[HIGH COURT OF AUSTRALIA.]

WILLIAMS . . . . . APPELLANT;

AND

THE OFFICIAL ASSIGNEE OF THE ESTATE OF WILLIAM DUNN . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 18, 19, 20, 21, 22.

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

Bankruptcy Act (*N.S.W.*) (*No.* 25 *of* 1898), *secs.* 57, 58*—*Protection of bonâ fide transaction—Preference—Payment of just debt—Act of bankruptcy—Distribution of property—Construction of Statutes.*

The effect of sec. 57 of the *Bankruptcy Act* 1898 is not limited by the provisions of sec. 58, and, therefore, a payment by a bankrupt which comes within the terms of sec. 57 is protected by that section, although it is an act of bankruptcy.

*Secs. 57 and 58 of the *Bankruptcy Act* 1898, so far as material, are as follows:—

"57. Subject to the provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements, and subject to the provisions of this Act with respect to the avoidance of certain preferences except as hereinafter provided, nothing in this Act shall invalidate in the case of a bankruptcy:—(*a*) any payment by the bankrupt to any of his creditors, for or on account of any just debt due at the time of payment. . . . . Provided that both the following conditions are complied with, namely:—(1) the payment . . . takes place before the date of the sequestration order; and (2) the person (other than the debtor) to . . . whom the payment . . . was made . . . has not at the time of the payment . . . notice of any available act of bankruptcy committed by the bankrupt before that time. And provided that the burden of proving that the above conditions have been complied with shall be upon the person who relies upon their having been complied with. 'Payment' shall for the purposes of this section include the drawing, making, or indorsing of a bill of exchange, cheque, or promissory note.

"58. Every distribution of property which is under this Act an available act of bankruptcy shall be void as against the official assignee or trustee, save only that in the case of a conveyance or assignment by the bankrupt of property in trust for his creditors registered within one month from the execution thereof by the assignor in accordance with the provisions of subsection ten of section four of this Act, all dealings with such property, and all acts done in good faith by any trustee under such instrument, shall be valid unless at the time of the dealing or act he knew or had notice that proceedings to sequestrate the assignor's estate had been or were about to be taken."

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The words "distribution of property" in sec. 58 do not include an isolated payment of money by a debtor to a creditor.

So *held*, *per Griffith* C.J., *Barton*, *O'Connor* and *Higgins* JJ., *Isaacs* J. dissenting.

Shears v. *Goddard*, (1896) 1 Q.B., 406, followed. *In re Bond*, 16 N.S.W. L.R. (B. & P.), 74, approving the *dictum* of *Owen* J. in *In re Atlas Engineering Co.*, 10 N.S.W. L.R. (Eq.), 179, at p. 184, overruled.

Per Isaacs J. The words "distribution of property" are wide enough to include a payment to a single creditor, and have been long used in that sense by authorities on bankruptcy law, and sec. 58, which is clearly intended to be an invalidating section, can only be given independent effect by construing those words in that wider sense. So construed sec. 58 is a qualification or modification of sec. 57, invalidating, as against the official assignee, any dealing by a bankrupt which is an available act of bankruptcy, whether it comes within the terms of sec. 57 or not.

The rule that, when particular words in a Statute have received judicial interpretation and the Statute is subsequently repealed and re-enacted in identical terms, the words in the new enactment should be construed in the sense previously attributed to them by the Courts has no application where the received interpretation is not the result of considered decisions upon the meaning of particular words, but of mere expressions of opinion on a point not necessary for the decision of the particular case.

Rule stated by Lord *Macnaghten* in *Hamilton* v. *Baker*, *The* "*Sara*," 14 App. Cas., 209, at pp. 221, 222, applied.

Decision of *Street* J. (*Re William Dunn*, 24 N.S.W. W.N., 184), reversed.

APPEAL from a decision of *Street* J. on a motion under sec. 134 of the *Bankruptcy Act* 1898.

This was a motion for an order declaring void as against the official assignee two payments of £15 and £32 respectively by the bankrupt William Dunn to the appellant, upon the grounds (1) that the payments were void under sec. 56 of the *Bankruptcy Act* 1898, (2) that they were void under sec. 58 coupled with sec. 4, sub-secs. 1 (*b*) and (*c*) of that Act, and (3) that the moneys paid were the property of the bankrupt at the commencement of the bankruptcy, and as such became vested in the official assignee.

On the matter coming before *Street* J. sitting in the bankruptcy jurisdiction of the Supreme Court, it was admitted that the bankrupt was insolvent, or knew that proceedings for placing his estate under sequestration had been commenced, at the dates

of the payments in question, and that, if the payments were made with the bankrupt's money, they had the effect of preferring the appellant to other creditors, and that the payments were made before the date of the sequestration order. The presiding Judge made an order directing that certain issues of fact should be tried by a jury. At the trial of the issues the following facts were found:—That the bankrupt or someone on his behalf paid the sums of £15 and £32 respectively to the appellant on 25th January and 9th March 1906; that the appellant had not at the respective times of payment notice that the bankrupt had failed to comply with the requirements of a bankruptcy notice served on him or that a petition had been presented for the sequestration of his estate; that the payments were made by the bankrupt with intent to defeat or delay his creditors; and that the moneys paid were property of the bankrupt at the commencement of the bankruptcy. The act of bankruptcy on which the petition was based, viz., failure to comply with a bankruptcy notice, was committed on 13th January 1906. The date of the sequestration order was 24th April 1906.

His Honor, following a decision of his predecessor *A. H. Simpson* C.J. in Equity, then the Judge in Bankruptcy, *Re Eade* (1), held that the payments were void, and ordered that the amount of them should be paid by the appellant to the Official Assignee.

From this decision the present appeal was brought by special leave.

E. Milner Stephen (*Chubb* with him), for the appellant. The payments were, within the meaning of sec. 57, payments of just debts due at the time of payment before sequestration, and the conditions required by the proviso of that section were satisfied. Sec. 57 overrides the invalidating effect of any of the other sections of the Act with respect to any transaction coming within the terms of sec. 57, whether it is an act of bankruptcy or not. Moreover, neither of the payments was a distribution of property within the meaning of sec. 58. The fact that the payments were not made at the same time, and consequently that at the time of

(1) 7 B.C. (N.S.W.), 60.

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the second payment the appellant had notice of the first, did not constitute notice of an act of bankruptcy within the meaning of the proviso to sec. 57. Notice implies knowledge of the circumstances of the payment, *i.e.*, knowledge that it is an act of bankruptcy. There was no such notice in this case. Both payments, therefore, stand on the same footing as regards the protection of sec. 57.

[GRIFFITH C.J.: I think you may argue on the assumption that all the facts are in your favour.]

Sec. 57 of the *Bankruptcy Act* 1898 is taken from sec. 18 of the *Bankruptcy Act Amending Act* 1896, which embodied sec. 57 of the *Bankruptcy Act* 1887, 51 Vict. No. 19, with certain amendments. The last mentioned section originally gave protection to the transactions mentioned subject to the invalidating effect of sec. 56 in respect of preferences, the effect of which was to render nugatory the whole protection it appeared to give. In 1888 an amending Act was passed, sec. 2 of which provided that the words "and preferences" in sec. 57 should be omitted, and that was retrospective. The effect of that was to make sec. 57 override sec. 56 with regard to the particular preferences mentioned. The section as amended was adopted in the Act of 1896, sec. 18, now sec. 57 of the Act of 1898. The words "except as hereinafter" must belong to the clause preceding them, otherwise the position of affairs in 1887 would be restored. It cannot be supposed that the legislature intended that. The Supreme Court of New South Wales had before the Act of 1896 construed sec. 58 in such a way as to render a *bonâ fide* payee liable to repay the money he received from the bankrupt. The clause ending with the words "except as hereinafter provided" was apparently intended to cancel the effect of those decisions if the legislature can be supposed to have attended to them at all. At any rate, there is no indication of any intention to adopt that construction. The first case was *In re Atlas Engineering Co.* (1), known as *Davy's Case.* That was after the Amending Act of 1888. *Owen* J. there assumed that sec. 58, because it followed sec. 57, was a proviso to that section, and cut down the protection given by it so as to invalidate all payments

(1) 10 N.S.W. L.R. (Eq.), 179.

which were acts of bankruptcy. The ruling was *obiter dictum*, because the payee in that case had knowledge of the fraudulent intent of the bankrupt. It was based on the assumption that a payment to a single creditor was a "distribution of property" within the meaning of sec. 58. That is not the natural meaning of the words. The ordinary meaning implies a division of property amongst several, and unless some reason appears from the context for construing the words otherwise, that meaning should be adopted. The context affords no such reason. On the contrary, by excepting dealings by trustees under the circumstances mentioned, the section indicates the nature of the transactions that are aimed at, that is, the division of property by a bankrupt amongst his creditors, either by himself or through the agency of a trustee, and protects the latter if certain conditions are complied with, probably because they are likely to be fair and just. [He referred to *In re Player*; *Ex parte Harvey* (1).] The ruling of *Owen* J. was followed by other Judges of first instance, as in *In re Jackson* (2), but the point did not come before the Full Court until *In re Bond* (3). In that case the ruling of *Owen* J. was approved, but it was not necessary to decide the point. *Bevan* v. *Nunn* (4) was relied upon. That was overruled in a subsequent case, *Shears* v. *Goddard* (5), in which it was held that the fact that a transaction was an act of bankruptcy did not invalidate it if it came within the protection of sec. 49 of the English *Bankruptcy Act*, which closely corresponds with sec. 57 of the New South Wales Act. That case is conclusive of the present question, unless sec. 58 overrides sec. 57. It was, however, not followed by the Judges in bankruptcy, who adhered to the construction put upon sec. 58 in the earlier decisions, and the point has not since come before the Full Court. [He referred to *In re Keith* (6); *Re Glynn* (7); *Re Eade* (8); *Re Carter* (9).

Gordon K.C. and *R. K. Manning*, for the respondent. "Distribution of property" includes a single payment. From 1887

(1) 15 Q.B.D., 682.
(2) 10 N.S.W. L.R., 307.
(3) 16 N.S.W. L.R. (B. & P.), 74.
(4) 9 Bing., 107.
(5) (1896) 1 Q.B., 406.
(6) 17 N.S.W. L.R. (B. & P.), 1.
(7) Salisbury, *Bankruptcy Prac.*, 2nd ed., app., p. 400.
(8) 7 B.C. (N.S.W.), 60.
(9) 8 B.C. (N.S.W.), 21.

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down to the present it has been used in that sense, and the legislature has adopted that sense by repealing and re-enacting the original section in substantially the same words. The only amendments made are immaterial. It was held that sec. 58 was a proviso to sec. 57, rendering invalid all preferences that were acts of bankruptcy, the word "distribution" being construed as meaning any dealing with property by the bankrupt: *In re Atlas Engineering Co.* (1). Though that was in a sense *obiter dictum*, it was a distinct ruling as to the meaning of particular words, and it was followed in a number of cases: *In re Jackson* (2); *Re Rogers* (3); *Re Summerfield* (4); *In re Turner* (5); *In re McRae* (6), and the Full Court approved it in *Re Bond* (7). This ruling was not disputed during all those years until after the decision of *Shears* v. *Goddard* (8), when it was held by *Manning* J. in *In re Keith* (9), and *A. H. Simpson* J. in *Re Eade* (10), that sec. 58, construed as it had invariably been construed, differentiated the position under this Act from the position in England. Even if this Court were of opinion that these decisions were erroneous, it should follow them under the circumstances, now that the legislature has adopted the received judicial interpretation: *Saunders* v. *Borthistle* (11); *Greaves* v. *Tofield* (12); *Dale's Case* (13); *Jay* v. *Johnstone* (14); *Craies' Statutory Law*, 4th ed., pp. 89, 461.

[O'CONNOR J.—That rule only applies where there have been direct decisions upon the meaning of particular words.]

It certainly should be applied where there has been a recognized judicial interpretation, adopted by all the Courts without exception. The presumption is that the legislature used the words in the sense in which the Courts have understood them.

[GRIFFITH C.J.—For the application of the rule it is essential that there should be considered decisions on the particular words of a Statute: *Mackay* v. *Davies* (15); *Craies*, 4th ed., p. 161.

(1) 10 N.S.W. L.R. (Eq.), 179, at p. 183.
(2) 10 N.S.W. L.R., 307.
(3) 1 B.C. (N.S.W.), 46.
(4) 2 B.C. (N.S.W.), 14.
(5) 3 B.C. (N.S.W.), 46.
(6) 2 B.C. (N.S.W.), 85.
(7) 15 N.S.W. L.R. (B. & P.), 120; 16 N.S.W. L.R. (B. & P.), 74.
(8) (1896) 1 Q.B., 406.
(9) 17 N.S.W. L.R. (B. & P.), 1.
(10) 7 B.C. (N.S.W.), 60.
(11) 1 C.L.R., 379, at p. 383.
(12) 14 Ch. D., 563.
(13) 6 Q.B.D., 376, at p. 453.
(14) (1893) 1 Q.B., 25, 189.
(15) 1 C.L.R., 483, at p. 491.

ISAACS J. referred to *Attorney-General for Victoria* v. *Melbourne Corporation* (1); *Attorney-General v. Clarkson* (2).]

Apart from legislative adoption, the mere existence of a long course of judicial decisions to the same effect is sufficient to justify the Court in holding that the law is as it has been judicially assumed to be for so many years: *The Anna* (3); *Maxwell, Interpretation of Statutes*, 4th ed., p. 454.

[GRIFFITH C.J.—But if *Shears* v. *Goddard* (4), applies, and the Courts wrongly refused to follow it, should we regard the course of decisions: *The Mecca* (5)?]

The rule is based on the assumption that there are decisions with which the Court disagrees.

[ISAACS J. referred to *Hamilton* v. *Baker*, *The Sara* (6).]

The construction put upon sec. 58 by the Courts, if not the natural and primary one, is the only one which gives full effect to all the provisions of the Act. The effect of secs. 56, 57 and 58 taken together is that all payments which are in themselves acts of bankruptcy are void. Payments which are not acts of bankruptcy are protected by sec. 57. The addition of the words in reference to preferences by the Act of 1896 tends to show that it was intended by sec. 58 to invalidate all transactions which were preferences. Sec. 58 only limits sec. 57 as regards preferences. [He referred to the *Bankruptcy Act* 1887, secs. 56, 57, 58; *Bankruptcy Act Amendment Act* 1896, secs. 2, sub-sec. (14), 5, 14, 16, 17, 18, 23.] The words "except as hereinafter provided" do not limit the words immediately preceding, but point towards later provisions of the Act. The section is taken from the Victorian *Insolvency Statute* 1871, sec. 69, in which the transactions aimed at clearly include single payments by the bankrupt. The policy of the law is to discourage not only general assignments, but all dispositions of property by a bankrupt except through a trustee under proper safeguards. A distribution could only be attacked by attacking the individual payments. If one payment cannot be a distribution, where is the line to be drawn? Sec. 58 must have been intended to have some independent invalidating

(1) (1907) A.C., 469.
(2) (1900) 1 Q.B., 156.
(3) 1 P.D., 253.
(4) (1896) 1 Q.B., 406.
(5) (1895) P., 95, at p. 111.
(6) 14 App. Cas., 209.

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effect. Unless it is read as a proviso to sec. 57 so far as preferences are concerned, it affects nothing. If only assignments are aimed at, they are already void by virtue of sec. 4 (1) (*a*) and (*b*) read in conjunction with sec. 51, which provides for the relation back of the assignee's title.

[GRIFFITH C.J. referred to *In re Jukes*; *Ex parte Official Receiver* (1); *Davis* v. *Petrie* (2).

ISAACS J. referred to *Bourne* v. *Graham* (3).

HIGGINS J. referred to *Ex parte Villars*; *In re Rogers* (4).]

This argument was withdrawn.

As to the facts, there was no finding that at the time of the second payment the appellant had no notice of the previous act of bankruptcy. The onus was upon him to establish that: sec. 57.

[GRIFFITH C.J.—But the jury have found that he had no notice of the facts which rendered the payment an act of bankruptcy.]

E. Milner Stephen, in reply. The object of the legislature in inserting sec. 58 may have been to provide for the avoidance of schemes of distribution unless they were carried out in a certain manner.

The word "distribution" is used elsewhere in the Act in that sense, and there is nothing in the context to require a different meaning in sec. 58. In the Act of 1887, sec. 51, the title of the assignee related back only to acts of bankruptcy within three months of the bankruptcy. Sec. 58 may have been intended to carry the avoidance of distributions further back.

The respondent is not entitled to rely upon the course of decisions before 1898. There has been no decision on that Act. Costs should be given against him if the appeal is allowed.

[GRIFFITH C.J.—In *Hamilton* v. *Baker*, *The Sara* (5), the Court ordered the respondent to pay the costs though there was an uninterrupted course of authority for thirty years.]

Cur. adv. vult.

May 22.

GRIFFITH C.J. This is an appeal from a decision of *Street* J.

(1) (1902) 2 K.B., 58.
(2) (1905) 2 K.B., 528.
(3) 2 Jur. N.S., 1,225.
(4) L.R. 9 Ch., 432.
(5) 14 App. Cas., 209.

declaring that two payments of money to the appellant by a debtor, after committing an act of bankruptcy and before sequestration, were void as against the trustee in bankruptcy. The learned Judge expressed no independent opinion as to the law on the subject, but rightly considered himself bound by a series of decisions in the Supreme Court to decide in favour of the official assignee.

The matter is now brought before this Court, and we are asked to say what is the true construction of the Statute upon which the question depends, and also to declare, if we are of that opinion, that, notwithstanding the length of time that a particular view of the Statute has been taken by the Supreme Court, that is a wrong view.

I will deal first with the construction of the Statute itself and afterwards with the other questions that arise. The question arises under the *Bankruptcy Act*, now No. 25 of 1898, which was in fact a mere reprint with such verbal alterations as were necessary of two earlier Acts, one of 1887-1888 and the other of 1898. Before 1887 the laws in force in New South Wales were the Act 5 Vict. No. 17, and 25 Vict. No. 8, which contained various provisions, to most of which it is not necessary to refer. By the earlier Act all payments made by and transactions with the bankrupt, which were in themselves acts of bankruptcy and available for that purpose, were absolutely void, and a person who claimed under them had no protection whatever. That continued to be the law in New South Wales until the year 1861, though it had been modified in England to a great extent before that year. Then the legislature of New South Wales passed the Act 25 Vict. No. 8, which—dealing with cases of payments that would have been void as against the official assignee, so that the receiver of the money would have been bound to pay it back notwithstanding the honesty of his conduct in receiving it—provided (sec. 1) that :—" Every payment heretofore or hereafter made by any person before the sequestration of his estate under the Act 5 Vict. No. 17 to any creditor for or on account of any just debt due at the time of payment shall except only in the cases hereinafter mentioned be and be deemed to have been a valid payment anything in the said Act notwithstanding." (Sec.

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2):—"Provided that such creditor or the person receiving payment on his behalf shall not at the time of payment have known that the debtor was then insolvent—or was by such payment rendered insolvent—or that he then contemplated the surrender of his estate as insolvent—or that proceedings for causing his estate to be sequestrated had been commenced—or that the payment was a voluntary preference of such creditor to other creditors . . ." Thus honest transactions were protected. So the law continued until the year 1887. In that year a new Act was introduced which was founded substantially upon the English *Bankruptcy Act* of 1883, which contained a definition of acts of bankruptcy. I will only refer to three, which were specified in sec. 4 (1) and were, (*a*) if a debtor makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (*b*) if he makes a conveyance, gift, delivery, assignment or transfer of his property, or of any part thereof, with intent to defeat or delay his creditors, or any of them; and (*c*) if he makes a conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if a sequestration order were made against him. Sec. 51 of the Act provided that the bankruptcy of a debtor should have relation back to the time of the act of bankruptcy upon which the order for sequestration of his estate was founded, or, if he were proved to have committed other acts of bankruptcy, to the first of those acts proved to have been committed within six months of the date of the presentation of the petition. The result, if the Act had stopped there, was this:—The title of the trustee relating back to the first act of bankruptcy proved, from the moment when the bankrupt commenced to commit that act he was dealing not with his own property, but with that of the trustee, and therefore anything that he did afterwards was void and could not confer any right. The purchaser or person dealing with the bankrupt was precisely in the same position as if he were dealing, for instance, with a person who offered for sale a horse which he had stolen. That had been the condition of the bankruptcy law, but it had been modified in New South Wales in 1861 by the *Bankruptcy Act*

of that year, and in England by the Act of 1860, and again by the Act of 1883, upon which, as I have said, the New South Wales Act of 1887 was founded. Sec. 54 of that Act contained certain provisions as to executions. Sec. 55 contained provisions for the avoidance of voluntary settlements, and sec. 56 contained provisions as to fraudulent preferences, all of which were declared to be void as against the trustee in bankruptcy. Then followed sec. 57, which was a protecting section and ran thus—following, and in fact being a transcript of sec. 49 of the English *Bankruptcy Act* 1883, which has been the subject of interpretation in the Court of Appeal in England on more than one occasion: "Subject to the provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements, and . . . preferences . . . nothing in this Act shall invalidate, in the case of a bankruptcy," amongst other things, "any payment by the bankrupt to any of his creditors," provided that both the following conditions were complied with, namely, that the payment took place before the date of the sequestration order, and that the person with whom the transaction was made had not at the time notice of any available act of bankruptcy having been committed before that time. The onus of proof was thrown upon the person claiming to uphold the transaction. Payment or delivery for the purpose of this section included the drawing, making, or endorsing of a bill of exchange, cheque, or promissory note. Now, sec. 56 of the Act of 1887 had provided in respect of preferences that "every alienation, transfer, gift, surrender, delivery, mortgage, or pledge of any estate or property, real or personal—every warrant of attorney or judicial proceeding made, taken, or suffered—every bill of exchange or promissory note drawn, made or endorsed, and every payment made . . . by a person being at the time insolvent, or in contemplation of surrendering his estate under this Act, or knowing that proceedings for placing the same under sequestration have been commenced, or within sixty days before the sequestration thereof" and whether fraudulent or not, "having the effect in any such case of preferring any then existing creditor to another, shall be absolutely void." Sec. 58, which was not taken from the English Acts, was in these terms:—[His

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Honor read the section and continued]—Shortly after this Act was passed it appears to have occurred to somebody that, as sec. 57 was made subject to the foregoing provisions of the Act with respect to the avoidance of preferences, there was no protection for any transaction which was a preference. Whether that doubt was well founded or not is not material, but the opinion of the Court of Appeal in the case of *Bullock* v. *Ardern* (1) seems to suggest that there was no foundation for it. However, whether that is so or not, the legislature struck out the words "and preferences" from sec. 57, leaving absolutely subject to the previous provisions of the Act with respect to the particular matters mentioned—that is to say, executions and attachments and the avoidance of certain settlements—the provision that nothing in the Act should invalidate, amongst other things, any payment by the bankrupt to any of his creditors. Soon after that there came before the Supreme Court of New South Wales a case generally known as *Davy's Case*; *In re Atlas Engineering Co.* (2), in which *Owen* J., then Chief Judge in Equity, held that sec. 58 operated as an exception from the protection of sec. 57 and as a proviso to that section, so that any transaction of the bankrupt which was an act of bankruptcy was void as against the official assignee, notwithstanding the provisions of sec. 57. The argument in the case is not reported, but it appears to have been assumed or admitted that the word "distribution" in sec. 58 meant or was equivalent to "disposition." The learned Judge apparently did not think that the words "nothing in this Act shall invalidate" in sec. 57, which are positive words, extended to the section which followed. Whether he thought they applied to the sections preceding or not I do not know. We have not the advantage of his reasons. But he came to the conclusion that sec. 58 operated as if it were a part of sec. 57. It may be remarked that it was not necessary for the decision of the case to decide that point, because the transaction in question did not come within the protection of sec. 57, there having been a previous act of bankruptcy to the knowledge of the person who received the money.

Now, before entering upon a discussion of the decisions in the

(1) 17 T.L.R., 285. (2) N.S.W. L.R. (Eq.), 179.

Supreme Court of New South Wales, I will pause to consider the real meaning of sec. 58. I would point out, to begin with, that when the Act of 1887 was passed preferences in good faith were protected by law, under the Act of 1861. By sec. 57 they were protected under substantially the same conditions as in the Act of 1861. But, it is said, sec. 58 had the effect of repealing that and going back to the law as it stood before 1861. That contention is founded upon two arguments, both of which are, in my opinion, without foundation. It is said, first, that the word "distribution" in sec. 58 is equivalent to "disposition," and, secondly, that the words "nothing in this Act shall invalidate" do not include sec. 58. With regard to the meaning of the word "distribution," distribution of property is an expression not unknown in bankruptcy law. A distribution of property in a bankruptcy is made by a trustee or assignee for the benefit of creditors. Sometimes there is a distribution under a deed executed by a debtor amongst his creditors or some of them. Such distributions are made acts of bankruptcy by sec. 4 (1) which relates to assignments for the benefit of creditors generally, so that a distribution exactly falls within that sub-section. They are made void as against the assignee. There was, therefore, no necessity to say in sec. 58 that any such transactions should be void as against the official assignee. The initial words of sec. 58 are:—"Every distribution of property which is under this Act an available act of bankruptcy shall be void." But the Act had already said so, and saying it twice over did not make any more effectual the invalidation already enacted in secs. 4 and 51. Can it be supposed that the legislature would, by language so ambiguous, have gone back upon the legislation of 1861, which was also the law in England, and had been adopted from there by New South Wales. It is suggested that historically the word "distribution" may be a mistake for "disposition." The legislature may, perhaps, have meant to say "disposition," but that is mere conjecture, and I do not think it ought to be adopted. But this appears historically, that sec. 58 came from the Victorian *Insolvency Statute* 1871 where it was necessary. The word there was not "distribution," but "conveyance, assignment, gift, delivery or transfer of any property." Under that Act there was

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no provision for relation back of the assignee's title to the act of bankruptcy, so that it was necessary to have some such provision in the Act. That being so, we find provisions in the Act limiting the general words to particular distributions and assignments.

Then, it was said, what reason was there for inserting such a provision in this Act? I answer: Although sec. 57 had protected innocent purchasers—using the term in its most general sense—in nearly all cases it left unprotected the acts of persons who took under an assignment or distribution, whether it was under an assignment for the benefit of creditors generally, or such creditors as signed the deed, or some particular class of creditors. That is seen from the decision in *Davis* v. *Petrie* (1). It is strange that that should only have been decided as recently as 1905. The object of such a provision is, therefore, in my opinion, quite clear. In my opinion, the word "distribution" cannot under these circumstances be read as meaning "disposition." Secondly, if it could be so read, it appears to my mind to be covered by the negative words of sec. 57, "Nothing in this Act shall invalidate," unless there is some cogent reason to the contrary.

So far for the meaning of the words as they stood in 1887, for what has happened since is really immaterial. In 1896 for some reason or other the legislature struck out of sec. 56 the words relating to bills of exchange and payments, thinking, it may be, that they were included in the word "property." I do not know whether that is so or not. But that such transactions were still considered to be preferences was shown by the protection of payments in sec. 57 where the term "payment" is defined to include "the drawing, making, or indorsing of a bill of exchange, cheque, or promissory note." From the express protection of these transactions, which could only be attacked as preferences, it must be taken that the legislature thought it a possible contention that such transactions were within sec. 56. The legislature made another alteration; they inserted in sec. 57 this sentence—"and subject to the provisions of the Principal Act and of this Act with respect to the avoidance of certain preferences except as hereinafter provided." In my opinion, the words "except as hereinafter

(1) (1905) 2 K.B., 528.

provided" relate to the preceding words, that is to say, that the provisions of the Act as to the avoidance of preferences are not to take effect so far as thereinafter provided. There were no other alterations of importance except that in sec. 58 the word "available" was inserted before the words "act of bankruptcy." Some other minor alterations were made, but I do not think that it can be contended from these alterations that they show an intention to adopt the meaning which had decidedly been put upon the word "distribution" by *Owen* J. in 1889 and afterwards followed, if that particular doctrine can be called in aid. I have already pointed out that all this part of the Act was a reprint from the Act of 1887. I am of opinion, fortified by the opinion of the Court of Appeal in England in a case to which I will presently refer, that all transactions falling within sec. 57 are protected notwithstanding sec. 58, and in the present case the transaction came clearly within sec. 57, upon the facts as found by the jury.

After the decision in *Davy's Case*; *In re Atlas Engineering Co.* (1), in the same year the same point was again raised before a learned Judge who had been counsel for the unsuccessful party in *Davy's Case* (1). He followed the opinion of *Owen* J.; and in later cases that was again followed, but no opportunity was taken to bring the case before the Supreme Court until 1895, when it came before them in *In re Bond* (2). In that case the Court came to the conclusion that the transaction was honest, but they expressed their approval of the ruling of *Owen* J. There, again, it was not necessary to decide the point. In the following year the exact point came before the Court of Appeal in England in *Shears* v. *Goddard* (3), which turned upon the construction of sec. 49 of the *Bankruptcy Act*, which is in the same terms, so far as is material, as sec. 57 of this Act. It was contended that the section did not protect acts of bankruptcy, and reliance was placed upon cases decided under earlier Statutes. Lord *Esher* M.R. said (4):—"The 49th section of the Act was meant to protect innocent persons who have entered into *bonâ fide* dealings or transactions with the bankrupt for valuable consideration. It

(1) 10 N.S.W. L.R. (Eq.), 179.
(2) 15 N.S.W. L.R. (B. & P.), 120; 16 N.S.W. L.R. (B. & P.), 74.
(3) (1896) 1 Q.B., 406.
(4) (1896) 1 Q.B., 406, at p. 408.

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provides in the plainest terms that nothing in the Act shall invalidate in case of a bankruptcy any such dealing or transaction, provided that two conditions are complied with, namely, that the dealing or transaction shall have taken place before the date of the receiving order, and the person with whom it was entered into shall not have had at the time of entering into it notice of any available act of bankruptcy committed by the bankrupt before that time." Then he pointed out that both those conditions existed in the case before the Court, and went on—"That being so, I have no hesitation in saying that I think the legislature meant what they have in plain terms said in this section; and I do not think it is material to consider what may have been decided upon the terms of other sections in other Acts relating to bankruptcy now repealed." And *Rigby* L.J. in the same case said (1):—"It seems impossible to say that the words 'nothing in this Act shall invalidate,' literally construed, would not include that portion of the Act which provides what acts shall constitute an act of bankruptcy. The specific exceptions contained in the beginning of the section serve to show the absolute generality of the words that follow them." In my opinion the only possible distinction between that case and the present is that the Act here says in two places that acts of bankruptcy are invalid, while the English Act says so only in one. He went on—"But I cannot see any foundation for the contention that the legislature did not intend to protect a transaction coming within the term of sec. 49, because but for that section it would have been rendered invalid by a previous section of the Act as constituting an act of bankruptcy." In this case the words in question are not in a previous section, but in a subsequent section. But the subsequent section that made the act an act of bankruptcy referred to the previous section, and then proceeded to deal with some transactions not falling within sec. 57.

When the case next came before a Court of Bankruptcy in New South Wales the learned Judge was asked to follow *Shears* v. *Goddard* (2). But he declined to do so on the ground that the sections were not identical. In my opinion *Shears* v. *Goddard* (2) governed the case, and ought to have been followed, and I

(1) (1896) 1 Q.B., 406, at p. 410. (2) (1896) 1 Q.B., 406.

cannot help thinking that, if the point had come before the Full Court after that case, it would have been followed. It did not, however, come before the Full Court again, but every Judge of first instance has felt bound to follow the decision of his predecessors. In my opinion all these decisions were erroneous, and the question now arises whether it is not too late to correct the mistake that has been made during all these years. The doctrine that, where a particular provision in a Statute has received definite judicial interpretation and the legislature afterwards repeals that provision and substitutes for it another in the same language, it should be presumed that they intended to adopt the interpretation that had been put upon the words by the Courts, has no application unless it appears that the legislature intended to apply their minds to the subject. In the present case it appears from the nature of the legislation that the legislature intended a mere consolidation of existing statutory provisions, whatever they might mean. With respect to the duty of this Court I will read a passage, to which my learned brother *Isaacs* J. referred during the argument, from the speech of Lord *Macnaghten* in *Hamilton* v. *Baker* (1). In that case the House of Lords was asked in 1889 to reverse a decision of the Court of Appeal which affirmed a decision of the Court of Admiralty, following a decision given after very full consideration by Dr. *Lushington* in the year 1865 in *The Mary Ann* (2). That is to say, that more than 20 years afterwards the House of Lords was asked to reverse a decision on a very important point of maritime law on the ground that it had been wrongly decided in the first instance. Lord *Macnaghten* said :—"The appellants challenge the decision in *The Mary Ann* (2), and the course of practice which has followed it. The respondent contends that the decision was right. But whether it was right or not, he says that it is too late now even for this House to interfere. I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time and which has been sanctioned by such high authority. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error.

(1) 14 App. Cas., 209, at p. 221. (2) 1 A. & E., 8.

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To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time." And the result was that the appeal was allowed and the law declared to be in accordance with their Lordships' opinion. I think that this Court, sitting as a Court of Appeal, is bound to follow that precedent, and if, in this case, my judgment is right, and the construction contended for by the appellant is the correct construction, we ought to say so. The result of holding otherwise would not only be to do violence to the language of the Statute, but would involve this extraordinary position, that in 1887 the legislature reversed the settled policy of the law as introduced in New South Wales in 1861, and adopted in England and most other countries, and reverted to the old and barbarous system under which a man who had received a payment in all honesty was compelled to pay it back, and did this by using the word "distribution" in a sense which was not only unusual but different from the sense in which it was used elsewhere in the Act. I think it is perfectly impossible to attribute any such intention to the legislature, and that the appeal should be allowed.

BARTON J. I also am of opinion that the appeal should be allowed. The exhaustive judgment just delivered by the Chief Justice renders it unnecessary for me to express my opinion at length on most of the points which he has touched. But I should like to say something as to the construction of the various sections, and particularly as to the question whether sec. 58 is to be read as a proviso to sec. 57. In the first place, sec. 58 cannot be intended to be such a proviso unless the words "distribution of property" are equivalent to disposition of property, or transaction by the bankrupt. Etymologically the word "distribution" has no such meaning. It imports a division or handing round of something to more persons than one, to several persons at least. That, again, is its ordinary sense, and the sense in which it is interpreted in the *International Dictionary*, which is the only one at which I have looked, and which is generally reliable. Is

it to be taken out of that sense? If so, what is there to give it a different one? Is it that in the context, by which I mean the rest of the Act, it is used generally, or in a similar connection, in a sense other than the natural and ordinary one? That is by no means the case. A number of sections were cited in the argument—it is not necessary to mention them now—in every one of which, where the word "distribution" was used, it was used in connection with the notion of division, or as an equivalent for division of property of the bankrupt, whether all the property or among all the creditors is immaterial. Invariably throughout the Act it imported a division of the property of the bankrupt among several persons the creditors of the bankrupt. That, then, is the sense in which it must be understood in this section unless there is some context, other than the context I have pointed out as favouring the natural meaning, to take it out of the natural meaning, and that must be a context as plain or plainer than the context I have pointed out. I have not found in the rest of the Statute, nor has there been indicated during the argument, any such context. I am of opinion, therefore, that the words "every distribution of property" must be read in the ordinary and natural sense, and if they are so read, they do not refer to the kind of transctions that sec. 57 protects. They deal with matters that *primâ facie* are different, and in the ordinary and in no other sense; thus construed the section cannot operate as a proviso. The class of cases referred to in sec. 57, as is easily seen, are single or isolated transactions with the bankrupt. The class of cases referred to in sec. 58, on the other hand, are dealings, not between an individual standing alone and the bankrupt, but transactions by the bankrupt with more than one person; an additional class of acts to those to which, by the provisions of sec. 57, protection is given. How, then, can it be argued that sec. 58 under these circumstances is a proviso to sec. 57? I think that the learned Chief Judge in Equity, who first gave the construction now complained of to the section in question, had not had the matter of the meaning of the word "distribution" fully brought before his mind by argument. Turning now to sec. 57, we find that it begins with words of reference to other sections of the Act:—"Subject to the provisions of

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this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements, and subject to the provisions of this Act with respect to the avoidance of certain preferences except as hereinafter provided." The effect of bankruptcy upon an execution or attachment is dealt with in secs. 53 and 54. And I should mention that the group of sections now in question are put with sec. 58 in Division IV. of the Act under the heading "Effect of Bankruptcy on antecedent transactions." Sec. 55 (1), (2) deals with the avoidance of certain settlements, and sec. 56 with the avoidance of certain preferences. But, as some of the transactions to be protected by sec. 57 are preferences, the words are added "except as hereinafter provided," in order that the preferences, which it is intended that sec. 57 shall protect, may be quite safely protected by the addition of those words. The respondent's construction, however, seems to me to attach no weight to the fact that in the Act of 1896, sec. 18, which repeals the old sec. 57 and re-enacts the present one in its place, inserts the words "with respect to the avoidance of certain preferences except as hereinafter provided" in such a way that one takes them to be a coherent phrase in themselves. This, then, is the extent to which antecedent transactions are dealt with as regards the effect of bankruptcy upon them in that Division of the Act. Then we go to the remaining part of the section:—"Nothing in this Act shall invalidate in the case of a bankruptcy:—(*a*) any payment by the bankrupt to any of his creditors for or on account of any just debt due at the time of payment," and then the other matters which are protected. "Nothing in this Act." That does emphasize, if it is necessary to emphasize it further, any protection which the words standing alone would give. It means that, whether a portion of the Act precedes or follows the section in question, it shall not have the effect of invalidating these transactions. It seems to me difficult to contend that—where you find these strong words "nothing in this Act shall invalidate,"—invalidation should be sought in the very next following section, and that end attained by taking the words of the section out of their ordinary meaning and giving them a meaning not sustained by the rest of the Act. Under

these circumstances I am strongly of opinion that sec. 58 is not a proviso to sec. 57, and that sec. 57 therefore stands undiminished in force by the other section. If that is so, then *Shears* v. *Goddard* (1) applies exactly to this case. The result is that the operation of sec. 49 of the English Act, and of sec. 57 of this Act, must be held to be exactly the same unless we disregard the reasoning of the Court of Appeal. Under the circumstances, what is the duty of this Court? Is it, when certain previous local decisions are pointed out, to disregard the decision of the Court of Appeal and leave matters as they stand? If these previous decisions had been as to some matter of title, the devolution of property, or the course of conveyancing, one could understand that they had so operated upon the transactions of the public that it would be the duty of the Court not to disturb them. But it can hardly be contended that that rule applies to a construction such as that we have been discussing here. I do not think any such rule as would apply in the former case does apply. But we find that the original construction was in truth a dictum, since there the payee was affected with notice. It was arrived at by the Chief Judge in Equity apparently without having the effect of certain words brought to his mind, and it seems to me that this construction should be considered as having been applied by inadvertence. That construction was adopted by his successor, and came ultimately before the Supreme Court, and the Supreme Court, in a case in which the transaction was valid without reference to the decision in *In re Atlas Engineering Co.* (2), expressed itself as satisfied with the construction. Seeing that after all the judgment of the Full Court *In re Bond* (3), decided that the transaction was protected notwithstanding *Davy's Case* (2), I do not see that the judgment of the Full Court gives such binding authority to it, as representing the course of legal decision in New South Wales, that we are bound to act upon any presumed rule in this respect. If the rule is asserted to be that, where there are no considered decisions on the point at all, Parliament will be presumed to act upon a received judicial interpretation founded on a dictum in all its legislation subsequent to that interpretation, it must always be recollected that Parlia-

(1) 1896) 1 Q.B., 406. (2) 10 N.S.W. L.R. (Eq.), 179.
(3) 16 N.S.W. L.R. (B. & P.), 74.

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ment is a body of some sense. If there is a succession of decisions arrived at upon full argument and consideration upon the exact point, it may be assumed that Parliament has acted upon the basis of those decisions and adopted them. But if the decisions are not of that kind, and are, moreover, doubtful in themselves, I do not think it can be assumed that Parliament paid attention to them at all. Because, upon the discovery of the slender basis upon which the original decision, which was afterwards followed, rests, and especially upon finding that a Court of superior authority has in the interim given a different decision, the expectation would be that Parliament, in using the words again, would not use them in the sense attributed to them by decisions found to be weak in their authority, and not founded upon sufficient discussion. That being, as a matter of common sense, the way in which we should interpret the much discussed rule as to the circumstances in which Parliament may be taken to act upon judicial construction, it is not to be supposed that Parliament attributed to the words used here the construction that had been put upon them by the Courts. The case *Shears* v. *Goddard* (1) was decided as early as February 1896, and the *Bankruptcy Act* of that year was not assented to until November 1896, so that, if there is any presumption to be drawn from the course of legal decision, it is rather in favour of the theory that Parliament had in its view the latest decision of the highest authority upon the point. I must say that I agree with my learned brother the Chief Justice in this, that if, after the decision in *Shears* v. *Goddard* (1), the matter had come before the Full Court, there can be very little doubt that they would have followed it, particularly as the later decisions do not affect its authority as applied to this case in the slightest degree.

I think there is only one other matter which could be argued to affect the construction of the section, and that is the decision of *Wood* V.C. in *Bourne* v. *Graham* (2). There is attributed to that decision a value as affecting the construction of this Act which causes me to mention the decision for the purpose of saying that, in my opinion, it cannot be held to have such a value. It is not, of course, to be thought of, that when a Judge

(1) (1896) 1 Q.B., 406.

(2) 2 Jur. N.S., 1225.

uses an expression in what may be called a loose and conventional sense, the same force is to be attributed to it as if found in the section of a Statute. That is not the way in which judicial decisions are to be interpreted. They are to be interpreted by their substance, not by fortuitous expressions, and it would, in my opinion, be an unreasonable use of the expression of *Wood* V.C., to apply it to the extent of reading this sec. 58, passed in New South Wales long afterwards, as having used the word in the sense in which his Honor happened to use it as far back as 1856. Far rather is there to be attributed to the legislature the intention to be consistent, and to have used the word in exactly the same sense in this section as in every other case where the word is used throughout the Act. That being so, I think it unnecessary to address any further comment to the matter.

It seems to me quite clear that the appeal should be allowed.

O'CONNOR J. It is generally considered that *Shears* v. *Goddard* (1) would have formed the proper rule to be adopted in the interpretation of sec. 57, if it were not for the meaning given to sec. 58 of the *Bankruptcy Act* 1898 by *Owen* J. in *In re Atlas Engineering Co.* (2), and in the decisions following that judgment. In the question as now raised there are two grounds upon which the matter is put before us. One is, what is the real meaning of sec. 58? And the other is that, even if sec. 58 has been wrongly interpreted by the Courts of New South Wales, yet, having regard to the legislative history of sec. 58 and the Bankruptcy Acts generally, the Court is bound to give effect to the existing decisions in New South Wales notwithstanding it is of opinion that they are erroneous. I propose to say very little upon the first ground, because both my learned colleagues have gone very fully into the bearing of the different sections that have been considered in connection with sec. 58. I shall advert to a few considerations, arising out of the general principles of the interpretation of Statutes, that seem to me conclusive as to the proper meaning of sec. 58 itself. The first rule in the interpretation of Statutes is that the legislature will be taken to have used words in their ordinary meaning. There is an

(1) (1896) 1 Q.B., 406. (2) 10 N.S.W. L.R. (Eq.), 179.

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exception to that rule in the case where the words used have acquired a technical meaning which is well known, or where they have acquired a legal meaning by decisions of the Courts. In either of these cases it may be presumed that the legislature used the word in the legal or technical sense, as the case may be, rather than in the ordinary sense. But before the exception to the general rule can arise, there must be some strong ground for attaching to the words used a meaning different from the ordinary meaning. The word upon which the decision as to the meaning of sec. 58 turns is "distribution." It is an ordinary word, not one with a technical meaning, nor one that has acquired any legal meaning, and, therefore, in this section it must be construed in its ordinary sense. Now, in its ordinary sense the word "distribution" connotes a division amongst several persons. Sometimes it conveys the idea that there is a separation or division for the purpose of handing over property. The division may be amongst two only, but it is quite clear that in no ordinary sense of the word can it be applicable to the transaction of handing over property of the debtor to one person. There seems to be no reason why the word should not have its ordinary meaning unless there is something in the context to show that the legislature is not using it in that sense. Mr. *Gordon* has very properly admitted that in the ordinary use of the word it has not the meaning which is relied upon. But he argues that, in connection with the context in sec. 58 and the rest of the Act, the special and peculiar meaning that was placed upon the word by the Supreme Court should be adopted. So far from that being the case, I have come to the conclusion that the use of the word in its ordinary sense carries out the intention of the legislature expressed upon the face of the section itself, whilst its use in the special and peculiar meaning would not. It was clearly intended to provide for the protection of *bonâ fide* dealings with property in the special case of assignments. Sec. 57 protects *bonâ fide* transactions on the part of a payee and assignee under the circumstances set out in that section. But the transactions in sec. 58 would certainly be open to attack under the other general sections of the Act were it not for the protection given to trust deeds and those who act under them

within the meaning of sec. 58. And, therefore, one meaning that may be given to the section, interpreted according to the ordinary meaning of the language used, is that it is a proviso to sec. 4, sub-secs. (*a*) and (*b*). Both of those sub-sections deal with the class of assignments in which the debtor is really making a distribution of his property, in the case of sub-sec. (*a*) of part of his property, in the case of sub-sec. (*b*) a distribution of almost the whole of his property. In addition to that, I think that the suggestion of Mr. *Stephen* in reply is worthy of consideration, that is, that, as the Act of 1896 was first drawn, sec. 58 enabled the transactions under a deed of assignment to be opened up for a period which goes three months beyond the period at which other dealings with property can be opened up. I do not propose to say any more upon sec. 58 than this, that it seems to me that full meaning can be given to every word in it by interpreting it as a proviso to sec. 4, sub-secs. (*a*) and (*b*), and as affording a protection that would otherwise not be found in the Act to *bonâ fide* dealings under assignments of property made in trust for creditors generally. In the early Acts of 1887-1888, there was no limit as to time nor any required mode of registration. In the Act of 1896 there was an express provision that certain classes of assignments, registered in a certain way and within a certain time, should be protected, and this is expressly repeated in sec. 58.

Now, the other point is important because it is an attempt to extend beyond reasonable limits one of those mechanical rules applied in the construction of Statutes, which should always be used with very great care. The duty of the Court in construing any Statute is to find out as nearly as possible the intention of the legislature. Sometimes it is necessary, in considering a number of meanings, each of which is equally definite or indefinite, that the Courts should act upon a rule which may be called mechanical in order to come to some conclusion. Now, the rule sought to be made applicable here is stated better, I think, than in any other text book, in *Maxwell on Interpretation of Statutes*, 4th ed., p. 462, in these words:—"It may be taken for granted that the legislature is acquainted with the actual state of the law. Therefore, when the words of an old Statute

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are either transcribed into, or by reference made part of a new Statute, this is understood to be done with the object of adopting any legal interpretation which has been put on them by the Courts. So, the same words appearing in a subsequent Act *in pari materiâ*, the presumption arises that they are used in the meaning which had been judicially put on them; and unless there be something to rebut that presumption, the new Statute is to be construed as the old one was."

That is only an extension of the exception, to which I referred in the earlier part of my judgment, to the rule that words are to be given their ordinary meaning, but that when words have acquired another meaning that is to be given to them. So where a word, although it has not acquired a technical or special meaning in general use, and has not acquired the status of a legal term, has been consistently interpreted by the Courts in a particular way, and acquired a certain meaning in connection with a particular subject matter, the legislature must be taken to have known that meaning, and to have used it in that sense. I know of no decision which has ever carried that rule beyond the limits of recognizing that, when by judicial interpretation particular words or phrases have acquired a certain meaning, the legislature must be taken to have used them in that sense. Now, the facts of legislation upon which Mr. *Gordon* has relied in regard to this section are these. The section is first to be found in the Act of 1887. Then in 1889 *In re Atlas Engineering Co.* (1) was decided, and it was followed by other cases until in 1895 the matter came before the Full Court in *In re Bond* (2). In 1896 another Act was passed embodying sec. 57 just in the same words as in the Acts of 1887-1888, that is to say, a year after the decision in the Supreme Court the legislature re-enacted the same section in the same terms. There is no part of the new Act which in any way recognizes the correctness of the decision in *Davy's Case* (1). Some necessary amendments were made by the Act of 1896, called the *Bankruptcy Acts Amendment Act* 1896. Two amendments were made in sec. 58, one inserting the word "available" before "act

(1) 10 N.S.W. L.R. (Eq.), 179.
(2) 15 N.S.W. L.R. (B. & P.), 120; 16 N.S.W. L.R. (B. & P.), 74.

of bankruptcy," the other making provision for the registration within a month of deeds of assignment; but neither having any connection with the interpretation placed upon "distribution of property." After the Act of 1896 came the consolidation in 1898. That is the Act which we have now to interpret. It is not contended that the consolidation involved in the passing of the Act of 1898 added any weight to the facts upon which Mr. *Gordon* relied. He relied upon the Act of the legislature in passing the Act of 1896. Now, it seems to me impossible to say that because the legislature—assuming, as we are bound to assume, that they knew of these decisions—afterwards used the same language and enacted the same provisions, they must therefore be taken to have approved of the meaning put upon the Act, erroneously as I think, by the Supreme Court in the year before. The utmost extent to which the rule can fairly be stretched cannot cover a case of this kind. Many cases have been decided in which the rule has been laid down. I do not think it necessary to advert to them except to say that they all refer to the decision of the Court upon particular words. For instance, Lord *Coleridge* C.J. in his statement of the rule in the case of *Barlow* v. *Teal* (1), said :—"Whatever may have been the intention of the legislature we can only decide this case on general principles, and one of those general principles is, that where cases have been decided on particular forms of words, in Courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts showing that the legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them." To the same effect are the words of *James* L.J. in *Greaves* v. *Tofield* (2); *Dale's Case* (3); and of Lord *Coleridge* C.J. in *Jay* v. *Johnstone* (4). The limitation I have referred to is in them all. There was one case much relied upon, *The Anna* (5), but it is quite clear that, when that is read in the light of the comment made upon it by *A. L. Smith* L.J. in *The Mecca* (6), that is not a case in which the interpretation

(1) 15 Q.B.D., 403, at p. 404
(2) 14 Ch. D., 563.
(3) 6 Q.B.D., 376, at p. 453.
(4) (1893) 1 Q.B., 25, at p. 28.
(5) 1 P.D., 253.
(6) (1895) P., 95.

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of a word by the Courts was relied upon, but one in which the great number of years during which the law had been settled was taken as a reason for not disturbing it. That appears from the judgment of *A. L. Smith* L.J. (1), where he says this:—"The present appeal is in reality brought to review the construction Dr. Lushington has placed upon the Statute of 1861, firstly, in the case of *The Ella A. Clark* (2), decided February 14, 1863, and then in the case of *The India* (3), decided March 26, 1863. It cannot be denied that judgments so long sanctioned by acquiescence are of great weight, and ought not, without good reason, to be disturbed upon the principle that *communis error facit jus* ; and *James* L.J. went so far in the case of *The Anna* (4) as to say, 'It is too late to raise questions of jurisdiction after that lapse of time'—in that case twenty years. This, however, is the first time in which the construction of these Statutes upon the present point has been brought up for consideration in a Court of Appeal; and, in my judgment, it is incumbent upon this Court, irrespective of judgments in Courts of first instance, to apply itself to the construction of Statutes of the present reign and ascertain what they enact, and then look at the judgments, which, if not clearly incorrect, ought to be upheld."

Therefore it seems to me that the limitation I have suggested must be placed upon the rule, and that the statement of it by this Court in *Mackay* v. *Davies* (5) must for our purpose be taken to be the law. In that case the learned Chief Justice, in delivering the judgment of the Court, said (6):—"No doubt it is a general rule of construction that, when particular words in a Statute have received judicial interpretation, and the Statute is subsequently repealed and re-enacted in identical terms, the words in the new enactment should be construed in the sense previously attributed to them by the judiciary. But I think that rule only applies to cases of considered decisions upon the meaning of particular words in a Statute." That being the rule, it certainly has no application in a case of this kind. In the first place, there was no decision upon the particular word

(1) (1895) P., 95, at p. 111.
(2) Br. & L., 32.
(3) 32 L.J. (Ad.), 185.
(4) 1 P.D., 253, at p. 259.
(5) 1 C.L.R., 483.
(6) 1 C.L.R., 483, at p. 491.

"distribution." No doubt, in the decision which was arrived at, the meaning which is contended for must have been given to the word in the context in which the section stood. But to what extent and in what way it was arrived at, whether it turned upon the actual meaning that must be attributed to the word in a contest of that kind does not appear. But, unless it appears that the decision turned in some definite way upon the meaning of the word in that connection, it is impossible to take it as having altered the ordinary meaning and given it a special sense which would bring the case within the rule. In the second place, the legislature has not adopted that meaning. For it cannot be said to have done so merely by re-enacting in a section passed a short time afterwards the same section in identical language. It therefore seems to me that the argument of Mr. *Gordon* on that ground fails. That leaves the section to be interpreted according to the plain meaning of the language of the legislature. The plain meaning is, as I have said, that it does not apply to the case of payments within sec. 57, and is not a proviso to that section, and therefore that *Shears* v. *Goddard* (1) must be applied in its interpretation.

ISAACS J. There are two questions to be determined in this case; one is what is the meaning of the expression "distribution of property" in sec. 58, whether it includes a single act of fraudulent preference; and the other is what is the effect of sec. 58 as a whole. In approaching the determination of these questions it is said that this Court is not now entitled to look at the meaning of those words as they would be construed for the first time, but that it is bound, according to received principles of construction, to interpret them by the light of some subsequent exposition placed upon them by Parliament itself. That is based upon the fact that there have from time to time been various decisions given by the Supreme Court of New South Wales, partly by Primary Judges and partly by the Full Court, which have placed an interpretation upon the section, and upon these words, and that Parliament has afterwards adopted that interpretation, recognizing that it was correct by amending the section in certain

(1) (1896) 1 Q.B., 406.

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directions, and not altering the crucial words now under consideration. I take it that what the Court has to do is to ascertain and enforce the will of Parliament and to enforce that will as discoverable by legislative enactments. If Parliament has so acted as to indicate, in the words of the Privy Council in *Attorney-General for Victoria* v. *Melbourne Corporation* (1), either expressly or by clear intendment that it has accepted the interpretation of the words by the Court then in future all Courts have to follow that. But I am unable to see in this instance that Parliament has done this. It certainly has not done it expressly, and I cannot see that it has done it by necessary intendment. Therefore I feel that we are bound, so far as the matter depends upon the expression "distribution of property," to apply our minds to the question as if those words appeared for the first time. It is true that Parliament has passed the section again in a consolidating Act. If it were not for the known circumstances under which these consolidating Acts have been passed in New South Wales, I think I should have felt considerably pressed, but having regard to those circumstances and to the fact, which is common knowledge, that Parliament in passing this Act was not holding itself in a situation to consider attentively whether it would accept that particular meaning or not, I do not see how we are able to draw the conclusion that Parliament has deliberately adopted the interpretation put upon the words by the Court. With regard to the effect of the section as a whole, as I shall indicate more precisely presently, I think that what Parliament has done, by reason of one amendment at least, has been to indicate its view of the effect and operation of that section. But that is another matter. Before considering the precise meaning of the term I intend to address myself to the question of the effect of sec. 58. The section begins with a distinct and positive enactment. "Every distribution of property which is under this Act an available act of bankruptcy shall be void as against the official assignee." *Primâ facie*, that is a distinct and affirmative enactment of invalidity. As the section originally stood the word "available" was not there. In 1896 the legislature inserted that word. If Parliament had not looked upon the

(1) (1907) A.C., 469, at p. 475.

section as an invalidating section to begin with, I do not understand why it should have inserted the word "available." The effect of inserting the word was to limit its invalidating operations. Instead of applying to all acts of bankruptcy, it was in future to apply only to an available act of bankruptcy, and just as in the case of *Attorney-General* v. *Clarkson* (1), cited in the Privy Council case to which I have already referred, the necessary effect of that particular amendment seems to me to be that Parliament did recognize that sec. 58 had somewhat too large an invalidating operation, too large for the view of Parliament, and, therefore, Parliament limited that operation for the future. Then we find that after that enactment we get the words "save only," indicating, according to ordinary principles of construction, that what follows is an exception from the previous general expression, and if the limited protection thereafter enacted in the section is an exception, it necessarily follows that the previous portion must have an independent effect. To my thinking that section was necessary, having regard to the other portions of the Act, to invalidate acts of bankruptcy if Parliament wished to make them in all cases invalid. Sec. 4 provided what should be acts of bankruptcy, and sec. 51 provided that the bankruptcy of the debtor was to have relation back, and to commence at the time of the act of bankruptcy, which is first proved to have been committed within six months preceding the date of presentation of the petition, that is, the first available act. And then sec. 52 provides in sub-sec. (*c*) that all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy is property divisible amongst the creditors, that is to say, belongs to the assignee. Therefore, if the Act had not proceeded in some subsequent section to qualify that and to protect some acts of bankruptcy, it would have been wholly unnecessary to have put in any invalidating words regarding acts of bankruptcy. There are many cases which establish that property, which has been passed or which has been purported to pass by reason of an act of bankruptcy, may be claimed by the assignee unless it falls within the protecting terms of subsequent sections, in England sec. 49. I refer only to one or two of them: *In re*

(1) (1900) 1 Q.B., 156.

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Pollitt; *Ex parte Minor* (1); *In re Carl Hirth*; *Ex parte The Trustee* (2); and there is a passage in *Wace on Bankruptcy* 4th ed., p. 161, which seems to me to correctly state the law:—"Subject to the protection given to certain transactions by sec. 49, the trustee can sue the person to whom the bankrupt has paid away moneys, which have become the trustee's property by relation back, without showing any ground upon which, apart from the special bankruptcy law, the bankrupt or the trustee could have maintained an ordinary action for money received to his use, just as he can follow goods or recover their proceeds; *Ward* v. *Fry* (3), where the authorities are collected." In the New South Wales Act, sec. 57 is the protecting section, and *Shears* v. *Goddard* (4), as has been pointed out by the Chief Justice, is distinct upon the point that even an act of bankruptcy may be protected under that section if the necessary facts are proved by the person claiming their protection. And it is put most distinctly by *Lopes* L.J. that if the terms of sec. 49 apply the transaction is protected. I should refer to the case of *Davis* v. *Petrie* (5). There the learned Judge of the County Court had to deal with an application turning upon sec. 43 of the English Act. He thought that the transaction was protected by sec. 43, though he considered that the language of the section itself was opposed to that view. There was an appeal by the trustee in bankruptcy and Lord *Alverstone* C.J. there pointed out that, unless the case could be brought within sec. 49, it was not protected, and *Kennedy* J. said (6):—"If such a payment is protected, the protective section —sec. 49—as to payments made without notice would appear to be unnecessary." It therefore appears to me that if you stopped at sec. 57 you would be exactly in the position of the English law, namely, that all transactions, unless they can be brought within the protecting provisions of sec. 57 may be invalidated if otherwise obnoxious to the Act, but if they do come within the terms of the protection indicated by that section then, no matter that they are acts of bankruptcy, the section says that nothing in

(1) (1893) 1 Q.B., 175.
(2) (1899) 1 Q.B., 612.
(3) 85 L.T., 394.
(4) (1896) 1 Q.B., 406.
(5) (1905) 2 K.B., 528.
(6) (1905) 2 K.B., 528, at p. 531.

this Act shall invalidate, in the case of bankruptcy, any of those particular transactions mentioned, which would include, of course, the same things as are made by the Act acts of bankruptcy, as the section says, "nothing in this Act shall invalidate" them provided that the requisite conditions are complied with. Having reached that point I do not see how it can be said that the invalidating provisions of sec. 58 are unnecessary if Parliament wishes to do anything more. If the transaction is prohibited by sec. 57, the trustee is protected by it, and creditors who act in good faith are protected. You do not want the protecting portion of the section at all; you have already got it. And unless some new and independent invalidation was intended by sec. 58, then it seems to me that the protecting provisions of sec. 58 are utterly unnecessary. I therefore consider that sec. 58 is an invalidating section. It is the latest exposition of the legislative will, and I must say that, in order to give some effect to it, I do not see my way to differ from the view taken by the learned Judges of the Supreme Court of New South Wales in regarding it as a qualification or modification of sec. 57. In other words, Parliament has said that certain acts shall be acts of bankruptcy and shall be invalid as against the trustee or assignee, and I include among acts of bankruptcy preferences and other transactions, and various voluntary settlements; and then Parliament has said:—"we intend to protect some of these things upon certain conditions"; and then they have said, according to my view, "we will not include in that protection any distribution that is an available act of bankruptcy." And, looking at the context, it seems to me that the predominant idea in the mind of the New South Wales legislature was this, while in other respects we are going to protect *bonâ fide* dealings by third persons, still, we are going to see that, so far as we can, there shall be a rateable distribution among the creditors of the property of a bankrupt which would otherwise be distributed by available acts of bankruptcy. It may be hard upon one particular creditor who has taken under a fraudulent preference, considered from the standpoint of the creditor, to have to refund it.

But the legislature has thought it still harder upon a number of others who, having equal rights with the particular creditor,

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ought to share equally with him. He has no greater claim upon that money than they have, and, therefore, upon the whole it seems to me that we need not attribute injustice or absurdity or reversal of intention to the legislature in order to apply, if the words will properly lend themselves to it, the meaning which I am now suggesting. Then, having done that, it is necessary to consider what is the meaning to be attached to the expression "distribution of property." The first observation I will make is this, that the meaning of words in a particular context must be ascertained by considering the subject matter and considering the nature of the context in which they are found; and the first observation that occurs to anyone's mind is this, that this is a bankruptcy Act, and being a bankruptcy Act we have got to consider the meaning of the words "distribution of property" in bankruptcy. If that expression has no definite meaning, no recognized meaning, if in the course of bankruptcy administration the term "distribution of property" has not been regarded as a well known term, with a certain signification, then we are thrown back upon the ordinary English meaning of the term, and at first I was much impressed with that view, and however hard it may be and however unreasonably it may work out, for some time I did not see my way to depart from the ordinary meaning of the word "distribution." But subsequent consideration and examination of authorities have led me to change my mind. I should point out that from the very beginning of bankruptcy administration in England the term "distribution" has been used, and used in a sense to include one isolated payment by a debtor. If, therefore, we find that in an Act of this nature that expression has been used in that sense, we are not, I think, driven to adopt necessarily the ordinary dictionary signification of the term in which it may be used in a context of a totally different nature; and before proceeding to refer to those authorities I am going to assume that what I say is correct as to there being an ambiguity in the term, arising, upon the one hand, from the ordinary meaning of the term, and on the other, from its frequent use in bankruptcy proceedings. And assuming that, I want to see how the section works out in order to see which construction we should adopt.

It is said, on the one hand, that "distribution of property" means an assignment for the benefit of creditors. That is the argument. I am not quite sure whether it means, according to the argument, an assignment of all property for the benefit of creditors generally, or also includes an assignment to some creditors; it does not matter much which view is taken. But, however the argument is intended to be presented, I see in the section itself a clear distinction between "distribution of property" and a conveyance or assignment of property in trust for creditors. If the legislature meant the section to apply only to the case of conveyances or assignments of property in trust, they would have begun the section with those terms. They did use them later on; why did they not use them at the beginning of the section if they intended them? Therefore, at the very threshold we find the legislature distinguishing between the dictionary or ordinary meaning and a larger sense than conveyances of property on trust. Once you arrive at that you are a long way on the road to giving a fair and reasonable meaning to the whole section. It is said that the word, at all events, must mean something equivalent to a distribution or division. My first answer to that is that you do not find the word "equivalent" in the section, and I do not see why it should be inserted. Then I see how the section works out. According to the argument, if a debtor transfers land or goods, part of his property, to A. as trustee for six creditors out of ten in consideration of a full release, with intent on the part of the bankrupt to delay and defeat the other four creditors, the trustee taking in perfect good faith, that transaction is an act of bankruptcy under sec. 4 (*b*), and it is void according to the argument because it is a distribution. But if the transfer were to A. as a creditor for himself of the very selfsame property in consideration of a release by him, he taking in good faith and the debtor intending to defeat and delay the other nine creditors, the transfer, though equally an act of bankruptcy and an injury to the creditors, is not voidable, according to the argument, because it is not a "distribution." If we take sec. 4 (*e*), fraudulent preference, and a debtor divides £1,000, part of his property, among six creditors out of ten giving them a preference, it is voidable because it is a distribu-

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tion, but if he gives it all to the one creditor it is not. That is the argument. Distribution, it is said, cannot mean giving to one man, and I am assuming that the debtor does not intend to give anything to another creditor, but simply hands over the money to one and says:—"Now I may be made bankrupt, I am not going to follow any process of distribution further than what I have done." It does seem to me that that is not what the legislature can have intended. Unless we are forced to the position I am not prepared to accept it. If that be the nature and effect of the argument, if distribution does not mean the disposal of money among several, if it does not mean a scheme of distribution, then what becomes of the argument? Am I driven then to the everyday meaning? I think not. I refer with a good deal of comfort to that case of *Bourne* v. *Graham* (1) decided by *Wood* V.C., a learned Judge on whom, I suppose, one may well place great reliance; I may say that without presumption. And reading his judgment which was in reference to a fraudulent preference, a case of a single transaction, I do not think, so far as I personally am able to judge of the matter, that his Honor was there using the terms "distribution" and "distribute" in any but the most deliberate sense. I may be wrong in that, but it is the impression that I have, reading it as well as I may, because the word is used time after time in the judgment, and time after time with reference to a single act. And, if so, it affords very strong grounds for believing that in 1856 the leading authorities in English bankruptcy law regarded that word as a well known term in reference to that matter. I now turn to a textbook for a moment, *Robson on Bankruptcy*, 7th ed., p. 161. There the learned author, speaking about fraudulent preferences and the doctrine which was generally considered to have been introduced by Lord *Mansfield*, says:—"The object of it was to prevent a trader on the eve of bankruptcy from making a voluntary distribution of his property amongst his creditors, so as to defeat that equal distribution which is contemplated by the bankrupt laws." Of course the doctrine was applied as much to one transaction as to fifty. But I go back for a moment to undoubted authorities to show how the phrase

(1) 2 Jur. N.S., 1225.

was used from the earliest time, and, it seems to me, how the law regarded the act of a debtor in paying a creditor by way of fraudulent preference as distributing his estate to that extent. Because in contemplation of bankruptcy he said in effect:—"I divide my estate in this way, so much for you in preference." He might do the same to others, or he might not, but as to the residue he says:—"I reserve that for my assignee for distribution among my other creditors." And the law looked upon that as substantially a distribution and void. In the *Case of Bankrupts* (1), a case in which A. became bankrupt, and after a commission awarded against him sold part of his goods to one of his creditors, and afterwards the Commissioners sold these goods jointly to the plaintiffs, it was held that the sale by the Commissioners was good, for the intent of the Statute 13 Eliz. c. 7 was to relieve all the creditors equally in proportion to their several debts, and the debtor himself cannot dispose of his estate. *Wray* C.J. on behalf of the whole Court said (2):—"There should be an equal and rateable proportion observed in the *distribution* of the bankrupt's goods amongst his creditors, having regard to the quantity of their several debts, so that one should not prevent the other, but all should be in *æquali jure*." So that they were dealing with a single case, and upon the principle that he was not allowed to make a distribution of his goods, they held that it was void as against the Commissioner. And in speaking of fraudulent preference in *Rust* v. *Cooper* (3) *Aston* J. said:—"I do not know where such a preference as this is to stop. *There is no case which says, a preference shall be confined to a single creditor.* If a trader may prefer one, he may prefer more." In other words, the learned Judge was saying that it must be put upon the footing that he has made a distribution, and if he can give it to one he can give it to more than one, if not to one he cannot give to more than one. In *Harman* v. *Fishar* (4), one of the leading cases in Lord *Mansfield's* time, he said, speaking of the case of *Linton* v. *Bartlett*, in the Common Pleas, which went very far:—"Upon what then was the opinion of the Court founded? Not

(1) 2 Rep., 25 (*a*).
(2) 2 Rep., 25 (*a*), at 25 (*b*).
(3) Cowp, 629, at p. 635.
(4) Cowp., 117, at p. 124.

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upon one third being the same as an assignment of all his effects; but upon the trader's giving a preference: and upon his sole motive being to do so. *If he can give it to one, he can give it to another*; which would establish this principle, that a bankrupt may *apportion* his estate amongst his different creditors as he thinks proper." Distribution is only another word for apportionment. If the debtor may give an apportionment to one creditor, he may give it to another. Now it will be observed that the *Case of Bankrupts* (1) was an assignment after bankruptcy, and, although it was not known at the time, still the law held that the property was the property of the Commissioner. Lord *Mansfield* intended the doctrine—and that is why it is said that he invented it—to apply to acts done by the debtor before the bankruptcy, but done in anticipation of bankruptcy with intent to defeat the equal and rateable distribution of the estate, and that is how the doctrine came in. At first it was not an act of bankruptcy, in fact it was never made a legislative act of bankruptcy until 1883. I think from Lord *Mansfield's* time down to 1861 it was only a fraudulent preference and void, but it could not be protected even by *bona fides*, and in 1861 the English Parliament protected it where it was *bonâ fide*. In 1883 the legislature declared it to be an act of bankruptcy, and that was followed in the New South Wales Act. The whole doctrine is based on this, that the distribution must be equal. When the debtor allows a distribution which is contrary to the law relating to bankruptcy, he interferes with the proper management of the estate. He interferes most of all with what the law declares shall be a just and equal distribution, and he does that by taking the distribution in his own hand when he should not, and therefore I do not see that it makes any difference whether the property is given to one man or is distributed amongst many. Distribution cannot mean that the debtor is to take the whole of his property and distribute it. That is seen by comparing sec. 58 with sec. 4. The latter section relates to distributions of the whole of the debtor's property. Sub-sec. (*b*) refers alike to dealings with the whole and dealings with part of the property. But sec. 58 does not say "his property" but "property," leaving

(1) 2 Rep., 25 (*a*).

it quite open to include the whole or portion of the debtor's property. Thus, as far as I can read the law, it does not seem reasonable that the legislature should have left fraud to the sections I have adverted to. As was stated by *Mellish*, L.J in *Ex parte Cooper*; *In re Zucco* (1), "The doctrine of fraudulent preference is entirely for the purpose of distribution among the creditors generally; not for the benefit of any single creditor."

If that is the purpose, why should not the section be construed so as to give the greatest effect to that purpose? Seeing that in the authorities the use of the word "distribution" applied to include the case of a single transaction in bankruptcy, I see no difficulty, if the Act more properly and more justly works out in this way, to prefer that meaning to the ordinary and every day meaning which would give a less reasonable construction to the document, according to my way of reading it. For these reasons I think we should adopt the meaning which has been placed upon the section over a long course of years, nearly twenty, by successive Judges, six at least, not including that of the learned Judge whose judgment is now before us for review, because I think it is a right view.

I recognize the great probability of my being utterly wrong as I have the misfortune to differ from my learned collēagues, but having the view I hold, I must honestly express it, and, therefore, I am in favour of dismissing the appeal.

HIGGINS J. The judgments of my learned brothers have covered the ground so well that I can make my judgment very brief. The position, to my mind, is very clear, if we confine ourselves to the modest function of interpreting the Act of 1898, which is the only Act that binds us for present purposes. The only difficulty arises when we try to reconcile complicated cases and forms of expression used by Parliaments and Judges in England and elsewhere under other Acts and other circumstances. I desire to base my judgment upon this—that sec. 58 is not an exception to or qualification of sec. 57.

A payment is made by a debtor to his creditor. The debtor means thereby to defeat and delay his creditors; but the creditor

(1) L.R., 10 Ch., 510, at p. 511.

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takes the payment honestly, without any knowledge of the debtor's intention. Under sec. 57 the creditor need not hand it back to the official assignee. This is what sec. 57 means, and this is in accordance with the steady trend of legislation in New South Wales and elsewhere. As for sec. 58, on which alone the respondent has based his argument, it relates solely to transactions which are distributions of property. "Distribution" is found, as my learned brothers have said, in other parts of the Act where it bears quite aptly the meaning of distribution of property in the ordinary sense. I see no sensible reason for changing the meaning here. The dictionary meaning is "the act of dividing or apportioning among several or many." I cannot admit that there is any ambiguity in the term; and I can see no reason whatever for giving the word any exceptional meaning here. The word does not relate to an isolated payment to one creditor—such payment is covered by sec. 56 as qualified by sec. 57.

I do not feel pressed by the fact that *Wood* V.C. in *Bourne* v. *Graham* (1) used the term distribution repeatedly in giving his reasons in a case of fraudulent preference in which the transaction impeached was an isolated payment to one creditor. In that case the distinction between a payment to one creditor and a distribution among several creditors was immaterial—was not before the mind of the Judge. He was not concerned with the distinction. He does not give any interpretation of the word; nor, indeed, could he alter the meaning of the English language. He does not say that the word has any exceptional meaning in bankruptcy matters. The stress of his thought was laid on the duty of distributing according to the Act among all creditors; and the transaction in question was a violation of due distribution. He means that, if a man is in difficulties, and wants to do his best for his creditors, he must not prefer some to others, and must distribute in the way prescribed in the Act. The word "distribution" in sec. 58 is probably used, instead of the phrase in sec. 4 (1) (*a*), because that phrase could not cover all the transactions of distribution which are intended to be made void. There may be a distribution among several creditors to the exclusion of

(1) 2 Jur. N.S., 1,225.

the others; and this is an available act of bankruptcy under sec. 4 (1) (*b*); *In re Phillips*; *Ex parte Barton* (1).

I am bound to add, however, that I do not concur with the view that sec. 58 was unnecessary, so far as it declares a distribution which is an available act of bankruptcy to be void. No doubt, by sec. 51 all dispositions which take place *after* bankruptcy are made void, because the bankrupt is not, at that moment, dealing with his own property. That is obvious. But the bankruptcy does not begin until the disposition—the deed of conveyance, assignment, &c.—is completed: *Ex parte Helder*; *In re Lewis* (2). The bankruptcy relates back, commences at the moment that the act of bankruptcy has been "committed" (sec. 51); and, therefore, the transaction which becomes an act of bankruptcy takes place at a moment when the property still belongs to the debtor. Therefore, if it were not for the express provision of sec. 58, I know of no ground on which a mere deed of assignment for creditors could be declared void (if there had been no previous act of bankruptcy). In my opinion, therefore, the earlier part of sec. 58 is not unnecessary; and for the reasons which I have stated, I think that the appeal should be allowed.

[*Gordon* K.C. offered no objection, under circumstances which he stated, to an order being made for payment of costs by the respondent.]

Appeal allowed. Order appealed from discharged. Motion dismissed with costs. Respondent to pay the costs of the appeal.

Solicitor, for the appellant, *W. A. Windeyer*, for *Alexander & Windeyer*, Deniliquin.

Solicitors, for the respondent, *Villeneuve Smith & Dawes.*

C. A. W.

(1) (1900) 2 Q.B., 329.

(2) 24 Ch. D., 339, at pp. 343, 344.