1) (1870) L.R. 4 H.L. 414, at p. 434.

(2) (1911) P. 108.

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So, also, an acquittal by one court is not conclusive evidence before any other court that an offence has not been committed (*Helsham* v. *Blackwood* (1)). Thus, whatever may have been the result of any criminal proceedings, the Court of Bankruptcy must determine for itself, in a proceeding under sec. 119, whether or not the bankrupt has committed the offence alleged. The question of guilt cannot be determined by any court in such a manner as to preclude the Court of Bankruptcy from, or to relieve that court of its obligation of, considering the question independently of the result of any criminal proceedings, though a conviction in such proceedings will be prima facie evidence in the Court of Bankruptcy. It appears to me to be clear that proof of a conviction cannot be regarded, as has been contended, as the only means of establishing that an offence has been committed.

In this case, however, arguments have been addressed to the court based upon the specific provisions of the *Bankruptcy Act* which, it is urged, show that it was intended by the legislature that no action should be taken under sec. 119 to the prejudice of a bankrupt on account of the commission of an offence unless he had been prosecuted and convicted for that offence. The argument is based upon the provisions of sec. 217 of the Act. This section is in the following terms :—" (1) If the court, in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against this Act punishable by imprisonment, it may—(*a*) charge him with the offence and try him summarily ; or (*b*) commit him for trial before any court of competent jurisdiction. (2) Where the court tries the bankrupt summarily it shall serve him with a copy of the charge and appoint a day for him to answer it. On the day so appointed, the court shall require the bankrupt to plead to the charge, and if the bankrupt admits the charge, or if after trial the court finds the bankrupt is guilty of the offence, the court may sentence him to imprisonment for any period not exceeding six months. . . ."

It will be seen that the section specifically refers to applications for an order of discharge. The section empowers the court upon such an application to charge the bankrupt and to try him summarily

(1) (1851) 11 C.B. 111 ; 138 E.R. 412.

or to commit him for trial, and it is argued that this procedure must be followed before the court may properly hold upon an application for discharge that he has committed an offence under the Act. The first comment which I make upon this contention is that if it had been intended that there should be a conviction before the court could hold under sec. 119 (5) that the bankrupt had committed an offence, it would have been very easy to use the words " convicted of " instead of the different word " committed." In the next place, sec. 217 deals with punishment by way of imprisonment. It confers a power on the court, and the effect of the exercise of that power, where the offence is proved, will be that the bankrupt will be subjected to a penalty not exceeding six months' imprisonment. The court is not bound to exercise the power. In my opinion, the Act is based upon the view that, in some cases, refusal of a discharge will be a sufficient punishment, without imprisonment. Of course it is clear that the penalty of imprisonment cannot be imposed unless and until the bankrupt is convicted. Sec. 119, however, deals with a different subject matter. The bankrupt cannot be imprisoned by reason of any action taken under sec. 119. The only effect in relation to this particular subject matter is that the court may refuse an order of discharge unless it exercises a discretion in his favour. The legislature, of course, might very well have provided that action should be taken under sec. 217 before any attention could be paid to the alleged offence under sec. 119, but, as I have already said, the Act has conspicuously not made any such provision. In the absence of any words to that effect, and in view of the presence of words to a different effect, I am unable to see any justification for saying that the Act contemplates that there should always be a prosecution and conviction before the court can determine upon an application for an order of discharge that an offence has been committed.

The next question which arises is a question as to the standard of proof to be required when the Court of Bankruptcy is exercising its functions under sec. 119 upon an application for an order of discharge.

It was stated very emphatically by *Griffith* C.J. in *Scott Fell* v. *Lloyd* (1) that proof of a misdemeanour in an application for a

(1) (1911) 13 C.L.R., at p. 239.

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certificate of discharge under the *Bankruptcy Act* 1898 (N.S.W.), sec. 39, must be given in the same way as if the bankrupt were charged with the offence before a jury. Upon this view the offence must be proved beyond reasonable doubt, and not upon a preponderance of probability. (It may be observed, in passing, that it was not suggested in that case that the bankrupt must have been already convicted before the court could properly be satisfied, upon a certificate application, that he had been guilty of a misdemeanour.) In the view which I take of the evidence in this case it is not necessary for me to consider this question in relation to sec. 119 of the Commonwealth *Bankruptcy Act*. If it were necessary to decide the question, I would give careful consideration to the provisions in sec. 119 (5), directing the court to take into account the trustee's report, which would not be admissible in ordinary criminal proceedings, and also to the provisions of sec. 119 (9) which, for the purposes of the section, makes reports of the official receiver or trustee prima facie evidence of the statements therein. I would also have to consider the "facts" mentioned in sec. 119 (7), some of which amount to or may involve criminal offences, and would consider whether different standards of proof are required in relation to different "facts" apparently placed on the same footing in this section. It would also be necessary to examine such authorities as those collected in *Phipson* on *Evidence*, 7th ed. (1930), p. 11, as to the standard of proof of a criminal offence which is required when, in proceedings which are not criminal, it becomes necessary to decide whether facts amounting to a criminal offence have been established by evidence. However, it is not necessary for me to deal with these matters in this case because I am of opinion that the appeal should be allowed upon another ground.

It is further objected that, before it can properly be held upon an application under sec. 119 that the bankrupt has committed an offence, he should have proper notice that an offence was alleged against him, and fair opportunity of meeting the allegation, even if it should not be necessary first to obtain a conviction against him. I agree with this contention (See per *O'Connor* J. in *Scott Fell* v. *Lloyd* (1)). It is necessary, therefore, to examine the

(1) (1911) 13 C.L.R., at pp. 245 et seq.

relevant facts. The offence in question related to the alleged non-disclosure by the bankrupt to the official receiver of the fact that he was the owner of certain shares. He was examined under sec. 80 in relation to this matter, and also under sec. 68, and also upon a motion, as the result of which it was decided that the shares were the property of the bankrupt and not the property of the person to whom the bankrupt had transferred them in pursuance of a trust which he alleged to exist. These proceedings, however, did not inform the bankrupt that he was charged with any offence, though they must have prevented him from being surprised when the charge was made. The date of the bankrupt's application for discharge is 4th March 1935. On 29th May 1935 the official receiver made his report, in the course of which, after reporting on (*inter alia*) this question of the true ownership of the shares, he said : " Taking into account the evidence given at the various examinations of the bankrupt, I would draw the attention of the court to the fact that the bankrupt may have contravened the following section of the *Bankruptcy Act* :—Section 210 (1) (*a*)—that the bankrupt did not, to the best of his knowledge and belief, fully and truly discover to me all his property in that he disclaimed the true ownership of certain shares and certain articles of household furniture in his possession at the date of the sequestration order." This is fair notice of a charge, and it was so understood by the bankrupt. On 31st July 1935 the bankrupt made a very lengthy affidavit in reply to the official receiver's report in the course of which he put his case in reply to the charge. Then the official receiver made another report (29th November 1935) in which, in every sense, he returned to the charge. On 3rd December 1935 the bankrupt made an affidavit in further reply. The official receiver made a further report on 5th December 1935 in which there was some recrimination. After all these preliminaries, the application for discharge was heard on 26th December 1935, when the bankrupt gave evidence with respect to the shares in question and again alleged, on oath, that the shares did not belong to him but belonged to one Washington L. Nassoor. He was disbelieved, as he had already been disbelieved in the proceedings on the motion already mentioned. The court then made the order of which complaint is made. Upon these facts

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it is impossible, in my opinion, to say that the bankrupt did not have full notice of the charge and ample opportunity of defending himself.

In this case the court decided that the bankrupt had committed an offence under the Act. The court then, under the proviso to sec. 119 (5) (*b*) exercised its discretion not to refuse the discharge. The court, however, did not grant the discharge absolutely. Neither did the court suspend the operation of the order "for a specified time," or impose any of the conditions referred to in sec. 119 (5) (*b*) as to pay, pension, salary, etc. The court did not purport to exercise any of the powers mentioned in par. *b* of sec. 119 (5). The discharge is suspended until a dividend of not less than 10s. in the pound is paid. This order is made under sec. 119 (6) (*c*), and depends upon proof of facts mentioned in sec. 119 (7), not upon proof of the commission of an offence. Thus the finding that the bankrupt committed an offence does not provide a basis for the order actually made. The bankrupt contends, however, that he is entitled, for the various reasons with which I have dealt, to have this part of the order struck out. I am unable to accept any of those reasons. But the real question, as I see it, is whether the bankrupt is entitled to have struck out of the order a declaration which is not used as the basis of any operative part of the order. In my opinion he is so entitled. A declaration that an offence has been committed can properly be included in an order made upon an application for discharge only (*a*) if it is made the ground for the refusal of a certificate; or (*b*) if it also appears from the order that the court has exercised a discretion to "determine otherwise," and has then proceeded to exercise one of the powers referred to in sec. 119 (5) (*b*), to which the provision relating to the commission of an offence is a proviso (See Forms 138 and 139 in the First Schedule to *Bankruptcy Rules* 1934). Neither of these conditions is satisfied and, for this reason, the declaration that the bankrupt has committed an offence should be struck out of the order.

The order must then be supported, if at all, under the provisions of sec. 119 (6) and (7). The order recites that facts *a*, *c*, *d* and *f* set forth in sub-sec. 6 have been proved. The only evidence which I have been able to discover to support the findings as to

c, *d* and *f* is contained in the official receiver's report, which is made prima facie evidence by sec. 119 (9). But an examination of the facts proved does not support the statements on these matters contained in the report, and, in my opinion, shows that they have not been established. That leaves fact *a*, viz., " that the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, unless he satisfies the court that that fact has arisen from circumstances for which he cannot be held responsible." There is, in my opinion, evidence to support this finding of fact. But the actual order made was almost certainly affected by the finding as to the commission of an offence, and certainly by the findings as to facts *c*, *d* and *f*. Further, there was evidence as to the bankrupt's conduct during the bankruptcy (See sec. 119 (5) (*a*)) which, if accepted, showed that he adopted an attitude of persistent obstruction to the trustee. This evidence was to the effect that he would give no assistance in the realization of his estate, apparently because he resented a judgment of the Supreme Court which was given against him. Immediately after the judgment he petitioned for sequestration of his estate. He did not appeal from the judgment. His complaint against the judgment was that he was held liable, under a certain agreement, to indemnify one only of the opposing creditors against certain losses, whereas he ought not to have been held so liable unless both of the petitioning creditors had jointly incurred losses. When he gave evidence he did not seek to conceal his determination to avoid paying these creditors anything. These facts are possibly among " the surrounding circumstances " to which the learned judge refers in his judgment as assisting towards the conclusion that the case falls within sec. 119 (6) (*c*), authorizing the suspension of a discharge until a dividend of not less than ten shillings in the pound has been paid. In all these circumstances I am of opinion that the proper order for this court to make is to allow the appeal, to set aside the order, and to remit the application for re-hearing to the Court of Bankruptcy.

RICH, DIXON, EVATT AND MCTIERNAN JJ. This is an appeal by a bankrupt from an order of the Federal Court of Bankruptcy suspending the operation of his discharge from bankruptcy until

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a dividend of not less than twelve shillings and sixpence in the pound had been paid to his creditors.

One of the grounds of appeal was that the court was in error in suspending the discharge until payment of that amount in the pound. This ground was well founded, and the order could not have stood, because it required a greater payment than that allowed by the Act (See *In re Kutner* (1)). But after the appeal was instituted the learned judge of the Court of Bankruptcy placed the case in his list again and made an order in the following terms : " It is ordered of this court's own motion but without prejudice to the appeal instituted by the bankrupt herein that the said order of the eighth day of April last be varied by substituting the words ' ten shillings in the pound ' for the words ' twelve shillings and sixpence in the pound ' in the said order appearing." The bankrupt did not consent to this order and it is not easy to understand how it could operate " without prejudice to the appeal," unless perhaps the view were taken that, the order as originally framed having gone beyond the power conferred on the court, it was incurably bad.

The order against which the appeal is brought found that the bankrupt had been guilty of an offence against sec. 210 (1) (*a*) of the *Bankruptcy Act* 1924-1933, viz., that he did not, to the best of his knowledge and belief, fully and truly discover all his property in that, contrary to the fact, he represented that 1,000 shares of a company of which he was manager standing in his name were held by him in trust and were not his property.

The first question which calls for decision is whether that finding can be supported. It is impeached on two grounds. The appellant complains that the court did not charge him summarily under sec. 217 (1) and (2) with the offence of which it found him guilty and contends that, without doing so, the Court of Bankruptcy could not find him guilty of such an offence upon his application for a discharge.

The second ground upon which he attacks the finding goes to the facts of the case. He says that upon the evidence he ought not to have been held guilty of the offence.

(1) (1921) 3 K.B. 93.

In our opinion on both grounds the finding should be set aside. Upon the proper interpretation of sec. 217 and the proviso to sec. 119 (5) (*b*) considered in combination, it appears to us that the duty and power of the Court of Bankruptcy to act under the proviso depend upon the guilt of the bankrupt having been ascertained according to sec. 217. Sub-secs. 1 and 2 of that section are as follows :—" (1) If the court, in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against this Act punishable by imprisonment, it may—(*a*) charge him with the offence and try him summarily ; or (*b*) commit him for trial before any court of competent jurisdiction. (2) Where the court tries the bankrupt summarily it shall serve him with a copy of the charge and appoint a day for him to answer it. On the day so appointed, the court shall require the bankrupt to plead to the charge, and if the bankrupt admits the charge, or if after trial the court finds that the bankrupt is guilty of the offence, the court may sentence him to imprisonment for any period not exceeding six months." It is to be noticed that par. *a* of the first sub-section attempts to enable the court to lay the charge and to try the offence. Sub-sec. 2 directs that the court itself shall serve the accused with a copy of the charge. No doubt this means that an officer of the court, acting under the direction of the court, must serve the process (Cf. rule 107 of the *Bankruptcy Rules*). Sub-sec. 3 goes on to provide that at the " summary trial " the court may cause the evidence taken before the court on which the charge is based to be read to the bankrupt, that such evidence shall thereupon be evidence in the trial, and that the court " may take further evidence in support of the charge." These provisions appear to mean that the court may assume the duties of a prosecutor, that it may determine upon a prosecution, formulate the charge, cause the process to be served, and then adduce the evidence. During the argument of *Marks* v. *The King* (1), which was heard and disposed of since the argument of the present appeal, it was suggested that under the Constitution it might not be open to the legislature to bestow such functions on a court ; that they were functions going beyond and inconsistent with the exercise of judicial

(1) (1937) 57 C.L.R. 58.

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power. This court has heard no argument upon the question, and in *Marks* v. *The King* (1) it was found unnecessary to consider the suggestion. But, even if it turned out that the provisions authorizing the Bankruptcy Court to act in this manner were void, and if, further, they involved the invalidity of the entire attempt to confer summary jurisdiction, the alternative power of committing for trial would remain unaffected. Indeed, even without sec. 15A of the *Acts Interpretation Act* 1901-1932, it would be unlikely that this power would be held inseparable. It, therefore, becomes necessary to consider whether sec. 217 provides the means by which the guilt of the bankrupt is to be ascertained ; in other words, whether it is an exhaustive statement of the procedure for investigating the question whether he has committed an offence against the Act, or whether, upon an application for his discharge, that question can be decided independently as an incidental issue.

The proviso to sec. 119 (5) requires " that the court shall refuse the discharge in all cases where the bankrupt has committed any offence under this Act, or any other offence connected with his bankruptcy, unless the court, in its discretion, otherwise determines." Thus the proviso to sec. 119 (5) speaks of the guilt of the bankrupt as a fact known when the discharge is under consideration, without referring to the method of ascertaining it, while sec. 217 (1) refers in terms to the application for an order of discharge and says that, if the court in that application has reason to believe that the bankrupt has been guilty of an offence against the Act, it may proceed in the manner the section describes.

The Federal Court of Bankruptcy appears to have acted upon the assumption that it is unnecessary to follow the procedure of sec. 217 unless that court considers it desirable to try the bankrupt with a view of punishing him by imprisonment. If its purpose is simply to ascertain whether this proviso to sec. 119 (5) (*b*) applies, it deals with the suggestion that the bankrupt has been guilty of an offence in the same manner as any other question which arises on his application for a discharge. The provisions affecting the matter do not, in our opinion, permit of this course. The very situation contemplated by sec. 217 (1) must arise before the court can find

(1) (1937) 57 C.L.R. 58.

that the proviso applies, namely, in an application for a discharge it must have reason to believe that an offence has been committed. The sub-section then goes on to empower the court to have the question determined as against the bankrupt. The question involves the charge of a criminal offence. The refusal of the certificate has always been considered a form of punishment. It appears to us that the Act contemplates the decision of the question whether the bankrupt has been guilty as one requiring a charge and distinct hearing. It does not regard it as a matter to be dealt with as a subsidiary civil issue forming part of the composite question whether the court should grant or refuse a discharge. If the court could so deal with the question, it would appear to follow that for the purpose of punishment by imprisonment one conclusion might be reached and a contrary conclusion for the purpose of discharge from bankruptcy. For example, suppose the court acted under sec. 217 and committed the bankrupt for trial and the jury acquitted him. On the assumption that the question whether he committed an offence is a subject of independent investigation for the purpose of his application for discharge, his acquittal would not, it seems, be conclusive (See *Helsham* v. *Blackwood* (1); *Caine* v. *Palace Steam Shipping Co.* (2); *Re Crippen* (3)). Clearly if the court on an application for discharge had given a decision that a bankrupt was, or was not, guilty of a particular offence, and he was afterwards put upon his trial for the same offence, the court's decision would not even be admissible in evidence on the question of his guilt or innocence. We think the legislation meant the question of guilt to be decided conclusively, and to that end provided by sec. 217 a means for proceeding to have it determined if on an application for discharge there appeared reason to believe that an offence had been committed. It is an affirmative provision stating a procedure for the very case; it implies that when the question arises that shall be the procedure by which it is determined. An analogous view has been taken of the English legislation in the Court of Appeal (See *Re Wood*; *Ex parte Leslie & Co.* (4)). In the case of offences

(1) (1851) 11 C.B. 111, at pp. 122-124, 128; 138 E.R. 412, at pp. 417-419.
(2) (1907) 1 K.B. 670, at p. 683.
(3) (1911) P., at pp. 112-115.
(4) (1915) H.B.R. 53.

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connected with his bankruptcy, not being offences against the Act, the reasoning of this decision would apply. As the court has not jurisdiction to try such offences, according to that decision, the question of guilt must be settled by a prosecution before a competent court. We do not think sec. 217 means that in every case in which the court proceeds summarily and the bankrupt admits the charge or is found to have committed the offence, the court must proceed to impose some punishment in addition to considering whether his discharge should be refused or suspended. It gives a discretionary power to impose a sentence up to six months' imprisonment, but whether this should be exercised depends on the circumstances of the particular case.

If, in the present case, proper steps had been taken under sec. 217 to charge the bankrupt with having committed the offence of failing to discover all his property to his trustee, we do not think the facts proved would have sufficed to establish the charge. Indeed, even if sec. 217 did not bear the construction we have given it, the standard of proof would not necessarily be lower (*Re Riley* (1)). The circumstances said to constitute the offence involve no suppression of the existence of property or of the fact that the legal title was vested in the bankrupt. The charge rests on the fact that he alleged that he was a trustee. In his statement of affairs made at the time of sequestration the bankrupt made this statement: "I hold 1,000 shares in Sydney Costume Co. 1932 Ltd. as trustee for Washington L. Nassoor." It is said that he was not a trustee of the shares for Washington L. Nassoor and that they were his own beneficial. property. To represent falsely that property vested in him is held upon trust is an act not very happily described by the language of sec. 210 (1) (*a*), which makes a bankrupt guilty of an offence who "does not to the best of his knowledge and belief, fully and truly discover to the trustee all his property." If such conduct is to be brought within the provision at all, clearly proof is essential that the bankrupt was not a trustee and that he knew he was not. These essential facts must be established positively. His knowledge of the falsity of the statement could not but be a necessary part of the facts on which the application of the paragraph at all would depend.

(1) (1894) 15 L.R. (N.S.W.) B. & P. 54, at p. 61; 5 B.C. (N.S.W.) 26, at p. 29.

Belief in its truth is not merely a matter of defence under sec. 210 (6). The facts must be proved by admissible evidence and beyond reasonable doubt. The official receiver as trustee had made an application to the Court of Bankruptcy for a declaration that the 1,000 shares formed part of the bankrupt's estate. To this proceeding the bankrupt was not a party. Washington L. Nassoor, the alleged *cestui que trust*, opposed the application and offered evidence to prove the trust.

It is unnecessary to state in detail all the facts deposed to. A brief statement of the story will suffice. The bankrupt had been managing director of a company called Sydney Costume Co. Ltd. On 15th October 1932 it went into voluntary liquidation. The bankrupt formed a project of registering another company which would purchase the assets of the liquidating company. He made an arrangement with some business acquaintances that they should provide £4,000 for the purpose, if he provided £1,000. To enable him to fulfil the condition, he applied to a cousin named Mrs. G. A. Nassoor for a loan. She agreed to lend him £500 and he hoped to obtain the remaining £500 elsewhere. He did not do so, and moreover his business acquaintances withdrew from the proposed transaction. He then arranged with Mrs. G. A. Nassoor to provide £3,000. She was to become a shareholder in the company which would employ him as managing director at a salary. On 7th December 1932, as trustee for a company to be formed, he entered into an agreement with the liquidator of the old company for the purchase of its assets for £5,100, of which £500 was payable as a deposit and the balance in instalments. On 22nd December 1932 the new company was registered under the name of Sydney Costume Co. (1932) Ltd. A cheque of Mrs. Nassoor's, dated 8th November 1932, was used to pay the deposit of £500. Of the balance of purchase money, £3,000 was found by her and the remainder was obtained from the collection of book debts taken over from the liquidating company. The formal allotment of shares in the new company did not take place until 1st August 1933. Then 3,000 shares of £1 were allotted as fully paid to Mrs. Nassoor and 1,000 to the bankrupt. Cheques for the respective sums of £3,000 and £1,000 were issued to them by the company and handed back to the company by them.

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The company was, or might be considered as, indebted to Mrs. Nassoor in the sum of £3,000. The drawing of a cheque in her favour for that amount was therefore justified. But some other justification was necessary for the cheque for £1,000 drawn in favour of the bankrupt and handed back by him in payment of the amount of the shares allotted in his name. As to £500 the justification might be supplied by the deposit paid on the purchase of the assets. The remaining £500 was in fact made up by crediting it to his ledger account in the company's books in which the cheque for £1,000 was debited. Under date 30th June 1933 an entry was made "by plant £500." This entry represented an increased value placed upon the assets acquired from the liquidating company. If the bankrupt had been an intermediate vendor to the company who was entitled to transfer the assets to it at a higher value than he gave for them, the entry might be sustainable. But he bought as a trustee for the company. We have little doubt, however, that the basis of the entry is the supposition that, whether in his own right or as trustee, he could be treated as entitled to the benefit of the increased value. To maintain consistency the payment of the deposit of £500 ought also to have been made the source of a credit to his ledger account. But this was not done and a strange feature of the bookkeeping is that, so far as we can discover from an examination of the company's books, there is no entry which records or accounts for this part of the purchase money. On 4th August 1933, when the company's cheque which he returned in payment for the shares was debited to his account, a little less than that sum stood at its credit. There was evidence upon which it might be found that the bankrupt directed or approved the revaluation of the assets which appears to have been done at the beginning. It is, perhaps, unnecessary to add that the passing of the cheques is the method adopted for the purpose of avoiding filing an agreement stating the consideration for paid-up shares (See *Messer* v. *Deputy Federal Commissioner of Taxation* (1)). In this particular case, the company's accounts show a muddled conception of the procedure and requirements, a matter which cannot be ignored if inferences are to be based on the entries.

(1) (1934) 51 C.L.R. 472, at pp. 478-480.

The 1,000 shares are those which the bankrupt represented that he held as trustee for Washington L. Nassoor. The latter is the son of Mrs. G. A. Nassoor, who is a widow. He came of age on 16th June 1934. According to the bankrupt, when he originally obtained the cheque for £500 from Mrs. Nassoor, it was intended as a loan. But after she had agreed to find another £3,000, the transaction assumed an altogether different character. When the arrangement by which he was to obtain £3,000 from his business acquaintances fell through, he says he returned her cheque for £500 to her, but when she agreed to provide the full sum required, she handed it back to him to enable him to pay the deposit. At that stage she was the real purchaser of the assets. She agreed to take 4,000 shares in the company which the assets would satisfy. But she arranged that until her son, who went into the business, came of age or reached twenty-five, an age at which he became entitled to an interest under a will, the bankrupt should hold in his name 1,000 of the shares and should receive the dividends as additional remuneration and treat 100 of the shares as his director's qualification. The scrip was endorsed with a blank transfer and handed to her.

This story was deposed to by the bankrupt, confirmed by the testimony of Mrs. Nassoor and by the independent evidence of Mr. Humphreys, the liquidator of Sydney Costume Co. Ltd., and supported to some extent by the evidence of Washington L. Nassoor. The latter said that, about the time he came of age, his mother told him she had 1,000 shares in the company which he was to receive when he was twenty-five. The bankrupt's solicitor gave evidence that the scrip was in Mrs. Nassoor's possession at the time of sequestration, which took place on 8th October 1934, and that the scrip was produced out of that custody bearing the bankrupt's signature to the blank transfers indorsed thereon.

The official receiver's application for a declaration that the shares formed part of the bankrupt's estate succeeded. His Honour Judge *Lukin* decided the application upon the burden of proof. In the course of his judgment he said : " It is admitted that the onus of establishing such a trust or any trust in favour of the respondent " (namely, Washington L. Nassoor) " rests with him." After reviewing

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the evidence he concluded his judgment with the statement: "In the result I must find that the respondent has not satisfied me that his claim to the shares was or is well founded. I think the shares were the bankrupt's property and the transfer was made in order to defeat the official receiver's claim." We take this to mean that beginning with a presumption that the shares were the property of the bankrupt, his Honour was not persuaded by the evidence that a trust had been created and disbelieved the story as one set up to defeat the trustee's title. This may be a view which the learned judge was entitled to take. But it does not justify a finding that the bankrupt committed an offence against sec. 210 (1) (*a*). The difference between refusing to act upon evidence adduced to prove a state of facts and proceeding to find affirmatively that an opposite state of facts existed hardly needs illustrating. But the necessity of observing the difference between affirmative proof and negative incredulity is strongly brought out by a recent decision of the Privy Council to which *Rich* J. has referred us. In *Commissioner of Income Tax, Bombay Presidency and Aden* v. *Bombay Trust Corporation Ltd.* (1), in dealing with a finding of the Bombay Income Tax Commissioner that a loan set up by the taxpayer and the bookkeeping entries supporting it were fictitious, Sir *George Rankin*, speaking for their Lordships, said that proof that the parties did not intend a real transaction was lacking and proceeded: "The only evidence in the case is evidence to that effect, and a mere refusal to believe in the evidence is not, in the absence of any positive evidence, sufficient to entitle the income tax authorities to hold" what they did. A finding that the bankrupt committed an offence against sec. 210 (1) (*a*) could not be made unless affirmative proof were forthcoming establishing beyond reasonable doubt that the bankrupt was not a trustee and that he knew he was not when he included in his statement of affairs the assertion that he held the shares in trust for Washington L. Nassoor. The burden of establishing the entire issue lay on those supporting the charge. On this occasion no presumption in their favour arose from the fact that the legal title to the shares was vested in the bankrupt. Unless the condition of

(1) (1936) L.R. 63 Ind. App. 408, at p. 420.

the bankrupt's ledger account affords evidence sufficient to justify a finding that his statement was false to his knowledge, there is, in our opinion, none.

Except for a short examination of the bankrupt no oral evidence was taken on the application for discharge. The depositions on the public examination and upon the previous motion were treated as evidence; the official receiver filed several reports and the bankrupt a long affidavit. The reports would not have been looked at if a charge had been formulated under sec. 217 and the evidence would have been given orally. But, in any event, the statements of fact, as distinguished from argumentative inferences, contained in these documents do not show circumstances upon which an affirmative conclusion adverse to the bankrupt could be based. But it is said that the bankrupt knew how the transaction was dealt with in his ledger account in the company's books, and that from this it appeared, stating it briefly, that he had incurred a personal liability to the company as a result of paying for the shares, a personal liability which he acknowledged in his statement of affairs. As we have said, when the cheque for £1,000 was debited to his account, it was in credit a little less than that amount. Subsequently it became substantially overdrawn. In our opinion this does not form a satisfactory foundation for the conclusion based upon it. The credit of the £500 under the item "plant" has no significance. It is evident that, if shares of a face value of £4,000 are to be paid up and only £3,500 is found, a credit, set-off, or cross entry of £500 must be provided in some way. The person in whose favour the credit must be provided is necessarily the person in whose name the shares are allotted. The fact which might be significant is that the cheque for £1,000 debited to the bankrupt's ledger account was covered by a corresponding credit of this £500 only, with the consequence that as to the balance the debit of the cheque absorbed his own money. It might mean that he was intended to pay for the shares to that extent out of his own resources. But we think this inference is much shaken, if not altogether repelled, when the fate of the deposit of £500 is investigated. It was paid as part of the purchase price for the company's assets. If it was money borrowed by the bankrupt from Mrs. Nassoor and paid by him to

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the vendor, the bankrupt should have received it back from the company, if not in money, then in the form of a credit to his ledger account or against his liability on the shares. If it was money paid on behalf of Mrs. Nassoor to the vendor, then she should have received a corresponding benefit. In fact no such credit is made in the books as far as we can discover. If a credit representing the £500 deposit had been carried to the bankrupt's ledger account, we should not have considered it inconsistent with his story. For, as the shares were allotted to him, we should expect the credit through which the liability on the shares was to be satisfied to be made to him. In other words, if he was to be trustee of the shares, the credit which paid for them would be transferred into his name. In reality, we think the persons responsible for recording in the books the manner in which the shares were supposed to be fully paid up confused the accounting and lost sight of part of the purchase money attributable to the assets. We do not think that in truth the condition of the bankrupt's ledger account has any probative value one way or the other upon the question whether he took the shares as a trustee. One thing, however, is clear; he did not pay for them, but Mrs. Nassoor found £500, which ought to have been credited against them, and she paid for the assets whence the credit of £500 actually made was regarded as arising. No doubt the legal relation of Mrs. Nassoor to the shares was vague and ill defined. It is one thing to say the existence of a beneficial interest in her son as her nominee is not proved. But, on the other hand, we do not think there is evidence establishing affirmatively that the bankrupt had no justification for his statement that he was a trustee, but made it well knowing it to be false. Indeed, inasmuch as Mrs. Nassoor found the money which the shares really represent, there is much to be said for a resulting trust in her favour even if the oral evidence of the express trust for the son is discarded.

In addition to finding the bankrupt guilty of an offence under sec. 210 (1) (*a*), the learned judge found that facts mentioned in sec. 119 (7) had been proved. He found under par. *d* of the subsection that the bankrupt had contracted debts without having at the time reasonable or probable ground of being able to pay them after taking into consideration his other liabilities at the time.

The cause of the bankruptcy was an adverse decision in a defended action. As a result, judgment was recovered against the bankrupt for £1,193. The cause of action arose on an agreement entered into four years before, and the question at issue was the application of a clause in the agreement to the events which had happened. Although the question was decided against the bankrupt, it was one open to so much doubt that the liability, which in any case was contingent when incurred, should not be treated as one against which the bankrupt ought to have provided.

His remaining debts consisted in (*a*) moneys borrowed, in 1926 and 1927, from relatives, and in 1929 elsewhere, for the purpose of buying interests held by his brothers in the Sydney Costume Co. Ltd., (*b*) in his overdrawing of his account with his company, and (*c*) in a few small debts of no importance. He borrowed the money on personal security, but his assets were considerable, and he applied the money to increasing them. Although the burden lies upon him of proving that he had reasonable or probable ground of expectation of being able to pay the debts at the time he contracted them, we think the circumstances leave little doubt that he did have such ground.

Further findings were made against the bankrupt under sec. 119 (7). Under par. *c* it was found that, after knowing himself to be insolvent, he obtained credit to the amount of £50 or upwards. The finding is not specific and it is difficult to discover its basis. Probably it rests upon the reports of the official receiver. If so, we can only say that we are unable to agree in the conclusion. An attempt was made by counsel to support the finding by means of an answer which on his public examination the bankrupt gave to a question directed to his position when his company went into liquidation. But we do not think the answer should be understood as covering his personal position after he had registered the new company. In any case it would be necessary to point to a distinct obtaining of credit while he knew he was insolvent.

A finding was also made under par. *f* of sub-sec. 7 that the bankrupt had contributed to his bankruptcy by unjustifiable extravagance in living. This finding is, doubtless, founded upon the report of the official receiver. But an examination of the reasoning upon which

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the report is based has left us clearly of opinion that it is erroneous. There are practically no debts owing to tradesmen or representing living expenses. The overdrawing of the bankrupt's account with his company was largely the consequence of the debit of the cheque in payment for the shares. No interest upon borrowed money seems to have been left unpaid. We do not think that the bankrupt's expenditure on living in any way contributed to the bankruptcy. The substantial cause of bankruptcy was the adverse judgment, upon which sequestration immediately followed. On behalf of the official receiver no attempt was made before this court to support the finding of unjustifiable extravagance in living.

Finally, a finding adverse to the bankrupt was made under par. *a* to sec. 119 (7). The effect of this paragraph is to invest the Bankruptcy Court with the powers specified in sub-sec. 6 if the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, unless he satisfies the court that that fact has arisen from circumstances for which he cannot justly be held responsible. Here the burden of proof is upon the bankrupt. Upon the hearing of the appeal an attempt was made on his behalf to show from various pieces of evidence that a fall had taken place in the value of his assets which he could not reasonably anticipate, and that but for this reduction in value his estate would have paid ten shillings in the pound. We do not think that the material before the court is very satisfactory. As it stands, it is not by any means conclusive in the bankrupt's favour. But the order of the Court of Bankruptcy must be set aside for the reasons already given. For the findings which, in our opinion, cannot stand are the foundation of the discretion exercised.

The question then arises what order should be made by this court in substitution for the order appealed from. Inasmuch as the assets are not of a value equal to ten shillings in the pound on the amount of the unsecured liabilities and the bankrupt has not satisfied the court that that fact has arisen from circumstances for which he cannot justly be held responsible, the case falls within sub-sec. 6 of sec. 119. Under that sub-section one or other of four courses are open. The discharge may be refused. It may be suspended for a specified period. It may be suspended until a

dividend has been paid to the creditors not less than an amount in the pound which, as the law stands, can be fixed by the court at no other amount than ten shillings (See *In re Kutner* (1)). The discharge may be granted, subject to a condition that the bankrupt consent to judgment in favour of the trustee for the balance of the debts payable or part of that balance to be paid out of future earnings or after-acquired property in the manner and subject to the conditions which the court may direct, execution being stayed in the meantime.

In the present case, the debts proved appear to have amounted to £4,032. Of the proving creditors, three, the debts to whom amount to £2,475, have consented to the bankrupt's discharge. The debt to the opposing creditors amounts to £1,193. The balance is largely represented by an amount of £287 owing under a guarantee given by the bankrupt. The remuneration of the official receiver who acted as trustee has not yet been fixed. The assets appear to be negligible except for a suggested possibility of some increase in value.

According to " the usual and settled practice of the court " in England, an order suspending a discharge until payment of a dividend of not less than a specified amount up to ten shillings in the pound is not made " unless there is a reasonable prospect that some funds or property will be forthcoming and will be made available for the payment of the debts of the bankrupt " (*Re Marley* (2), per *Wright* J.).

The circumstances of the present case make it not improbable that the bankrupt will obtain the benefit of a sufficient income to enable him to provide more than a mere nominal dividend upon the proved debts. He remains in *de facto* control of the company formed with the capital supplied by Mrs. G. A. Nassoor. It is true that he has not been a shareholder and his position in the company necessarily depends upon the continued confidence of Mrs. G. A. Nassoor and the few other shareholders. But he occupies a somewhat more favourable position than a manager under a contract of service at a stipulated salary. It is unnecessary to enter upon a discussion of all the circumstances of the case, and it is enough to say that it does not appear proper to grant an unconditional

(1) (1921) 3 K.B. 93.

(2) (1900) 82 L.T. 692.

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discharge. But the case does not seem one in which he should be expected to pay not less than ten shillings in the pound. At the same time an obligation should be imposed on the bankrupt to provide some amount towards the satisfaction of his debts. In fixing an amount, it is necessary to remember that the remuneration of the official receiver has yet to be fixed and paid and that he will be entitled to take out of the estate a sum in respect of the costs of these proceedings. It is a case that illustrates the awkward restriction upon the court's discretion which is imposed by sub-sec. 6 of sec. 119. For we do not think that any of the four courses among which the court must choose is very satisfactory. That least open to objection, however, appears to be the imposition of a condition that the bankrupt shall consent to judgment for a part of the balance of his provable debts as yet unsatisfied. The question then arises what sum should be fixed. It must be a sum that he probably will be able to find out of his future earnings or after-acquired property and he ought not to be deprived of what is reasonably necessary for himself and his dependants to live upon. On the whole, we think that an amount of £500 payable in instalments is appropriate. In fixing this amount, we have necessarily taken into account the question of costs. It remains to state our opinion on that somewhat difficult question of discretion.

At the hearing before the Court of Bankruptcy the official receiver did not appear by counsel, and no provision need be made for his costs in that court. Rule 281 of the *Bankruptcy Rules* provides that a bankrupt shall not be entitled to receive the costs of his application for a discharge out of his estate. It is not usual to visit an opposing creditor with costs of a certificate application unless his conduct has been unreasonable or oppressive. Certainly, in the present case, the opposing creditors supported charges which have been held to be without foundation. But the charges were first propounded by the official receiver in his report. In the circumstances, it appears that no order should be made in respect of the costs of the hearing in the Court of Bankruptcy.

In this court, the appeal was heard twice. On the first hearing the official receiver and the opposing creditors appeared respectively by counsel. On the second hearing the official receiver only appeared.

The bankruptcy rule does not apply to this court (*Re Nicholas* (1)), and an order might be made that the costs of the bankrupt whose appeal has succeeded should be paid out of his estate. But it is difficult to see what advantage this would be to him, unless either the value of the assets underwent a surprising increase, or in fixing the amount which he must pay under the condition we have already discussed, we were to ignore altogether the consequence of an order for costs in his favour. For, otherwise, it would mean that the order for costs in his favour would be reflected in the amount fixed as the contribution he must become liable to make to the estate. That is to say, we would have had to fix a larger sum than £500. To make the opposing creditors pay his costs of the appeal would be to make them pay the costs rendered necessary by an order pronounced in a proceeding where, as a rule, they may be present without paying costs unless their conduct is unreasonable.

It follows that no order should be made in respect of the costs of the appeal, except that the taxed costs of the official receiver be paid out of the estate.

Appeal allowed. Order of the Federal Court of Bankruptcy dated 8th April 1936 *discharged. Order that the bankrupt be discharged subject to the following condition to be fulfilled before his discharge takes effect, namely, he shall before the order of discharge of the Court of Bankruptcy is signed consent to judgment being entered in the Court of Bankruptcy against him by the official receiver for the sum of* £500 *being part of the balance of the debts provable in the bankruptcy which is not satisfied at the date of this order. And further order without prejudice to and subject to any execution that may be issued on the said judgment with the leave of the Court of Bankruptcy that the amount of the said judgment be payable at the rate of* £10 *a calendar month out of the future earnings or after-acquired property of the bankrupt but that if the bankrupt's earnings and other income during any month after deduction of such sum of* £10 *be less than* £30 *then*

(1) (1890) 7 Morr. 54.

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the sum payable in respect of such month be the amount, if any, by which his earnings and other income exceed £30 *and the bankrupt shall at the end of six calendar months from the date of the order of discharge or within fourteen days thereafter and at the end of every succeeding six calendar months or fourteen days thereafter while any part of the sum of* £500 *remains unpaid file in the Court of Bankruptcy an account setting forth a statement of his receipts from earnings, after-acquired property and income during such six months unless he has during such six months made the monthly payments of* £10 *in full. Order that the taxed costs of the respondent the official receiver of this appeal be paid out of the estate of the bankrupt. Otherwise no order as to costs of the appeal or of the application for discharge in the Court of Bankruptcy.*

Solicitors for the appellant, *Perkins, Stevenson & Co.*

Solicitor for the respondent official receiver, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.