[HIGH COURT OF AUSTRALIA.]

S. RICHARDS AND COMPANY LIMITED . APPELLANT; APPLICANT,

AND

LLOYD AND ANOTHER . . . . . RESPONDENTS. RESPONDENTS,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

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*April* 24, 26; *May* 15.

Rich, Starke, Dixon and Evatt JJ.

*Bankruptcy—Preference—Antecedent debt—Assignment of moneys to become due—Intention of debtor—Assignee's knowledge as to other creditors—Good faith—"Ordinary course of business"—Bankruptcy Act* 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *sec.* 95.

An intention on the part of the debtor to prefer is not necessary in order that a transaction should have, within the meaning of sec. 95 (1) of the *Bankruptcy Act* 1924-1930, the effect of giving a creditor a preference over the other creditors of the debtor.

*Bank of Australasia* v. *Harris*, (1861) 15 Moo. P.C.C. 97; 15 E.R. 429, distinguished.

A debtor, who was engaged on certain work for which he was not to receive payment until completion, executed, without pressure being brought to bear upon him, an assignment of all moneys so to be received to secure a creditor's long-standing debt. Three months later a sequestration order was made on the debtor's own petition. At the time of the assignment the debtor owed about £2,380 to other creditors and he was unable to pay his debts as they became due. When the assignment was executed the creditor realized that the debtor was unable to pay the amount owing, and knew that the debtor was employing labour and buying materials, rations and supplies in connection with the work on which he was engaged. The creditor did not enquire who was providing these, but said, subsequently, that he assumed that the debtor was paying for them. The Judge in bankruptcy found that the assignment had the effect of giving the creditor a preference over the other creditors of the debtor and that the creditor was not a purchaser or encumbrancer in good faith and in the ordinary course of business, within the meaning of sec. 95 (2)

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(*b*) of the *Bankruptcy Act* 1924-1930, and accordingly held that, under sub-sec. 1 of that section, the assignment was void as against the trustee in bankruptcy.

*Held* that the decision of the Court of Bankruptcy should be affirmed, on the grounds—

(1) By the whole Court, that the assignment had the effect of giving the creditor a preference within the meaning of sec. 95 (1) of the *Bankruptcy Act*.

(2) By *Rich*, *Starke* and *Dixon* JJ., that the evidence did not require the conclusion that the creditor took the assignment "in good faith" within the meaning of sec. 95 (2) (*b*), or (by *Starke* J.) "in the ordinary course of business."

(3) By *Evatt* J., that the proper conclusion from the evidence was that the creditor had not taken the assignment "in the ordinary course of business."

*Per Rich* and *Dixon* JJ.: Sub-sec. 4 of sec. 95 of the *Bankruptcy Act* should not be understood as detracting at all from sub-sec. 3 or as intending to substitute some artificial criterion for the issue set by sub-sec. 2 (*b*).

Decision of the Court of Bankruptcy: *In re Walsh*, (1933) 5 A.B.C. 166, affirmed.

APPEAL from the Court of Bankruptcy (District of the State of New South Wales and the Territory for the Seat of Government).

The applicant, S. Richards & Co. Ltd., a company carrying on the business of a storekeeper at, amongst other places, Leeton, New South Wales, sought a declaration from the Court of Bankruptcy (District of the State of New South Wales and the Territory for the Seat of Government) that the Official Receiver, Charles Fairfax Waterloo Lloyd, held the sum of £519 13s. 6d. in trust for the applicant, such sum being portion of a sum of £617 1s. 4d. received by him from the Water Conservation and Irrigation Commission under a contract between one Stephen Vincent Walsh, a bankrupt, and the Commission, on the ground that, on 12th January 1931, the bankrupt assigned to the applicant by way of security all moneys becoming due to him by the Commission, and that there was due under such security to the applicant the said sum of £519 13s. 6d. The Official Receiver admitted the receipt of the money as alleged, but counterclaimed a declaration that the assignment referred to constituted a preference which was void under sec. 95 of the *Bankruptcy Act* 1924-1930. The Southern Cross Windmill Co. Ltd., as assignee of "the balance of any moneys due to" Walsh "under and by virtue of the assignment by him to the applicant" was joined as a respondent to the application.

The bankrupt was a boring contractor, and, in addition, worked an irrigation farm at Leeton. During 1927 and the earlier part of 1928 the bankrupt obtained from the applicant's Leeton branch, upon credit, supplies of building materials for the erection of a house on his farm. At 30th June 1928 the bankrupt owed the applicant about £679 in respect of the materials so supplied, and he was further indebted to the applicant in the sum of about £308 upon a general account for supplies of goods. His brother was also indebted to the applicant in the sum of about £126 for goods and materials supplied. In June and July 1928 the position between the applicant, the bankrupt and his brother was, apparently, reviewed, and, as a result, the bankrupt paid about £236 in cash in respect of the account for building materials; he gave four promissory notes for sums amounting to £433; and he paid the sum of £40 off his general account. The bankrupt also made himself responsible for the payment of his brother's account, and for any further credit his brother might require, and agreed to settle for the same as he received payments for boring contracts. During the next eighteen months the bankrupt continued to obtain goods from the applicant, but to a diminishing extent. None of the promissory notes was paid. The first was presented and returned, but the other three were not presented. Three payments, of £158 8s. 9d., £200, and £100 respectively, were, however, made by the bankrupt on general account, the last of such payments being made on 30th January 1930. After that date practically no goods were supplied by the applicant to the bankrupt who, according to the evidence, was engaged on boring contracts in a distant part of the State. On 15th September 1930 the bankrupt's wife gave to the applicant his cheque for the sum of £200. The cheque was dishonored and, in explanation, the bankrupt's wife told the manager of the applicant's business at Leeton that the cheque was sent to her to be met from moneys that were coming from some Government contract and which were sufficient not only to cover that cheque but some other accounts. The cheque was re-presented and was eventually paid on 5th November. On 12th January 1931 the bankrupt was indebted to the applicant on his own account in the sum of £770 2s. 3d., and, under his guarantee of his brother's account,

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in the further sum of £118 8s. On that date he gave the assignment which the Official Receiver sought to have declared void under sec. 95 of the *Bankruptcy Act* 1924-1930 as constituting a preference in favour of the applicant over other creditors. He assigned to the applicant all his right, title and interest in all moneys due or which should become due to him in connection with a boring contract then being carried out by him at Brindiwilpa, Broken Hill, for the Water Conservation and Irrigation Commission. In his evidence the applicant's manager stated that the applicant had not pressed the bankrupt for payment and gave the following account of the transaction :—" He called on me as he usually did when he visited his farm and I asked him how he was getting on with the boring work and he said ' Quite alright ' and then I asked him when he would be likely to complete his bores and he said ' Of course that is practically impossible to answer. We may strike water in a week or it may be three months possibly and we don't know until we actually strike water when the bores will be completed.' I asked him could he not give me a definite date and he said ' No ' and then in general conversation he said that if I liked he would be quite prepared to offer me securities over the moneys coming from the bores, and in the end he offered me security over the money coming from Brindiwilpa bore." The manager stated that for some time prior to 12th January 1931 he knew that, in addition to working his farm, the bankrupt was carrying out work at two bores, and that the bankrupt was employing labour and buying materials, rations and supplies in connection with such work, but he did not inquire of the bankrupt whether he, the bankrupt, owed any money in connection with the labour and goods so supplied. He stated that " in the ordinary course of business after dealing with a man for thirteen years and knowing him personally and he being well thought of in the district, you do not cross-examine him and ask him every time to prepare a balance-sheet of how he stands or anything like that. I assumed that he would not be able to keep going as he was going in a large way unless he was getting advances from these people " for whom he was putting down the bores. As a matter of fact the bankrupt owed to creditors other than the applicant various amounts aggregating £2,380, one of such amounts having

been outstanding since August 1928, and he was, and had been for a long time, unable to pay his debts as they became due. On the bankrupt's own petition a sequestration order was made against him on 16th April 1931. At that date the bores had not been completed and when, subsequently, under an arrangement with the Official Receiver, they were carried to completion the Brindiwilpa bore produced an available sum of £617 1s. 4d. In the meantime, on 2nd February 1931, a further sum of £400 had been paid, from a source which was not shown by the evidence, to the credit of the bankrupt's account with the applicant so that at the date of sequestration the account was in debit to the extent of about £520.

Judge *Lukin* found that the assignment of 12th January 1931 was made by the bankrupt in favour of the applicant at a time when he was unable, from his own money, to pay his debts as they became due, and that such assignment had the effect of giving the applicant a preference over other creditors. His Honor also found that the applicant did not act in good faith, within the meaning of sub-sec. 2 (*b*) of sec. 95 of the *Bankruptcy Act* 1924-1930, in that, within the meaning of sub-sec. 4 of that section, the assignment was given under such circumstances as to lead to the inference, not only that the applicant had reason to suspect, but that the applicant knew that the bankrupt was unable to pay his debts as they became due, and that the effect of the assignment would be to give the applicant a preference over other creditors. His Honor declared (1) that the assignment was void as against the Official Receiver ; and (2) that, as against the applicant, the Official Receiver was entitled to retain the money claimed : *In re Walsh* (1).

From this decision the applicant now appealed to the High Court.

*Teece* K.C. (with him *Fuller*), for the appellant. The evidence before the Bankruptcy Court did not justify the inference that at the time of the assignment the appellant knew that the debtor was unable to pay his debts. The assignment was taken in good faith within the meaning of sec. 95 of the *Bankruptcy Act* 1924-1930. There is no justification for the inference that because a person allows a certain account to remain unpaid his other accounts, if

(1) (1933) 5 A.B.C. 166.

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any, are also unpaid. There is no evidence before the Court as to the source of the money paid to the appellant by or on behalf of the debtor: it may have been obtained from a variety of sources, which did not necessarily include the source referred to in the assignment. The appellant did not know, and had no reason to suspect, that in taking the assignment it was obtaining a preference over other creditors.

[DIXON J. referred to the *Australian Law Journal*, vol. 3, pp. 174, 211.]

At the time the assignment was given the appellant was not pressing for payment (*Stewart & Walker* v. *White* (1)). A person's inability to pay his debts may be temporary only (*Gow* v. *White* (2)). It is not sufficient that a person does not pay a debt when it becomes due: the creditor must know or suspect that he is unable to do so. A sound and logical statement of what constitutes a preference appears in *Sheldrick* v. *Aitken* (3). So far as New South Wales is concerned, all doubts were removed by the inclusion in the relevant section of the *Bankruptcy Act* of that State, of the words "whether fraudulent or not." Under that section it was held that a person supporting the transfer must not only prove absence of notice but also that he did take the benefit in good faith (*Re Macadam* (4)). Those words do not, however, appear in sec. 95 of the *Bankruptcy Act* 1924-1930. Any difficulty as to fraudulent preference is cleared up by sec. 24 of the amending Act of 1932 which, however, is inapplicable here as the estate in question was sequestrated prior to the commencement of that Act.

[EVATT J. referred to *Butcher* v. *Stead* (5).]

Sec. 95 of the *Bankruptcy Act* 1924-1930 should be construed in such a way that, where a creditor who has been the object of a debtor's preference can prove that he is a purchaser in good faith, the preference is validated by reason of the creditor's good faith if the transaction is in the ordinary course of business. The word "preference" in sub-sec. 1 of sec. 95 should be given the meaning given to it in *Butcher* v. *Stead* (5). The evidence shows that what

(1) (1907) 5 C.L.R. 110.
(2) (1908) 5 C.L.R. 865.
(3) (1869) 6 W.W. & a'B. 59.
(4) (1913) 13 S.R. (N.S.W.) 206.
(5) (1875) L.R. 7 H.L. 839.

was done by the appellant was done by it in the ordinary course of business, and that it neither knew of, nor had reason to suspect, a preference. There is no evidence of an intent on the part of the debtor to prejudice other creditors. The onus of showing such intent is on the Official Receiver (*Muntz* v. *Smail* (1) ). If the decision of Judge *Lukin* is correct, then the position is that, prior to accepting any payments from them, a storekeeper must cross-examine those of his customers who have outstanding accounts extending over lengthy periods, as to other creditors. Such a position would be intolerable.

*Maughan* K.C. (with him *R. K. Manning*), for the Official Receiver. In drafting sec. 95 of the *Bankruptcy Act* 1924-1930 the draftsman utilized words used by *Griffith* C.J. and *Isaacs* J. in *Stewart & Walker* v. *White* (2) ) Notwithstanding what was said in *Sheldrick* v. *Aitken* (3), sec. 95 is a distinct and successful effort by the Legislature to get away from the state of mind of the debtor and the creditor. The *Bankruptcy Act* is directed not only to fraudulent preferences, but to all preferences. Sec. 95 was enacted for the purpose of overcoming difficulties under the old Acts that invalidated fraudulent preferences. The evidence contains all the elements necessary to support a declaration that the assignment in question is void as against the trustee in bankruptcy. For the purposes of sub-sec. 1, the state of mind of the debtor and creditor is immaterial.

[STARKE J. referred to *Bank of Australasia* v. *Harris* (4).]

The Act there in question was directed at fraudulent preferences but here the Act is aimed at any preferences. The observations of the Privy Council in *Bank of Australasia* v. *Harris* were expressed as opinions only, and not as binding decisions.

[STARKE J. referred to *Nunes* v. *Carter* (5).]

In construing sec. 95 of the *Bankruptcy Act* 1924-1930 the Courts here have declined to follow the decision in *Bank of Australasia* v. *Harris*, owing to the difference in the language of the relevant sections of the respective Acts under consideration, and also in

(1) (1909) 8 C.L.R. 262, at p. 290.
(2) (1907) 5 C.L.R. 110.
(3) (1869) 6 W.W. & a'B. 59.
(4) (1861) 15 Moo. P.C.C. 97; 15 E.R. 429.
(5) (1866) L.R. 1 P.C. 342.

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order to give a more natural meaning to the words used in sec. 95 (*Re Stevens* (1) and *Re Scott* (2) ). The words " with a view of " appearing in the corresponding section of the English *Bankruptcy Act*, which was referred to when sec. 95 of the *Bankruptcy Act* 1924-1930 was in course of being drafted, do not appear in the latter section, the words used being " having the effect of." Having regard to the words " lead to the inference " and " had reason to suspect " in sub-sec. 4 of sec. 95, the Court should construe that sub-section as throwing on a creditor the onus of proving affirmatively not only that he did not know, but also that he had no reason to suspect, that the debtor was in an insolvent condition and that the effect of the transaction would be to give him, the creditor, a preference. In order to satisfy the requirement of good faith the creditor must make all proper inquiries (*Tomkins* v. *Saffery* (3); *Stewart & Walker* v. *White* (4); *Gow* v. *White* (5) ). The evidence shows that as far back as 1928, that is, when the first promissory note was dishonored, the appellant knew that the debtor could not pay his debts. On the evidence the only inference open to Judge *Lukin* was that by giving the assignment the debtor intended to prefer the appellant to his other creditors. There was no valuable consideration for the assignment within the meaning of sub-sec. 2 (*b*) of sec. 95.

[EVATT J. referred to *Re Macadam* (6).]

The mere existence of the past debt is not sufficient consideration to support the assignment (*Wigan* v. *English and Scottish Law Life Assurance Association* (7) ): it is necessary also that the assignment was given in response to a request therefor (*Glegg* v. *Bromley* (8) ). Here the assignment was offered voluntarily by the debtor to the creditor, who did not ask for it, and who did not forbear on account of it. A security for past debts taken by a creditor over what is apparently the only asset of an insolvent debtor is not " in the ordinary course of business " within the meaning of sub-sec. 2 (*b*) of sec. 95 (*In re Eaton & Co.* (9) ). " Ordinary

(1) (1929) 1 A.B.C. 90.
(2) (1931) 4 A.B.C. 8.
(3) (1877) 3 App. Cas. 213, at pp. 226, 227.
(4) (1907) 5 C.L.R. 110.
(5) (1908) 5 C.L.R. 865.
(6) (1913) 13 S.R. (N.S.W.), at pp. 206, 207.
(7) (1909) 1 Ch. 291.
(8) (1912) 3 K.B. 474, at p. 491.
(9) (1897) 2 Q.B. 16.

course of business" means doing those things which a man in business would do, that is, as regards a storekeeper, to supply goods on cash or credit and to get periodical settlement of his accounts in cash. The appellant has not discharged the onus of proving that it accepted the assignment in good faith. In the circumstances the appellant must have known or had good reason to suspect that the debtor had other creditors (*Tomkins* v. *Saffery* (1) ).

*E. P. White*, for the other respondent, appeared only on the question of costs.

*Teece* K.C., in reply. There is evidence that the appellant knew that the debtor had assets other than the asset in respect of which he gave an assignment. The assignment so given was not a complete security as was the position in *Tomkins* v. *Saffery* (2). A similar transaction was upheld in *Gow* v. *White* (3), although the debtor concerned must have had other creditors. As to whether an antecedent debt is a good consideration in a transaction of this nature, see *Glegg* v. *Bromley* (4) ; *Re Bond* (5) ; and *Ex parte Tempest* ; *In re Craven and Marshall* (6). See also *Williams* v. *Dunn's Assignee* (7).

*Cur. adv. vult.*

May 15.

The following written judgments were delivered :—

RICH AND DIXON JJ. This appeal is brought from an order of the Federal Court of Bankruptcy made by his Honor Judge *Lukin* declaring void, as a preference, an equitable assignment given by the bankrupt to the appellant by way of security for a debt, and dismissing an application by the appellant for an order for payment to it by the Official Receiver of moneys which, although comprised in the assignment, had nevertheless come into his hands.

The bankrupt was a boring contractor. He also worked an irrigation farm at Leeton in New South Wales. The appellant is a

(1) (1877) 3 App. Cas., at pp. 236, 237.
(2) (1877) 3 App. Cas. 213.
(3) (1908) 5 C.L.R. 865.
(4) (1912) 3 K.B., at pp. 486, 487.
(5) (1895) 16 N.S.W.L.R. (B. & P.) 74.
(6) (1870) 6 Ch. App. 70.
(7) (1908) 6 C.L.R. 425.

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company which conducts a storekeepers' business at Leeton, among other places. In 1927 and the earlier part of 1928, the bankrupt obtained from the appellant, upon credit, supplies of building materials for the erection of a house on his farm. At 30th June 1928, he owed the appellant about £679 on this account. He was further indebted to it in a sum of about £308 upon a general account for supplies of goods. His brother was also in the appellant's debt. In June and July 1928 some sort of review of the position seems to have taken place. The bankrupt paid about £236 in cash in respect of the building account; he gave four promissory notes for the balance of the account amounting to £433; he paid £40 off his general account, and he gave a guarantee of his brother's account. During the next eighteen months he continued to obtain goods from the appellant, but to a diminishing extent. None of the promissory notes was paid, but three substantial payments were made on general account, namely, £158 8s. 9d., £200, and £100 respectively. The last was made on 30th January 1930. After this date practically no goods were supplied to the bankrupt. It appears that he was away boring. His wife gave the appellant her husband's cheque for £200 on 15th September 1930. It was dishonored, but she explained to the appellant that some Government payments, sufficient to meet the cheque and some other accounts, had not been made as expected. The cheque was eventually paid on 5th November. On 12th January 1931, the bankrupt was indebted on his own account in the sum of £770 2s. 3d., and, under his guarantee of his brother's account, in the further sum of £118 8s. On that date he gave the assignment which has been declared void by the judgment under appeal. He assigned to the appellant all his right, title and interest in all moneys due or which should become due to him in connection with a boring contract then being carried out by him at Brindiwilpa, Broken Hill, for the Water Conservation and Irrigation Commission. In his evidence, the manager of the appellant's business at Leeton gave the following account of the transaction:—"He called on me as he usually did when he visited his farm and I asked him how he was getting on with the boring work and he said quite all right and then I asked him when he would be likely to complete his bores and he said 'Of course that is practically impossible to answer. We

may strike water in a week or it may be three months possibly and we don't know until we actually strike water when the bores will be completed.' I asked him could he not give me a definite date and he said 'No' and then in general conversation he said that if I liked he would be quite prepared to offer me securities over the moneys coming from the bores and in the end he offered me security over the money coming from Brindiwilpa bore." The witness knew that the bankrupt was carrying on work at two bores as well as conducting his farm, but he said that he did not know that he had other creditors. In point of fact, he owed about £2,380, excluding the appellant's debt, and he was, and had long been, quite unable to pay his debts as they became due. A sequestration order was made against him on 16th April 1931. At this date the bores had not been completed and when, subsequently, under an arrangement with the Official Receiver, they were carried to completion, the Brindiwilpa bore produced an available sum of £617. In the meantime, on 3rd February, a further sum of £400 had been paid to the appellant, from what source does not appear, and the bankrupt's debt to it stood at £520 nearly.

The learned Judge found that the assignment had the effect of giving the appellant a preference over the other creditors, and that the appellant did not act in good faith, in that, within the meaning of sub-sec. 4 of sec. 95 of the *Bankruptcy Act* 1924-1930, "the charge was given under such circumstances as to lead to the inference, not only that the company had reason to suspect, but that the company knew, that the debtor was unable to pay his debts as they became due, and that the effect of the charge would be to give the company a preference over" the "other creditors" (1).

On behalf of the appellant, this conclusion was said to be insufficient to support the order, because it contained no finding that the debtor spontaneously, voluntarily, or intentionally gave the preference. It was contended that upon the true construction of sec. 95 (1), at any rate before it was amended by Act No. 31 of 1932, which inserted after "preference" the words "a priority or an advantage," the advantage constituting the preference must be meant by the debtor, and an unintended superiority or greater benefit would not suffice.

(1) (1933) 5 A.B.C., at p. 169.

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This argument is founded in part upon the decision in *Bank of Australasia* v. *Harris* (1), as explained in *Nunes* v. *Carter* (2), and in part upon the associations and the implications of the word "preference," which, according to *Isaacs* J. in *Muntz* v. *Smail* (3), "connotes a free choice" and has voluntariness inherent in it. The question has been examined more than once since the Federal statute came into force (see *Re Stevens* (4); *Re Sanderson* (5); *Re Mazok* (6); *Re Scott* (7); *Australian Law Journal*, vol. 3, pp. 174 and 211). We think the language of the section, the history of the bankruptcy legislation in Australia and the course of the colonial decisions provide considerations which displace the effect of the decision in *Bank of Australasia* v. *Harris* (1), which, after all, was given on a very different statute, containing a context which, in the Commonwealth Act, does not appear with the critical words that are, in effect, common to both enactments. This contention, therefore, should be rejected.

It was next said that the appellant had taken the assignment in good faith and for valuable consideration and in the ordinary course of business, and so obtained the protection of sub-sec. 2 (*b*) of sec. 95. Upon this issue the burden of proof was upon the appellant and we think it is impossible to say that the evidence requires the conclusion that good faith was established. The debtor was unable to pay his large and long-standing debt to the appellant, and, of course, this the appellant's manager knew only too well. The sole difficulty arises from sub-sec. 4, which may be thought to be expressed as if, before good faith is negatived, facts should affirmatively appear justifying the positive inference that the creditor suspected that the debtor could not pay his debts as they became due and that the effect of the transaction would be to give the creditor a preference. But sub-sec. 4 should not be understood as detracting at all from sub-sec. 3, or as intending to substitute some artificial criterion for the issue set by sub-sec. 2 (*b*). In terms it is a prohibition. It denies the possibility of good faith if its conditions are satisfied. It says

(1) (1861) 15 Moo. P.C.C. 97; 15 E.R. 429.
(2) (1866) L.R. 1 P.C. 342.
(3) (1909) 8 C.L.R., at p. 295.
(4) (1929) 1 A.B.C. 90, at pp. 94, 96.
(5) (1930) 2 A.B.C. 182, at pp. 187, 188.
(6) (1930) 2 A.B.C. 237, at pp. 241-243; (1931) S.R. (Q.) 19.
(7) (1931) 4 A.B.C., at pp. 13-26.

nothing about onus. In the present case it was apparent to the appellant that, if there were other creditors, the assignment must operate to give it a preference over them. No inquiry was made as to the existence of other creditors. The debtor's wife, after the cheque was dishonored, probably in October, had referred to other accounts of the debtor. His account with the appellant proclaims the company's knowledge of his lack of funds. Could anyone familiar with affairs have hesitated in adopting the supposition that he was indebted elsewhere? At any rate, it was open to Judge *Lukin* to refuse to believe that the witness whom he had heard cross-examined on the subject did not know "that the debtor was unable to pay his debts as they became due" and that the effect of the charge would be to give the company a preference over other creditors.

We think that the appeal should be dismissed with costs.

STARKE J. This is an appeal from an order of the Federal Court of Bankruptcy declaring void an assignment made on 12th January 1931 by one Walsh to Richards & Co. Ltd. of all his right, title and interest in moneys due and owing, or to become due, to him under a contract with the Water Conservation and Irrigation Commission. On his own petition, filed on 16th April 1931, Walsh's estate was sequestrated in bankruptcy on the same day. The order declaring the assignment void was founded upon sec. 95 of the *Bankruptcy Act* 1924-1930, as it stood before the amendment of 1932 (No. 31 of 1932, sec. 24) which inserted the words "a priority or an advantage" after the word "preference" wherever occurring.

Several matters have been argued before us, but the principal question is whether the mere fact of a conveyance, transfer or assignment of property being made which has the effect of giving a creditor a preference avoids the transaction if the debtor becomes bankrupt on a bankruptcy petition presented within six months thereafter, or whether the conveyance, transfer or assignment is avoided only if it constitutes a fraudulent preference, that is, if the conveyance, &c., were made with a view to prefer the creditor to whom it was made—the question then depending upon the state of

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mind of the debtor (*Sharp* v. *Jackson* (1) ). Since the 1932 amendment, the former view is inevitable (see *Sharp* v. *Jackson* (2) ; *Muntz* v. *Smail* (3) ). But, before the additional words were inserted by the later Act, the word " preference," in its then context, involved, it is contended, some element of choice or selection, " so that the motive actuating the debtor must be the wish that the creditor should be preferred " (*Ex parte Topham* (4) ; *Butcher* v. *Stead* (5); *Bank of Australasia* v. *Harris* (6) ; *Nunes* v. *Carter* (7) ; *Sheldrick* v. *Aitken* (8) ; *Humphery* v. *McMullen* (9) ). Whatever assistance, however, we may derive from these decisions upon other Acts, the decision of this Court in the present case depends upon the true construction of the Federal *Bankruptcy Act* 1924-1930. Now that Act says nothing about the view or intention of the debtor nor about any choice or selection by him. It simply declares that a conveyance, transfer or assignment, made within a certain time before bankruptcy, having the effect of giving the creditor a preference, shall be void. It looks to the effect of the transaction and not to the intent, or state of mind, of the debtor. In my opinion, therefore, the argument addressed to us is untenable and must be rejected.

Richards & Co. Ltd. next claimed protection under sec. 95 (2) (*b*), as a purchaser or encumbrancer in good faith and for valuable consideration and in the ordinary course of business. The burden of proving compliance with the requirements of this sub-section is cast upon Richards & Co. Ltd. by sub-sec. 3, and the learned Judge in bankruptcy has found against it. There is no doubt, I think, that Richards & Co. Ltd. took the assignment for valuable consideration (*Glegg* v. *Bromley* (10) ), but it took it knowing that Walsh was insolvent and unable to pay his debts as they became due, and, obviously, to protect itself and give it priority and security over other possible creditors. By sec. 95 (4), it is provided that a creditor shall not be deemed to be a purchaser or encumbrancer in good faith if the conveyance, transfer, &c., were made under such circumstances

(1) (1899) A.C. 419.
(2) (1899) A.C., at p. 423.
(3) (1909) 8 C.L.R., at pp. 293, 294.
(4) (1873) 8 Ch. App. 614, at p. 619.
(5) (1875) L.R. 7 H.L., at p. 846.
(6) (1861) 15 Moo. P.C.C. 97 : 15 E.R. 429.
(7) (1866) L.R. 1 P.C. 342.
(8) (1869) 6 W.W. & a'B. (L.) 59.
(9) (1868) 7 S.C.R. (N.S.W.) 84.
(10) (1912) 3 K.B. 474.

as to lead to the inference that the creditor knew or had reason to suspect that the debtor was unable to pay his debts as they became due, and that the effect of the conveyance, &c., would be to give him a preference over other creditors. It is quite impossible, having regard to these sub-sections and to the facts, to displace the finding of the learned Judge in bankruptcy that Richards & Co. Ltd. was not a purchaser or encumbrancer in good faith and in the ordinary course of business (*Tomkins* v. *Saffery* (1); *Robertson* v. *Grigg* (2)).

The appeal should be dismissed.

EVATT J. The appellant attacks the judgment of *Lukin* J. upon two grounds. 1. It contends that the assignment executed by the debtor in its favour on January 12th, 1931, is not void as against the respondent trustee in bankruptcy under sec. 95 (1) of the *Bankruptcy Act* because of the absence of proof that the debtor had any intent to give a fraudulent preference. This argument was based upon the well known decision of the Privy Council in the *Bank of Australasia* v. *Harris* (3). In that case the Privy Council had to construe the words "having the effect of preferring any then existing creditor" which were contained in the New South Wales Act, 5 Vict. No. 17. *Knight Bruce* L.J. said (4):—

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

A perusal of the sections of the New South Wales Act referred to, especially sec. 12, makes it reasonably clear why the state of mind

(1) (1877) 3 App. Cas., at p. 236.
(2) (1932) 47 C.L.R. 257, at pp. 266, 267.
(3) (1861) 15 Moo. P.C.C. 97; 15 E.R. 429.
(4) (1861) 15 Moo. P.C.C., at pp. 114, 115; 15 E.R., at pp. 436, 437.

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of the debtor was considered to be a relevant fact in relation to sec. 8. But sec. 95 (1) of the Commonwealth Act is not surrounded by any other provisions which reflect any light upon the meaning of its own words. It is carefully drafted in order to invalidate transactions by an insolvent debtor if in fact they produce a certain result, that is, a preference over the other creditors. In my opinion words could hardly be devised which would more plainly show a legislative intent to hit at the results and effects of a debtor's action, whatever his motive or intention may have been. The test adopted is completely objective and in no way subjective. This view has been consistently adopted for a number of years by all Courts administering the Federal *Bankruptcy Act*. The argument of the appellant on this first point should fail.

2. Next, it was contended by the appellant that it came within the protection of sec. 95 (2) of the *Bankruptcy Act* as being an encumbrancer in good faith and for valuable consideration and in the ordinary course of business. The respondent trustee, on the other hand, says that the appellant cannot be deemed to be an encumbrancer in good faith, and invokes in his favour the rule laid down in sec. 95 (4).

In my opinion it is not necessary to consider the finding of Judge *Lukin* that the appellant did not act in good faith. Such a finding is a serious one, and of necessity much depends upon the credibility of the appellant's manager, who gave evidence in the Court below and was cross-examined at considerable length. Too much, I think, has been made of the manager's statement that he never troubled to inquire into the debtor's financial position. There is much force in the answer of this witness that " in the ordinary course of business after dealing with a man for thirteen years and knowing him personally and he being well thought of in the district, you do not cross-examine him and ask him every time to prepare a balance-sheet of how he stands or anything like that."

In my opinion the appellant fails to bring itself within sec. 95 (2), because the assignment it received from the debtor on January 12th, 1931, was not taken " in the ordinary course of business."

In *Robertson* v. *Grigg* (1) I had to consider this phrase, and I was of opinion that it " is not . . . to be related to any special

(1) (1932) 47 C.L.R., at p. 273.

business carried on by either debtor or creditor but is concerned with the character of the impeached transaction itself."

In that case the lender was financing a debtor in order to enable him to carry certain contracts to completion. A charge was taken by the lender upon the proceeds which were to come from the contracts. In the present case the appellant carried on business as a storekeeper and had no direct concern with the boring contracts between the bankrupt and the Water Conservation and Immigration Commission. The assignment was executed, not in consideration of any advances from the appellant, but merely, the law would have us presume, in consideration of the appellant's forbearance in respect of debts incurred by the bankrupt long before. There had been a break in the business relationship between the appellant and the bankrupt for a considerable time prior to the date of assignment. The appellant's manager's evidence states quite frankly that the suggestion of a security over the moneys to come from the boring contracts proceeded, not from the appellant, but from the bankrupt. The absence of any pressure or demand by the appellant is significant (cf. *Nunes* v. *Carter* (1) ).

It is true that there was some evidence adduced that the appellant used to take security over crops grown by its customers in the irrigation area, but, looking on all circumstances of the transaction of January 12th, 1931, the conclusion is that it was not in, but out of, the ordinary course of business.

For these reasons the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Kershaw, Matthews, Lane & Glasgow.*
Solicitors for the respondent Lloyd, *Perkins, Stevenson & Co.*
Solicitors for the other respondent, *Sullivan Bros.*

J. B.

(1) (1866) L.R. 1 P.C., at p. 348.