1932 *Present :* **Lyall Grant and Akbar JJ.**

In re DE SARAM.

124—D. C. (Inty.) Colombo, 3,920.

Insolvency—Dishonesty and fraud—Refusal of certificate—Unexplained allegations—Burden of proof—Court of Appeal disagrees with original Court—Powers of Court—Ordinance No. 7 of 1853, ss. 124 and 151.

Where an insolvent has been guilty of wilful falsehood or dishonesty he is not entitled to a certificate. Where a set of facts is shown, which unexplained would lead a reasonable man to believe the allegations of the opposing creditor, the burden is on the insolvent to relieve himself from the inference to be drawn from the facts.

Where the Court of Appeal disagrees with the conclusion of fact formed by the Court below, it is in no way fettered by the amount of the sentence which the Court below has thought fit to pass and may absolutely refuse an order of discharge, although the lower Court merely suspended the certificate.

APPEAL from an order of the District Judge of Colombo. The facts are fully stated in the judgment.

Soertsz (with *B. F. de Silva*), for creditor-appellant.

F. de Zoysa, K.C. (with him *Nadarajah and Choksy*), for insolvent-respondent.

March 14, 1932. AKBAR J.—

The appellant is the opposing creditor in this insolvency appeal and he is appealing against the order of the District Judge awarding the insolvent a certificate of discharge of the 2nd class and an absolute and unconditional discharge from all his liabilities. The opposing creditor (hereinafter referred to as the appellant) is the Acting District Judge of Colombo and is the brother of the insolvent, who is a proctor practising in Colombo for the last 26 years. The facts in this case are somewhat unusual, but it is clear from the large volume of evidence led and the many documents, that the appellant in addition to his ordinary duties of a Judge, invested his savings by lending money and that he

reposed a great deal of confidence in his brother, the insolvent, not only in the choice of the borrowers but also in the recovery of the interest and the principal sums invested. Many of the loans were guaranteed by the insolvent and were for short terms, the insolvent getting a commission of 2½ to 3 per cent. from the persons borrowing, not only for each loan but for each extension, of which there was a large number in the case of certain favoured debtors. So that, so long as the borrowers made good in the end, the transactions were profitable not only to the appellant but also to the insolvent . . . . .

If we turn to the career of the insolvent, he too, in addition to his main occupation as a proctor, had several side lines with a view to augmenting his income. He began practice as a proctor about 26 years ago, and according to him had a very successful career, so much so that he began buying rubber shares from 1909 to 1920. Apparently these speculations were successful, for he says he was worth in 1920 about 1½ lakhs rupees, including the value of a house called "Alderley" which he bought for Rs. 40,000. He borrowed Rs. 30,000 from the appellant and lent it to a Taxi-Cab Co., which loan was afterwards converted into shares. He repaid his brother, but he lost this Rs. 30,000 as the Company failed. The insolvent borrowed large sums from the appellant on interest and list I. 4 shows these items, totalling Rs. 155,000 excluding Rs. 42,000 still due.

Insolvent himself lent out moneys on interest and I. 485 shows the items up to October, 1925. According to the insolvent's evidence his affairs appeared to flourish till 1925 for he says "I was in funds up to 1925". The insolvent admitted that he played cards for high stakes and that he was a punter for 10 or 12 years. His evidence was as follows:—"I became a punter 10 or 12 years ago. I have placed money on Madras and Calcutta races. My brother too was a punter. I have put as much as Rs. 26,000 on one race and won as much as Rs. 82,000 on a single race. I lost this amount on the very day. My volume of losses and winnings must be about equal. My present income is practically nil". Then again he stated "I have attended races regularly and also played cards for stakes. I did not keep any statement of my winnings or losses on cards and races. I don't think I lost on racing but I lost on cards. I used to play poker or bridge. I did not play cards with Don William or any Maharajah but I did so with my Colombo friends. I played cards when I had my own money and not when I was badly off. I played for very high stakes. I know of people who have lost about Rs. 20,000 or Rs. 30,000 in one night. The moneys I spent on racing and cards playing would have absorbed moneys I earned and moneys I got by way of interest on loans." From July, 1925, to June, 1928, he embarked on a series of speculations buying raw rubber and selling it on a fluctuating market and the net result of his operations was that he was a loser in the end of Rs. 58,000.

It is urged that the money which insolvent lost was all his own money. But was it? He kept no accounts and his own evidence shows that he was a most reckless gambler. This is an element which must be kept in mind when his evidence is being weighed, for no books of account of any kind have been produced by him.

The principal person with whom both the insolvent and the appellant had extensive dealings is a man called Walter Perera, who figures prominently in this case. List I. 136 shows the loans made by the appellant to him from time to time.

On July 14, 1926, Walter Perera filed an application under section 2 of Ordinance No. 2 of 1918, alleging that the insolvent had lent to the petitioner various sums of money in respect of which the respondent charged as his commission (in addition to interest at the rate of 12 to 18 per centum per annum), sums ranging from 36 per centum per annum to 48 per centum per annum on the capital sums borrowed. The total amount so paid as commission the petitioner estimated at Rs. 125,000. All the principal sums borrowed were said to have been paid except Rs. 28,000. The petitioner alleged that these transactions were unconscionable and were induced by undue influence and he prayed for relief. After this case was postponed for nearly 2 years, the insolvent filed a declaration of insolvency on a date when the case was fixed for trial, namely, July 28, 1928. He disclosed liabilities to the extent of Rs. 142,465.35 and his only assets were his furniture valued at Rs. 10,000 which was sold for Rs. 2,000 and the loan of Rs. 28,000 above mentioned to Walter Perera. The largest item in his liabilities was a sum of Rs. 89,126.91 due to the appellant. This sum was made up as follows:—

(1) 3 sums of Rs. 12,000, Rs. 20,000, and Rs. 10,000 borrowed by the insolvent in July 18, 1925, September 21, 1925, and September 20, 1926, with interest, *i.e.*, Rs. 42,000 plus interest from 1925 and 1926. It will be remembered that the insolvent himself admitted that he was in funds till 1925.

(2) Rs. 27,177.71 plus interest due in respect of D. C., Colombo, No. 22,588, from Walter Perera.

(3) Rs. 3,175 plus interest on account of a rubber transaction.

(4) Rs. 17,048.66 due in respect of D. C. 22,585. Item No. (2) above is included in charge 4 (*a*) under section 151 (3) of the Insolvency Ordinance framed by the appellant and is disclosed in the documents C. 33 of March 27, 1922, and the letters preceding that letter, viz., documents I. 124 of August 24, 1921, to I. 135 and C. 27 to C. 32, and the documents following, viz., letters C. 34, C. 36, C. 37, C. 38, C. 39, to C. 83 of May 11, 1925, and I. 500 to I. 504, I. 326, I. 329, &c.

Charge 4 (*a*) charges the insolvent with contracting the debt No. (2) above by fraud and false pretences, in that he had taken a secondary mortgage instead of a primary mortgage from Walter Perera in favour of the appellant over a property called "Harburgh" in Castle street, Colombo, for Rs. 40,000, against the direct instructions of the appellant and by deceiving the appellant and making him believe that the money had been lent on a primary mortgage. In the face of the letter C. 33 of March 27, 1922, from Kandy, and the insolvent's reply C. 34 of March 29, 1922, from Colombo, showing that the bond had been signed that very day, and in view of the last paragraph of C. 34 the charge has to my mind been clearly proved.

I. 500 of April 1, 1922, giving notice to the real primary mortgagee that his mortgage will be paid up on June 30, 1922, shows that the statement on the face of the deed signed on March 29, in favour of the appellant and referred to in C. 34 was a false statement to the knowledge of the insolvent as admitted by him in evidence and that it was inserted to deceive the appellant. The Rs. 40,000 was made up of a previous loan of Rs. 20,000 to Walter Perera guaranteed by the insolvent and two other payments of Rs. 10,000 each conditional on the bond being a primary mortgage. C. 37 from insolvent says not a word of the mortgage in favour of Mr. Bartholomeusz ; on the other hand there is a promise to send " the relative title deeds . . . . in due course ". The appellant called the attention of the insolvent to the non-sending of the title deeds by C. 43 and C. 46 of July 5, 1923, and the first written intimation of Mr. Bartholomeusz's primary mortgage was in C. 47 of July 12, 1923, but with the assurance that till the title deeds were sent after payment of Mr. Bartholomeusz's mortgage, the appellant's loan to Walter Perera was to stand guaranteed by the insolvent. This guarantee and the trust which the appellant had always reposed in the insolvent explain why the appellant made further loans to Walter Perera, most of which were guaranteed by the insolvent, including a loan of Rs. 26,000 by Mrs. de Sarm to Walter Perera which was subsequently guaranteed by the insolvent depositing his title deeds in respect of " Alderly ". The original deceit stands clearly proved and the fact that the appellant was induced to acquiesce in the situation owing to the trust that he had always placed in his brother cannot in my opinion in any way lessen the full effect of the fraud.

It is true that the fraud occurred in 1922, but the loss of the sum mentioned in item No. (2) above to the appellant is directly due to this fraud because Walter Perera never paid off the Rs. 17,500 due on Mr. Bartholomeusz's primary mortgage. This debt of Rs. 40,000 was guaranteed by the insolvent according to the terms of C. 47 and the insolvent included the shortfall in bond C. 131 given as a secondary mortgage by the insolvent over his property on May 31, 1928.

Under charge (1) the insolvent was charged with wilfully and with intent to conceal the true state of affairs, failing to keep proper books of account in connection with his trade in rubber with John Perera and his trade in arrack with Don William under section 151 (9) of the Insolvency Ordinance, No. 7 of 1853. Under this charge it is first necessary to establish that the insolvent was a " trader ", or in other words that John Perera was a partner with him in respect of the trade of rubber or that he was merely a nominee of the insolvent and that the trade was really carried on by the insolvent with John Perera as a dummy to hide from the world the fact that he, a proctor, was engaged in commercial enterprises. Similarly in the case of Don William in respect of Arrack. As regards John Perera the insolvent admitted that he financed him in his rubber trade, equally sharing profits. This does not however show that he was a partner with John Perera (section 3 of 21 of 1866) ; but there are many points which I can take into account under section 21 (4) of 7 of 1840 for the purpose of determining whether there was such a partnership or whether John Perera was not after all a mere nominee. He financed

John Perera from 1926 up to August, 1927, "to the tune of thousands of thousands of rupees". He began financing John Perera after a crisis arose in his financial position in 1925 and he did so by backing John Perera's cheques for the purpose of discounting them with professional money-lenders, viz., Sea street Chetties. These are shown in his list of liabilities at Rs. 7,750. When the insolvent held his brother's power of attorney in 1927, when the latter went on leave, he was expressly instructed to sue John Perera for repayment of a balance sum of Rs. 5,000 due to the appellant, which the insolvent failed to do. Instead of taking these steps the insolvent actually lent Rs. 6,000 of the appellant's money without express authority on May 25, 1927, which loan it is said was repaid on September 6, 1927 (see letters C. 7 and C. 15), and another sum of Rs. 2,600 on September 26, 1927, which the insolvent repaid on February 17, 1928, by including it in the sum of Rs. 16,100 referred to in C. 15. It will be noticed that the insolvent paid this sum after he was pressed on the matter by the appellant by his letters C. 16 and C. 17. The fact that this so-called loan to John Perera was repaid apparently by the insolvent shows I think the identity of interests of John Perera and the insolvent during this time. The insolvent also admitted that there was a fire in the rubber stores of John Perera, and that Perera had instituted a case against an Insurance Co. for Rs. 50,000 and that if John Perera won his claim (as Walter Perera did when he too had a similar fire in his yard and the Insurance Co. paid up no less than Rs. 60,000 in settlement) he would be entitled to half this sum. Unfortunately this expectation did not materialize as John Perera lost his case in the District Court and on appeal. The insolvent admitted to the assignee that he was more fortunate with regard to his other client Walter Perera, who paid over to him Rs. 20.000 out of the money paid by the Insurance Co. The insolvent drew his profits from time to time from John Perera, but from December, 1926, to August, 1927, he was unable to draw anything from John Perera nor was he able to get any accounts. It is significant that in his statement of liabilities and assets, his debts to the Chetties incurred on account of John Perera are shown amongst the liabilities but nothing is shown as due from John Perera either as the insolvent's half share of the profits or in respect of the moneys borrowed from the Chetties on account of John Perera by the insolvent. The insolvent admitted in his evidence that he had to get Rs. 3,000 or Rs. 4,000 from John Perera in December, 1926, as his share of the profits. The same remarks apply to the insolvent's connection with Don William. Here too the connection began in 1926 (September) and ended on September 30, 1927, and here too the insolvent financed Don William by cheques discounted by Chetties, the whole proceeds of which went into an account entitled the A. R. account and which was operated on by the insolvent alone. There is a vague unreality about the exact terms on which this venture was conducted, which becomes quite apparent when we contrast the insolvent's evidence given before the assignee with the evidence given by Don William in these proceedings. Don William contradicts the evidence given by him in cross-examination in his re-examination. In cross-examination "he had promised to pay the Chetty" but in re-examination "the Chetty's claim against him is gone". The Chetty's

claim of Rs. 13,500 is shown among the liabilities, but any claim which the insolvent may have had against Don William in respect of the moneys lent to Don William by the insolvent from the A. R. account is left out from the realizable assets. Further, the incidents relating to the sum of Rs. 2,750 drawn by the insolvent from the funds of the appellant when the insolvent acted as the appellant's attorney point in my mind to the conclusion that Don William was a mere servant or nominee of the insolvent who had lent his name to the business. These incidents are disclosed in the evidence and also in the documents, notably C. 7 and C. 15. The insolvent admitted that he gave his brother's cheque to Don William and that he left the counterfoil blank. This cheque (though issued the day before the appellant arrived in Ceylon and when the appellant's account in the bank had not been replenished by payment of appellant's salary for December) was cashed on January 10, 1928, after such payment, and the pass book was not available to the appellant till this cheque had been cashed by the insolvent's clerk Konniah. And yet we find this sum paid into the A. R. account.

The rubber trade of John Perera and the arrack trade of Don William both begin in 1926 and end in 1927. Both the businesses collapsed hopelessly about the same time ending in complete loss. It is to be noted that the insolvent began these doubtful ventures after 1925, the year in which he was beginning to feel the pinch in his financial position. It was in July, 1925, that he began his speculations in raw rubber and I. 335 is a promissory note for Rs. 29,000 given by the insolvent on July 29, 1925, to Messrs. E. John & Co., one of the brokers who acted for him in his speculations relating to rubber.

It is also significant that he borrowed Rs. 12,000 on July 18, 1925, Rs. 20,000 on September 21, 1925, and Rs. 10,000 on September 20, 1926, from the appellant. In October, 1926, he mortgaged his house to the Eastern Bank and from this money he paid his debts including Rs. 16,000 to the Turf Club on account of voucher betting and Rs. 7,500 on account of rubber speculations. I. 485 only shows loans by the insolvent up to October, 1925. All these facts show that the insolvent's financial position began to totter about 1925 and that he thereafter embarked on risky enterprises hoping to retrieve his position and that he actually traded in rubber and arrack. He has filed no accounts with regard to these two trades, for the copy of the A. R. account with the Bank (with nothing to show to whom the sums were paid) and the few arrack return copies, can hardly be called an account. I therefore hold that the insolvent is guilty of the 1st charge under section 151 (9). Even if he was not a trader, he should have disclosed the debts due to him from John Perera and Don William under charge (2) in respect of moneys lent, for the charge is wide enough to include such debts, even if there was no partnership between the insolvent and John Perera in respect of the trade in rubber and between the insolvent and Don William in respect of the arrack rent. The words "with whom he carried on business in partnership" can be regarded as merely descriptive and therefore as mere surplusage. I do not agree with the District Judge that charge (2) relates to profits which could only result from a partnership.

Charges 4 (*b*), (*c*), and (*d*) relate to a speculation in buying and selling rubber on a fluctuating market indulged in by the appellant and Mr. Bartholomeusz, Barrister-at-law, on the instigation of the insolvent in July, 1925, when the latter's financial position was beginning to be desperate. In spite of a previous unsuccessful venture in the same field the appellant attempted a second time to try his fortune in the rubber market in July, 1925. It is clear from Mr. Bartholomeusz's evidence that he was not told of the fact that the appellant was also a co-adventurer at the beginning, when Mr. Bartholomeusz rather hesitatingly agreed to try a modest Rs. 3,000 and to limit his losses to that sum. The result of all the evidence on this matter and the documents is to point to the conclusion that the insolvent dragged these two into the venture with the object of getting funds from them to help him in his own speculations. He succeeded in getting Rs. 4,500 from the appellant and Rs. 3,000 from Mr. Bartholomeusz on July 14, 1925 (see I. 467 and I. 468).

The rubber was sold on July 29 at a loss. On August 11 he got Rs. 1,000 from Mr. Bartholomeusz and without disclosing this fact he got Rs. 7,000 from the appellant the same day. On September 4 he got a further sum of Rs. 1,000 from Mr. Bartholomeusz. As the rubber was sold on July 29, 1925, on his orders the insolvent must have known the amount of the loss on the 10 tons bought by the appellant and Mr. Bartholomeusz (see I. 467) and that the appellant by paying Rs. 7,000 on August 11 was paying more than his share of the loss. And yet to letters C. 84 of February 4, 1926, I. 121, C. 88, C. 85, C. 87, C. 89, C. 90, no reply is sent by the insolvent. I. 467 of October 12, 1925, and I. 468 of the same date are addressed to the insolvent and show how the account stood with Messrs. E. John & Co. C. 91 or I. 2A of June, 1926, and I. 2B and I. 2C are addressed to the insolvent and the loans of Rs. 1,000 each by Mr. Bartholomeusz are not shown in the rubber account of Bartholomeusz and the appellant but in the accounts of the insolvent. These accounts were so made up at the instance of the insolvent according to Mr. Paterson's evidence and yet he sends no reply to the letters C. 93, C. 94, C. 95, C. 96, C. 97, C. 98, C. 99, C. 100, C. 101, C. 102, C. 104 of March 1, 1927. By C. 103 of March 1, 1927, the appellant having come to the end of his patience, wrote to Mr. Bartholomeusz direct. The evidence and the letters C. 105, C. 106, C. 107, C. 108, C. 110, C. 111, C. 112, C. 113, C. 114, C. 115, C. 116, C. 117, C. 118, C. 119, and C. 120, show how the matter ended.

In my opinion the charges 4 (*b*), 4 (*c*), and 4 (*d*) have been proved. They are all offences under section 151 (3) of the Ordinance. In the end the insolvent admitted his liability for a sum of Rs. 3,175 to the appellant and this is the sum in item (3) of the debts due by the insolvent to the appellant mentioned by me in an earlier part of my judgment.

The insolvent was badly in want of funds to meet the liabilities on his own speculations, especially the liability on promissory note I. 335 which, it should be noted, was paid up on September 19, 1927, and he obtained the sum of Rs. 7,000 by inducing the appellant to believe that it was a loan to Mr. Bartholomeusz. He also obtained two sums of Rs. 1,000 each from Mr. Bartholomeusz which were entered in his own account

when the accounts were settled in June, 1926 (see I. 2A, I. 2B, and I. 2C), and this fact was hidden by the insolvent from the appellant for over one year (see C. 93 and the subsequent letters ending with C. 118 of May 6, 1928, and C. 120 of May 9, 1928). After admitting his liability for this amount on May 9, 1928, by C. 120 and after the appellant had written C. 123 on May 15, 1928, in which the appellant threatened him with the charges in charges 4 (*b*) and 4 (*c*), the insolvent filed his declaration of insolvency on July 28, 1928.

Charge (3) and charge 6 (*c*) were not pressed in appeal, and I do not think charges (5), (7), and (8) have been proved. As regards charges 6 (*a*), (*b*), and (*d*) although they do not appear to come under section 151 of 7 of 1853, there is the general section 124, under which a Court can always take into account the conduct of the insolvent in relation to his estate. Charge (2) which I have already discussed can also be brought under section 124 or section 127. As regards the facts alleged under charges 6 (*a*), (*b*) and (*d*) there can I think be no doubt. We have the express evidence of the appellant that the withdrawals of the sums mentioned in C 7 of January 20, 1928, which the insolvent had drawn from the appellant's account were unauthorized. The power of attorney although a full one only authorized the attorney to invest the principal's money on proper security. The fact that the insolvent helped himself to the money because the appellant had not hesitated in the past to lend money to his brother is no answer to the charge that the moneys were drawn without the authority of the principal. Neither does the fact that the insolvent repaid all these items on February 9, 1928, and the item of Rs. 2,750 on February 12, 1928 (see C. 21 and C. 23). affect the question. Letter C. 16 of January 27, 1928, supports the testimony of the appellant that the loans were unauthorized, for that letter definitely states that the appellant had expressly directed the insolvent to let the money remain in the Bank. The insolvent never protested in writing against this definite assertion by the appellant in C. 16, but on the contrary he paid in all the sums with interest in full when by C. 17 of January 30, 1928, the appellant threatened him in effect with serious consequences. I think the charges 6 (*a*), (*b*) and (*d*) have been fully proved, especially 6 (*d*). The insolvent, when his position was almost hopeless, borrowed Rs. 30,000 from the Imperial Bank in 1927 and he speculated in rubber with Messrs. Philips & Co. by drawing a cheque in their favour for Rs. 25,256 and the loss on this deal was Rs. 5,000. I cannot see how it can be urged that this is not reckless conduct. It is from this sum of Rs. 30,000 that the insolvent says he repaid his brother the Rs. 16,100 which he had misappropriated. It is true that the insolvent paid up all interest on the Rs. 42,000 he had borrowed up to December, 1927, but this was on December 22, 1927, and January 4, 1928 (see C. 137 and C. 138). The payments were made before the discovery by the appellant of the unauthorized withdrawals (see C. 7 of January, 1928). This conduct of the insolvent shows that he had discovered early a weakness of the appellant. The documents show that the most effective method of conciliating the appellant, which the insolvent had discovered, was to send the interest for a new extension whenever the appellant was vociferous in demanding the repayment of a loan (made even to others)

which was overdue, and if the appellant still persisted, the insolvent had only to guarantee the extension.

The insolvent's conduct, to my mind, has been most unsatisfactory and dishonest on the general charge under section 124 and the specific charges I have mentioned above. He has produced no books, not even of his earnings in his profession. Mr. Wilson's evidence regarding the disappearance of 2C1—2C7 is entirely hearsay because Mr. Mack was not called as a witness. I cannot understand how these books disappeared. If the insolvent had rich and influential clients as he stated, it cannot be that none of them owed any money for professional services when he filed his declaration of insolvency on July 28, 1928. No such sums are shown in his list of assets.

Before discussing the law on the subject I must say a few words with regard to the loan of Rs. 26,000 to Mrs. de Saram, the shortfall on which was Rs. 17,048.66 and which sum was included in bond C. 131. The documents I. 408 to I. 466 show that this loan was guaranteed by the insolvent, and that the security was to be by way of a primary mortgage instead of the tertiary mortgage which the insolvent ultimately secured for the benefit of the appellant. The correspondence also shows how grossly the insolvent delayed in taking steps to recover this sum from Walter Perera and how the services of Messrs. F. J. & G. de Saram had to be requisitioned by Mrs. de Saram in the end in May, 1928. This explains why the insolvent consented to include the shortfall on this item in his bond C. 131 of May 31, 1928.

In the result I am of opinion that the insolvent is guilty of the following charges :—

(*a*) Charge (1) (see section 151, sub-section (9), of 7 of 1853) in that he actually traded in rubber with John Perera and in arrack with Don William and that he has wilfully and with intent to conceal the true nature of his dealings with them omitted to keep proper accounts. All the three elements required by the sub-section have been established here unlike the case reported in *7, Tambiah's Reports, p. 71.*

(*b*) Charge (4) (see section 151, sub-section (3)) in that the insolvent contracted the liability to pay to the appellant the sum of Rs. 27,305.04 in respect of D. C. 22,588 owing to his fraud and false pretence in taking a secondary mortgage from Walter Perera over the property "Harburgh" to secure a debt of Rs. 40,000 against the express instructions of the appellant and in thereby deceiving and making the appellant believe that the money had been lent on a primary mortgage.

(*c*) Charge (4) (*b*) (see section 151 (3)) in that the insolvent contracted the debt of Rs. 3,175 and Rs. 17.40 interest due to the appellant by fraudulently deceiving the appellant to believe that a loan of Rs. 7,000 was required by Mr. Bartholomeusz.

(*d*) Charge (4) (*c*) (see section 151 (3)) in that the insolvent contracted the debt specified in (*c*) above because he had misappropriated and applied to pay his own liabilities the sums of Rs. 4,500, Rs. 3,000, Rs. 7,000, and Rs. 2,000 contributed by the appellant

and Mr. Bartholomeusz on the express understanding that they were to be utilized on their joint contract to purchase and sell ten tons of rubber. I have indicated the evidence in detail to show why the insolvent had one account with Messrs. E. John & Co. in respect of his own speculations and those of the joint speculation of Mr. Bartholomeusz and the appellant. I. 468 dated October 12, 1925, and the insolvent's conduct during the whole period show, I think, that the charge has been proved.

(*e*) Charge (4) (*d*) (see section 151 (3)) in that the insolvent incurred the debt mentioned in (c) above owing to the fact that he misappropriated the two sums of Rs. 1,000 each paid by Mr. Bartholomeusz on August 11 and September 4, 1925. They were not shown in the accounts he submitted in June, 1926, to the appellant and he withheld the fact of the payment of Rs. 1,000 on August 11, 1925, from the appellant in order to induce the latter to pay Rs. 7,000 as a loan to Bartholomeusz.

These are all offences under section 151 of 7 of 1853. In addition to these charges I find that the insolvent is guilty of charges 6 (*a*), 6 (*b*), and 6 (*d*) which can be taken into account under section 124. Further, even if the insolvent was not a trader under charge (1) he would be guilty under charge (2) in that he concealed from the Court, debts due to him from John Perera and Don William in respect of their trade in rubber and arrack respectively, which charges can be taken into account under section 124 and section 127. So far as these latter charges are concerned under section 124, charges 6 (*a*), 6 (*b*), 6 (*d*), and 2 contain the particulars required according to the ruling in the case of *Marikar v. Arunachalam Chetty* [1].

It has been held in *ex parte Ryder* (*26, L. J. Bankruptcy, p. 69*) under the English Act that stock-jobbing acts even though they may not be strictly "gaming and wagering" could not be overlooked by the Court with regard to the bankrupt's general conduct, on a question of the issue of a certificate.

In the case of *ex parte Dobson* (*25, L. J. Bankruptcy, p. 17*) it was held that a Court must consider not only the bankrupt and his affairs, but also the interests of society and that where he has been guilty of wilful falsehood or sheer dishonesty he is not entitled to a certificate. Under section 151 of 7 of 1853 where it appears to the Court that the insolvent has committed any of the offences specified therein, "the Court shall refuse to grant a certificate or shall suspend the same for such time as it shall think fit".

In *William on Bankruptcy, s. 26, p. 116,* there is a reference to the power of the Court to refuse the discharge where the bankrupt has been guilty of gross misconduct as a trader although he is not guilty of any of the specific offences mentioned in the section. There is a similar statement of the law (on the authority of *re Badcock, 3 Morr., p. 138*) in *2 Halsbury's Laws, s. 436.* And in paragraph 437, I find this passage "when the reasons assigned by the Court below for coming to the conclusion that a bankrupt has not been guilty of misconduct are

[1] *18 N. L. R. 75.*

illusory, or such as the Court of Appeal can see to be wrong, it is the duty of the Court of Appeal to do what the Court below should have done". Further, where the Court of Appeal disagrees with the cosion of fact formed by the Court below, it is in no way fettered by the amount of the sentence which the Court below has thought fit to pass and may absolutely refuse an order of discharge, although the Court below merely suspended it. See also *re Goonasinghe* (*5 Times of Ceylon L. R., p. 152*).

In the case now before me, in my opinion, the Court below came to an erroneous conclusion on the facts. It has been held locally in *Mohamadu v. Ramasamy Chetty* ' that the onus does not lie entirely on the opposing creditor to prove that the insolvent has committed an offence and that the responsibility was cast on the Court to inquire into the suspicious features in the case. In that particular case in the absence of satisfactory explanation by the insolvent his conduct was held to be fraudulent.

In an American Text Book (*1 Collier on Bankruptcy, p. 510*) it is stated that though the burden of proof was on the opposing creditor, where a set of facts is shown which unexplained would lead a reasonable man to believe the allegations of the objector the burden was on the bankrupt to relieve himself from the inference to be drawn from the facts. This of course is the ordinary rule of evidence, that when any fact is within the special knowledge of a party, the burden of proving those facts is on him. Collier goes on to say that it is not necessary that the alleged ground for refusing a discharge be proved beyond a reasonable doubt as in the case of the trial of a criminal offence, although, the conscience of the Court should be satisfied by clear and convincing testimony that the bankrupt is not entitled to his discharge. Whether this last statement of law is right or not it does not matter in the case before me. Here the appellant has placed certain facts which prove the commission of the offences I have mentioned by the insolvent, and the explanations given by the insolvent in his defence are so unconvincing and unsatisfactory that I have no doubt that he is guilty of these charges.

That being so, the appeal is allowed with costs. The order of the District Judge ordering the insolvent a certificate of the 2nd class is set aside and I direct that a certificate of conformity be refused.

LYALL GRANT J.—Agreed in a separate judgment.

Appeal allowed.