Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Bank of Australasia v. *Harris, from Queensland; heard* 21*st June,* 1861 ; *delivered February* 8, 1862.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.

THE action in the Supreme Court at Moreton Bay, the verdict and judgment in which have produced the present Appeal, was brought upon the 7th of October, 1859, by the Appellants on a bill of exchange for 1,336*l.* 8*s.* 3*d.*, which, though dated 1st July, 1859, was drawn on or before the 28th of June in that year, payable three months after date to the order of Messrs. Lloyd and Co., of Sydney, the drawers. The Respondents, gentlemen in trade at Brisbane, Moreton Bay, were the drawees, and were the Defendants in the action. The Bill was placed by Lloyd and Co., on the 28th of June, 1859, at Sydney, in the hands of the Appellants, their bankers, and was on the following day transmitted by the Appellants to Brisbane for acceptance by the Respondents, who accepted it accordingly on the 3rd or 4th of July, 1859. The Appellants on the 8th of the same month received it back from Brisbane thus accepted, and it was afterwards, while in their hands, indorsed (generally) by Lloyd and Co., on the 9th or 10th of the same month.

It was formally discounted by the Appellants on the 11th of that month, and the produce passed to the credit of Lloyd and Co., in account with the Appellants accordingly. They thus became, at least as between them and Lloyd and Co, the

absolute owners of the Bill for valuable and full consideration, whether by a title commencing before the 2nd of July, 1859 (though there was not any indorsement before the 9th or 10th of that month), or commencing at a later day. It may be taken that Lloyd and Co. stopped payment or suspended their payments on the 5th of the same July. They were at the time indebted to the Appellants in 5,000*l.* or upwards. The estate of Lloyd and Co. was not sequestrated until a day in September 1859; it was then judicially sequestrated for the benefit of their creditors by the Supreme Court of New South Wales. This, for all or many purposes, was equivalent to bankruptcy. During the intermediate time they had continued to a certain extent to transact business, notwithstanding the stoppage or suspension.

The pleadings in the action are stated in the 4th and 5th pages of the printed Record of Proceedings. To the declaration, one in the ordinary form by the Appellants, as indorsees, the pleas of the Respondents were thus :—

The defendants, by William Rawlins their attorney, as to the first count of the declaration say, that before and at the time the said bill of exchange was endorsed by the said George A. Lloyd and Co. to the plaintiffs, as in the declaration mentioned, the said G. A. Lloyd and Co. were insolvent, of which the plaintiffs then had notice.

And the defendants further say, that the said G. A. Lloyd and Co. then being insolvent as aforessid, and then being also indebted to the plaintiffs in a sum larger than the said sum of one thousand three hundred and thirty-six pounds eight shillings and threepence, endorsed the said bill of exchange to the plaintiffs in order that the said bill might be discounted by the plaintiffs, for the sole purpose of enabling the plaintiffs to apply the proceeds thereof in reduction of their said debt.

And the defendants further say, that the plaintiffs then well knowing the premises did discount the said bill of exchange for the said G. A. Lloyd and Co. for the purpose aforesaid, and did then apply the proceeds thereof in reduction of their said debt as aforesaid.

And the defendants further say, that before and at the time said bill of exchange was endorsed by the said G. A. Lloyd and Co. to the plaintiffs as aforesaid, they, the defendants, were creditors of the said G. A. Lloyd and Co. to an amount larger than the said sum of one thousand three hundred and thirty-six pounds eight shillings and threepence, and other persons were then also crediters of the said G. A. Lloyd and Co.

And the defendants further say, that the estate of the said G. A. Lloyd and Co. was by order of the Supreme Court of New South Wales in its insolvency jurisdiction sequestrated for the benefit of their creditors.

And the defendants further say, that the said endorsement of the said bill of exchange by the plaintiffs as aforesaid, and the transfer and delivery of the same to them for the purpose aforesaid, then had the effect of preferring the plaintiffs as creditors of the said G. A. Lloyd and Co. to the defendants and others, then also being creditors of the said G. A. Lloyd and Co., by reason of which said premises, and by force of the statute in such case made and provided, the said G. A. Lloyd and Co. had no right to endorse the said bill of exchange to the plaintiffs, and the plaintiffs derived no title through the said G. A. Lloyd and Co., and have no title or interest in the said bill of exchange, and the endorsement of the said G. A. Lloyd and Co. became and is void, and created no right in the plaintiffs to sue, and the plaintiffs have no right to sue the defendants on the said bill.

And as to the residue of the declaration, the defendants say they never were indebted as alleged.

The only defence, therefore, was founded on the alleged insolvency of Lloyd and Co. before and when they indorsed the bill. Issue having been taken on the pleas, the action came on for trial; witnesses were examined. The learned Judge told the jury that the words "being insolvent" in the 8th section of the Colonial Insolvent Act, 5 Vict., No. 17, must be taken to mean "being unable to pay 20*s*. in the pound," and left to them four questions, which, and the answers of the jury, were these:—

Were G. A. Lloyd and Co. insolvent at the time when the note was endorsed to the Bank on the 9th July?—Yes.

Were they insolvent on 27th June, and from that time to the 9th July?—Yes.

Was the note given to the Bank on the 28th June to secure the repayment of an overdraft to the extent of 5,000*l*. between that date and the 1st July?—No.

Was any agreement made on the 1st July that the note should be held to secure repayment of overdraft to same extent between 1st and 4th July?—No.

Verdict to be entered for defendants, with liberty reserved for plaintiffs to move to set that verdict aside, and to enter a verdict for plaintiffs.

Whereupon the verdict was, under the learned Judge's direction, entered for the Defendants, with liberty for the Plaintiffs to move to set it aside and to enter a verdict for the Plaintiffs. This application was made and refused; and hence the Appeal.

The main or only questions are whether the alleged facts stated in the first plea are true, and whether if true they formed a good ground of defence

to the action, and their Lordships are of opinion that both these questions ought to be answered in the negative; even assuming, which is the view most favourable to the Respondents, that the word "preferring," as used in the special plea, ought to have the same meaning attributed to it as ought to be attributed to that word as used in the Act of Parliament, a point on which their Lordships give no opinion.

Their Lordships consider it impossible to construe the words "having the effect of preferring any then existing creditor," contained in section 8 of the Colonial Insolvency Act, read as that section must be in connection with the rest of the Act, and particularly with its 5th, 6th, 7th, 9th, and 12th sections, in the manner for which the Respondents contend. The better opinion, they think, is that according to the true construction of the Act those words indicate fraudulent preference, and were not intended to refer to any case of preference not fraudulent; but whether this be so or not in the full sense of fraudulent preference, as generally understood, their Lordships are satisfied that the words in question were not intended, and ought not to be construed, to extend to a case in which not only there was no intention to prefer, but in which the preference (if such there were) arose merely from the circumstance that Harris and Co. when they accepted the bill were creditors of Lloyd and Co., whereas by accepting the bill they had represented themselves to be debtors, and had authorized third persons dealing with the bill to consider them as such.

In their Lordships' judgment, the expression "had the effect of preferring the Plaintiffs" contained in the special plea, if to be construed as not embodying any allegation or suggestion of fraudulent preference, or of some preference beyond what is above referred to, is immaterial, but, if to be considered as embodying such an allegation or such a suggestion, is not supported by the evidence. Their Lordships, however, do not consider the words to embody such an allegation, or such a suggestion. They think it also not proved that before the 5th of July, 1859, the Appellants had notice of the insolvency, if any, of Lloyd and Co., or that, in fact, the Appellants had any such notice or any notice of the suspension of payments before August or September of that year. There is, in their Lordships' opinion, nothing in the

evidence to show or lead to the inference that the delivery or indorsement of the bill to the Appellants by Lloyd and Co., or the discount of the 11th of July, was by way of fraudulent preference, or was otherwise than a fair transaction in the ordinary course of business.

In their Lordships' opinion the Respondents have wholly failed to show that the delivery of the bill to the Appellants on the 28th of June, or its subsequent indorsement, was an unfair or improper transaction, or was avoided by reason that at each of those times the estate of Lloyd and Co. was insufficient to pay their creditors in full. They consider also that the case is not affected in any way by the sequestration of September; nor does it, indeed, appear that any claim has under that sequestration been made against either the Appellants or the Respondents.

Their Lordships, repeating, however, that they consider the first plea to be essentially bad, think the Appellants entitled to judgment in the action, and to their costs here; and their Lordships will report to Her Majesty accordingly.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Harris v. *the Bank of Australasia from the Supreme Court of New South Wales; heard* 2*nd December,* 1861, *by the same Committee; delivered* 8*th February,* 1862.

What has just been stated in disposing of the other Appeal between these parties, that from Queensland, from the Supreme Court at Moreton Bay, renders it unnecessary to say more than that in our opinion the Bank of Australasia was on the whole record entitled to judgment in the action brought by that Company in the Supreme Court of New South Wales against Messrs. Harris, and that the Appeal of Messrs. Harris against the Judgment so obtained ought to be dismissed with costs.