understand how it applies exactly in the way of merger, but it has not been raised properly in the pleadings. Leave to add it was refused, and, in my opinion, properly refused. But I am also of opinion that if it had been raised formally it would not, for the reasons given by the learned Chief Justice, have been successful. On these grounds I think the appeal should be dismissed.

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McLAUGHLIN v. FREEHILL.

Isaacs J.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. H. McLaughlin.*
Solicitors, for the respondent, *Freehill & Donovan.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

ROBERT MYLNE GOW AND EBENEZER CHARLES CHAMBERS (TRADING AS R. M. GOW & Co.) APPELLANTS;

AND

THOMAS EDWARD WHITE . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Insolvency—Fraudulent preference—Payment—Good faith—Insolvency Act 1874 (*Qd.*) (38 *Vict. No.* 5), *secs.* 107, 108.

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BRISBANE, *April* 29, 30; *May* 2.

Griffith C.J., Barton and O'Connor JJ.

The mere fact that a debtor, who is unable for the moment to pay all his debts as they become due, makes a payment to a creditor, is not conclusive evidence that the payment is a fraudulent preference within sec. 107 of the *Insolvency Act* 1874 (Qd.).

Stewart & Walker v. *White*, 5 C.L.R., 110, explained.

Payments by a debtor within six months of his insolvency of fortnightly sums of money in pursuance of a prior valid agreement with his creditor for the compromise of an existing debt :

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Held, upon the evidence, to have been received in good faith by the creditor, and, therefore, that the payments were not fraudulent preferences.

A creditor bought £800 worth of butter from his debtor for cash, there being at the time a debt of £25 due and owing to the creditor by the debtor. The creditor paid the debtor by cheque £775.

Held, that there was not a delivery of butter by the debtor to the creditor in discharge of a past debt within the meaning of sec. 108 of the *Insolvency Act* 1874 (Qd.)

Decision of Supreme Court of Queensland, *In re Springall*; *Ex parte White*, 1908 St. R. Qd., 60, reversed, and judgment of *Cooper* C.J. restored.

APPEAL by special leave from a judgment of the Full Court of Queensland (1) reversing a decision of *Cooper* C.J., who dismissed a motion by the trustee in the insolvent state of A. F. Springall asking for a declaration that certain payments by the insolvent to the appellants were fraudulent and void as against the trustee, and for consequent relief. *Cooper* C.J., who heard the case mostly on oral evidence, found that the transactions did not come within the fraudulent preference clause of the *Insolvency Act* 1874 (Qd.) (38 Vict. No. 5) sec. 107, but were *bonâ fide* and valid.

The facts are fully stated in the judgments hereunder.

Stumm and *Graham*, for the appellants. *Real* and *Chubb* JJ. came to the conclusion that the appellants should have known that Springall was in insolvent circumstances. The evidence is, however, the other way, as it was proved that Springall got credit for £5,000 worth of butter from Brisbane merchants shortly before the adjudication in insolvency, and that the appellants also made full and satisfactory inquiries as to the insolvent's financial position. It cannot be said that Springall was insolvent in October when the arrangement for refunding was entered into.

[They referred to *Bills* v. *Smith* (2); *In re Vautin*; *Ex parte Saffery* (3); *Ex parte Mackenzie*; *In re Bent* (4); *New, Prance & Gerrard's Trustee* v. *Hunting* (5); *Sharp* v. *Jackson* (6); *Williams' Bankruptcy*, 8th ed., pp. 250 *et seq.*

(1) 1908 St. R. Qd., 60.
(2) 6 B. & S., 314; 34 L.J.Q.B., 68.
(3) (1900) 2 Q.B., 325.
(4) 42 L.J. Bk., 25.
(5) (1897) 2 Q.B., 19, at p. 29.
(6) (1899) A.C., 419, at pp. 421, 423.

The *Insolvency Act* 1874 strikes at the intention and not at the mere acts of parties: *Ex parte Taylor*; *In re Goldsmid* (1). The arrangement was not made with a view of giving the creditor a preference but to enable the debtor to reap the advantage of a highly beneficial contract which he had entered into with another exporter. It was therefore not a fraudulent preference: *Ex parte Hill*; *In re Bird* (2). The learned Judges of the Full Court refused to consider whether any excuse existed for the arrangement between the creditors and debtor, and overlooked the decision of the High Court in *Bank of Australasia* v. *Hall* (3). The present case is clearly distinguishable from *Stewart & Walker* v. *White* (4) in that the creditors in that case knew that the insolvent's business affairs were in a bad state, whilst in the present case the appellants were not aware of such instability. "Good faith" is defined in *Butcher* v. *Stead*; *In re Meldrum* (5). The transaction as to the £25 worth of butter was in the ordinary course of mutual dealings; and the deduction of £25 was merely to save the trouble of drawing two cheques, and is governed by the decision in *Spargo's Case*; *In re Harmony & Montague Tin & Copper Mining Co.* (6). A Court of Appeal is always loth to disturb the findings of a presiding Judge who has the advantage of seeing and hearing the witnesses: *Coghlan* v. *Cumberland* (7); *Colonial Securities Trust Co.* v. *Massey* (8).

[O'CONNOR J. referred to *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (9).]

Feez and *O'Sullivan*, for the respondent. This case is on all fours with *Stewart and Walker* v. *White* (4), the High Court decision in which had not been given when *Cooper* C.J. heard the case now under notice. No facts are in dispute in the present case, and the only difference between the judgment of *Cooper* C.J., and the State Full Court is as to the proper inferences to be drawn. *Coghlan* v. *Cumberland* (7), and *Colonial Securities*

(1) 18 Q.B.D., 295.
(2) 23 Ch. D., 695.
(3) 4 C.L.R., 1514.
(4) 5 C.L.R., 110.
(5) L.R., 7 H.L., 839, at pp. 847, 849.
(6) L.R., 8 Ch., 407.
(7) (1898) 1 Ch., 704.
(8) (1896) 1 Q.B., 38.
(9) 1 C.L.R., 243.

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Trust Co. v. *Massey* (1), do not apply: see *Luke* v. *Waite* (2); *Thurburn* v. *Steward* (3).

[GRIFFITH C.J.—An appeal Court is only bound by the findings of the Judge who heard the evidence at the trial so far as the Judge is influenced by the demeanour and conduct of witnesses.]

This case differs from that suggested by *Cooper* C.J., of a series of promissory notes given by a trader, because that would be in the ordinary course of business, and it is not in the ordinary course of business to pay a large sum of money for goods which are not as yet in existence. It was only after the appellants had failed to get the butter contracted for that they entered into the agreement of October, and they should have known that Springall was in a bad way financially. In certain cases the onus of proving that payments are not made with a view of giving a preference shifts to the creditor: *In re Eaton & Co.*; *Ex parte Viney* (4); *In re Lake*; *Ex parte Dyer* (5); *Ex parte Suffolk*; *In re Fletcher* (6); cf. *In re Laurie*; *Ex parte Green* (7), as to whether the payment was made with a view to prefer: *Stewart & Walker* v. *White* (8), did away with the necessity of looking at what is in a man's mind—the necessity of any psychological research. See also *National Bank of Australasia* v. *Morris* (9).

[GRIFFITH C.J—The important element in *Stewart & Walker* v. *White* (8) was that the insolvent knew he could not pay all his creditors in full, not merely that he was short of cash.]

As to *bona fides* see *Butcher* v. *Stead*; *In re Meldrum* (10); *Tomkins* v. *Saffrey*; *Ex parte Saffrey*; *In re Cooke* (11). The onus is on the creditor to establish *bona fides*; *Ex parte Tate* (12). The delivery of the £25 worth of butter in January 1907 falls within the purview of sec. 108 which is not affected by the presence of *bona fides*.

Stumm, in reply.

Cur. adv. vult.

(1) (1896) 1 Q.B., 38.
(2) 2 C.L.R., 252, at p. 265.
(3) L.R. 3 P.C., 478.
(4) (1897) 2 Q.B., 16, at p. 17.
(5) (1901) 1 K.B., 710.
(6) 9 Morr., 8.
(7) 67 L.J.Q.B., 431.
(8) 5 C.L.R., 110.
(9) (1892) A.C., 287.
(10) L.R. 7 H.L., 839, at pp. 847, 849.
(11) 3 App. Cas., 213.
(12) 35 L.T., 531.

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Griffith J. This is an appeal from a decision of the Full Court reversing the decision of the learned Chief Justice of Queensland on a motion by the trustee of a debtor to declare certain payments to the appellants to be fraudulent preferences. The payments in question were a series of sums of £25 made at intervals of about a fortnight during the six months preceding the insolvency, which occurred in May 1907. The relevant facts of the case lie within a very small compass. The debtor was a butter buyer and manufacturer, selling the butter to other persons for export. The appellants were agents for English buyers, and bought butter for export from the debtor and others. They had been dealing with the debtor for several years. In May 1906 their accounts nearly balanced. In that month the appellants agreed to buy from the debtor about £500 worth of butter to be delivered at short dates, and advanced the £500 before delivery. The debtor's business, consisting of buying from creameries and dairymen, naturally required the command of capital, and there is nothing very surprising in the fact that he occasionally obtained payment in advance from persons to whom he was selling to enable him to pay for the butter as he bought it. Persons are at liberty to carry on business in that way if they like, and it appears that it is not unusual in the butter trade, as, indeed, might naturally be expected. Before advancing this large sum of money, however, the appellants took the precaution of inquiring as to the debtor's financial stability from his bankers and received satisfactory answers. They also made other inquiries, the nature of which may not be very clear, but, at any rate, they were sufficiently satisfied of his stability to advance the £500. The debtor did not deliver £500 worth of butter, and made excuses for not delivering it. The appellants did not ask for their money back, but they asked for the butter. This went on for some time, and in October it was arranged that the debtor should repay the £500 with interest by instalments. The reason that he gave to the appellants for not delivering the butter, and for asking to be allowed to repay in that way, was that he had entered into a contract to supply £8,000 worth of butter a month to another exporter, which was expected to be very much more profitable to him than the contract which he

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had made with the appellants. That is the reason which he gave. Whether it was true or not seems to me to be quite irrelevant if the appellants believed it. Under these circumstances they agreed in October to allow him to pay the £500 in fortnightly instalments of £25 each. He became insolvent in the following May. In the meantime he paid the instalments, and it is contended that each of the payments made within six months of the commencement of the insolvency was a fraudulent preference, and further that none of them was received by the appellants in good faith, that is, not knowing or having reason to suspect that it was a preference. That is the question to be determined.

In October the formal legal position was that the appellants had a claim upon the contract to deliver butter, and could have brought an action in which they could have recovered damages. Instead of doing so they compromised their claim by an agreement to accept repayment of the money advanced by instalments with interest at 10 per cent. That agreement was then performed by the debtor by paying the instalments, and the objection is that the payments made in performance of that agreement are fraudulent preferences, and that the money paid was received under circumstances showing want of good faith. The learned Chief Justice who heard the case, mostly on oral evidence, found the facts in favour of the appellants. He doubted whether there was a fraudulent preference at all. That depended on the intention of the debtor. He found also that there was good faith on the part of the creditors. On appeal to the Full Court his decision was reversed. The Court were of opinion that there was a fraudulent preference on the part of the debtor, and that the money was not received by the creditors in good faith. So far as the case depends on the oral testimony, there is no good reason for differing from the conclusion of the learned Chief Justice, but, as I understand it, the Full Court did not base their decision on any difference of opinion between themselves and the learned Judge of first instance as to the credit to be given to the witnesses, but upon certain admitted facts which they thought established conclusively that these payments were fraudulent

preferences, and that there was an absence of good faith on the part of the appellants.

The learned Judges in the Full Court considered themselves bound by the decision of this Court in the case of *Stewart & Walker* v. *White* (1). In that case this Court had occasion to express its dissent in part from a dictum attributed to the Full Court in a previous case: *Russell, Wilkins & Sons Ltd.* v. *Outridge Printing Co. Ltd.* (2), as to the effect under sec. 107 of the *Insolvency Act* 1874 of pressure exercised by a creditor on a debtor, and my learned brothers *Barton* and *Isaacs* referred to the point at considerable length, and expressed their dissent from the view which was attributed in the report to the learned Judges of the Full Court. The learned Judges in the present case, *Real* J. more especially, have explained that their opinion was not correctly apprehended, either through a defect in the report or from some other reason, and have corrected the rule as they intended at that time to lay it down. I do not think it necessary to refer further to that point, except to say that as the rule is now stated by them, there is not much difference, if any, between the opinion expressed by my learned brothers, and that expressed in his judgment by *Real* J. With respect to the statement in that learned Judge's judgment (3), that "this Court did not, and I certainly did not, intend to hold that pressure in any way rendered invalid anything that would, but for pressure, be valid," I understand him to mean "anything which irrespective of pressure would be valid." That is very much the same opinion as this Court expressed in *Stewart & Walker* v. *White* (1). But it relates only to the question of pressure, which in the present case is absent.

Real J., after quoting from my judgment in *Stewart & Walker* v. *White* (1), said (4):—"It would seem from the wording of the judgment of the High Court, as stated in the Brisbane *Courier* report, that in attacking a payment on the ground that it was made with a view to prefer, all that is necessary to prove, apart from the question of good faith, is that the debtor was unable to pay his debts as they became due from his own moneys; that he

(1) 5 C.L.R., 110.
(2) 1906 St. R. Qd., 182.
(3) 1908 St. R. Qd., 60, at p. 66.
(4) 1908 St. R. Qd., 60, at p. 68.

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was aware of that fact; and, being aware of that fact, and intending the consequences of his act, using the word 'intention' in the same sense as it is used in the *Criminal Code*, sec. 302, sub-sec. 3, he made the payment otherwise than in the ordinary course of business."

I apprehend that the learned Judge referred to this passage in my judgment in *Stewart & Walker* v. *White* (1):—"I think that when a debtor, knowing that he cannot pay all his creditors in full, deliberately pays one of them, he intends the necessary consequences of his action, *i.e.*, he intends to give him a preference. And I think that under such circumstances he makes the payment with a view of giving the creditor a preference within the meaning of sec. 107." In the passage I have just read, the important words are, "Knowing that he cannot pay all his creditors in full, deliberately pays one of them." Now, it does not follow, from the mere fact that a debtor is unable at a particular moment to pay all his debts as they become due from his own moneys, that he cannot pay all his creditors in full, if time is allowed him. For certain purposes of the Insolvency Law that state of things is made conclusive evidence of insolvency. Failure to meet a promissory note is ordinarily sufficient evidence of such inability. But it is notorious that such a state of things does not necessarily lead to insolvency, nor does the payment of the debt due to one creditor necessarily have the effect of preferring him to the others. It may, on the contrary, be the best and only way of ensuring the ultimate payment of the others. In such a case it would be improper to infer an intention to prefer that creditor, because such a result is not probable. If the rule were as suggested, any debtor, who falls for a moment within the artificial rule of the section, has only two alternatives, to suspend payment or make a fraudulent preference of some creditor or creditors. Business could not be carried on under such conditions. If that is the principle which the learned Judges of the Full Court thought that we laid down, they were under a misapprehension.

The learned Judge of first instance found that, at the time the agreement of October was made, the debtor was in insolvent cir-

(1) 5 C.L.R., 110, at pp. 116, 117.

cumstances—hopelessly insolvent circumstances—and continued to be so until the insolvency. He hesitated, however, to come to the conclusion that under all the circumstances of the case there was a fraudulent preference. In the view I take of this case it is not necessary to decide that point. As I have pointed out, the mere fact that a debtor, who is unable for the moment to pay his debts as they become due out of his own moneys, makes a payment is not conclusive, but I think it is unnecessary to decide that point. I think with the learned Chief Justice that there is a good deal to be said on both sides.

I turn now to the other question, of good faith. Now the agreement was made in October, more than six months before the insolvency. It was made for a valuable consideration. True, it was not a present consideration, but that is quite irrelevant. An agreement made for a past consideration is just as good as any other agreement, unless there is some law that makes it less valid. The relevant dates in this case are the dates when the payments were actually made, and the question as to each of them is whether at that date the creditor received the payment in goop faith, that is, to use the language of this Court in *Stewart & Walker* v. *White* (1), whether he "knew or had reason to suspect that the effect of it would be to pay him in full and leave other creditors unpaid." In the absence of actual knowledge, there must be circumstances calling for inquiry. If a debtor in apparently solvent circumstances, as this debtor was, pays a portion of his debt on the day on which he is bound under a valid agreement to pay it, what is there to call for inquiry on the part of the creditor? In *Tomkins* v. *Saffery* (2) the circumstances were such that the creditor knew that the debtor was insolvent, and that, if there were any other creditors, they must necessarily be left wholly unpaid. In the present case, so far as I can see, the only fact that can be referred to, as calling for inquiry, is that an old claim was being paid by instalments. If that fact is sufficient to call for an inquiry, a creditor who gives extended credit to a debtor for part of a debt could not safely receive any further payments without inquiry as to the debtor's circumstances at the time of each payment, although to all appearances the debtor was

(1) 5 C.L.R., 110, at p. 117. (2) 3 App. Cas., 213.

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in prosperous circumstances and the payments were otherwise in the ordinary course of business. That cannot be the rule. The agreement of October being unimpeachable, payments made in accordance with it were made in the ordinary course of business in the sense in which I used those words in *Stewart & Walker* v. *White* (1). They were made in pursuance of a valid agreement. Whether the agreement itself was an unusual or a usual one is a matter of no consequence. It was a perfectly valid agreement, and, as I have said, unimpeachable, and the payments impeached were simply payments made in pursuance of a lawful, binding obligation, by a debtor who was apparently in prosperous circumstances and carrying on a large business. The fact that he happened six months before to be in temporary difficulties (as happens in the history of a very large number of prosperous mercantile concerns) is not conclusive. If, because a man has been once in difficulties, a creditor is not to be allowed to give him time to get out of his difficulties, I am afraid business could hardly be carried on. In my opinion, the conclusions of the learned Chief Justice were correct, and the motion of the trustee ought to have been dismissed.

There was another point raised with respect to one of the instalments—what was called the delivery of butter in satisfaction of a past debt. In the period during which the instalments were being paid, the appellants bought from the debtor about £800 worth of butter. It was a cash transaction, and when the time came for paying the £800 it happened that one of the instalments of £25 was due. Instead, therefore, of giving the debtor a cheque for £800, and taking a cheque from him for £25, they gave him a cheque for £775. That transaction is impeached on the ground that it was a delivery of butter in discharge of a past debt. The first answer is that that was not the transaction. There was no delivery of butter in satisfaction of a past debt. The appellants had bought £800 worth of butter, to be paid for in cash, and, instead of two cheques being passed, one cheque was given for £775. Suppose the appellants in the present case had only given him the £775, and the debtor had become insolvent, the trustee in his estate would have been

(1) 5 C.L.R., 110.

entitled to sue them for £25. But they would have been entitled to set off against his claim the £25 that the debtor had promised to pay them on that date, and the estate would have got nothing. Why then should any other result follow in the present case? I am of opinion that it would be applying the provisions of sec. 108 to a purpose for which they were never intended, if we were to hold that they covered a transaction of that nature. For these reasons I think the appeal should be allowed.

Barton J. The learned Chief Justice has expressed the sense in which we intended the rule laid down in the case of *Stewart & Walker* v. *White* (1) to be understood; and I would just like to say that if our observations were not sufficiently explicit we must be sorry for that, but after reading the judgments through again, I see no necessity for further explanation. As to the rest, I entirely concur in the conclusions which my learned brother has come to; and even without reference to the other aspects of the case, it seems to me that the learned Chief Justice of this State, who sat in this case as Judge of first instance, was absolutely right in his conclusions upon the facts. I think the appeal, therefore, should be allowed.

O'Connor J. The transactions which are attacked in this case must, I think, all be regarded as payments. I entirely agree with my learned brother the Chief Justice in the view that he has taken of the transaction as to the £25 worth of butter. The substantial matter, therefore, for determination is, were the payments of the instalments in question in contravention of sec. 107 of the *Insolvency Act* 1874?

I do not propose to refer to the view which the Supreme Court of Queensland took as to the meaning of *Stewart & Walker* v. *White* (1), because, as the facts stand, the view which they took was substantially that which the judgment itself was intended to convey. *Stewart & Walker* v. *White* (1) decides two matters. First, the meaning of the words "with a view of giving a preference," in sec. 107, and secondly, the meaning of the words

(1) 5 C.L.R., 110.

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bonâ fide in the latter part of the section. As to the former it decides that "with a view of giving" means with an intention to give. It has been said in the course of the argument that the section gets rid of all questions of the state of mind of the person making the payment—the insolvent—but that is not so. The question of intention must always be determined—whether the intention is, or whether the intention is not, to give a preference to the creditor paid. That intention, of course, must be proved, like any other intention, by statements of the insolvent or by inferences drawn from the facts. But *Stewart & Walker* v. *White* (1) lays down no hard and fast rule, that it is always necessary to come to the conclusion that there has been a preference under circumstances such as existed in that case. The statement to which my learned brother the Chief Justice has referred contains these words (2):—"I think that when a debtor, knowing that he cannot pay all his creditors in full, deliberately pays one of them, he intends the necessary consequences of his action, *i.e.*, he intends to give him a preference." I think that passage has to be taken in connection with the facts with which the Court was dealing, and it undoubtedly is true that, where you get facts which come within that description, the inference may very fairly be drawn that there is an intention to give a preference to the creditor who has been paid. The rule as to good faith laid down in *Stewart & Walker* v. *White* (1) states the position as it has been put in many other cases, and it is concisely summed up in these words in the judgment of the Chief Justice (3):—"In my opinion a payment made by a debtor who is unable to pay his debts as they become due from his own moneys, and which is not made in the ordinary course of business, and is made under such circumstances that the creditor has good reason to suspect that he is obtaining a preference from an insolvent debtor, is void under sec. 107. That is to say, the case is brought within the first part of the section, and the creditor cannot bring himself within the protective proviso." The law, therefore, applicable to the case is abundantly clear, and the matter for our consideration really is, what is the right conclusion to come to upon the facts.

(1) 5 C.L.R., 110. (2) 5 C.L.R., 110, at p. 116. (3) 5 C.L.R., 110, at p. 117.

Now, questions arise on two aspects of the facts involved. The first is, were these payments preferences in contravention of sec. 107, secondly, if they were, were they payments received by the debtor *bonâ fide* in the sense in which those words had been explained in the judgment I have referred to.

As to the first question, if it were necessary to decide it, I should be very much inclined to take the same view as was taken by *Real* J. in the Supreme Court. It appears to me that the facts are very much more consistent with these payments being made with the intention of preferring the creditor than not, but it becomes unnecessary to decide that question, because of the view which I take of the defence which has been set up, and I think established, by the creditor; that is, that even if it were a fact that these payments were made in such a way as to amount to a preference, still they were received by the creditor under circumstances which made the receipt on his part *bonâ fide* and for valuable consideration. The learned Chief Justice of Queensland, the Judge of first instance, found that there was *bona fides* in the receipt of these payments. The Judges of the Supreme Court have come to the contrary conclusion, and under these circumstances it seems to me proper to inquire whether greater weight should be given to the findings of fact by the Court of first instance or to the findings of the Supreme Court on appeal. This Court in the case of *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1) adopted the rule laid down in *Coghlan* v. *Cumberland* (2), where Lord *Lindley* M.R. dealing with a similar question said :—"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before

(1) 1 C.L.R., 243, at p. 277. (2) (1898) 1 Ch., 704.

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the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." As the case was put to us by the appellants' counsel it was suggested that there was no question of fact in dispute—that no question of credibility arose, that it was merely a question of inferences from undisputed facts. I cannot agree with that view. It seems to me that one cannot decide upon any aspects of facts necessary to be considered here, without having regard to the credibility of the witnesses. The matter to be established is principally the knowledge and the state of mind of the creditors when they received these payments. They have made certain statements in regard to their state of mind, and it is impossible to decide the case without coming to some conclusion as to whether they did or did not honestly believe what they said. It seems to me, therefore, that the credibility of the witnesses on both sides is a matter which enters quite as materially into the consideration of the facts to be determined, as do the inferences from facts established or admitted. Under these circumstances I feel bound to give a very great weight to the opinion of the learned Chief Justice who heard the case, and who had the advantage of seeing the demeanour of the witnesses under examination and cross-examination. Apart from that consideration, indeed, I should be disposed to concur in the view which the learned Chief Justice took in the Court below on the facts as to the *bona fides* of the receipt of these payments, but, with the addition of that consideration, I have no hesitation in coming to the conclusion that his finding on the facts should be adopted by this Court

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rather than that of the Supreme Court. I feel it unnecessary, in view of the very full statement which has been made by my learned brother the Chief Justice on the facts, to further elaborate my reasons. It only remains for me to say that I entirely concur in the view that, in the receiving of these payments, the appellants were acting in a *bonâ fide* way as that phrase is explained by the judgment in the case to which I have referred. I, therefore, agree that the appeal must be allowed, and the judgment of the Chief Justice in the Court below restored.

Appeal allowed. Order appealed from discharged. Order of the Chief Justice restored. Respondent to pay the costs of the appeal.

Solicitors, for appellants, *Atthow & McGregor.*

Solicitors, for trustee (respondent), *Thynne & Macartney.*

H. V. J.

Foll *Taxes, Commissioner of (NT) v Tangentyere Council Inc* (1992) 23 ATR 370

Appl *Taxes, Commissioner of v Tangentyere Council Inc* (1992) 83 NTR 32

Appl *Taxes, Commissioner of (NT) v Tangentyere Council Inc* (1992) 2 NTLR 76

[HIGH COURT OF AUSTRALIA.]

THE SYDNEY HARBOUR TRUST COMMISSIONERS . . . . . PLAINTIFFS. } APPELLANTS;

AND

WAILES AND OTHERS . . . . DEFENDANTS, RESPONDENTS.

H. C. OF A. 1908.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *May* 13.

Sydney Harbour Trust Act 1900 (*No.* 1 *of* 1901), *sec.* 27—*Vesting of lands the property of the Crown in the Commissioners—Proclamation by Governor in Council—Title in Commissioners without conveyance—Ejectment.*

Griffith C.J., O'Connor and Isaacs JJ.