

[HIGH COURT OF AUSTRALIA.]

KING . APPELLANT:

AND

THE COMMERCIAL BANK OF AUSTRALIA LIMITED . .

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Insolvency-Compulsory sequestration-Act of insolvency-Execution returned H. C. of A. unsatisfied in whole or in part-Relevance of truth or falsity of return-Order nisi-Impossible day stated for return-Enlarging order nisi-Execution unsatisfied "in whole or in part"-Error in office copy of order nisi-Impossible day MELBOURNE, for return—Signature of order—Signature of office copy—Secured debt—Guarantee -Payment-Insolvency Act 1915 (Vict.) (No. 2671), secs. 49, 57, 58, 59-Rules of the Supreme Court in Insolvency 1916 (Vict.), Part I., rr. 7, 13.

Sec. 49 of the Insolvency Act 1915 (Vict.) provides that a creditor may present a petition to a Judge of the Supreme Court praying that the estate of his debtor, whose debt amounts to not less than £50, may be sequestrated, alleging as the ground for such petition any one or more of certain specified acts or defaults, called "acts of insolvency"; among them being "(8) That execution or other process issued on a judgment decree or order obtained in any Court in favour of any creditor in any proceeding instituted by such creditor has been returned unsatisfied in whole or in part. Provided that the debtor has been called upon to satisfy such judgment decree or order by the officer or other person charged with the execution thereof and has failed to do so." The section also provides that the petitioning creditor's debt must not be a secured debt unless he states in his petition that he will be ready to give up the security for the benefit of the creditors or unless he is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated. Sec. 57 provides that every order nisi for sequestration shall set out "the nature and amount of the petitioning creditor's debt and the act or acts of insolvency relied on."

Mar. 3, 4.

Knox C.J., Gavan Duffy and Starke JJ. H, C. of A.
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Sec. 58 provides that every order nisi for sequestration and any order enlarging the same "shall be served personally on the respondent by delivering to him an office copy thereof" &c. Sec. 59 provides that every respondent to an order nisi for sequestration, if he intends to oppose it being made absolute, shall file notice of his intention to do so, and that "such notice shall be a waiver of all technical objections to the proceedings."

Held, that the requirement of sec. 49 (8) in respect of the return of the writ is complied with if there be proof that the execution has issued and has been returned unsatisfied in whole or in part, and that the truth or falsity of the return is not a matter relevant to be considered.

In re Rylah; Ex parte Colonial Bank of Australasia Ltd., 24 V.L.R., 844; 20 A.L.T., 277, overruled.

Held, also, that in setting out in an order nisi the act of insolvency specified in sec. 49 (8), it is sufficient with regard to the requirement that execution shall have been returned "unsatisfied in whole or in part" to state that it has been returned "unsatisfied in whole."

An order *nisi*, which was made on 18th May 1920, appointed Thursday 3rd June 1920 as the day on which cause might be shown against the order *nisi* being made absolute, but in the office copy of the order *nisi* which was served on the debtor the date stated was "Thursday 3rd May 1920."

Held, that the order nisi might properly be enlarged.

An order nisi for compulsory sequestration on the ground mentioned in sec. 49 (8) of the *Insolvency Act* 1915 was discharged on the ground that the petitioning creditor's debt was a secured debt and ought to have been described as such in the petition and that the case was not a proper one for amendment, but the discharge was without prejudice to future proceedings by the petitioning creditor.

Held, that in order to support a subsequent order nisi on the same ground it was not necessary that there should be a fresh demand for payment or a fresh return by the sheriff.

Rule 7 of Part I. of the Rules of the Supreme Court in Insolvency 1916 (Vict.) provides that "all orders made by a single Judge exercising the powers of the Supreme Court, either in disposing of orders nisi for compulsory sequestration or otherwise in insolvency, may be signed by the associate of such Judge, and all orders of the Full Court upon appeal may be signed by the Chief Clerk." Rule 13 provides that "the associate of any Judge of the Supreme Court making an order nisi for sequestration . . . may sign office copies for service under sec. 58" of the Insolvency Act 1915.

Held, that under rule 7 an associate of a Judge may properly sign an order made by that Judge enlarging an order nisi for compulsory sequestration.

Held, also, that even if the signing of an office copy of an order made by one Judge enlarging an order nisi for compulsory sequestration made by another Judge by the associate of the Judge making the order of enlargement

is not authorized by rule 13, an objection founded on such an irregularity is a H. C. of A. technical objection which under sec. 59 is waived by the filing of notice of objections.

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The petitioning creditor's debt was a judgment debt against a firm of which the debtor was a partner. The petition set out that the debt of the COMMERCIAL firm to the petitioning creditor, which was the banker of the firm, was part of a much larger debt for which the creditor held certain securities the estimated value of which was stated. One B. had under a special agreement guaranteed the account of the firm with the creditor up to a certain sum, and it was a term of that agreement that the creditor should be entitled to place all payments made under the agreement to a suspense account and should not be bound to give credit in account in reduction of the firm's indebtedness for the sums so paid, but might at any time at the creditor's discretion appropriate any sums so paid in and towards satisfaction of the indebtedness of the firm, and that until such appropriation such sums should be held by the creditor as security for the payment of the firm's indebtedness. In compliance with a demand by the creditor, B. had paid up the whole of such sum to the creditor, and the latter paid it into a suspense account under the terms of the agreement and refused to pay it to the credit of the debtor's account as B, requested the creditor to do. The amount of the sum so paid by B., if added to the estimated value of the securities, would have practically wiped out the whole indebtedness of the firm.

Held, that the circumstances with regard to the payment by B. to the creditor afforded no ground for refusing to make the order nisi absolute.

Decision of the Supreme Court of Victoria: In re King; Ex parte Commercial Bank of Australia Ltd. [No. 2], (1920) V.L.R., 490; 43 A.L.T., 3, affirmed.

APPEAL from the Supreme Court of Victoria.

On 18th May 1920 an order nisi was made by Hood J. placing the estate of Roff Courtney King under sequestration. The order nisi, which was based upon a petition presented by the Commercial Bank of Australia Ltd. as petitioning creditor, was dated 14th May, and was supported by an affidavit sworn on the same day by the general manager of the Bank. The petition alleged that King was indebted to the Bank in the sum of £313 2s. 10d. in respect of a judgment for £308 18s. 10d. and £4 4s. costs recovered in the Supreme Court on 23rd January 1920 in an action instituted by the Bank against Courtney King, Smith & Co., in which action King had been individually served as a partner in the firm and had failed to appear. It was further set forth that this debt was unsecured except in so far as it was secured by certain liens and promissory notes, the total AUSTRALIA

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H. C. of A. value of which security was estimated by the Bank at £5,600; that these were held as security for a total debt by Courtney King, Smith & Co. amounting to £9,600 11s. 3d., inclusive of the sum of £313 2s. 10d. above referred to; that the proportion of the said security attributable to this sum of £313 2s. 10d. was £182 12s. and that the Bank claimed to be admitted as a petitioning creditor in respect of the balance, namely, £130 10s. 10d. The act of insolvency alleged in the petition was that execution issued on the judgment against King already referred to had been returned unsatisfied "in whole or in part," and that the respondent had been called upon to satisfy the judgment by the officer charged with such execution and had failed to do so, a writ of fieri facias issued on the said judgment having been returned unsatisfied "in whole" and the said respondent having on 24th January been called upon to satisfy the said judgment by the sheriff's officer charged with the execution thereof and having failed to do so. The affidavit in support of the petition verified the facts stated therein as to the nature of the petitioning creditor's debt and as to the securities held by the Bank, their estimated value and the proportion attributable to that debt. It also stated that the act of insolvency committed by King was that execution issued on a judgment obtained in the Supreme Court by the Bank in a proceeding instituted by it has been returned unsatisfied "in whole," and that the respondent had been called upon by the officer charged with the execution of the judgment to satisfy it and had failed to do so.

Notice of intention to oppose the order nisi and to dispute the act of insolvency and the Bank's debt upon various grounds set out in the notice was duly filed by the respondent pursuant to sec. 59 of the Insolvency Act 1915 (Vict.). The objections were substantially as follows: (1) that the order nisi in alleging the act of insolvency set out that execution had been returned "unsatisfied in whole," whereas it should under sec. 49 (8) of the Insolvency Act 1915 have stated that it had been returned "unsatisfied in whole or in part"; (2) that the order nisi did not sufficiently identify the judgment in respect of which the execution had issued; (3) that, as the petition set out that the judgment had been returned "unsatisfied in whole or in part," there

was a variation between the petition and the order nisi; (4) that H. C. or A. the order nisi in setting out the estimated value of the securities held by the Bank stated it as £5,000 whereas the petition stated it as £5,600; (5) that, as in the affidavits in support of the petition it COMMERCIAL was stated that the judgment was "unsatisfied in whole" whereas the petition stated that it was "unsatisfied in whole or in part." the petition was not properly verified; (6) that the Bank had omitted to state in the petition and in the affidavit in support thereof that one Archibald McGregor Black had guaranteed the account of Courtney King, Smith & Co. in the sum of £4,000 in all, that subsequently the Bank had called up and received from Black this sum and that, although directed by Black to do so, the Bank had failed to appropriate that sum in reduction of the amount alleged to be owing by Courtney King, Smith & Co. or to value the security of the guarantee, the effect of which would have been to reduce the debt owing to the Bank to less than £50; (7) that there had been neither a fresh demand for payment nor a fresh return to the writ of execution by the sheriff; (8) that the return to the writ of execution was false; (9) that King was not given a reasonable time within which to comply with the demand of the sheriff's officer, and therefore that he could not be said to have failed to do so: (10) that the matter was res judicata by reason of the decision of Cussen J. in the previous proceedings; (11) that it would be unjust and inequitable to sequestrate King's estate as the Bank would not be prejudiced by the discharge of the order nisi; (12) that the petition was not made bonâ fide and with a view to getting the Bank's debt paid or

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The order nisi was made returnable on Thursday 3rd June 1920, but in a document signed by the associate of Hood J., which purported to be an office copy of the order nisi and which was served on King, the return day was stated as "Thursday 3rd May 1920." On Thursday 3rd June counsel for the Bank appeared before Schutt J., and moved the order absolute. There was no appearance for King, but it was brought to the attention of Schutt J. that in the document above referred to the return day was wrongly stated.

to the distribution of King's assets among his creditors; and (13) that the petition was unfounded, vexatious, malicious or oppressive

and was made with ulterior motives.

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H. C. of A. Schutt J. thereupon enlarged the order nisi until 10th June (In re King: Ex parte Commercial Bank of Australia Ltd. (1)). A document purporting to be an office copy of the order of Schutt J. enlarging the order nisi signed by his associate was served upon King.

On the order nisi coming on for hearing on 10th June, two preliminary objections were taken by counsel for King, the first that the original order of Schutt J. of 4th June enlarging the order nisi was signed by the associate of Schutt J. instead of by Schutt J. himself, and the second that the document purporting to be an office copy of the order of Schutt J. enlarging the order nisi which was served on King was not a proper office copy inasmuch as it was signed by the associate of Schutt J. instead of by the associate of Hood J. Schutt J. overruled both of these objections, holding that the first was met by the provision in rule 7 of Part I. of the Rules of the Supreme Court in Insolvency 1916 (Vict.), and that the second was a technical objection, which, under sec. 59 of the Insolvency Act 1915, King had waived by filing his notice of objections.

Evidence was then given from which the following facts appeared:-The judgment referred to in the petition was obtained on 23rd January 1920 in an action in which the writ of summons was issued under the provisions of the Instruments Act 1915. King applied for leave to appear and defend the action, but on 22nd January this application was refused by Mann J., who, however, granted leave to appeal from such refusal. Judgment having been signed, a writ of fieri facias was issued on the same day, and Thomas Wood, an officer of the sheriff, was entrusted with the execution thereof. He was unable to see King on that day though he endeavoured to do so, but on the next day, 24th January, he interviewed King, who, in answer to his demand, stated he was not going to satisfy the judgment as his lawyer was appealing, and added, later on, "I could pay it but I won't." Notice of appeal to the High Court against the decision of Mann J. was in fact given on 27th January, and, security having been lodged, the appeal was on the same day "duly instituted " within the meaning of the Rules of the High Court, which operated as a stay against all proceedings under the order appealed from. On 28th January a return was made by the sheriff to the writ

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of fieri facias in these words : "The within-named Roff Courtney H. C. of A. King has no real or personal estate whereof I can cause to be made the money within required or any part thereof as I am within commanded." A petition for the sequestration of King's estate, COMMERCIAL dated 10th February, based upon this demand and return, was then presented by the Bank, and an order nisi dated 11th February was made by Hood J. Notice of objections was filed by King, and the order nisi came on for hearing before Cussen J., who discharged the order but with the proviso that such discharge should be without prejudice to fresh proceedings by the Bank after the appeal to the High Court had been disposed of. The only matters decided by Cussen J. were that the debt of the Bank was a secured debt and ought to have been described by it as such in the petition and order nisi before him, and that he ought not to allow an amendment of the proceedings so as to cure this defect. The refusal of the application for amendment was based upon the fact that the appeal to the High Court was then pending. That appeal was dismissed on 12th May (King v. Commercial Bank of Australia Ltd. (1)), and these proceedings were then launched by the presentation of a new petition dated 14th May, as already stated, no fresh demand having been made by the Bank and the judgment debt remaining unpaid, the Bank still relying on the same facts as constituting an act of insolvency on the part of King. As to the alleged guarantee of Black, the only evidence was that on 22nd December 1919 Black had paid the sum of £4,134 5s. to the Bank, that on 5th June 1920 he had asked the Bank to pay the amount to the credit of Courtney King, Smith & Co., and that the Bank had refused to do so but had paid the amount to the credit of a suspense account in Black's name under "the special agreement."

Schutt J. overruled all the objections, and on 17th June 1920 made the order nisi absolute.

From the order of Schutt J. of 4th June 1920 enlarging the order nisi made by Hood J. on 18th May 1920, and from the order of Schutt J. of 17th June 1920 making that order nisi absolute, King appealed to the Full Court.

On the hearing of the appeal, by consent of the parties, the 7 C.L.R., 569.

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H. C. of A. guarantee given by Black was put in evidence. By it Black agreed (inter alia) to pay to the Bank all advances, loans or credits and all debts then owing or payable or thereafter to become owing or payable by Courtney King, Smith & Co. to the Bank in case that firm should make default in payment thereof or of any part thereof on demand in writing, provided that the amount ultimately payable by King thereunder should not exceed the sum of £4,000 and interest thereon until payment; that the guarantee should be a continuing guarantee, and should extend to cover and be a security for every and all future sum or sums of money at any time due to the Bank upon the general balance of the firm's account: that Black would not by reason of any payment which might be made by him under the guarantee prove for or claim any dividend out of the estate of the firm in the event of any member of the firm becoming insolvent in competition with the Bank; that the Bank should be entitled to place all payments made at any time by Black to a suspense account in his name, and should not be bound to give credit in account in reduction of the firm's indebtedness for the sums so paid, but the Bank might at any time at its discretion appropriate any sums so paid in and towards satisfaction of the indebtedness of the firm, and until such appropriation such sums should be held by the Bank as security for the payment of the firm's indebtness; that the guarantee should remain in force until it was determined as to future advances by notice in writing; and that upon the determination of liability under the guarantee it should be cancelled and retained by the Bank. There were also put in evidence a letter from the Bank to Black dated 3rd December 1919 demanding immediate payment of the £4,000 and interest in terms of the guarantee, and a receipt given by the Bank to Black dated 22nd December 1919 for payment of £4,134 15s, with an intimation that that amount had been placed to the credit of a suspense account in terms of the guarantee.

> The Full Court dismissed the appeal: In re King; Ex parte Commercial Bank of Australia Ltd. [No. 2] (1).

> From that decision of the Full Court King now appealed to the High Court. The grounds of appeal were substantially as follows:-

- 2. That the certified office copy of the said order nisi which H. C. OF A. appointed an impossible and past date, namely, Thursday 3rd May 1920, as the time when cause might be shown against the said order nisi being made absolute was bad in law and should have been COMMERCIAL discharged.
- 3. That the order purporting to have been made herein on 4th June 1920 did not comply with the provisions of the Insolvency Act 1915 and the Rules of the Supreme Court in Insolvency 1916 made thereunder and was wrongly signed.
- 4. That what purported to be a true and office copy of the said order dated 4th June 1920 did not comply with the said Act and Rules and was wrongly signed and certified.
- 5. That the act of insolvency alleged in the said order nisi and in the said affidavit is not an act of insolvency under the said Act or at all and the act of insolvency alleged was not committed by the appellant.
- 6. That the evidence showed that the respondent on or about 22nd December 1919 had received from one Archibald McGregor Black the sum of £4,134 15s, and that, though directed by the said Black so to do, it had or has wholly failed to appropriate or apply such sum to the credit of the current account of Courtney King, Smith & Co. or in reduction of the amount of £9,600 11s. 3d. alleged to be owing by Courtney King, Smith & Co. to the respondent.
- 7. That in the said petition and in the affidavit in support of the petition the respondent wrongfully omitted to state, or wrongfully withheld from the learned Judge who made the order nisi, the fact of the receipt of the said sum of £4,134 15s. in respect of the liability of Courtney King, Smith & Co. to it, and wrongfully failed to value the security of the money so paid to it, and wrongfully failed to offer to give up such security or the said sum of £4,134 15s. or any part of it.
- 8. That the evidence showed that, having regard to the said payment of £4,134 15s. and to the said estimated value of the said security, namely, £5,600, the respondent was not entitled to be admitted as a petitioning creditor in any sum at the time of the presentation of the said petition, or alternatively was not so entitled

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H. C. of A. at the date of the making of the said order absolute, and the said order absolute should therefore have been discharged.

- 9. That all or sufficient of the facts set out in the notice of objections herein were proved; and the facts so proved show that on 24th January 1920, the date of the demand by the sheriff's officer upon which the alleged act of insolvency on which the said order nisi was based, the appellant had obtained leave to appeal against the decision of his Honor Mr. Justice Mann, that an appeal to the High Court of Australia was then being instituted and was in fact duly instituted before the completion of the said act of insolvency, that the respondent was aware of the appellant's intention to appeal, and that the appellant informed the sheriff's officer that he could satisfy the judgment but that, as he was appealing to the High Court, he would not do so.
 - 10. That the appellant did not fail to satisfy the said judgment, and no reasonable opportunity was at any time afforded the appellant to satisfy the said judgment; or the learned primary Judge should have granted the application of the appellant made by his counsel to be permitted to pay the amount of the said judgment.
 - 11. That the return endorsed on 28th January 1920 on the said writ of fieri facias, namely, "The within-named Roff Courtney King has no real or personal estate whereof I can cause to be made the money within required or any part thereof as I am within commanded" was false, and no facts occurred or were proved to warrant the making of such return.
 - 12. That the said Full Court did not exercise the discretion vested in them by law in dealing with the said appeal, or alternatively improperly exercised such discretion.
 - 13. That it was unjust and inequitable to sequestrate the estate of the appellant, and the respondent would not have been and would not be prejudiced substantially or at all by the discharge of the said order nisi.
 - 14. That the said petition was not made bonâ fide and with a view to get the respondent's debt paid or to the distribution of the assets of the appellant amongst his creditors, and such creditors were not interested in the said petition, or alternatively it was in the interest of such creditors to have the said order nisi discharged.

15. That the said petition was unfounded, vexatious, malicious H. C. of A. and oppressive and was made with ulterior motives or objects.

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Cohen K.C. (with him Robertson and Dean), for the appellant. In order to bring the case within sec. 49 (8) of the Insolvency Act 1915 it is necessary to show that there was a failure by the debtor to pay the debt when called upon to do so, and also that there was a return of nulla bona to the writ of execution justified by the facts. It must be shown that the return is true (In re Rylah; Ex parte Colonial Bank of Australasia Ltd. (1)). The petitioning creditor has not discharged the onus which is upon him unless he shows that the sheriff's officer has done everything reasonable to find out whether the debtor has property which will satisfy the debt. [Counsel referred to Gufford v. Woodgate (2); Leonard v. Simpson (3).] The payment by Black to the Bank was in pursuance of a demand for payment under the guarantee. The provision in the guarantee for payment into a suspense account was intended to apply in the event only of partial payments. But when the whole amount was paid the relationship between the Bank and Black came entirely to an end. The direction by Black to pay the money to the credit of the account of Courtney King, Smith & Co. deprived Black of any right to the money, and the Bank was bound to comply with the direction. The result of such compliance would have been that no sufficient debt to support the proceedings would remain, for the securities are valued at £5,600, leaving a debt of £4,000, which would have been wiped out by the £4,000 paid by Black. The Court should, in the exercise of its discretion, have refused to make the order absolute; for under the circumstances connected with this payment of £4,000 the sequestration of the appellant's estate will not benefit the Bank. The Bank can by merely crediting that sum to the account of Courtney King, Smith & Co. pay itself in full.

[STARKE J. referred to Dowling v. Colonial Mutual Life Assurance Society Ltd (4).]

The money paid by Black to the Bank was in such a position that the appellant had an interest in it, and it was therefore a security which the Bank should have valued or offered to give up. There

^{(1) 24} V.L.R., 844; 20 A.L.T., 277. (2) 11 East, 296.

^{(3) 2} Bing. N.C., 176. (4) 20 C.L.R., 509.

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H. C. OF A. was no act of insolvency within sec. 49 (8) of the Insolvency Act alleged in the order nisi, for the statement therein is that the writ of fieri facias was returned "unsatisfied in whole" whereas it should have been stated that it was returned "unsatisfied in whole or in part." The statement that the writ was returned unsatisfied in whole does not negative the fact that it was returned satisfied in part, and it is necessary to negative that fact in order to establish the act of insolvency. No amendment should be allowed so as to make the allegation in the order nisi correspond with the actual return (In re Caskie and Gane (1)). The insertion in the office copy of the order nisi of an impossible and past day as the day when cause might be shown against the order nisi being made absolute was such a substantial error that the Court should have discharged the order nisi, and should not have enlarged it (In re Bayne (2)). The fact that in that case the error was in the order nisi itself makes no difference, for all that the debtor sees is the office copy. [Counsel referred to secs. 52 and 58 of the Insolvency Act 1915.] The order made by Schutt J. enlarging the order nisi should have been signed by him and not by his associate. That is not one of the orders which rule 7 of Part I. of the Rules of the Supreme Court in Insolvency 1916 permits to be signed by an associate. The office copy of that enlarging order should, under rule 13 of those Rules, have been signed by the associate of Hood J., who made the order nisi, and not by the associate of Schutt J. This was not a technical objection such as should be held to have been waived under sec. 59 by the filing of notice of objections. (See In re Newbigging (3).) The original order nisi of 11th February 1920 having been discharged, there should have been a fresh demand for payment in order to support the present proceedings.

Pigott and Lowe, for the respondent, were not called upon.

KNOX C.J. In this case the first ground taken by counsel for the appellant is that the return of nulla bona to the writ of execution was not a correct return. Mr. Cohen alleged that the evidence showed either that the return was untrue or that it was made recklessly without any proper ground of belief in its truth. On

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^{(1) (1916)} V.L.R., 332; 37 A.L.T., 206.

^{(2) 25} A.L.T., 176. (3) 1 W.W. & àB. (I. E. & M.), 33.

that objection I think it is clear that the requirement of sec. 49 (8) H. C. of A. of the Insolvency Act 1915 in respect of the return of the writ is complied with if there be proof that the execution has issued and has been returned unsatisfied in whole or in part. I do not think COMMERCIAL fied in whole or in part, a refusal or failure on the part of the judgment debtor to pay the debt when demanded by the person charged with the execution of the writ. For these reasons I think that there is no force in this objection.

that the truth or falsity of the return is a matter relevant to be considered. Presumably the Legislature considered that the return might safely be treated as correct, and it has used words which admit of only one meaning. In that view of the matter I cannot agree with the decision in In re Rylah; Ex parte Colonial Bank of Australasia Ltd. (1), that on the motion to make absolute an order nisi for sequestration the question whether the return to the writ of execution is true or false may be investigated. I think that that case was wrongly decided, as the only requirement of the Act is that the return should show that the execution is unsatisfied in whole or in part. It is said that that is an insufficient protection to the debtor, but, as my brother Gavan Duffy pointed out in argument, the protection of the debtor is secured by the proviso to the section, which runs as follows: "Provided that the debtor has been called upon to satisfy such judgment decree or order by the officer or other person charged with the execution thereof and has failed to do so." The petitioner cannot rest on the return to the writ alone: he must prove, in addition to a return of the writ unsatis-

With regard to the other objections taken by Mr. Cohen, I see no reason to doubt that the decision of the Full Court of the State and that of Schutt J. were correct.

GAVAN DUFFY J. I agree.

STARKE J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, C. E. Coy. Solicitors for the respondent, J. M. Smith & Emmerton.

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(1) 24 V.L.R., 844; 20 A.L.T., 277.

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