[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } APPELLANT;
PLAINTIFF,

AND

HILL & HALLS LIMITED . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 18, 19.

MELBOURNE, *May* 28.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Liens on Crops—Registration—Advances by two parties on same crop—Priority—Whether according to execution or according to registration—Liens on Crops and Wool and Stock Mortgages Act 1898 (*N.S.W.*) (*No.* 7 *of* 1898), *secs.* 4, 5, 6, 9. 10—*Registration of Deeds Act* 1897 (*N.S.W.*) (*No.* 22 *of* 1897), *secs,* 3, 6, 12.

Sec. 4 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 (N.S.W.) provides that "In all cases where any person makes any bona fide advance of money or goods to any holder of land on condition of receiving as security for the same the growing crop or crops of agricultural or horticultural produce on any such land, and where the agreement relating to such security is made in the form or to the effect of the Second Schedule hereto, and purports on the face of it to have been made as security for such advance, and is duly registered within thirty days after its date in the office of the Registrar-General in Sydney, the person making such advance, whether before, at, or after the date of such agreement, shall have a preferable lien upon, and be entitled to the whole of such crop and the whole produce thereof, and possession thereof by the lienor shall be to all intents and purposes in the law the possession of the lienee, and when such advance is repaid with interest specified in such agreement the possession and property of such crop shall revert to and vest in the lienor."

Sec. 12 of the *Registration of Deeds Act* 1897 (N.S.W.) provides that "(1.) All instruments (wills excepted) affecting any lands or hereditaments, or any other property, in New South Wales which are executed or made bona fide,

and for valuable consideration, and are duly registered under the provisions of this Act, or of any Act hereby repealed, shall have and take priority not according to their respective dates but according to the priority of the registration thereof only."

Held, that the meaning of sec. 4 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 is that, on registration within thirty days after its execution of an agreement made in the form prescribed, the lienee is to be regarded as having had a valid security as from the date of the execution of the agreement.

Held, also, that liens on crops registered under sec. 4 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 are not within sec. 12 of the *Registration of Deeds Act* 1897.

Held, therefore, that of two agreements made in the prescribed form in respect of the same crop, each of which is registered within thirty days from its execution, that which was executed first has priority over the other notwithstanding that the latter was registered first.

Quœre, *per Higgins* J., whether sec. 4 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 allows a holder of land who has signed a lien on his crops for one year's growth to give another lien for the same year—at all events if the first lien be registered within thirty days.

Decision of the Supreme Court of New South Wales: *Attorney-General* v. *Hill & Halls Ltd.*, (1922) 23 S.R. (N.S.W.), 100, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court by the Attorney-General for New South Wales against Hill & Halls Ltd., a special case, which was substantially as follows, was stated by consent of the parties :—

1. This action is brought by the Attorney-General for New South Wales against Hill & Halls Ltd., being a company duly incorporated and liable to be sued in that name for the recovery of damages claimed to be due in the circumstances herein set out.

2. Before and during the month of May 1921 and at all material times one Walter Patrick Evans was, within the meaning of the *Liens on Crops and Wool and Stock Mortgages Act* 1898, the holder of certain land at Ooma in the said State.

3. On or about 7th April 1921 the said Walter Patrick Evans as such holder of land as aforesaid applied to His Majesty for an advance of seed wheat to the value of £150. On 23rd April 1921 the Rural Industries Board acting on behalf of His Majesty approved of the making of such advance on condition of receiving as security for the same, with interest thereon at the rate of 6 per cent. per

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annum, the crop of wheat growing and to grow on the said land during the current year.

4. On 28th April the said Board acting on behalf of His Majesty informed the said Walter Patrick Evans by letter that the said advance would be made on the condition aforesaid, and enclosed in the said letter an agreement to be signed by him.

5. On 2nd May 1921 the said Walter Patrick Evans signed the said agreement, a copy of which is annexed hereto and marked with the letter "A"; and the said Walter Patrick Evans on 4th May 1921 sent the said agreement by post to the said Board, who received it on 5th May 1921.

6. The said agreement was duly registered in the office of the Registrar-General in Sydney on 10th May 1921, and the said advance was accordingly duly made on 18th May 1921.

7. The defendant company for a number of years has carried on the business of a general storekeeper; and on 5th May 1921, as the result of a number of transactions, the said Walter Patrick Evans owed the defendant company £559 0s. 11d. on balance of account.

8. It was thereupon agreed by and between the defendant company and the said Walter Patrick Evans that the said company should receive as security for the said debt and future advances, together with interest thereon at the rate of 8 per cent. per annum, the crop of wheat growing and to grow upon the said land during the current year.

9. The said Walter Patrick Evans accordingly on 5th May 1921 signed and delivered to the defendant company the agreement a copy of which is hereunto annexed and marked with the letter "B," which agreement was duly registered in the office of the Registrar-General in Sydney on 7th May 1921; and thereafter before 31st January 1922 further advances were accordingly made in pursuance of the said agreement to the amount of £386 1s. 2d.

10. The said advances made by and on behalf of His Majesty and by the defendant company were respectively made bona fide.

11. Shortly after 18th May 1921 the said Walter Patrick Evans sowed a crop of wheat on the said land.

12. Thereafter on or about 31st January 1922, upon the said crop being harvested, the defendant company took possession thereof,

and upon realization of the same received and now holds the sum of £520 14s. 7d.

13. The said advance made by His Majesty to the said Walter Patrick Evans remains wholly due and unpaid, and the amount due and payable in respect thereof for principal and interest to 31st January 1922 is £156 18s. 7d., and interest thereafter accrued and is accruing at the rate of sixpence *per diem*.

14. The amount of the debt due from the said Walter Patrick Evans to the defendant company in respect of its advance aforesaid has always exceeded the said sum of £520 14s. 7d.

15. His Majesty's said Attorney-General claims that, as the lien to His Majesty was earlier in date and was registered within thirty days, the possession and property of the said crop vested in His Majesty.

16. The defendant company claims that, as its lien was registered before that of His Majesty, the possession and property of the said crop vested in it.

17. It is admitted by the defendant company that if the said lien of His Majesty vested the possession or property of the said crop in His Majesty in priority to the rights of the defendant company under its lien, the acts of the defendant company set out in par. 12 hereof amounted to trespass to goods of His Majesty and to conversion thereof to the use of the defendant company.

18. The question for the opinion of this Honourable Court is which of the two claims aforesaid is correct.

19. It is agreed that if the opinion of the Court is in favour of His Majesty judgment should be entered for the plaintiff for £156 18s. 7d., together with interest at the rate of sixpence *per diem* from 31st January 1922 to the date of judgment and costs; and, on the other hand, if the opinion of the Court is in favour of the defendant judgment should be entered for the defendant with costs.

The agreement referred to in par. 5 and marked "A" was in the form in the Second Schedule to the *Liens on Crops and Wool and Stock Mortgages Act* 1898 (N.S.W.); and by it Evans purported, in consideration of the advance of £150, to give to the Minister for Agriculture a preferable lien to the extent of £150 with interest thereon at six per cent. per annum on the crop of wheat growing or

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to grow on the land referred to in par. 2. The agreement referred to in par. 9 and marked "B" was also in the form in the Second Schedule to the above-mentioned Act; and by it Evans purported, in consideration of the advance of £740, to give to Hill & Halls Ltd. a preferable lien to the extent of such advance and all further sums of money or goods advanced or delivered to him on the crop of wheat growing or to grow on the same land as that referred to in par. 2.

The case was heard by the Full Court, which, being of opinion that, as the defendant's lien was registered before that of His Majesty, the possession and property of the crop vested in the defendant, ordered that judgment should be entered for the defendant with costs: *Attorney-General* v. *Hill & Halls Ltd.* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

Bavin A.-G. for N.S.W. (with him *Harry Stephen*), for the appellant. A lien on crops given under sec. 4 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 (N.S.W.) has priority according to the date of its execution, and not according to the date of its registration. Whenever the Legislature intends to alter the rule *Qui prior est tempore potior est jure*, it does so expressly. There is nothing in the Act which by necessary implication requires that priority should be given according to the date of registration. Sec. 4 puts the lienee in the same position as if he had physical possession of the crop, and upon registration within thirty days his title dates back to the date of the agreement. Upon entering into the agreement the lienee has an inchoate right which is perfected upon registration within thirty days, and nothing can be done within that time to interfere with the perfecting of that right (see *Ayers* v. *South Australian Banking Co.* (2)). The position is the same as that of a bill of sale under the *Bills of Sale Act* 1854 (17 & 18 Vict. c. 36) (*Ex parte Allen*; *Ex parte Page*; *In re Middleton* (3)).

[HIGGINS J. referred to *Ramsden* v. *Lupton* (4); *Marples* v *Hartley* (5); *Banbury* v. *White* (6).]

(1) (1922) 23 S.R. (N.S.W.), 100.
(2) (1871) L.R. 3 P.C., 548, at p. 552.
(3) (1870) L.R. 11 Eq., 209.
(4) (1873) L.R. 9 Q.B., 17.
(5) (1861) 30 L.J. Q.B., 92.
(6) (1863) 32 L.J. Ex., 258.

Leverrier K.C. (with him *Davidson*), for the respondent. There is a fundamental distinction between property the subject of a bill of sale and property subject to a lien under the *Liens on Crops and Wool and Stock Mortgages Act*. In the former case, apart from a statute a contract for the sale of property passes the property and a bill of sale can only be made over specific chattels. The *Bills of Sale Act* 1854 was not passed to give effect to what would otherwise be an invalid title; the assignee had a right at common law, but that right is defeated if he does not register within the fixed time. In the latter case, a right is given by the Act which would not otherwise exist, and registration is necessary to give a title.

Bavin A.-G. for N.S.W., in reply.

Cur. adv. vult.

May 28.

The following written judgments were delivered:—

KNOX C.J. This is an appeal by special leave from an order of the Supreme Court that judgment should be entered for the respondent, the defendant in the action. The following statement of the relevant facts and the contentions of the parties is taken from the reasons for judgment delivered by *Gordon* J. (1):—"The facts in this case are short and simple, the point of law arising on those facts is equally short and simple. The plaintiff bases his claim upon an agreement made with him by one Walter Patrick Evans dated 2nd May 1921. The defendants base their claim upon an agreement made with them by the same Walter Patrick Evans dated 5th May 1921. It is admitted that each of these agreements is in the form provided by the Act, was made bona fide and otherwise complied with all the requirements of the Act necessary to make it a good and valid security over the crops of Walter Patrick Evans then or thereafter growing on his land. The agreement, however, upon which the plaintiff bases his claim though made on 2nd May was not registered till 10th May 1921. The agreement under which the defendants claim though made on 5th May 1921 was registered on 7th May. The plaintiff claims that he is entitled to priority

(1) (1922) 23 S.R. (N.S.W.), at p. 109.

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over the defendants because his agreement was prior in date to the defendants' agreement though registered later than theirs. The defendants claim that their agreement takes priority because, though later in date than the plaintiff's agreement, it was registered at an earlier date. The short point may be stated thus: the defendants contend that the registration of any agreement is a condition precedent to the acquisition of the rights conferred by the Act; the plaintiff contends that immediately an agreement is made in the form and for the purposes of the Act, all the rights by the Act conferred come into existence but may be lost if registration of such agreement does not take place within thirty days after the date of that agreement."

The Act referred to is the *Liens on Crops and Wool and Stock Mortgages Act* 1898 (No. 7 of 1898); and the section on which the controversy arises is sec. 4, which is in the following words: "In all cases where any person makes any bona fide advance of money or goods to any holder of land on condition of receiving as security for the same the growing crop or crops of agricultural or horticultural produce on any such land, and where the agreement relating to such security is made in the form or to the effect of the Second Schedule hereto, and purports on the face of it to have been made as security for such advance, and is duly registered within thirty days after its date in the office of the Registrar-General in Sydney, the person making such advance, whether before, at, or after the date of such agreement, shall have a preferable lien upon, and be entitled to the whole of such crop and the whole produce thereof, and possession thereof by the lienor shall be to all intents and purposes in the law the possession of the lienee, and when such advance is repaid with interest specified in such agreement the possession and property of such crop shall revert to and vest in the lienor."

After considerable hesitation I have come to the conclusion that the decision of the Supreme Court cannot be sustained. I recognize that the construction of the section for which the appellant contends will lead to grave inconvenience; but I am unable to find any real ambiguity in the words used by the Legislature, and must, therefore, though reluctantly, construe those words according to what I conceive to be their natural meaning, regardless of the consequences.

I am inclined to agree with *Gordon* J. in thinking that, if the requirement of the section had been that the agreement should be registered, without specifying any time within which registration might lawfully be effected, the question now raised would not have been open to argument. But what the section requires is not registration simply, but registration within thirty days after its date. Parliament says in effect to the proposed lender: If you make an advance on condition of receiving a crop as security, if your agreement is in a prescribed form, if you register that agreement within thirty days and if you make the agreed advance either before, at or after the date of the agreement, you shall have a preferable lien upon the crop and possession by the lienor shall be your possession.

The appellant complied literally with all these conditions, but it is contended that he is not entitled to a preferable lien over the crop in priority to the respondent by reason of the prior registration by the latter of an agreement later in date than that relied on by the appellant. But the Act contains no provision such as is found in other Acts, that securities shall take priority according to date of registration; and, in the absence of such a provision, I can find no valid reason for departing from the maxim *Qui prior est tempore potior est jure*. It is true that, in order to obtain an effective security under the Act, it is necessary that the document should be registered within thirty days after its execution, and in this sense registration within that time may be said to be a condition of the continued validity of the security. But there is nothing in the Act to justify the conclusion that registration is a condition precedent to the acquisition of any rights under the agreement; indeed, the provisions of secs. 5, 6 and 10, seem to point in the other direction. It is conceivable that an agreement for a lien in the prescribed form might be entered into less than thirty days before the crop was ready to be gathered, and in such a case it can hardly be that the intention was that the person making the advance should not before registration have the advantage of the protection afforded by secs. 5 and 10. Moreover, the words used in sec. 9 seem to import that the lien is "in force" from the date of its execution. The true meaning of the Act seems to me to be that, on registration of a proper agreement within thirty days after its execution, the lienee is to be

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regarded as having had a valid security as from the date of the execution of the lien. There is no obscurity in the words of sec. 4, and no difficulty in applying its provisions when one lien only is in question; the difficulty in the present case arises from the omission of the Legislature to make any express provision for the case of a dishonest borrower who obtains two separate and independent loans on the security of one crop without disclosing the true facts. Probably the possibility of this happening was overlooked, or Parliament took an unduly optimistic view of the honesty of borrowers generally.

In my opinion the appeal should be allowed, the order of the Supreme Court discharged and judgment entered in the action for the appellant for £156 18s. 7d., with interest at the rate of 6d. *per diem* from 31st January 1922 to the date of judgment, and costs of the action, including the costs of the special case. The appellant will pay the respondent's costs of this appeal as between solicitor and client, pursuant to the undertaking given by him on the application for special leave to appeal.

ISAACS AND RICH JJ. The immense importance of this case to the mercantile, pastoral and agricultural interests in New South Wales, and to some extent elsewhere in Australia, justifies a full consideration of the arguments that have been addressed to us.

There are two distinct questions raised. They are: (1) Does sec. 12 of the *Registration of Deeds Act* 1897 (No. 22 of 1897) confer priority on the respondent's instrument; and (2) does prior registration in fact under the Act No. 7 of 1898 (which we may shortly call the Liens Act) of itself confer legal priority? An affirmative answer to either question would support the judgment under appeal.

1. *The Registration of Deeds Act.*—Sec. 12 confers legal priority on (a) "instruments" affecting lands, hereditaments, or any other property, which are (b) duly registered under the provisions (c) of this Act or (d) of any Act hereby repealed. As to "instruments," sec. 3 (II.) defines them for the purposes of "this Act" to "include not only conveyances and other deeds, but also all instruments in writing whatsoever, whereby real or leasehold estate is affected or is intended so to be." The word "include" is there obviously used as marking the full limit of comprehension, in the sense secondly

indicated by Lord *Watson* in *Dilworth* v. *Commissioner of Stamps* (1). Not only does the context as in sec. 6 show it, but so does the omission of the word "stock" which was found in the corresponding sec. 22 in the repealed Act. Besides, the real limitation for present purposes is not so much in the word "instrument" as in the words "real or leasehold estate," as to which there can hardly be a question. The words in sec. 12 "or any other property" apply, and, in view of the rest of the Act, can only apply, to the other words in sec. 12 "any Act hereby repealed." This is emphasized by the words "this Act" alone in sec. 3 (II.), as contrasted with the double reference in sec. 12 to "this Act" and "any Act hereby repealed."

The second essential above mentioned in sec. 12 is "duly registered under the provisions." Due registration in fact is admitted, but the case does not say "under the *Registration of Deeds Act*," and if it did, the legal effect might have to be considered. But all we know is that, at all events as far as the Liens Act is concerned, the registration is duly made as to both liens.

The third essential is "this Act." Under what portion of the *Registration of Deeds Act* 1897 could such lien have been registered? Sec. 6 is an exhaustive enumeration according to the law as then existing. The Act, it is true, is called a consolidating Act; but it is, both on its face and when considered as part of the general scheme of consolidation, much more than a consolidating Act. It is a consolidating Act and an eliminating Act, eliminating several matters from a general registration enactment and leaving them wholly, in accordance with a legislative plan, to the operation and effect of special statutes. Even what purports to be a purely consolidating Act must be read and construed according to its own terms, if they are plain, and even if it is equally plain that the superseded enactments made a different provision. That was distinctly laid down in a case in this Court (*Maybury* v. *Plowman* (2)), in which a very clear pronouncement on the point by the Privy Council was quoted (3). The passage referred to is found in *Administrator-General of Bengal* v. *Prem Lal Mullick* (4), where Lord *Watson*, referring to an argument

(1) (1899) A.C., 99, at p. 106.
(2) (1913) 16 C.L.R., 468.
(3) (1913) 16 C.L.R., at p. 479.
(4) (1895) L.R. 22 Ind. App., 107, at p. 116.

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exactly similar to the one dealt with here, assumed for this purpose that the legislation prior to the consolidation had the effect contended for, and then, so assuming, proceeded to say :—" The respondent maintained this singular proposition, that, in dealing with a consolidating statute, each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed." It is unaccountable to us that those judicial decisions were not brought to the notice of the Supreme Court. We observe that all three Judges think that the Liens Act is itself sufficient to support the decision. But the learned Chief Justice also relied on the Registration Act, and from its history drew an inference " that the Legislature did not by its consolidating enactments intend to take from statutory lienees of wool the right of claiming priority according to the date of registration." Had the case of *Maybury* v. *Plowman* (1) and the Privy Council case mentioned been drawn to the attention of *Cullen* C.J., it must be presumed that his Honor, especially when considering the effect of the whole scheme of consolidation, would not have drawn the inference he did. We have to read and apply sec. 6 of the existing Act as it stands. Sec. 6, however, is quite plain as to what may be registered under the provisions of *that* Act. No possible question can arise as to whether a lien on crops comes within sec. 6, except as to one part of it. With that exception the answer is too plain for words. The nature of the exception was not contended for by the respondent, but in considering its rights and interpreting the Act we are bound to give this our attention. The exception is found in sub-sec. III. of sec. 6, namely, " all instruments (except leases for less than three years) affecting any estate in land." The word " estate " has, unless the contrary intention appears, a very extensive meaning in an Act. It includes " any

(1) (1913) 16 C.L.R., 468

estate, or interest, charge, right, title, claim, demand, lien, or encumbrance at law or in equity." But all that is and must be in respect of the "land," and must constitute an interest in the "land" and not in something which the law regards as a pure chattel. It is clear both from the tenor of the Act read as a whole, from the contrast of the expressions in sec. 12, namely, affecting "any" (a) "lands or hereditaments" or (b) "any other property," from the common law nature of annual crops, and from the legislative footing upon which they have been placed for the purpose of the Liens Act, that a lien on crops is not, any more than a lien on wool, regarded by the Legislature as an "instrument affecting any estate in land." The two last mentioned considerations more appropriately form part of the interpretation of the Liens Act.

The fourth essential of sec. 12, which is alternative with the third, is where there is registration under the provisions "of any Act hereby repealed." The meaning of "hereby repealed" is found in sec. 2, which says: "The Acts mentioned in the First Schedule to this Act, *to the extent* to which the same are there expressed to be repealed, are hereby repealed." Turning to the First Schedule we find as to Act 7 Vict. No. 16 that, *inter alia*, sec. 11, the priority section (corresponding to the present sec. 12), is *wholly* repealed. So that thenceforth no priority can ever be claimed as to anything by virtue of that sec. 11. Then, as to sec. 10 (corresponding to sec. 6 of the present Act), it is repealed as to "the whole" with certain specified exceptions, none of which include liens on crops. At the date of the passing of what we may call the original *Registration of Deeds Act* (20th December 1843), there was no Lien on Crops Act. But there was inserted in sec. 10 a general provision in these words: "Other instruments in writing of and relating to the property situate within the said part of the said Colony which may require registration." That is expressly, though not specifically, repealed by the words "the whole" as applied to sec. 10. The omission, whether deliberate or not, is an omission and could not be supplied by a Court. But it is obviously deliberate; as is seen from the consistent plan of consolidation and repeals, which leaves registration, in connection with special subjects of legislation, to be dealt with under the provisions of the particular Acts dealing with those

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subjects. This is specifically indicated in the Liens Act, as will be presently pointed out. Indeed, it is only natural, seeing that sec. 10 of the Act 7 Vict. No. 16 was only directed to the *place* of registration, namely, the substitution of the office of the Registrar-General for the office of the Registrar of the Supreme Court. Thus the subjects saved by the First Schedule of Act No. 22 of 1897, with respect to the original *Registration of Deeds Act*, are respectively repealed by, and substantively enacted in, other Acts—as No. 7 of 1898 (Liens Act), No. 17 of 1898 (Conveyancing Act), No. 17 of 1899 (Registration of Births, Deaths and Marriages Act). It is not out of place to observe that the only specific provision made in sec. 10 of the original *Registration of Deeds Act* as to liens on wool and mortgages of stock was limited to the Act 7 Vict. No. 3, the original Liens Act. But that Act came to an end in July 1846, by disallowance. It was also locally repealed by Act 9 Vict. No. 30, as to which the royal assent was reserved and was given, as appears by Mr. Gladstone's despatch to Governor Fitzroy dated 4th July 1846. A despatch of Earl Grey dated 17th July 1846 shows that by Imperial Order in Council the Act 7 Vict. No. 3 was also disallowed. By Act 11 Vict. No. 4 the New South Wales Legislature purported again to repeal Act 7 Vict. No. 3, which by that time had been dead a year. But nowhere can we find that any later Act was substituted in sec. 10 of the *Registration of Deeds Act* for Act 7 Vict. No. 3. The reason for that is that, as pointed out in the Commissioner's memorandum and certificate prefixed to the Liens Act No. 7 of 1898, sec. 10 and other sections were "virtually repealed and wholly superseded by secs. 2, 3, 4 and 5 of 11 Vict. No. 4." In other words, registration of liens on wool was prescribed by the Liens Act, and, so far as the Registration Act 7 Vict. No. 16 was concerned, fell under the general provision in sec. 10 above referred to. Sec. 10, as we have said, is by the Act of 1898 definitely repealed as to liens on wool and stock mortgages. The expressed repeal of sec. 10 as to stock, &c., in the Liens Act 1898 was, as is seen, unnecessary. But it shows beyond question the intention of the Legislature. And, seeing that its intention in the repealing provisions of the *Registration of Deeds Act* 1897 was to repeal the whole of sec. 10 of the earlier Act except the specifically exempted matters, it follows

that the reference in sec. 12 of the Act of 1897 to registration under the repealed Acts, must mean past registration—at all events as to liens on crops.

The result, so far, is that, unless an agreement for a lien on crops is any instrument " affecting any estate in land," it is not within sec. 12 of the *Registration of Deeds Act*; further, that to be such an instrument it must be so either on a proper construction of the Liens Act or by common law not inconsistent with that Act.

2. *The Liens Act.*—To construe this Act, the rule acted on in *Maybury* v. *Plowman* (1) must again be applied. If the statute, read as a whole and by the light of the subject matter and surrounding circumstances at the time it is passed, is clear and unambiguous, its own terms must govern. If those terms remain doubtful, its history may assist. But first the effort must be made to interpret it as the will of Parliament declared in 1898. There is no preamble. The circumstances of New South Wales in 1898 were by no means identical with those of 1843, and the preamble to the earlier Act would have been untrue if repeated in 1898. The preamble to the Act of 1862 is a statement of purpose, which is evident from the operative provisions of the Act. If, however, the history of the legislation needs investigation by reason of ambiguity, the preambles become important elements. For the present we simply read the Liens Act to gather its meaning. Disregarding historical sequence, liens on crops come first, in Part II. It is common ground that Part II. enacts that a landholder can give, in the manner prescribed, what is called " a preferable lien " over growing crops of agricultural or horticultural produce, as described. It is also uncontested that the effect of the Act was to alter the common law as it then stood unaffected by any statute except the repealed Act, and to make provisions so as (1) to enable the " holder of land " to give, even before crops come into existence, a lien on those crops after they come into existence and are severed; (2) to make that lien " preferable," that is, a preference lien (just as shares are preference shares), over every other claim, including bankruptcy, that might otherwise exist in respect of the crops, and (3) to leave the landholder in actual possession of the crops until the time comes for enforcing the lien.

(1) (1913) 16 C.L.R., 468.

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It is beyond question that the Act looks for its real effect to the time when the crop is to be severed. The advance is on the "crop." The lien is declared to be, not on the "land," but on the "crop." The agreement scheduled, and the promise it contains, is that it shall be "gathered, carried away, and made marketable . . . and be delivered to" the lender, who may sell it, &c. The basis of the Act, in short, is that the crop is treated as *a pure chattel* for the purposes of the Act, with certain necessary powers in case of default, namely, powers of severance and disposal. The nature of the statutory lien given is entirely new. At common law a lien (1) is a mere personal right of detention and therefore requires possession (*Donald* v. *Suckling* (1), *Great Eastern Railway Co.* v. *Lord's Trustee* (2) and *John D. Hope & Co.* v. *Glendinning* (3)); (2) consequently cannot exist over property not yet in existence or, if in existence, that is not deliverable (*Thomas* v. *Kelly* (4); and see *Brantom* v. *Griffits* (5)); and, further, (3) having regard to the bankruptcy law, an agreement that left the property in the possession of the owner would not avail against the order and disposition clause in the event of bankruptcy. A new legal interest with new rights and obligations and new consequences was therefore devised, primarily for the relief of the property owners, with appropriate protection to the lenders. The course prescribed by the Legislature for the relief of the property owner and the assured security of the lender is:— (1) Advance to be on condition of "receiving as security" only for such advance a lien on the crop. That looks ahead to the time of the *severance of the crop from the land*, and is a present fictional separation of the two for the purposes of the Act. (2) An agreement in the statutory form. The agreement carries out the same idea. (3) Registration within thirty days; which, of course, means at any time within the thirty days. Obviously, taking that Act alone, once the landholder has done all he can do to invest the lender with the statutory right, he cannot be supposed to derogate from that, and, provided the lender follows the only requirements demanded of him by the Legislature, he would be protected by the

(1) (1866) L.R. 1 Q.B., 585.
(2) (1909) A.C., 109.
(3) (1911) A.C., 419, at p. 422.
(4) (1888) 13 App. Cas., 506, at p. 515.
(5) (1876) 1 C.P.D., 349.

legislative declaration of consequences. So far as concerns treating crops of that kind—*fructus industriales*—as personal property, where there is a contract to take them in a severed state, the Legislature was introducing no innovation upon the common law. The common law so regarded them as personalty for many purposes, though for others they are considered as part of the realty. Prior to 1862 that was so decided in several cases; indeed—as *Brett* J. pointed out in *Brantom* v. *Griffits* (1)—*Williams on Executors*, 7th ed., p. 709, states in a note that growing crops are for "most" purposes personal property. That is repeated in the 9th edition, at p. 623. In that case of *Brantom* v. *Griffits* it was held they were not within the *Bills of Sale Act* because not deliverable at the time of the bill of sale. But that is immaterial here, where the Legislature steps in and deals with them even though not "deliverable" at the time of the agreement. The Imperial Legislature took the matter in hand two years after *Brantom* v. *Griffits*, and by the *Bills of Sale Act* of 1878 (secs. 4 and 7), and later by the Act of 1882 (sec. 6), growing crops if separately assigned are treated as personal chattels in relation to a bill of sale. The cases on the common law relevant to this question go far back, and most of them are collected in *Marshall* v. *Green* (2). The material part of the decision is the judicial confirmation of the statement in the note to *Duppa* v. *Mayo* (3) that "it appears to be now settled that, with respect to emblements or *fructus industriales*, &c., the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods." That was Lord *Denman's* view in *Jones* v. *Flint* (4). (See also per *Kay* J. in *McManus* v. *Cooke* (5); *Ex parte National Mercantile Bank*; *In re Phillips* (6).) The view thus presented of the effect of the Act in accordance with the common law is reinforced by the nature of the "preferable lien." The

(1) (1876) 1 C.P.D., at p. 352.
(2) (1875) 1 C.P.D., 35.
(3) (1670) 1 Wms. Saund., 275d, at p. 277c.
(4) (1839) 10 A. & E., 753.
(5) (1887) 35 Ch. D., 681, at p. 688.
(6) (1880) 16 Ch. D., 104.

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lienee, as he is called, is by sec. 4 "entitled to the whole of" the "crop and the whole produce thereof" (that is, the "property" in the crop), "and possession thereof by the lienor shall be to all intents and purposes *in the law* the possession of the lienee" (that is, the legal "possession" of the crop). Then, says sec. 4: "When" the "advance is repaid with interest specified in" the "agreement the possession and property of such crop shall *revert to and vest* in the lienor." This shows how completely and effectually in the eye of the law the property and the possession have been transferred *to the lienee*, as his security. Then, says sec. 5: "No such lien duly made and registered shall be extinguished or otherwise prejudicially affected" by certain events mentioned. The section speaks of a "lien duly made and registered." No doubt, it refers to the agreement scheduled, but the use of the phrase "extinguished or otherwise prejudicially affected" shows that by "lien" in that expression the Legislature meant to include the legal effect. The word "extinguish" could not appropriately apply to the document or the bargain it in fact recorded, but it is quite apposite to the *effect* of making the agreement. We read the phrase to indicate, when read in conjunction with sec. 4, that, when the advance is made and the document signed under the conditions prescribed, a preferable lien is at once created, subject only to defeasance if there be no registration as required by the Act. The events that are mentioned in sec. 5 as not extinguishing or prejudicially affecting the lien are (1) death of the lienor; (2) his bankruptcy; (3) any sale, mortgage or other incumbrance *upon the land* upon which any such crop is growing. As to "death," it would be strange indeed if his death before registration, even in the absence of any competing lien, could be supposed to extinguish the lienee's right, while death after registration would not. At this point, as no express words determine the time of death intended by the Legislature, the history of the legislation does become useful. The same provision existed in the Act of 1862, and was followed by the same provision that appears in the present Act, namely, "If such lienor, his executors, administrators, or assigns, neglects or refuses either to pay off the whole of such advance with interest as agreed upon, or to give up such crop to the lienee thereof in pursuance of the agreement, such lienee,

his executors, administrators, or assigns, may enter into possession of such crop, and may gather," &c., and pay himself, " and shall pay the balance to the lienor, his executors, administrators, or assigns." Seeing that in 1862 it was the " heir " who would have been entitled to the *land*, this indicates that the character of the crop is *personalty* and also that the debt is protected from the beginning against the death of the borrower. Then, as to bankruptcy, the protection as to possession might be utterly defeated if the only bankruptcy referred to was bankruptcy after registration. Again, can it be supposed that in speaking of " sale or mortgage of, or other incumbrance upon the land " the Legislature meant to leave open to the lienor the opportunity of walking away from his lender's office and immediately defeating his creditor by selling, mortgaging or otherwise encumbering his land before the agreement could possibly arrive in Sydney ? We are quite unable to imagine such a legislative trap, but we read the protection in sec. 5 to apply to the events enumerated as occurring at any time after the due making of the " lien." This is borne out by secs. 6 and 7. By sec. 6 the lien is made " preferable " even to a landlord's claim, except as to one year's rent. But even that exception is consistent with the lienee's entering into possession and gathering the crop. It is only that " before selling " the crop the lienee shall pay the landlord " not exceeding one year's rent." Sec. 7 makes a similar provision in favour of a mortgagee in possession. That section indicates that the lien is preferable even to a prior existing mortgage of the land, and the personal obligation is put on the lienee to pay the mortgagee, if in possession at the time of harvesting, an amount of interest not exceeding twelve month's interest. What seems a very important proof that the Legislature in its scheme of consolidation was allocating its registration provisions to specific Acts is that a new provision is introduced into the Liens Act. It is found in sec. 16, and runs thus : " The Registrar-General may prescribe the form and size of all writings to be registered under this Act." The section then proceeds as in sec. 5 of Act 11 Vict. No. 4. The expression " this Act " applies to the whole statute and is contradistinguished from the words " this Part " found in secs. 19 and 20. (See sec. 1, " this Act.")

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The result of the foregoing considerations is as follows: (1) registration of liens on crops does not take place under the *Registration of Deeds Act* 1897, and therefore sec. 12 of that Act does not apply so as to give priority according to date of registration; (2) registration of liens on crops is expressly provided for by sec. 4 of the Liens Act 1898, the form being provided under sec. 16 and the alphabetical registry and fees under sec. 8; (3) no priority according to date of registration is expressly declared by the Liens Act, and no such priority is known to the law unless created expressly or implied by statute; (4) such an implication under the Liens Act, sec. 4, is opposed to the specified transfer of possession and property to a lienee, inasmuch as such statutory legal transfer cannot in the nature of things be made to more than one lienee at the same time; (5) a second lienee cannot obtain such a statutory transfer where a prior transfer has been made unless and until thirty days have elapsed from the execution of the prior agreement without its registration; (6) the implication referred to would be also opposed to sec. 5 of the Act because, if a second statutory lien could be given so as to defeat by prior registration a prior agreement for a lien, so also could a subsequent sale for valuable consideration without notice prior to registration of the lien—but that, as we have said, is contrary to sec. 5; (7) the implication would also destroy the inherent meaning of the word "preferable." "Preferable" means taking precedence of all other rights—there cannot be two liens each answering that description.

The consideration that seemed, notwithstanding the words of the Act itself, to sway the opinion of the Supreme Court with greatest force was the danger to second lenders who found the registry free and the consequent injury to would-be borrowers arising from the difficulty to obtain accommodation. Even if this were correct, it would afford no reason for a Court legislating by introducing words of priority into a statute. But the danger does not really exist. The landholder, at all events in the vast majority of instances, does not require his accommodation suddenly. He forecasts his requirements some distance ahead, long before his crop is in an advanced state. He does not usually require to spend what he

borrows all at once. He needs it usually for the gradual preparation of the land and production of the crop. In most cases, therefore, no practical difficulty can arise from waiting thirty days after the execution of the agreement for making the advance or, at all events, the full amount of the advance. The difficulty referred to does not seem to us to be very real ; nor did it seem so to the Legislature, because according to sec. 4 the lender may make the advance before the agreement is executed as well as at or after that time. On the other hand, when the Legislature assures a lender that he is to have a preferable lien provided all conditions named are fulfilled, and he fulfils those conditions to the letter, it would be legislative deception to allow him to be intercepted by a subsequent lender with no more merits than himself, unless the Legislature gave express notice that prior registration would have that effect. Every lender knows that there is a possibility of an outstanding lien unregistered until thirty days have elapsed from his own. He knows or is supposed to know that the Act says so. On the whole, therefore, we are unable to adopt the consideration referred to as sufficient to supply the place of an express statutory provision for priority according to order of registration.

We, therefore, think that the appeal should be allowed, and that the Crown is entitled to priority in respect of its earlier lien.

HIGGINS J. This is an appeal from a decision of the Full Court of New South Wales on a special case stated in an action. The question asked turns on the construction of the *Liens on Crops and Wool and Stock Mortgages Act of* 1898 ; and particularly of the part relating to lien on crops. A settler obtained an advance of seed wheat to the value of £150. On 2nd May 1921 he signed a lien over his crop for the year for that amount with interest at 6 per cent. This lien was received by the Rural Industries Board by post on 5th May and duly registered on 10th May ; and the advance was made on 18th May. But in the meantime, the defendants, who are storekeepers, and to whom a sum of about £600 was owing by the settler, obtained from him a lien for that debt and for future advances with interest at 8 per cent. ; and this security was registered on 7th May—before the prior lien was registered. The defendants claimed

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priority of right because of priority of registration; the plaintiff, because of priority of document of lien. The Full Court has decided in favour of the defendants.

Both parties argue the case from the common ground that an assignment of non-existent property was at common law inoperative; but that, if for value, "the assignment was in equity regarded as a contract, of which specific performance might be enforced when (if ever) the thing came into actual existence." The New South Wales Legislature, first in 1843 as to wool and stock, afterwards in 1862 as to crops, purported to give a legal title to this equitable right. By sec. 2 of the Act of 1862, which is substantially repeated in sec. 4 of the consolidating Act of 1898, it was provided that "Whenever any person shall make any bona fide advance of money or goods to any holder of land on condition of receiving as security for the same the growing crop or crops of agricultural or horticultural produce on any such land—and where the agreement relating to such security shall be made in the form or to the effect of the Schedule hereto and shall be duly registered within thirty days after its date in the office of the Registrar-General in Sydney—the person making such advance whether before at or after the date of such agreement shall have a preferable lien upon and be entitled to the whole of such crop or crops and the whole produce thereof—and possession thereof by the lienor shall be to all intents and purposes in the law the possession of the person making such advance. . . . Provided also that on repayment of such advance with interest specified in such agreement the possession and property of such crop or crops shall revert to and vest in the lienor."

The Supreme Court and this Court are, of course, limited by the question asked by the special case submitted; but, to prevent any misapprehension, I feel it incumbent on me to say that I am by no means satisfied that sec. 4 of the Act of 1898 allows a holder of land who has signed a lien on his crops for one year's growth to give another lien for the same year—at all events if the first lien be registered within thirty days. Two distinct parties cannot have the legal title which the section confers; and it may well be that

the power to give such a lien is exhausted if the power be once exercised. In the Victorian Act (*Liens on Crops Act* 1878, sec. 4) there was an express recognition of subsequent charges; there is none in the New South Wales Act. Moreover, there is nothing in the case as stated to show that the advances made by the defendants were made "on condition of receiving as security for the same the growing crop" (see *Powell* v. *Dawson* (1)). But I do not give an opinion on either of these points; I propose to deal with the precise point which the parties have chosen for discussion, and to consider whether the defendants have gained priority for their lien by securing priority of registration.

Now, there is nothing in sec. 4 of the Act of 1898 as to priorities between liens; and certainly nothing as to priority by date of registration. There is nothing to the effect of the *Real Property Act* 1900 of New South Wales (sec. 41): "No instrument, *until registered* in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but *upon the registration* of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass, or as the case may be the land shall become liable as security." To make the plaintiff's lien effective under the Act of 1898, all that I can find in sec. 4 is (1) a bona fide advance on condition of receiving as security the growing crop; (2) an agreement in the form or to the effect of the Second Schedule; and (3) registration within thirty days from its date. The plaintiff has satisfied all these requirements; and why should we infer another requirement that the lien must be registered before any other lien be registered? The section says that the person making an advance under these conditions, whether before, at or after the date of the agreement, shall have a preferable lien upon and be entitled to the whole of the crop and produce thereof, and possession thereof by the lienor shall be to all intents and purposes in the law the possession of the person making the advance. A main object of the Act is to protect the person advancing the money from the claims of assignees in bankruptcy and from the claims of vendees or mortgagees of the

(1) (1881) 7 V.L.R. (L.), 143; 3 A.L.T., 3.

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land (sec. 5). There is provision made for the protection of landlords and existing mortgagees of the land to the extent of one year's rent or one year's interest (secs. 6 and 7); but there is no indication of an intention to provide for the protection of subsequent lienees. The provision for registration within thirty days was not, so far as appears, a provision for the protection of subsequent lienees at all; and, even if some kind of protection to subsequent lienees is to be implied from the provision for registration within thirty days, it by no means follows that we are to create a more effective protection by treating sec. 4 as containing, by necessary implication, such further words as within thirty days after the date "*and before registration of any such lien by any other lienee.*" To make such an implication would be to make law, not to expound and apply it. The provision for registration within thirty days is put in the form of a condition subsequent; and, like a condition in a deed or will conferring a life estate or an estate tail on AB but stipulating that it is to cease if he alienate, or if he fail within six months to take the name and arms of the testator, it operates as a conditional limitation of the gift; so that if the lienee fail to register within the thirty days, the lien fails of effect. The mere fact that a provision for registration within thirty days does not afford an absolute protection to other persons disposed to give credit to the landholder, does not warrant a Court in inserting such words as would give what the Court would think to be better protection. The same sort of provision was inserted in the original *Bills of Sale Act* in England (17 & 18 Vict. c. 36). There every bill of sale had to be registered "within twenty-one days after the making," or be null and void as against assignees in bankruptcy or execution creditors. It was held that during the twenty-one days the bill of sale was effectual though unregistered (*Marples* v. *Hartley* (1); *Banbury* v. *White* (2); *Ex parte Allen* (3)). The Act, as construed in these cases, led to the abuse of "successive" bills of sale. The trader was not likely to get credit if it were known that his stock was mortgaged by bill of sale; so the device was used of giving a bill of sale which remained valid without registration for twenty-one days, and

(1) (1861) 30 L.J. Q.B., 92. (2) (1863) 32 L.J. Ex., 258.
(3) (1870) L.R. 11 Eq., 209.

then a fresh bill of sale was given just before the twenty-one days expired, and then another and another, every twenty days. If the trader during the twenty-one days became bankrupt, or had execution levied against him, the title of the concealed bill of sale holder held good against the assignee in bankruptcy, or against the execution creditor. In consequence of this abuse, the British Parliament, by an Act of 1878, shortened the period from twenty-one days to seven, made void successive bills of sale (sec. 9), and gave priority to bills of sale (of the same property) in the order of the dates of their registration (sec. 10). In Victoria, the abuse was met by an Act in 1876 (No. 557), which expressly made bills of sale to have no validity *until* registration, and which even forbade registration unless fourteen days' notice of intention to register had been lodged with the Registrar (see *Hedrich* v. *Commercial Bank* (1); *Black* v. *Zevenboom* (2)). But the framework of the New South Wales Act remains the same as in 1862, when liens on crops were first introduced; and the principles applicable to the British *Bills of Sale Act* of 1854 still apply to it. Therefore, under this consolidation Act of 1898 the legal title is vested in the lienee by execution and delivery of the document of lien; but it is liable to be divested by failure to register within the thirty days. The result is, in my opinion, that as the plaintiff's lien was registered within thirty days, it has priority over the defendants' lien. There is nothing in the Act to deprive the plaintiff of the benefit of the ordinary principle applicable as between two persons holding conflicting instruments—*Qui prior est tempore, potior est jure.*

It is not urged that the Crown is not bound by the Act; indeed, unless it is bound by the Act, it would seem that the Crown has no lien.

I have not, of course, omitted to consider fully the reasons given for their decision by the learned Judges of the Supreme Court, and the interesting comparison which they have made with the law as to liens on wool. I am not sure that I should regard sec. 11 of the Act 7 Vict. No. 16, taken with sec. 22, as applying to liens on wool; but assuming that it does, it is our duty to find the law from what

(1) (1870) 1 A.J.R., 155.
(2) (1880) 6 V.L.R. (L.), 473, at p. 478; 2 A.L.T., 96, at pp. 97-98.

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the Legislature has said as to liens on crops, and not to rest our decision in any way on conjecture as to what the Legislature would reasonably have provided with regard to such liens.

In my opinion, the appeal ought to be allowed, and the question asked should be answered in favour of the plaintiff.

STARKE J. The appeal must, in my opinion also, be allowed. The learned Judges of the Supreme Court held that registration of the document constituting the lien on crop created the rights given by the *Liens on Crops and Wool and Stock Mortgages Act* 1898. It appears to me, on the contrary, that, upon a true construction of the Act, the execution of the document creates the right or title. That right or title is no doubt inchoate; for registration is essential to perfect it. But the Act prescribes a period of thirty days within which the party may so perfect his right or title. And, when so perfected, the right or title takes effect from the date on which the document was made. The position is not wholly dissimilar from that which arose under the *Bills of Sale Act* of 1854 (17 & 18 Vict. c. 36). Under that Act a bill of sale was required to be registered within twenty-one days of the making thereof, otherwise it was void as against certain persons. But the Courts nevertheless held that the bill was, during the period prescribed for registration, valid and operative though unregistered, and gave a good title against execution creditors and others (*Marples* v. *Hartley* (1); *Smale* v. *Burr* (2); *Banbury* v. *White* (3); *Brignall* v. *Cohen* (4)). These cases, while they cannot be treated as of any authority upon the proper construction of the *Liens on Crops and Wool and Stock Mortgages Act* 1898, show that registration under that Act is not necessarily the root of title. The question is wholly one of construction.

There remain for consideration the provisions of the *Registration of Deeds Act* 1897. That Act provides: "All instruments (wills excepted) affecting any lands or hereditaments, *or any other property*, in New South Wales which are executed or made bona fide, and for valuable consideration, and are duly registered under the provisions of this Act, or of any Act hereby repealed, shall have and take

(1) (1861) 3 E. & E., 610.
(2) (1872) L.R. 8 C.P., 64.
(3) (1863) 2 H. & C., 300.
(4) (1872) 21 W.R., 25.

priority not according to their respective dates but according to the priority of the registration thereof only." The learned Judges of the Supreme Court did not, as I follow their reasons, think that the liens on crop the subject of these proceedings fell within the provisions of this section. And their view on this point is clearly right. The liens were not, and could not have been, registered under the provisions of the *Registration of Deeds Act* 1897, for they did not, in my opinion, fall within the category set forth in sec. 6 (see *Evans* v. *Roberts* (1); *Marshall* v. *Green* (2)), and they were not in fact registered under or pursuant to any Act repealed by the Act of 1897.

Appeal allowed. Order appealed from discharged. Judgment entered for the appellant for £156 18*s.* 7d. *with interest at the rate of sixpence per day from* 31*st January* 1922 *to the date of judgment, with costs, including costs of special case. Appellant to pay respondent's costs of appeal as between solicitor and client.*

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Crommelin & Moore*, Grenfell, by *L. G. B. Cadden.*

B. L.

(1) (1826) 5 B. & C., 829.

(2) (1875) 1 C.P.D., 35.