[HIGH COURT OF AUSTRALIA.]

BURNS . . . . . APPELLANT;
APPLICANT,

AND

McFARLANE . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

H. C. OF A. 1940.

ADELAIDE, *Sept.* 17, 25.

MELBOURNE, *Oct.* 11.

Rich, Starke, Dixon and McTiernan JJ.

Bill of Sale—Validity—Consideration for bill of sale—Part of consideration repaid to lender for rent due by borrower—Consideration for bill stated as contemporaneous advance—Whether truly stated—Discharge of debt for rent—Bills of Sale Act 1886-1935 (*S.A.*) (*No.* 389—*No.* 2246), *secs.* 2, 9 (2), 28.*

Bankruptcy—Preference, priority or advantage—Bona fides—Ordinary course of business—Pre-existing debt for rent—No rent due at date of sequestration—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 84 (1), 95.

If, from a larger sum described as lent as the consideration of a bill of sale, a smaller sum is deducted or repaid in satisfaction of a debt owing by the grantor to the grantee and presently payable, that debt is discharged by payment, and (in accordance with the provisions of the *Bills of Sale Act* 1886-1935 (S.A.)) the consideration for the bill of sale is truly stated as a payment of the full sum by way of loan or advance made at the time when the less sum is physically paid over.

W. carried on business as a garage proprietor and motor mechanic. On 10th February 1939 he owed M., his landlord, £77 rent for slightly under three months. In addition to other debts, he also owed two creditors amounts

* The *Bills of Sale Act* 1886-1935 (S.A.) provides :—By sec. 2 : " ' Contemporaneous advance ' shall include as well as a contemporaneous advance of money by the grantee to the grantor as the sale of goods or property upon credit or the drawing, accepting, indorsing, making or giving of any bill of exchange, promissory note, or guarantee, or other matter or thing by the grantee to, for, or on behalf of the grantor on the security of any bill of sale, and contemporaneously with the giving thereof." By sec. 9 : " Every bill of sale shall contain or state . . . (2) the consideration, and what portion (if any) of the consideration is for an antecedent debt or contemporaneous advance:

under hire-purchase agreements in respect of certain of his plant. W. was then unable to pay his debts as they became due, but he and M. both believed that he was solvent. On that day M. agreed to lend W. £175 on the security of a bill of sale over his plant, provided that the amounts due under the hire-purchase agreements were paid off and also that the arrears of rent were paid to M. The bill of sale was executed, and M. drew five cheques which he handed to W. Two of these cheques were in favour of the creditors under the hire-purchase agreements, one was for costs which W. had agreed to pay in connection with the bill of sale, a fourth was in favour of W. or bearer for £77, the amount of rent, and the remaining one was in favour of W. or bearer for £52 12s. 9d., the balance of the £175. These cheques were handed by M. to W. in the former's inner office. W., in the outer office, handed the cheque for £77 to M.'s clerk, who gave him a receipt for rent payable to 14th February 1939. The bill of sale was expressed as a transfer and assignment of the chattels assured "in consideration of the sum of £175 contemporaneous advance lent to" W. by M. W. remained M.'s tenant until 3rd April 1939, when his rent was not in arrears. About that time W. sold his business. The purchaser was financed by M., and the amount of the bill of sale was paid off out of the purchase money. On 20th May 1939 a sequestration order was made against W.

Held that the debt for rent was discharged by payment, and, for the purposes of the *Bills of Sale Act* 1886-1935 (S.A.), the consideration for the bill of sale was correctly therein stated as a contemporaneous advance.

Parsons v. *Equitable Investment Co. Ltd.*, (1916) 2 Ch. 527, *Ex parte National Mercantile Bank; In re Haynes*, (1880) 15 Ch. D. 42, and *Credit Co.* v. *Pott*, (1880) 6 Q.B.D. 295, applied.

Held, further, that the transaction, being found to have been entered into in good faith, for valuable consideration, and in the ordinary course of business, with a view to placing the finances of W.'s business on a sound basis by turning portion of the assets into cash for the purpose of carrying on the business, meeting obligations and having some ready money, was protected by sec. 95 of the *Bankruptcy Act* 1924-1933.

Robertson v. *Grigg*, (1932) 47 C.L.R. 257, applied.

Per Rich, Dixon and McTiernan JJ. (*Starke* J. expressing no opinion): Though, if W. had become bankrupt on 10th February 1939, M.'s claim for rent up to that date would have ranked preferentially under sec. 84 (1) of the *Bankruptcy Act* 1924-1933, that fact was not in itself enough to prevent the

Provided that the consideration . . . shall be deemed to have been sufficiently stated, notwithstanding that the commission, interest, or costs relative to such consideration shall have been deducted from or added to the amount of the consideration expressed." By sec. 28: "Every bill of sale in which there shall be any material omission or misstatement of any of the particulars required by the ninth section hereof . . . shall be void as against—(*a*) the official receiver or the trustee in insolvency of the grantor . . . so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale which within three months before the insolvency . . . are in the possession, or apparent possession, of the grantor."

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giving of the bill of sale from amounting to a preference under sec. 95, because for the purpose of the latter provision the actual date of bankruptcy must be taken and for some time immediately preceding bankruptcy W. was not M.'s tenant.

Decision of the Federal Court of Bankruptcy affirmed.

APPEAL from the Federal Court of Bankruptcy (District of South Australia).

Albert Linton Woon carried on business at Port Lincoln, South Australia, as a garage proprietor and motor mechanic in premises which he held on lease from Walter Muir McFarlane. The lease was for a term expiring in 1942 and at a rental of £6 per week. From July 1938 the rent began to fall into arrears, and these arrears grew notwithstanding repeated applications to Woon for payment. In February 1939 the rent due was £77. Woon explained to McFarlane that he had money out on hire-purchase and book debts and promised to pay when these were got in. McFarlane was not satisfied and intimated that he could levy distress. Woon then suggested an advance of £150 upon the security of his plant. After consideration and after consulting his solicitor McFarlane stipulated for a bill of sale. An inventory was taken. The stock and plant were found to be of considerable value, and there was a number of persons employed in the business. Some of the plant was under hire-purchase agreements. It was arranged that the balance of the hire (amounting to £42 8s. 9d. in all) and £77 arrears of rent should be paid out of the amount to be advanced. At Woon's request this amount was increased to £175, as he stated that he desired to pay his local creditors and to have money for medical attention. Woon thought and represented to McFarlane that his affairs were in a sound position, and McFarlane believed that the business was being conducted at a profit and that the balance that would remain in Woon's hands would be sufficient to pay off all his debts. In fact, however, on 10th February 1939 Woon was unable to pay his debts as they became due. On that date Woon executed a bill of sale in McFarlane's favour for £175 " in consideration of the sum of £175 contemporaneous advance lent to " him by McFarlane, the receipt whereof Woon thereby acknowledged. On settlement, which took place in McFarlane's inner office, he drew five cheques, which he handed to Woon. Two of these cheques, which totalled £42 8s. 9d., were respectively drawn to the order of two creditors under the hire-purchase agreements. Another cheque was in favour of the solicitor or bearer for £2 18s. 6d., the costs of the bill of sale, which Woon had expressly or impliedly agreed to pay. The remaining cheques were in favour of Woon or bearer and were for £77 and

£52 12s. 9d. respectively. Woon passed into McFarlane's outer office, where he handed the cheque for £77 to the latter's clerk and obtained a receipt for the rent payable to 14th February 1939. Woon sold his business as from 1st April 1939 and remained McFarlane's tenant only until 3rd April 1939. The purchaser of the business from Woon was financed by McFarlane, and the sum of £175 secured by the bill of sale was paid off out of the purchase money. Between 10th February 1939 and 3rd April 1939 Woon's rent did not fall into arrears. On 26th May 1939 a sequestration order was made against Woon, and George Weir Burns, the official receiver of the Federal Court of Bankruptcy at Adelaide, was appointed trustee of his estate.

The official receiver applied to the Federal Court of Bankruptcy (District of South Australia) for declarations :—(1) That the bill of sale was void against him because it contained a material omission or misstatement of the consideration. (2) That it was void against him as a preference, a priority or an advantage under sec. 95 of the *Bankruptcy Act* 1924-1933. (3) That the payment of £175 in discharge of the bill of sale was void under sec. 95. (4) Alternatively, that the payment of £77 for rent was void under sec. 95.

In the Court of Bankruptcy, Acting Judge *Haslam* held :—(1) That there was no material omission or misstatement of the consideration. (2) That, as McFarlane would have been entitled under sec. 84 of the *Bankruptcy Act* 1924-1933 to payment in full of his rent, had he distrained and precipitated the bankruptcy, the payment did not have the effect of giving McFarlane, for his debt, a preference, priority or advantage over other creditors. (3) That in any case McFarlane did not know or have reason to suspect that Woon was unable to pay his debts as they became due, and that he was a payee or encumbrancer in good faith and for valuable consideration and in the ordinary course of business, so that the transaction was protected by sub-sec. 2 (*b*) of sec. 95 as qualified by sub-sec. 3.

The official receiver appealed to the High Court.

Further facts appear from the judgments hereunder.

Newman (for *Griff*, on military service) (with him *Irving*), for the appellant. The bill of sale is void as against the official receiver by reason of secs. 28 and 9 of the *Bills of Sale Act* 1886-1935 (S.A.). English authorities do not assist, because the English statutes do not require the same particularity. The South-Australian Act requires the bill of sale to show what portion of the consideration is for an antecedent debt (*Re Harris* (1)). Looking at the case

(1) (1930) 2 A.B.C. 133, at p. 138.

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broadly and fairly it cannot be held here, as in English cases, that there was in substance a contemporaneous advance. [Counsel referred to *Maxwell* on *The Interpretation of Statutes*, 8th ed. (1937), p. 102 ; *Maas* v. *Pepper* (1) ; *In re Watson* ; *Ex parte Official Receiver in Bankruptcy* (2) ; *Beckett* v. *Tower Asset Co.* (3) ; *Sharp* v. *McHenry and Brown* (4) ; *In re Collins Bros.* ; *Ex parte White* (5) ; *Maddock* v. *Peacock* (6).] Sec. 9 of the *Bills of Sale Act* is designed to overcome the effect of the English decision and particularly requires that any part of the consideration that is for an old debt must be so stated. Under sec. 95 (3) of the *Bankruptcy Act* the onus was on McFarlane, and the Court of Bankruptcy should not have inferred that he acted in good faith and in the ordinary course of business. He took the bill of sale in an attempt to secure himself for rent owing, and the acting judge was in error in saying that McFarlane was in any event protected for the rent. It is submitted that the whole payment of £175 is a preference, notwithstanding such cases as *In re Nitschke* (7) ; *Re Docker* (8) ; *Re Grezzana* (9) ; *Re Richards* (10) ; *S. Richards & Co. Ltd.* v. *Lloyd* (11).

Abbott (with him *Cornish*), for the respondent. Sec. 9 of the *Bills of Sale Act* does not in substance carry the duty higher than that imposed by the English statutes. A prior liability may be, and in this case was, extinguished by payment (*Credit Co.* v. *Pott* (12) ; *Ex parte National Mercantile Bank* ; *In re Haynes* (13) ; *Ex parte Bolland* ; *In re Roper* (14) ; *Thomas* v. *Searles* (15) ; *Scott* v. *Shaw and Lee Ltd.* (16)). The arrangement regarding the £77 rent was a preliminary agreement which was quite apart from the bill of sale. The debt for rent was extinguished, and the consideration for the bill of sale was the cash. In *Re Harris* (17) the antecedent debt was not extinguished, and the transaction was in the nature of a sham. Here there is a finding that the transaction was bona fide. The giving of a cheque is literally within the definition in sec. 2 of the *Bills of Sale Act*, so there cannot be said to be a misstatement in the bill of sale. There was no preference regarding the £77, because sec. 84 of the *Bankruptcy Act* gave the landlord priority for thirteen weeks at £6, a total of

(1) (1905) A.C. 102.
(2) (1890) 25 Q.B.D. 27.
(3) (1891) 1 Q.B. 1.
(4) (1888) 38 Ch. D. 427, at p. 453.
(5) (1904) Q.S.R. 47, at p. 53.
(6) (1894) 20 V.L.R. 78. 15 ALT 201.
(7) (1930) 2 A.B.C. 36.
(8) (1938) 10 A.B.C. 97.
(9) (1932) 5 A.B.C. 233.
(10) (1935) 8 A.B.C. 218.
(11) (1933) 49 C.L.R. 49.
(12) (1880) 6 Q.B.D. 295.
(13) (1880) 15 Ch. D. 42, at p. 53.
(14) (1882) 21 Ch. D. 543, at p. 550.
(15) (1891) 2 Q.B. 408, at p. 411.
(16) (1928) 2 K.B. 26, at p. 31.
(17) (1930) 2 A.B.C. 133.

£78. The mere fact that at the date of bankruptcy the transaction resulted in a preference does not vitiate it. The payment was for rent, and there was therefore a valuable consideration. There was good faith. On 10th February both parties believed Woon to be solvent, and McFarlane had no reason to doubt his solvency. The evidence shows that McFarlane really believed he had a preference for £77 and was in a position to say that he was perfectly secured and was receiving no further preference by taking the bill of sale. The acting judge said that there were grounds from which the inference could be drawn that the transaction was a sham, but he accepted McFarlane's evidence as truthful and found, and was justified in finding, that McFarlane did not, at the date of the security, suspect Woon's position. As to good faith, see *S. Richards & Co. Ltd.* v. *Lloyd* (1); *Bank of Australasia* v. *Hall* (2). The transaction was in the ordinary course of business (*Robertson* v. *Grigg* (3)). The real security was for £98, not for overdue rent.

[STARKE J. Is giving security for overdue rent a business transaction?]

Alone it may not be, but the security was for £98, and it was not unreasonable for the landlord at the same time to protect himself for overdue rent. If the bill of sale is valid, the fact that the grantee realized on the security is no preference (*Re Grezzana* (4)).

Newman, in reply, referred to *Yit Tie Chee* v. *Mee Shuey* (5).

Cur. adv. vult.

Oct. 11.

The following written judgments were delivered:—

RICH, DIXON AND MCTIERNAN JJ. One Woon, now a bankrupt, occupied the respondent's premises as his tenant. He fell into arrears with his rent, and on 10th February 1939 he owed the respondent £77. Woon had obtained, under hire-purchase agreements, certain chattels for use in connection with his business. Under one of these agreements hire amounting to £24 12s. was owing, and under the other, hire amounting to £17 16s. 9d. On 10th February 1939 the respondent agreed to make an advance to Woon on the security of a bill of sale, provided that Woon, out of the advance, paid off the rent due to the respondent and the amounts owing under the hire-purchase agreements to the traders from whom he had obtained the chattels. Woon also agreed, either expressly or impliedly, to pay the costs of the bill of sale. The costs amounted to £2 18s. 6d.

(1) (1933) 49 C.L.R. 49.
(2) (1907) 4 C.L.R. 1514, at p. 1529.
(3) (1932) 47 C.L.R. 257, at p. 267.
(4) (1932) 5 A.B.C. 233.
(5) (1895) 21 V.L.R. 500. & (1 A.L.T. 203).

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The amount of the advance was fixed at £175. The sums to be paid for rent, instalments of hire and costs together amounted to £122 7s. 3d., leaving at Woon's free disposal £52 12s. 9d.

The bill of sale was executed, and the respondent drew five cheques and handed them to Woon. They were: (1) A cheque drawn to the order of one trader for £17 6s. 9d.; (2) a cheque drawn to the order of the other for £24 12s.; (3) a cheque in favour of the solicitor or bearer for £2 18s. 6d.; (4) a cheque in favour of Woon or bearer for £77, the amount of the rent, and (5) another cheque in favour of Woon or bearer for £50 12s. 9d., the residue of the £175. These cheques were handed to Woon by the respondent in the latter's inner office. Woon passed into the outer office and there handed the cheque for £77 to the respondent's clerk, who gave him a receipt for the rent payable to 14th February 1939. The bill of sale was expressed as a transfer and assignment of the chattels assured "in consideration of the sum of £175 contemporaneous advance lent to". Woon by the respondent, the receipt whereof Woon thereby acknowledged.

The *Bills of Sale Act* 1886-1935 (S.A.), by sec. 9, provides that every bill of sale shall state the consideration and what portion, if any, of the consideration is for an antecedent debt or contemporaneous advance. A proviso enacts that "the consideration for any bill of sale shall be deemed to have been sufficiently stated, notwithstanding that the commission, interest or costs relative to such consideration shall have been deducted from or added to the amount of the consideration expressed in such bill of sale." In sec. 2 there is a definition of "contemporaneous advance" which says that the expression shall include not only a contemporaneous advance of money but also an advance by the contemporaneous sale of goods on credit, the giving of bills of exchange and the like. Sec. 28 provides that a bill of sale shall be void if it contains "any material omission or misstatement of any of the particulars required by the ninth section."

The official receiver, as trustee of Woon's estate, contends that the bill of sale is void on the ground that it does not state truly the consideration. He does not contest the claim of the respondent that the cheques to the order of the two traders, the cheque in favour of the solicitor and that in favour of Woon for £52 12s. 9d. represent amounts contemporaneously advanced, but he denies that the sum of £77 applied in payment of the rent constitutes a contemporaneous advance. He maintains that this part of the consideration for the bill of sale was in truth "for an antecedent debt." The legal effect of the transaction is not open to doubt. The debt for rent was

clearly discharged by payment. If, after 10th February 1939, the respondent had attempted to levy distress for the rent he could not have justified on the ground that the rent was owing and that the bill of sale did no more than secure its payment. Woon's answer to any claim for rent would be payment and not discharge, accord and satisfaction or substituted agreement. Correspondingly, Woon's liability to the respondent after 10th February was for a single sum of £175 money lent. Further, it is settled by a long line of authority that in point of law the sum of £175 so lent was paid to Woon by means of the cheques. Indeed, even if the £77 owing for rent had been merely deducted and the balance of £98 only had been paid over, the transaction would in point of law have amounted to a payment of £175 to Woon for money lent. For "it is a general rule of law, that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards" (per *Mellish* L.J., *Spargo's Case* (1))—Cf. *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (2). This doctrine has been applied over and over again to the consideration of bills of sale in England, where the law requires that the consideration for a bill of sale shall be truly stated.

In *Ex parte National Mercantile Bank* (3) the consideration for a bill of sale was stated to be £2,050 by the mortgagees paid to the mortgagor at or before the execution thereof. Although the full amount was handed to the mortgagor in cash, he handed back a large part in repayment of promissory notes not yet due and in payment of interest and of expenses connected with the bill of sale. The Court of Appeal held that the consideration was truly stated. The decision is open to criticism on the ground that the mortgagor received the money on condition that he repaid portion of it, not in satisfaction of existing debts presently payable, but in retirement of bills not yet matured and in payment of charges for which he was not liable: Cf. *Ex parte Rolph*; *In re Spindler* (4); *Ex parte Firth*; *In re Cowburn* (5); *Richardson* v. *Harris* (6); *Cochrane* v. *Moore* (7). But the circumstance that the obligations were not due and payable passed unnoticed, and, upon the footing that the repayment was made in respect of a debt or debts immediately

(1) (1873) 8 Ch. App. 407, at p. 414.
(2) (1929) 42 C.L.R. 452, at pp. 475-478, *per Rich* J.; at p. 480, *per Starke* J.
(3) (1880) 15 Ch. D. 42.
(4) (1881) 19 Ch. D. 98, at p. 103.
(5) (1882) 19 Ch. D. 419, at p. 428.
(6) (1889) 22 Q.B.D. 268.
(7) (1890) 25 Q.B.D. 57, at p. 73.

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payable, the following statement by *James* L.J. expresses the law as it has stood for sixty years:—"Of course, if the consideration is to be set forth in the bill of sale, it must be set forth truly; probably it need not be stated with minute accuracy, but it must be set forth substantially. In my opinion the consideration for the bill of sale in the present case was really the advance of £2,050, which was lent by the bank to the grantor. Mr. *Roland Williams*, in his very able argument, contended that any collateral stipulations as to the application of the consideration ought to be set forth as part of the consideration; that there should be recitals of the intended application of the consideration. I cannot see that recitals of the motive and object of the advance are required by the Act. The motive of the lender, as it seems to me, is no part of the consideration for the deed, though it may be a collateral inducement to him to make the advance. Suppose that, instead of there being bills due by the grantor to the bank, there had been outstanding in the hands of some other bank bills upon which the lenders were liable, and they had said to the grantor you must take up those bills; or, suppose a loan were made upon the security of farming stock, and the lender said, 'You must pay the rent which is due to your landlord, or my security will be seriously prejudiced.' Stipulations of that kind would be part of the bargain between the parties, but they would be no part of the consideration which is intended by the Act to be set forth. The Act requires the real, the actual consideration to be set forth, but it does not require that any bargain between the parties relating to it should be stated. Of course, if there was a bargain that the whole sum which is stated to be the consideration should be at once returned to the grantee, that would be a sham transaction, and the court would know how to deal with it. But where there is a bargain that part of the sum stated to be advanced shall be applied in the payment of a real debt due at the time from the grantor to the grantee, there is no reason for calling that a sham transaction, or for holding that the Act applies to it. The Chief Judge characterized what took place in the present case as a comedy, but I can see no reason for so describing it. In cases of payment for shares in a company, we have frequently held that where there is a debt due from the company to the shareholder, and a debt for calls on shares due from him to the company, it is not necessary to go through the form of handing over the money and then handing it back again, but that the one debt may be set off against the other. But going through that form cannot make the transaction any the worse, and that is really what was done in the present case. In my view, the real consideration, as between the grantor and grantee,

the consideration which would have been properly stated in the deed if the Act had not been passed, is the consideration which ought now to be stated. And in my opinion that is the consideration which has been stated in the present case " (1).

In *Ex parte Charing Cross Advance and Deposit Bank*; *In re Parker* (2) the consideration of the bill of sale was expressed to be £120 advanced upon its execution by the grantee to the grantor; but £90 only was paid, the £30 being retained for interest and expenses. The bill was held bad, and the distinction was taken by *James* L.J. as follows:—" It is clear that the true consideration is not set forth in the bill of sale. The very object of the Act was to prevent the setting forth as part of the consideration that which was retained by the grantee in the shape of interest and expenses. In *Ex parte National Mercantile Bank* (3) the consideration was stated to be a loan of £2,050 by the grantees to the grantor, and it was not the less a loan of that amount because by a collateral agreement £550, part of it, was to be applied in the payment of a real bona-fide debt from the grantor to the grantees existing at the time, and not arising out of the then transaction between the parties. In the present case there was really an evasion of the provisions of the Act, and it is not at all like *Ex parte National Mercantile Bank* (3) " (4)—Cp. *Ex parte Challinor*; *In re Rogers* (5).

In *Credit Co.* v. *Pott* (6) the grantor of the bill of sale had borrowed sums of money from the grantee amounting to £7,350 upon the security of bills of sale which were renewed from time to time as the period for registration ran out, none of them being registered. At length the bill of sale in dispute was given, expressing the consideration as £7,350 then paid by the grantee as the grantor thereby admitted. The Court of Appeal held that this was a true statement of the consideration. Lord *Selborne* said: " Now, as between the parties to the deed, it appears to me that, as there was no fraud, the deed is conclusive evidence of the previously existing debt being satisfied, as much as if the money for it had actually been handed over; because, when the company treat the £7,350 as a new advance (and no money was in fact advanced, except by treating the previous debt as paid) the company could not then have said to the debtor that he owed the debt that had previously been contracted " (7). *Brett* L.J. said:—" What took place was this,—an account was stated between the parties, and it was agreed that a certain sum

(1) (1880) 15 Ch. D., at pp. 53, 54.
(2) (1880) 16 Ch. D. 35.
(3) (1880) 15 Ch. D. 42.
(4) (1880) 16 Ch. D., at p. 38.
(5) (1880) 16 Ch. D. 260.
(6) (1880) 6 Q.B.D. 295.
(7) (1880) 6 Q.B.D., at p. 298.

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should be taken as the amount due to the company, and that, in consideration of the debtor giving the security of a bill of sale, the sum so due, and which might have been demanded at once of the debtor, should be held over until it was demanded in writing. That arrangement was carried out by the bill of sale in question. Then what is the effect ? Why the old debt which was payable at once was wiped out, and a new debt constituted which was payable only after a demand in writing. A new credit was thus given, and the effect is the same as if after taking the accounts, £7,350, the sum found to be due, had been put into the hands of the creditors, and then handed back by them to the debtor to be repaid by him on demand in writing. Therefore both the legal effect and the mercantile and business effect of the transaction was as if there had been an actual advance in money of £7,350, and consequently the consideration is, I think, truly described in this bill of sale, both according to its mercantile and business effect and its legal effect " (1)—Cf. *Ex parte Bolland* ; *In re Roper* (2) ; *Ex parte Johnson* ; *In re Chapman* (3) ; *D'Usez* v. *Traffics and Discoveries Ltd.* (4) ; *Stott* v. *Shaw & Lee Ltd.* (5), all of which followed and applied the doctrine that if from a larger sum described as paid, lent or advanced as the consideration of a bill of sale, a smaller sum is withheld, deducted or repaid in satisfaction of a debt owing by the grantor to the grantee and presently payable that debt is discharged by payment and the consideration for the bill of sale is, in truth, a payment of the full sum by way of loan or advance made at the time when the less sum is physically paid over. But, nevertheless, a clear distinction was established and has ever since been maintained between, on the one hand, the settlement of a pre-existing liability immediately payable and, on the other, the application of part of the advance expressed as the consideration in or towards payment of a liability to the grantee not yet payable or of commission or charges for which the grantor is not liable except under an agreement forming part of the transaction giving rise to the bill of sale. In the latter cases a deduction of the amount of the charge or future liability cannot be considered as equivalent to a payment of the amount deducted: See *Hamilton* v. *Chaine* (6).

In *Richardson* v. *Harris* (7) the deduction from the full sum stated as the consideration for the bill of sale included the amount of acceptances not yet due and an agreed sum for the expenses of the

(1) (1880) 6 Q.B.D., at p. 299.
(2) (1882) 21 Ch. D. 543.
(3) (1884) 26 Ch. D. 338.
(4) (1924) 40 T.L.R. 441.
(5) (1928) 2 K.B. 26.
(6) (1881) 7 Q.B.D. 319.
(7) (1889) 22 Q.B.D. 268.

transaction. The Court of Appeal decided that the full sum was not paid at or immediately before the execution of the bill of sale. Lord *Esher* M.R. said :—" No doubt where two persons are mutually indebted the one to the other in different amounts, any mercantile or business man, and, therefore, any court of law, would consider it futile to go through the useless ceremony of handing over money in order that it may be handed back again ; and, therefore, it may be that, if, instead of the one indebted in the larger amount paying over the whole amount and the other handing back a part of it, the parties agree that the balance only shall be paid, there is what is the equivalent of a payment of the full amount. No court, however, has ever applied this doctrine in such cases unless there was, irrespective of the bargain under which the payment of the consideration took place, a debt already due from the grantor of the bill of sale to the grantee. No court has ever said that, if a person makes an agreement that he will advance £500, but that out of that sum of £500 he shall be entitled to deduct £50, the payment by the lender under such an agreement of £450 can be considered as payment by one party of £500 and a payment back again by the other of £50. To make the above-mentioned doctrine applicable there must, in my opinion, be a debt due and payable irrespective of the agreement for payment of the money which is the matter of discussion " (1). *Bowen* L.J. was less absolute in his statement in respect of a debt due but not payable. His Lordship said :—" If the assignee (i.e., grantee) had paid a sum to some third person indicated by the assignor, that would be money paid at his request, and might, according to the ordinary understanding of business men, be the same as money paid to the assignor. Here there is no question of the payment of money to a third person. The question here is whether money retained by the assignee can be said to be money paid to the assignor. It obviously would not be sufficient that the money should be merely retained at the request of the assignor. If it were so, then a statement that the money was paid would be quite illusory. The retention must surely be under such circumstances as to amount to the same thing as payment. Therefore, in the first place, there must be something to pay. The amount must be retained to meet something which otherwise ought to be met by payment. One can understand that there is something to pay, if there is a debt due and payable. It may be, though I do not say that it is so, that there might under certain circumstances be something to pay if a debt were due, but not payable. It is not, I think, necessary to decide that question. But, if there is no

(1) (1889) 22 Q.B.D., at pp. 272, 273.

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debt either due or payable, how can it be said that there is anything that can be paid ? " (1).

In *Parsons* v. *Equitable Investment Co.* (2) the sums retained out of or deducted from the full amount (£450) stated in the bill of sale to be then paid as the consideration therefor included a sum of £325 payable by instalments under a prior bill of sale between the same parties. The greater part of the instalments had not fallen due, but the full amount was deducted without discount for the future payments of which it was composed. On this ground the consideration was held to be incorrectly stated. Upon the facts it appeared that the money had actually reached the hands of the grantor, who was the plaintiff, but on terms that she paid thereout the amount of the previous bill of sale to the grantees, the defendants. *Warrington* L.J. said :—" On the face of the transaction the money was no doubt paid to the plaintiff ; she went to the bank and received the money on the defendant's cheque and had it in her possession until she handed it to the defendant's manager on her return to the office. This, however, in my opinion, is not enough. I think it must be shown that the money was in substance and not merely in form paid to the plaintiff—in other words, that she had dominion over it. Was it so in the present case ? At the time the money was received by her she was subject to a binding agreement, part of the terms on which the loan was made, that part of it should be applied in payment of a sum of money to the lender, not in respect of a debt actually due, but one which only became due by virtue of the agreement itself. It is true she might have retained the money and allowed herself to be subject to such legal consequences as might ensue, but she was under strong moral pressure not to take that course ; if she had done so she must have been aware that the defendants would seize and sell her furniture under the old bill of sale, and moreover she was at all times under the eyes of the defendants' clerk, sent, I have no doubt, for the express purpose of preventing any evasion on her part. There is no question that if the £325 had been retained by the defendants the consideration would not have been truly stated : *Hamilton* v. *Chaine* (3) ; *Richardson* v. *Harris* (4) ; and in my opinion the transaction in this case was in substance retention, though in form it was payment of £450 to the plaintiff and repayment of £325 by her to the defendants " (5).

(1) (1889) 22 Q.B.D., at pp. 274, 275.
(2) (1916) 2 Ch. 527.
(3) (1881) 7 Q.B.D. 319.
(4) (1889) 22 Q.B.D. 268.
(5) (1916) 2 Ch., at p. 534.

But the fact that the grantor receives the money under a trust, or upon a condition, that he pays over portion thereof is immaterial if the payment is to the grantee in respect of a pre-existing debt then due and payable (*Thomas* v. *Searles* (1)), or in respect of a debt to a third party although not yet due (*In re Wiltshire*; *Ex parte Eynon* (2)).

In our opinion the law, as settled by these authorities, establishes that in legal contemplation a payment of £175 was made on 10th February by the respondent to Woon and that this was a contemporaneous advance. Apart from the operation of the proviso to sec. 9, it might turn out, on an examination of the facts, that the sum of £2 18s. 6d. payable to the solicitor was not a liability, or at all events an independent liability, of Woon's, and, for that reason, fell outside the application of the doctrine. But the purpose of the proviso is to meet such a case and to do away with that qualification of the doctrine established by the authorities. The language of sec. 9, in our opinion, cannot exclude the principle that money is paid by way of loan notwithstanding that portion of it is retained or applied in satisfaction of a cross-demand. The words are quite inapt for the purpose. The proviso suggests that the legislature was alive to the principle, recognized it and, so far from intending to abrogate it, removed the qualification affecting it. We do not think that the word " for " in the expression " consideration *for* an antecedent debt or contemporaneous advance " can be pressed to mean " for the purpose of satisfying " or " applicable for." That expression describes the nature of the consideration, not the purpose for which the money forming the consideration is applied. Consideration is a technical legal expression, and we should give it its legal application. In point of law the consideration given for Woon's bill of sale was a loan of £175 then paid.

In our opinion this ground of attack made by the appellant, as official receiver, on the validity of the bill of sale is misconceived and ought to fail. But the transaction was also attacked by him as amounting to or including a preference void under sec. 95 of the *Bankruptcy Act* 1924-1933.

The learned acting judge who heard the motion decided that the transaction was not void as a preference. His conclusion was based cumulatively on two findings, viz., (1) that, inasmuch as the payment was made to the respondent as a landlord in respect of rent for a period not exceeding three months for which there was sufficient distress on the premises, the payment did not have the effect of giving to the respondent, for his debt, a preference, priority or

(1) (1891) 2 Q.B. 408. (2) (1900) 1 Q.B. 96.

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advantage over other creditors ; (2) that in any case the respondent was a payee or encumbrancer in good faith and for valuable consideration and in the ordinary course of business, so that the transaction was protected by sub-sec. 2 (*b*) of sec. 95 as qualified by sub-sec. 3. Accordingly, his Honour held that the bill of sale was a valid security, that the payment of the rent out of the advance was valid and that the subsequent repayment of the advance by the receipt of the proceeds of the sale of the chattels subject to the bill of sale was valid. The first ground for so holding that the transaction was not invalidated by sec. 95 depends upon sec. 84 (1) (*i*) of the *Bankruptcy Act*, which, in the application of the assets of a bankrupt, gives a priority to the claim of a landlord in respect of so much rent reckoned from day to day, for a period not exceeding three months, as was due and payable at the date of the sequestration order and in respect of which, at that date, there were goods on the premises liable to distress for rent, provided that the landlord's priority shall not extend beyond the value of the goods. It has been held in the Federal Court of Bankruptcy that the period of three months is that immediately preceding the date of the sequestration order (*Re Kanis* (1)). Upon the hearing of the present appeal the correctness of this interpretation was assumed. Although a landlord is thus preferred to ordinary creditors, his claim to rent ranks only sixth in the list of priorities if it is a bankruptcy of a living person, seventh if it is the estate of a deceased debtor. But in the present case there is nothing to show that debts existed falling under any earlier priority, and the onus of proof was upon the official receiver.

The sum of £77 amounted to just under three-months' rent at £6 a week. An attempt, however, was made to establish that it did not in fact represent rent owing for the three months immediately before 10th February 1939, when the debt for rent was discharged out of the loan. It was said that certain payments made by the bankrupt on account of rent had been appropriated to current rent and not to arrears, with the result that part of the amount actually owing at that date represented rent that had fallen due more than three months before. But we think that the contention arose from a misreading of the rent account, which, on examination, shows clearly that the payment covered arrears extending no further back than the three months immediately preceding 10th February 1939. After that date the rent was paid with substantial punctuality, and no rent was unpaid at the actual date of the bankruptcy, viz., 26th May 1939.

(1) (1933) 6 A.B.C. 268.

Sec. 95 (1) avoids, on bankruptcy within six months, transfers of or charges upon property and payments of money by a debtor unable to pay his debts as they become due in favour of a creditor if the transaction has "the effect of giving that creditor . . . a preference, a priority or an advantage over the other creditors."

In these circumstances the transaction of 10th February did not appear to the learned judge to have the effect of giving such a preference to the respondent, because it did no more than discharge a debt made preferential by the law.

If bankruptcy had taken place on 10th February, the respondent's claim for rent would have been paid in full in priority to ordinary debts. That, however, is not decisive, for it can scarcely be doubted that the actual and not a hypothetical date of bankruptcy must be taken for the purpose of considering the effect of the transaction. Suppose, for instance, that after 10th February rent had not been regularly paid but had been allowed to fall again into arrear and that at the date of the order of sequestration another three-months' rent had been unpaid. Suppose, further, the tenancy to be subsisting at the actual date of the order for sequestration and sufficient distress to be found on the premises. In that case, the landlord would be entitled to priority for the last three-months' rent accruing due immediately before the actual date of sequestration, viz., 26th May 1939, and the payment of the earlier three-months' rent on 10th February 1939 would therefore operate as a preference. For, in the case supposed, that three-months' rent, were it unpaid, would rank *pari passu* with ordinary unpreferred debts.

These suppositions are not, however, in accordance with the actual facts. What did occur was that Woon, the bankrupt, sold his business as from 1st April and remained the respondent's tenant only up to 3rd April. Between 10th February and that date his rent did not fall into arrears. The respondent's rent account continuously credits the payments in fact received, including the £77, in due order according to the time of actual accrual, and, though it notes the dates up to which the amounts received operate to pay the rent, it is clear that, throughout, the appropriation is always to the arrears in order of the time when they fell due. If therefore the payment of the £77 was held void and disregarded, the result might be that the subsequent payments of rent should be carried back and treated as discharging some of the arrears which the £77 was supposed to cover. Had the tenancy continued down to the bankruptcy, this view of the matter might have led to the conclusion that the only consequence produced by the payment of the £77, having regard to the regular discharge of the subsequent

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rent by valid payments, was to prevent the existence, at the time of the bankruptcy, of a preferential claim upon the assets for three-months' rent of equal amount, though in respect of a later period. On that footing it would be difficult to regard the payment as "having the effect of giving the creditor (the landlord) a preference, a priority or an advantage over the other creditors." For these words can scarcely include a preference, priority or advantage which his claim enjoys under the bankruptcy law. Apparently the learned acting judge proceeded on some such view.

The difficulty, however, is that during the eight weeks or thereabouts immediately preceding the sequestration order the bankrupt was not the respondent's tenant and, therefore, neither owed nor paid rent in respect of that period. For those weeks therefore, if not for the whole three months, there could be no preferential claim: Compare *Re Collins*; *Ex parte Richardson* (1).

We are therefore not prepared to support the decision of the learned acting judge upon the first ground stated. A firmer ground for the decision is, however, provided by the second ground.

After a very clear and careful discussion of the facts his Honour arrived at the affirmative conclusion that the conditions stated in sub-sec. 4 of sec. 95 were not fulfilled and that he was therefore at liberty to find that the respondent had discharged the burden of establishing that he was, within the meaning of sub-sec. 2 (*b*), a payee in good faith and for valuable consideration and in the ordinary course of business and that upon the evidence he ought so to find. The respondent's evidence bears every mark of candour, and his Honour accepted it. Substantially nothing is involved but a question or questions of fact, and in our opinion the findings ought not to be disturbed. To displace the operation of sub-sec. 4 of sec. 95 it was enough for the respondent to establish either that the circumstances under which the payment was made were not such as to lead to an inference that he knew or had reason to suspect that Woon was then unable to pay his debts as they became due or that the circumstances were not such as to lead to an inference that he knew or had reason to suspect that the effect of the payments would be to give him a preference or a priority or an advantage over other creditors. It appears to us that there was ample justification for the learned judge's finding that the circumstances were not such as to lead to the latter inference. Taking into account the value of the goods upon which a distress might have been levied, the amount of the advance made, viz., £175, the payment thereout of the amount of hire under the two hire-purchase agreements and

(1) (1930) 2 A.B.C. 61.

the statements of the debtor as to the condition of his business and as to the cars sold by him on hire-purchase terms on which hire was outstanding, and the respondent's own knowledge of the business, which formerly had been his own, we think that the respondent might naturally suppose that there was no question of his gaining an advantage at the expense of Woon's creditors. Both he and Woon appear to have regarded the transaction as a means of tiding Woon over a difficulty and thus enabling him to carry on a remunerative business and then to sell it without leaving anyone unpaid. Woon perhaps had no sufficient reason for his confidence, but Woon's account of his position coupled with the respondent's own experience of the business formed an ample basis for the respondent's expectations.

Under sub-sec. 2 (*b*) itself the issues are (1) good faith, (2) valuable consideration, and (3) ordinary course of business. There is adequate material to support the finding of good faith, and there can, of course, be no doubt that the payment was for valuable consideration. That it was made in the ordinary course of business is a finding upon which we have felt more difficulty. But the expression as used in the *Bankruptcy Acts* is a wide one: See *Sievwright* v. *Hay & Co. Ltd.* (1); *Robertson* v. *Grigg* (2), per *Gavan Duffy* C.J. and *Starke* J. Unlike the expression found in the bills-of-sale legislation, viz., "transfers of goods in the ordinary course of business of any trade or calling," it does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor: See *Robertson* v. *Grigg* (3), per *Evatt* J., and cf. *Halsbury's Laws of England*, 2nd ed., vol. 3, p. 20. Possibly the application of the expression in bankruptcy is not so wide as in relation to floating charges: Cf. *Halsbury's Laws of England*, 2nd ed., vol. 5, p. 482, and *Palmer, Company Precedents*, 13th ed. (1927), Part III., Debentures, p. 72. But that meaning has more analogy.

The transaction considered as a whole presented the appearance of a perfectly fair and honest attempt to place the finances of Woon's business on a sound basis by raising money on free assets, giving an ample security, for the purpose of paying off unsecured creditors and providing a small surplus for current expenses. On the whole, therefore, we think that the finding that it was in the ordinary course of business ought not to be disturbed.

In our opinion the appeal should be dismissed with costs.

(1) (1913) 50 Sc.L.R. 313.
(2) (1932) 47 C.L.R., at p. 267.
(3) (1932) 47 C.L.R., at p. 273.

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STARKE J. On 10th February 1939, one Woon gave a bill of sale to the respondent, McFarlane, over certain personal chattels scheduled to the bill of sale. The bill of sale was expressed to be "in consideration of the sum of £175 contemporaneous advance lent to me by" McFarlane, the respondent. Upon the negotiation of the bill of sale it was arranged that the sum of £175 so lent should be applied in payment of moneys owing to hire-purchase creditors and of rent together with the costs of the security and the balance to Woon. Accordingly, five cheques were drawn by the respondent, one for rent, £77, owing to the respondent. The cheques were handed to Woon, who in his turn handed the cheque for £77 to the respondent's clerk, who gave him a receipt for that sum as rent to 14th February 1939. Three cheques were sent to the respective payees, and the fifth, a cheque for £52 12s. 9d., was paid into Woon's banking account and was the only sum out of the £175 that remained in his pocket. At the end of March Woon sold his lease and business together with stock at a valuation for £412. The respondent financed the transaction, and he deducted the sum of £175 from the purchase price, discharged the bill of sale, and in April paid Woon the balance, £237. On 26th May 1939, Woon's estate was sequestrated in bankruptcy and the appellant was appointed the official receiver of his estate.

He contends that the bill of sale was void by reason of the provisions of the *Bills of Sale Act* 1886-1935 of South Australia. That Act, by sec. 9 (2), requires that every bill of sale shall contain or state "the consideration and what portion (if any) of the consideration is for an antecedent debt or contemporaneous advance," which words (sec. 2) "include as well as a contemporaneous advance of money by the grantee to the grantor as the sale of goods or property upon credit, or the drawing, accepting, indorsing, making or giving of any bill of exchange, promissory note, or guarantee, or other matter or thing by the grantee to, for, or on behalf of the grantor on the security of any bill of sale and contemporaneously with the giving thereof." And sec. 28 provides, so far as material, that "every bill of sale in which there shall be any material omission or misstatement of any of the particulars required by the ninth section . . . shall be void as against (*a*) the official receiver or the trustee in insolvency of the grantor . . . so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale."

The contention presented on behalf of the official receiver is that the sum of £77, portion of the sum of £175, was for an antecedent debt, namely, a debt for rent owing to the respondent, and was not

a contemporaneous advance, the consideration stated in the bill of sale. But the contention ignores principles of law that have been long settled. Thus, in *Parsons* v. *Equitable Investment Co. Ltd.* (1) Lord *Cozens Hardy* M.R. observes :—" Now the following propositions seem to me to be established by the authorities . . . In the second place, if there is a sum of money due from the grantor to the bill of sale holder less than the amount professed to be advanced, the retention of that sum and payment of the difference only to the grantor may be treated as payment of the whole sum to him. This proceeds on the well-known principle of which *Spargo's Case* (2) is an illustration, namely, that it is not necessary to go through the form of handing the entire loan to the grantor and for her then to return the amount to be retained. Such a transaction would be within a plea of payment under the old law." The present case falls precisely within that statement of the law and is distinguishable from such cases as *Ex parte Charing Cross Advance and Deposit Bank*; *In re Parker* (3), because the retention of the £77 in this case " was for the purpose of satisfying a debt existing independently of the transaction of loan."

It should be observed that the arrangement as to the application of the sum advanced, particularly of the sum of £77, is not set forth as part of the consideration for the bill of sale, and in the absence of authority an argument might have been raised that the consideration for the bill of sale was not fully and truly stated. But the point was thus disposed of by *James* L.J. in *Ex parte National Mercantile Bank*; *In re Haynes* (4) :—" Mr. *Roland Williams*, in his very able argument, contended that any collateral stipulations as to the application of the consideration ought to be set forth as part of the consideration; that there should be recitals of the intended application of the consideration. I cannot see that recitals of the motive and object of the advance are required by the Act. The motive of the lender, as it seems to me, is no part of the consideration for the deed, though it may be a collateral inducement to him to make the advance . . . The Act requires the real, the actual consideration to be set forth, but it does not require that any bargain between the parties relating to it should be stated. Of course, if there was a bargain that the whole sum which is stated to be the consideration should be at once returned to the grantee, that would be a sham transaction, and the court would know how to deal with it. But where there is a bargain that part of the sum stated to be advanced shall be applied in the payment of a real

(1) (1916) 2 Ch., at p. 530.
(2) (1873) 8 Ch. App. 407.
(3) (1880) 16 Ch. D., at p. 39.
(4) (1880) 15 Ch. D., at p. 53.

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debt due at the time from the grantor to the grantee, there is no reason for calling that a sham transaction, or for holding that the Act applies to it."

Another contention of the official receiver was that the bill of sale or the retention or payment of £77 to the respondent for rent or the payment of £175 in discharge of the bill of sale was void against him by reason of the provisions of sec. 95 of the Commonwealth *Bankruptcy Act* 1924-1933. The section, so far as material, provides that " every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred . . . by any person unable to pay his debts as they become due from his own money, in favour of any creditor . . . having the effect of giving that creditor . . . a preference, a priority or an advantage over the other creditors, shall . . . be void as against the trustee in bankruptcy." But it further provides (sub-sec. 2) that nothing in the section shall affect " the rights of a purchaser, payee or encumbrancer in good faith and for valuable consideration and in the ordinary course of business." And by sub-sec. 3 the burden of establishing the protective conditions lies " upon the person who relies upon their having been complied with." In *S. Richards & Co. Ltd.* v. *Lloyd* (1) this court held that the section looked to the effect of the transaction and not to the intent or state of mind of the debtor, and, further, in *Robertson* v. *Grigg* (2), that the test under sec. 95 of the ordinary course of business was not related to any special business carried on by the debtor or creditor but was whether the transaction was fair and what a man might do without having any bankruptcy in view. The trial judge was inclined to think that the respondent was given no practical advantage by the retention or payment of the sum of £77 for arrears of rent, having regard to the priority provisions of sec. 84 (1) of the Act, in respect of rent due to the landlord of a bankrupt. But it is not necessary to investigate that matter, for the respondent was, in any case, a purchaser or encumbrancer in good faith and for valuable consideration and in the ordinary course of business. Woon was short of cash but regarded his position as solvent, and the respondent had no knowledge of other trade debts, though he did know of amounts due locally and some medical expenses which he expected would be provided for out of the advance. The bill-of-sale transaction, as the trial judge said, was a common one—that of turning portion of the assets into cash for the purpose of carrying on the business, meeting obligations, and having some ready money.

(1) (1933) 49 C.L.R. 49. (2) (1932) 47 C.L.R. 257.

It was, in short, a transaction in good faith, for valuable consideration, and in the ordinary course of business.

The transaction of March, when the business was sold and the respondent obtained £175 from the purchase price and discharged the bill of sale, was also attacked. But this attack cannot be supported, for, the bill of sale being a valid instrument, its enforcement was not contrary to any law or statutory provision.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *B. G. Griff.*

Solicitor for the respondent, *C. R. Doudy*, Port Lincoln, by *Lempriere Abbott & Cornish.*

C. C. B.