[HIGH COURT OF AUSTRALIA.]

RICHARDSON . . . . . APPELLANT;
APPLICANT,

AND

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED . . . . } RESPONDENT.
RESPONDENT,

H. C. OF A. 1951-1952.

SYDNEY, 1951, *Nov.* 19–21.

MELBOURNE, 1952, *March* 11.

Dixon, Williams and Fullagar JJ.

Bankruptcy—Preferences—Avoidance—Bank deposits within six months of sequestration—Payments in ordinary course of business—Reduction of debit—Bank account used to meet liabilities—Office and trust accounts of solicitor—Bankruptcy Act 1924-1950 (*No.* 37 *of* 1924—*No.* 80 *of* 1950), *ss.* 90, 91, 95, 96A.

In determining whether a transaction is a preference within the meaning of s. 95 of the *Bankruptcy Act* 1924-1950 a court is required to consider (1) the kind of "effect" which the section treats as decisive, and (2) whether that effect is a consequence of the payment. In a case where the payment forms an integral or inseparable part of an entire transaction its effect as a preference involves a consideration of the circumstances of the whole transaction. When it is seen from the character of that transaction that, if it be carried out to its intended conclusion, the creditor will be left without any preference priority or advantage, a particular payment cannot be isolated and construed as a preference.

APPEAL from the Federal Court of Bankruptcy.

Arnold Victor Richardson, the Official Receiver, and trustee of the estate of Harold Joseph Price, a bankrupt, applied by way of motion, as amended, to the Federal Court of Bankruptcy, for various declarations and orders against the respondent, the Commercial Banking Co. of Sydney Ltd.

The declarations sought by the applicant were in the following terms:—

1. that on and after 15th May 1947, and before 12th November 1947, certain sums of money totalling £30,065 3s. 1d. representing

moneys of the bankrupt were paid by the bankrupt to the respondent by way of deposit thereof into an account with the respondent styled or known as Harold J. Price and Company—Office Account in the books and records of the respondent;

2. that in the circumstances the payments referred to in declaration 1 constituted to the extent of £10,301 19s. 0d. (part of the £30,065 3s. 1d.) preferences, priorities, or advantages to the respondent within the meaning of s. 95 of the *Bankruptcy Act* 1924-1946;

3. that on and after 15th May 1947, and before 12th November 1947, certain sums of money totalling £41,989 0s. 11d. representing moneys of the bankrupt were paid by the bankrupt to the respondent by way of deposit thereof into an account with the respondent styled or known as Harold J. Price and Company—Trust Account in the books and records of the respondent;

4. that in the circumstances the payment referred to in declaration 3 constituted to the extent of the sum of £4,982 7s. 11d., a preference, priority, or advantage to the respondent within the meaning of s. 95 of the *Bankruptcy Act* 1924-1946;

5. that certain sums of money totalling £30,149 18s. 10d. paid by the respondent to the bankrupt or in accordance with his directions on and after 15th May 1947, and before 12th November 1947, and representing moneys withdrawn from an account with the respondent styled or known as Harold J. Price and Company—Office Account were at the respective times of payment thereof the property of the applicant as Official Receiver of the bankrupt estate pursuant to the provisions of the *Bankruptcy Act* 1924-1946, and in particular ss. 60, 90 and 91 thereof; and

6. that certain sums of money totalling £42,005 18s. 0d. paid by the respondent to the bankrupt or in accordance with his directions on or after 15th May 1947, and before 12th November 1947, and representing moneys withdrawn from an account with the respondent styled or known as Harold J. Price and Company—Trust Account were at the respective times of payment thereof the property of the applicant as Official Receiver of the bankrupt's estate pursuant to the provisions of the *Bankruptcy Act* 1924-1946, and in particular ss. 60, 90 and 91 thereof.

In par. 7 of the notice of motion the applicant asked for orders that the respondent do pay to the applicant the total of the sum of money referred to in: (a) declarations 2 and 4 above, namely, £15,284 6s. 11d.; (b) declarations 1 and 3 above, namely, £72,054 4s. 0d. excepting to such extent (if any) as any portion of those sums might be held to be included in the amount claimed in sub-par. (a); and (c) declarations 5 and 6 above, namely,

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£72,155 16s. 10d. excepting to such extent (if any) as any portion of those sums might be held to be included in the amount claimed in sub-pars. (a) and (b).

By sub-par. (d) the applicant asked for an order that an inquiry be held and an account be taken subject to the direction of the Court as to the property other than above referred to (if any) of the bankrupt lodged by him with the respondent as a security or otherwise on or after 15th May 1947, and before 12th November 1947, and as to the dealings by the respondent therewith and that the respondent be ordered to hand over to the appellant any such property or the proceeds thereof as the applicant might be declared entitled to.

In its notice of opposition the respondent denied that allegation contained in pars. 1 to 6 inclusive of the notice of motion; and asserted (i) that such of the payments referred to in pars. 5 and 6 of the notice of motion as were made by it were made to or by order of the bankrupt by the respondent as a banker in good faith and before the sequestration order in respect of the bankrupt's estate and (ii) that there were not any reasons to justify the making of the orders as prayed in sub-pars. (a), (b) and (c) of par. 7 of the notice of motion, or for the taking of an account as prayed in sub-par. (d) of par. 7.

The following statement of further material facts is substantially as it appears in the judgment of *Clyne* J., Federal Judge in Bankruptcy.

The case for the applicant rests in the main upon documentary evidence and the evidence of the bankrupt.

Price had for many years been practising as a solicitor in Sydney. On 12th November 1947, on his own petition an order of sequestration was made in respect of his estate. He had assets of an amount of about £4,500. At the date of the sequestration order there were, according to the evidence of Mr. Murray, an officer of the Official Receiver's department, liabilities amounting to £64,000, and though claims amounting to £36,000 had been admitted Mr. Murray said he would expect the total liabilities to exceed £64,000.

In 1938, Price became a customer of the respondent bank at its Marrickville branch, and he then opened an office account in the name of "Harold J. Price and Company", and also a trust account entitled "Harold J. Price and Company—Trust Account", and also a "Personal Account". In these proceedings the personal account can be disregarded. Price said that when the trust account was first opened it was intended to be the ordinary solicitor's trust account into which clients' moneys would be paid. Price at

or about the time he opened these accounts lodged security for a small overdraft and this was from time to time increased. For the purposes of this application it was agreed between counsel that there was during the relevant period from May to November 1947 security for an overdraft of £680.

When Price became a customer of the respondent bank one Commins was the manager of the Marrickville branch, and in the course of time there grew up between them a close relationship or at least a close business relationship. In 1942 and 1943 the taxation authorities began to make an investigation into Price's affairs and in the course of this investigation Commins and some of Price's clients were interviewed. As a result of the investigation, Price was re-assessed to tax and received amended assessments for an amount exceeding £6,000. Price was unable so pay this extra tax and told Commins if the commissioner's demand were enforced he would have to become bankrupt unless something " turned up ". Price also said he was going to try and induce the income tax authorities to take £2,000, an amount which he could borrow from one Flanagan who, according to Price, was his client and a wealthy man, and arrange to pay the balance by instalments.

In October 1944 the Deputy Federal Commissioner recovered against Price a judgment for £3,997 4s. 0d. and the State Commissioner of New South Wales a judgment for £1,237 18s. 3d. Some provisional relief was granted to Price by the income tax authorities, but it was not satisfactory to them as some cheques for the payment of instalments of arrears of tax which he had agreed to pay were not met. Six of such cheques were indorsed " present again ". Price said he thought the indorsement was in the handwriting of Commins.

Price said he first appreciated in point of time that he was insolvent in the sense that he was unable to pay his debts as they became due out of his own moneys some time in 1943, and he also said that in 1944 he was never in a position to pay his debts as they became due. Price's difficulties became more and more embarrassing and certainly from the beginning of 1944 Price was getting money " here and there " to meet pressing commitments, and was also playing " ducks and drakes " with his office and trust accounts. Of all this Commins was fully aware.

For about two years preceding his bankruptcy Price and Commins used to speak to each other with regard to Price's bank accounts. According to Price, Commins would ring him up invariably in the afternoon shortly after two o'clock when cheques had come in for collection from other banks, and Price would ask Commins what he had in on the two accounts and there would then be a discussion

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as to the cheques that were owing, the state of the accounts and what cheques were " the most desirous to be paid ", what they were for, and what were the dangerous cheques from the point of view of going back to other banks. Commins would then decide as to which of the lot of cheques he would meet and which he would send back. Price said that the dangerous cheques were in respect of the money of other people which he had misappropriated and whom he was trying to repay.

At these consultations Price would know the cheques that would come in and would tell Commins what deposits he was about to send out to him during the day, and Price said that generally he would pay in what he had undertaken to pay. Some amounts so paid in were credited as at the next day because the hours of business had closed. The entries on any one day did not actually coincide with the actual order of events.

Commins at times allowed Price to draw beyond the security limit and this was on occasions allowed without prior consultation though Commins reserved to himself the right to stop cheques as he saw fit. When Price exceeded the overdraft limit Commins would sometimes honour cheques and sometimes would not.

Evidence was tendered of a number of specific transactions prior to May 1947, between Price and the bank at Marrickville and such evidence was admitted as it was considered it had some bearing on questions such as good faith and the ordinary course of business, but in the light of evidence subsequently given of transactions between May and November 1947 it was to a large extent unnecessary.

I do not think it would serve any useful purpose to narrate the evidence of these transactions prior to May 1947 ; but as an indication of the relations between Price and Commins I refer to one transaction relating to a cheque received by Price which for convenience will be called the Vautin-Harris cheque.

In January 1946, Price received from Vautin-Harris & Co. a cheque for £3,963 8s. 8d. payable to the Commissioner of Taxation or bearer and crossed not negotiable. Price said that at Commins' suggestion, apparently as a delaying tactic, this cheque was paid into the head office for transmission to the Marrickville branch. This cheque encountered some difficulty before it was transmitted because when it was presented at the head office the teller questioned it and sent Price to see the sub-accountant who, it seems referred the matter to Commins. The cheque was duly transmitted to Marrickville. Price then gave Commins a cheque either filled in or in blank to enable some of the proceeds of the cheque to be trans-

ferred to Price's office account, and at the same time arranged with Commins to meet some dishonoured cheques. Out of the proceeds of the Vautin-Harris cheque, £1,000 was paid into the office account and the proceeds enabled Price to cash a cheque for £1,000 which he thought was "in connection with betting losses" and Price also met some of his creditors' cheques.

In 1946, Price discussed with Commins the formation of a company which would have as one of its objects the building of houses. Price considered he wanted £20,000 to £30,000 to meet his obligations and the formation of such a company might help to provide a substantial sum and would thus prevent a terrific crash. Both Commins and Price thought that unless the latter obtained a large sum of money there would be a terrific crash for both of them.

The Continental Builders Pty. Ltd. was then formed.

I come now to the period between May and November 1947. At the close of the day prior to 15th May 1947, the office account showed a debit balance of £735 8s. 8d. and thereafter it was regularly overdrawn beyond the security limit. There were numerous payments into this account and numerous withdrawals therefrom until the account was closed on 17th October, 1947.

I refer to some of the payments in on the 15th and 16th days of May. On the 15th a sum of £1 5s. 0d. was credited to the account, and on the same day there was a credit of £1,200 which reduced the overdraft below the security limit. On the next day £134 15s. 6d. was credited to the account. I mention these amounts because the applicant said these payments were preferences and therefore acts of bankruptcy.

The trust account at the beginning of 15th May had a credit of £38 2s. 10d. and when the account was closed in the following October there was a credit balance of £21 5s. 9d. According to the copy of the trust account put in evidence the trust account was overdrawn on four occasions, namely:—(a) On 14th July at the close of the day there was a debit of £938 11s. 6d. which on the following day was turned into a credit by a deposit of £1,000. (b) On 25th July the trust account was overdrawn in an amount of £45 19s. 5d. and this was subsequently turned into a credit by a deposit of £60. (c) On 1st September the trust account was overdrawn in an amount of £1,994 2s. 9d. and on the next day the account was credited with £2,204 14s. 10d. and £850. (d) On 15th October the account showed a debit of £2,003 14s. 3d. and this was turned into a credit by a deposit on the next day of £2,300.

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The applicant claims that these payments into the trust account were preferences.

Price said in respect of these payments that though the sum of £1,000 was credited to the trust account on 15th July there had been lodged with the bank on the previous day a Government Savings Bank Book with a withdrawal slip which entitled the bank to obtain a sum of £1,000.

With respect to the overdraft on 25th July of £45 19s. 5d. Price said that a deposit of £60 intended for the trust account was by inadvertence paid into the office account but later there was " an adjustment from the office account ".

When the trust account was on 1st September overdrawn Commins had £2,204 14s. 10d. in hand on the afternoon of that day. Again when on 15th October the account was overdrawn and in credit on the following day, a cheque for £2,300 from Irving Investments Ltd. had been paid in late on the 15th.

During the relevant period from May to November, 1947, the office and trust accounts, as Price said, were in a mess. Moneys paid into the trust account consisted of clients' moneys and as Price said moneys of his own. Price admitted that he met his liabilities on the trust account out of other people's moneys or moneys of his own which he had paid into the trust account. Moneys of his own paid by him into the trust account were so paid to meet cheques coming into the trust account, mostly in respect of moneys owing to clients, but not altogether. He also repaid out of the trust account moneys he had borrowed because he had not sufficient moneys in his office account. Evidence was tendered of numerous specific transactions between the bank and Price during the period between 15th May and 17th October, 1947. These transactions related to the transfer of substantial sums from the trust account to the office account, the transfer of moneys from the office account to the trust account, the payment of moneys borrowed by Price into one or other account, and as he said the payment into the trust account of his own moneys, and also the payment out of the office account of moneys which ought to have been paid out of the trust account. I do not propose to narrate all the evidence relating to these transactions for reasons which subsequently appear, but I think it reasonable and proper to refer to the evidence relating to some of them. Even if I dealt with all of these transactions during the relevant period, it would I think be necessary, if my decision were adverse to the bank, to direct the taking of an account.

On 15th May the sum of £1,200 was credited to the office account and this sum was taken from the trust account. On 12th June the sum of £4,414 18s. 9d. was credited to the trust account. Included in this amount were two cheques which Price had received from the Continental Builders Co., one for £2,914 18s. 9d. and another for £1,000 and a further sum of £500 received from one Macpherson which Price said Macpherson owed to him. Price gave varying accounts of the history of this sum of £4,414 18s. 9d. but in the end he said that £2,500 of it belonged to persons named Howarth and the balance of £1,900 odd belonged to him. Before receiving this sum of £4,414 18s. 9d. Price had given one Lee a cheque which he thought was for £4,500 and which represented the balance of purchase money due to Lee on the sale of a property. The cheque given to Lee was drawn on the trust account and was dishonoured; this cheque had been paid by Lee into his account with the Bank of New South Wales, George Street, branch.

In this difficulty Commins told Price that he had arranged with the branch manager of the Bank of New South Wales that Price's cheque would not come back until the date fixed for a settlement of some transactions concerning the Continental Builders Co. by which Price became entitled to some money. When Price received the two cheques from this company which have been referred to, Commins obtained in some haste warrants of clearance for them. He later on informed Price that he had cleared up Lee's matter.

On 25th July, Price deposited £525 in the office account and £450 of this amount was trust money belonging to one Slattery. On 18th August £4,228 11s. 8d. was placed to the credit of Price's office account and this amount included a bank cheque for £4,100. This sum Price said was trust money he had received on behalf of some company. Price said he paid it into his office account and later paid this company by a cheque drawn on his trust account. He also said that this sum of £4,100 was used for current expenditure. On 8th September £1,989 15s. 0d. was placed to the credit of the office account and £1,450 of this amount was represented by a cheque drawn by Price on an account he had with the E. S. & A. Bank. Price in cross-examination said he had won £3,000 on a horse called Leetona and agreed with a suggestion of counsel that it looked as if £2,000 of the winnings went into his account with the E. S. & A. Bank. Price also paid, so he said, £750 of his winnings into an account he had with the Commercial Bank and he thought that a sum of £750 deposited in the trust account on 8th September was part of his race winnings.

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On 16th September a sum of £1,150 was transferred from the office account to the trust account. On the same day £4,000 was placed to the credit of the trust account, and this amount Price said was money he had borrowed from Shannon's Brick Tile and Pottery Co.

At some time in September, Price told Commins that he would have to find some £8,000 in respect of a matter which he described as the Flanagan and Richards matter, and Price said he had had the use of a large part of this sum, viz. £7,500 since early in the year. Price said he had arranged to borrow from one Arthur Sing £2,500 on promissory notes payable over a short period and was also going to get £4,000 from Shannon, but he would still be short of the amount for the bank cheque he would have "to give out" and he asked Commins if he would help him. Commins said he would if there were no delay. Price received from Sing a cheque for £2,500 which he said he deposited in the trust account. About the same time Price received a cheque for £1,150 on behalf of a vendor of property from one Gibson the purchaser. Gibson, so Price said, was a customer of the Marrickville branch of the bank. At Commin's suggestion Gibson's cheque was paid into an account Price had with the Bank of Australasia. Later, when Price got Shannon's cheque for £4,000 he wanted Commins to make it available to him at once so that he could pay a bank cheque to the Perpetual Trustee Co. in connection with the settlement of the transaction with Flanagan as quickly as it could be done. Commins examined the trust account and found it to be over £1,000 short of the amount required for the settlement. Commins agreed to give Price a bank cheque payable to the Perpetual Trustee Co. but at the same time he wanted from Price an office account cheque in blank so that at the end of the day he could see the state of the account and could then fill in the cheque and deposit it in the trust account so that that account would not be overdrawn. The blank cheque was filled in for £1,150 and was made payable to the trust account. Price got the cheque he wanted.

At some time in October when Price's office account was heavily overdrawn Price informed Commins that he was acting for one Judah in the purchase of a house and there was a balance of £5,000 owing. Price said he expected to get this money in a week. Commins told him to get it as quickly as he could. Price obtained the money in the form of a cheque which he sent out to Marrickville. I might add that this cheque was credited to the trust account on 2nd October. Commins without delay came into the city, got a warrant of clearance for the cheque and took it back to Marrickville.

Commins then rang Price and asked him to transfer £2,500 of it into the office account straight away, and thereupon Price sent out to Marrickville a cheque for £2,500 drawn on the trust account. This payment of £2,500 into the office account placed the account in credit, but in the course of a few days it was heavily overdrawn.

One other transaction I mention. On 16th October, the day on which Price was arrested, he received a cheque for £390 from a Mrs. Turner, being the balance due by her on the purchase of a cottage. Price said he gave this cheque to one of his clerks. Commins on the following day informed Price that the clerk had given him the cheque and he had put it to the credit of the office account. At the same time Commins gave Price a letter closing the office account. I should here interpose that Commins was not called as a witness.

The evidence I have narrated has a strong bearing on the question of good faith and illustrates in a striking form the dubious and suspicious character of the dealings between Price and Commins during the period from May to October 1947.

According to the evidence, the bank was well aware of the fact that Price was a very unsatisfactory customer.

In March 1945, in a memorandum from head office signed "R. W. R. Johnston, Inspector" addressed "To Marrickville" there was the following injunction: "Keep the account in the name of H. J. Price & Co. within the amount of the security held."

In December, 1945, in another memorandum "To Marrickville" signed "R. W. R. Johnston, Inspector" there appeared the following: "We insist that you keep any overdraft within the amount of cover held as previously instructed. In view of the large amount —£6,500—owing by him to the Taxation Department following an investigation of his affairs by that Authority, also the scope of his betting transactions, it is essential that you closely watch the operation of these accounts. Before drawings are allowed against cheques lodged for credit, all such cheques must be cleared."

In another memorandum dated 13th February 1947, addressed "To Marrickville" and signed "L. Farrar, pro Inspector" it was said, "The working of this account is most unsatisfactory and we insist that the debt be kept within the amount of cover held. On no account must the trust account be allowed to be overdrawn."

Again in April 1947, in a further memorandum "To Marrickville" signed "A. W. M. Furze, Asst. Inspector" in reference to "Accounts out of Order" there appears the following statement: "Regard our instructions of 13th February last."

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Mr. Johnston, now Chief Inspector of the respondent bank, was unhappy about Price's account in 1943. He never liked it. It was the type of account he did not like to see in the bank. The manager may have liked it but head office never liked it.

Again in September 1944, Mr. Johnston wrote to Commins saying the debt was ranging too high.

Price said that about the middle of 1947, he was shown some correspondence by Commins about operations on the trust account, when the trust account was overdrawn. Commins said that head office had been on to him because of the trust account being overdrawn and though they had been quietened down Price would have to try and put his transactions through the office account and use the trust account as little as he possibly could.

On this point I add one further piece of evidence.

In extracts from inspection books it appears that in November 1945, it was reported that Price's transactions through both accounts were unusual for a solicitor and Commins was warned to be on his guard against kite-flying. Mr. Bowring who made the inspection suggested that the manager be more specifically warned against possible kite-flying and instructed to clear Price's cheques on any other bank or branch before paying against them.

Again in January 1947, it was reported that the working of the office account had not been satisfactory. The "Trust Account also has been overdrawn (small amount) for a day or two." The report states that Price "is a heavy bettor and works commissions," and that he owes a large amount for taxation (some £6,500) and is paying £15 each week at present and that his cheques have at times been dishonoured.

The case for the applicant may be summarized briefly. (1) (a) He claims that payments of an aggregate amount of approximately £10,000 made into the office account between May and 17th October 1947, and which reduced from time to time the overdraft to within the security limit were void preferences; (b) that the payments amounting in all to £4,982 7s. 11d. made into the trust account to discharge the overdraft on the four occasions when it was overdrawn, and to which I have referred, are also void preferences; (2) (a) That by reason of the doctrine of relation back embodied in s. 90 of the *Bankruptcy Act* 1924-1946, payments made by Price or to his order during the relevant period out of the office account totalling approximately £30,000 were payments made with moneys which belonged to the applicant; (b) that by reason of the same doctrine payments made out of the trust account by the bankrupt or by his order or direction during the relevant period

totalling approximately £42,000 were payments made with moneys belonging to the applicant.

It is reasonably clear, I think, that the claims under paragraphs (1) and (2) are not mutually exclusive.

Clyne J. held that with the exception of the payment into the office account of the sum of £390 received by the bankrupt from Mrs. Turner, the various payments made by the bankrupt into his banking accounts with the respondent did not constitute preferences to the respondent within the meaning of s. 95 of the *Bankruptcy Act* 1924-1946. The respondent was ordered to pay the sum of £390 to the applicant (*Re Price* (*No.* 6); *Richardson* v. *Commercial Banking Co. of Sydney Ltd.* (1)).

From that decision the applicant appealed, and the respondent cross-appealed, to the High Court.

A. J. Moverley K.C. (with him *N. H. Bowen*), for the appellant. Section 95 of the *Bankruptcy Act* 1924-1950, which avoids preferences refers to particular transactions. It is inappropriate to refer to a series of transactions so that one must wait until the end of the series to ascertain whether in the ultimate result the series has the effect of giving a preference to a creditor as his Honour has done. Provided a bank at all times acts bona fide as stated in the section; it has nothing to fear from that construction. It is protected by other sections of the Act. It is only when a bank is not acting bona fide that the present question arises. In the present case his Honour has held that the respondent bank was not acting bona fide in the sense used in s. 95. In those circumstances it cannot escape the conclusion that it received a preference. When the overdraft exceeded the limit of the security held by the respondent bank it insisted upon and received a deposit of an amount which had the effect of bringing the overdraft back within the limit of the security. Any subsequent increase above the limit would represent a separate further advance by the bank which it was under no obligation to make to Price. Although on occasions Price overdrew beyond the limit of security held, upon the distinct understanding that moneys were being deposited by him in the immediate future, that was by no means always the case. Where it was not so there may have been an expectation that there would be further deposits but that was not definitely arranged: *In re Gunsbourg* (2); *In re Pollitt*; *Ex parte Minor* (3); *Williams* v.

(1) (1949) 15 A.B.C. 26.
(2) (1920) 2 K.B. 426.
(3) (1893) 1 Q.B. 455, at p. 457.

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Dunn's Assignee (1); *Robertson* v. *Grigg* (2); *S. Richards & Co. Ltd.* v. *Lloyd* (3); *Stephen* v. *Doyle* (4) which was relied upon by his Honour does not support the view taken in the judgment below. *Re Docker* (5) is a case where the view now submitted by the appellant was taken by *Lukin* J.: see also *Re Pitts and Lehman Ltd.* (6), *Re Scott*; *Ex parte Cruikshank* (7) and *Re Bryant*; *Ex parte Bryant* (8). It may be suggested that a creditor cannot obtain a preference out of trust moneys. However, a creditor who is paid out of trust moneys does, in fact, have an advantage over other creditors unless and until he is compelled to disgorge under the principle in *Soar* v. *Ashwell* (9). In any case it is not clear that trust moneys were used to benefit the bank in this case. The fact that moneys are paid into a solicitor's trust account under the *Legal Practitioners Act* 1898, does not of necessity make them trust moneys. Particular deposits may be trust moneys but then it is necessary in order to ascertain upon what trusts they are held to consider the particular circumstances applicable to them. Different circumstances would apply to each deposit. There is not any common trust applicable to all. In the present case it is clear that moneys were paid into the trust account in many instances. Where moneys were transferred from trust account to office account it will be presumed that Price was transferring such of his own moneys as were in trust account. It will not be presumed that he was committing a breach of trust. In the present case there are certain deposits as to which it is submitted that upon any consideration of the circumstances the bank in fact received a preference over the other creditors when they were placed in the bank account.

A. R. Taylor K.C. (with him *J. K. Manning*), for the respondent. The primary question for determination is whether the deposits or any of them made by the bankrupt to the credit of either his office account or his trust account constitute preferences. In this regard the real question to be resolved is whether such payments had the *effect* of giving to the respondent "a preference, priority or advantage" over the other creditors. The cases relied upon by the appellant relate to an entirely different set of circumstances from those present in this case. Here there was an ordinary current account. In *Re Docker*; *Ex parte Official Receiver*; *E.S. & A. Bank*

(1) (1908) 6 C.L.R. 425, at p. 434.
(2) (1932) 47 C.L.R. 257.
(3) (1933) 49 C.L.R. 49.
(4) (1882) 3 L.R. (N.S.W.) Eq. 1.
(5) (1938) 10 A.B.C. 198.
(6) (1940) 40 S.R. (N.S.W.) 614; 57 W.N. 212; 11 A.B.C. 261.
(7) (1931) 4 A.B.C. 8.
(8) (1895) 1 Q.B. 420.
(9) (1893) 2 Q.B. 390.

Ltd. (*Respondent*) (1) the payments which were alleged to have been preferences were sums deposited to an account which had been closed except for the receipt of moneys and such deposits were made to that account upon terms that the whole of the amounts thereof were to be retained in permanent reduction of the old overdraft account. Similarly *Re Ruwaldt*; *Ex parte Fleetwood Smith, Trustee*; *Commercial Bank of Australia Ltd.* (*Respondent*) (2); *Re Bowman*; *Ex parte Trustee in Bankruptcy*; *National Bank of Australasia Ltd.* (*Respondent*) (3) and *Re Pitts and Lehman Ltd.* (4) were cases which did not relate to deposits made to the credit of an ordinary current account.

Furthermore, the question whether a preference was given, or the extent to which any particular payment is a preference, depends entirely upon the chronological order in which the various entries appeared in the accounts. The transactions in question did not take place in that order. There is a further distinction because here many of the payments made to the office account and which are alleged to be preferences were payments of trust moneys. As regards the trust moneys it is submitted that where a person who stands in a fiduciary position with respect to another, receives moneys on behalf of that other person and is bound either to hold, apply, or account for such moneys for the latter's benefit, the former is a trustee of such moneys (*Burdick* v. *Garrick* (5); *Soar* v. *Ashwell* (6); *Cohen* v. *Cohen* (7); *Mayne* v. *Public Trustee* (8)).

A solicitor receiving moneys or holding moneys on behalf of a client occupied such a fiduciary position and is a trustee under the general law. The *Legal Practitioners Act* 1898-1936 (N.S.W.) and the general law, justify the following conclusions:—(i) The solicitor is not entitled to make use of such moneys on his own account (*In re a Solicitor* (9)); (ii) he is bound to place such moneys to the credit of a trust account; (iii) he is bound to hold such moneys exclusively for his client; (iv) the moneys are not available in execution for the solicitor's debts; and (v) there is not any right in the bank to set off the sum to the credit of the trust account against any other account. Prima facie all moneys credited to a solicitor's trust account are trust moneys. This inference may properly be drawn not only against the solicitor but also against any person claiming through him. No payment-out by a bank

(1) (1938) 10 A.B.C. 198.
(2) (1931) 3 A.B.C. 245.
(3) (1932) 5 A.B.C. 126.
(4) (1940) 40 S.R. (N.S.W.) 614; 57 W.N. 212; 11 A.B.C. 261.
(5) (1870) 5 Ch. App. 233.
(6) (1893) 2 Q.B. 390.
(7) (1929) 42 C.L.R. 91.
(8) (1945) 70 C.L.R. 395.
(9) (1910) 10 S.R. (N.S.W.) 124; 27 W.N. 18.

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of trust moneys to a creditor can constitute a preference under s. 95 because such moneys are not available for payment to creditors in the course of an administration in bankruptcy (*Re Thompson*; *Ex parte The Official Assignee, Cross, Respondent* (1)). If that were not the case then all creditors would be entitled to share equally in the proceeds of the breach of trust. In any event there can be no preference where the creditor-payee is a party to the breach of trust because he would be bound to repay the amount in question to the beneficiary. If in fact the Official Receiver did succeed in collecting moneys which really belonged to a beneficiary and distributed such moneys to the creditors, then the beneficiary would be entitled to have recourse against such moneys in the hands of the creditors to obtain repayment. As regards the payments made by the bankrupt to his office account, the question which falls for determination is whether the *effect* of the payment is to be determined (a) at the moment of time when the payment was made, or (b) as at the date of the sequestration order having regard to all subsequent events. It is submitted that the question must be determined having regard to the effect of the payment upon the position of the creditors in the bankruptcy (*Burns* v. *McFarlane* (2); *In re Banque Canadienne Nationale and Vermette & Laperle (Que.)* (3)). If that were not so it would be impossible to determine whether payments to creditors who might possibly be entitled to be paid in priority to ordinary creditors under s. 84 resulted in preferences because until the date of the sequestration order was fixed the extent of the right to payment in priority could not be determined. That would apply to payments made for rent, for wages and the like. A further difficulty would be met if there were a change in the general body of creditors as between the date of the alleged payment and the date of the sequestration order. As regards payments to a current account it is submitted: (a) that a payment ment made by a debtor to a creditor during a course of dealings in which receipts and payments are interdependent, one upon another, does not of itself give a creditor a preference. The course of dealings must be considered as a whole, and there will be no preference unless as a result of such dealings, considered as a single transaction, the creditor obtains a benefit or advantage over the other creditors in the bankruptcy; (b) that no individual payment can be regarded as having any separate *effect* and the effect of any one item in the series cannot be determined apart

(1) (1903) 3 S.R. (N.S.W.) 166; 20 W.N. 37, 94.
(2) (1940) 64 C.L.R. 108.
(3) (1947) 28 Can. Bktcy. R. (Ann.) 204.

from the effect of the series of which it forms part; and (c) that to ascertain the effect of any payment it is necessary to look at all related events. The consequences which flowed from the payment must be considered and it is only when the moment of time arrives at which the sequestration order is made that the consequences can be ascertained. Submissions have been made on behalf of the appellant in relation to the effect of s. 97. The provisions of that section are not really relevant in these proceedings. They only operate where the payment was intended to be in discharge of a debt and can not relate to a payment to an account which is overdrawn. In such case the payment by the bank was by way of loan and not in discharge of the debt which the bank owed the customer. In any event good faith under that section can only be determined in relation to each individual payment upon an examination of the whole of the circumstances surrounding such payment. The respondent accordingly submits:—(A) that no preference is established simply by treating payments into a current account as independent or isolated transactions. The effect of such payments can only be determined by consideration of the relevant circumstances; (B) that all circumstances which go to show whether a bank has received any real benefit from such payments as are relevant; (C) that the circumstances of the present case establish—(i) that the bank was not intended to benefit, and (ii) that it did not in fact benefit; and (D) that payments of trust moneys cannot constitute a preference in any circumstances.

A. J. Moverley K.C., in reply.

Cur. adv. vult.

March 11, 1952.

The Court delivered the following written judgment:—

This is an appeal by the Official Receiver, as trustee of the estate of Harold Joseph Price, a bankrupt, from an order of the Federal Court of Bankruptcy declaring that, with one exception, various payments made by the bankrupt into his banking accounts with the respondent bank did not, as was alleged by the Official Receiver, constitute preferences within the meaning of s. 95 of the *Bankruptcy Act* 1924-1946. The exception is a deposit of £390 made on 17th October 1947, which the order declared to be a preference and void. Against this part of the order the respondent bank cross appeals. The order of sequestration was made on 12th November 1947 on a petition presented by the bankrupt himself on that day. The period therefore of six months within which a preference priority or advantage must have been given by a debtor, if its validity is to

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be open to attack under s. 95 (1), extends back to 13th May 1947 from 12th November 1947.

The bankrupt was a solicitor of the Supreme Court of New South Wales who had practised in the city of Sydney for about thirteen years. Although he practised in the city his banking business was done at the branch of the respondent bank at the suburb of Marrickville. There he had a private account, an "office" or ordinary business account and a trust account. He said that he began with the private account and then in 1937 opened the other two accounts. The reason he gave for banking in the suburbs was a ripening friendship with the local manager, one Commins, a friendship which proved disastrous. To Commins, however, it must for a time have been useful. For Price put a great deal of business in the way of the local branch. But Price, who was a gambler, got into deep water and resorted to all the time-honoured devices for keeping his head above the surface. He had lodged some securities for an overdraft upon his office account but he continually overdrew. He placed cheques drawn on his trust account, and in this and other ways he contrived to misappropriate sum after sum of his clients' and other trust moneys. Sometimes he paid trust moneys into his office account. There were occasions when he transferred moneys from his office account to his trust account. This, he said, was done for the most part to meet cheques he had given to clients upon the trust account. He borrowed money from clients and, with Commins' help, from customers of the branch of the respondent bank. He resorted freely to the use of accommodation cheques, sometimes other peoples' sometimes his own. He gained some advantage in the practice of this device by the possession of accounts in two other banks. In all this he expected the assistance and protection of his friend Commins and the latter seems to have done the best he could for him. But the head office kept a critical and suspicious eye on Price's accounts and it is evident that Commins would not honour cheques when the result would be to place the account too heavily in debit, and so disclose upon the record that he was doing more for his friend than for his bank. By the time the period of six months was reached with which this appeal is concerned a definite practice had been established between them for dealing with the daily situation. It was a course they followed for about two years before the sequestration order. Invariably, said Price, shortly before two o'clock in the afternoon, he would ring up Commins, when the cheques had come from the other banks for collection. There would then be a consultation as to what cheques could be

dishonoured without too much danger, what could be met and how. "Where they were cheques it was very desirable to meet", he said in evidence, "that is dangerous cheques, if I had £500 in and I wanted £1000, I would have to try and see where I could get further money from. I discussed it with him; perhaps I would go to so and so or I had seen so and so that morning and that I could get a couple of hundred from him that afternoon or something like that". He added that the position of the trust account would be considered when the cheques in for collection were cheques upon the office account. Price was asked to tell the Court in general the conversations between Commins and himself about paying moneys. In answer he gave an example as follows:—"The account would be overdrawn by say £700 and there would be £300 worth of cheques coming in during the day. I would speak to him and I would not have the £300, I would probably say to him, "I have £100 in the office. I will get that out." He would say: "That will not be enough". I would say: "I cannot get any money from this one and that one", and he might say, "How about McEwan" or mention some other name and I would say, "I will see if I can't do something with them". He would say: "If you do not get me word that you can get £150 somewhere about five o'clock I will send all your cheques back". Nearly every day some one would go out to Marrickville with whatever Price had said he could lodge. The hours of business having ended, the amounts so lodged would for the most part be credited next day. The order of the entries in the passbook, even on the same day, often did not coincide with the order of events. Price said that when he gave his word about his obtaining money Commins accepted it because in those matters Price always told him the truth. He did what he said he would do or, if it became impossible, he told Commins. Commins and Price apparently regularly saw each other before the day's work began and no doubt this meant that Commins was fairly well informed in advance of what the day was likely to produce. In the end, as might be expected, Price was arrested for criminal misappropriation. This was on 16th October 1947 and his bank accounts were closed next day.

It does not appear that any very definite or exact limit had been placed upon Price's overdraft. Price thought that Commins had fixed £600 and later £650. But Commins' instructions were to keep it within the amount of liquid securities held and that only temporary drawings in excess were to be allowed. The value of the security held by the respondent bank has been fixed at £680 by agreement between the parties.

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The case for the appellant, the Official Receiver, is that when the office account was overdrawn to a greater amount than this sum and a deposit was made having the effect of reducing the amount overdrawn, then to the extent which the excess over £680 was so paid off, it amounted to a preference within the meaning of s. 95. There were four occasions when the trust account was overdrawn. Deposits were made by which the debit balances were extinguished. To the extent that the deposits had this operation the Official Receiver claims that they too were preferences within s. 95. Further, he relies upon the effect of s. 90 in giving the bankruptcy a relation back to the earliest act of bankruptcy within six months of the petition and upon that of s. 91 in including in the property of the bankrupt vested by s. 60 in the Official Receiver all property belonging or vested in him at the commencement of the bankruptcy. But the act or acts of bankruptcy upon which reliance is placed for this purpose are the very preferences attacked under s. 95. They extend back to the commencement of the period of six months. These would indeed, if established, be acts of bankruptcy by virtue of s. 52 (*c*). But the Official Receiver's second ground raises the same issues as his first, subject, however, to this theoretical qualification. It might be that he established his allegations that an early payment into one of Price's accounts amounted to a void preference and failed in his allegations as to later payments. Then there might be some point in his reliance on the relation back of the bankruptcy to the earlier payment which he had succeeded in showing to be void as a preference. It may be that even so the payments out of the bank accounts as discharges of the banker's liability would qualify for protection under s. 96A as made pursuant to the ordinary course of business. But payments into the account, deposits, stand on a different footing. If they be preferences they are void unless good faith is made out in the sense required under s. 95 (2) and (4). It is hardly necessary to say, in view of the foregoing account of the part played by the local manager Commins, that the respondent did not deny, but, on the contrary, admitted that Commins not only had reason to suspect but knew that the bankrupt was unable to pay his debts as they became due during the relevant period. Thus it will be seen that the appeal turns upon the question whether the deposits in the office account reducing the overdraft within the limit of the security, namely, £680, or any of the four deposits in the trust account made when it was overdrawn, amount to preferences within s. 95 (1).

The material words of that sub-section provide that every payment made 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, if the debtor becomes bankrupt on a bankruptcy petition presented within six months thereafter be void as against the trustee in bankruptcy. Under this provision it is of no importance whether the debtor does or does not spontaneously voluntarily or intentionally give the preference (*S. Richards & Co. Ltd.* v. *Lloyd* (1)): " It looks to the effect of the transaction and not to the intent, or state of mind, of the debtor " (per *Starke* J. (2)).

In considering what is the effect of the transaction impeached under s. 95, in this case a deposit, or each of a succession of deposits, to the credit of an overdrawn current account or an overdrawn trust account at a bank, there are two things that it is important to have clearly in mind. One of them is the kind of " effect " which the provision treats as decisive. It must be " the effect of giving the creditor a preference, a priority or advantage over the other creditors " : it is then void in bankruptcy if the sequestration is within six months. Section 95 supposes a bankruptcy, and it is in relation to that bankruptcy that the question arises whether, over the other creditors, a preference priority or advantage has been given to the particular creditor. Section 52 (*c*), on the other hand, propounds the hypothetical question whether in the event of bankruptcy such an effect would be produced. The bankruptcy or the petition must of course be within six months : s. 55 (1) (*c*).

The second thing is that the effect is a consequence of the payment and that where the payment forms an integral, an inseparable, part of an entire transaction its effect as a preference involves a consideration of the whole transaction. In applying s. 95 (1) to the facts relating to the various deposits it is convenient to begin with the four payments into the trust account that are challenged.

The first of the four occasions within the six months when the ledger account shows a debit balance in the trust account is on 25th July 1947. It arose, however, from a mistake on the part of Commins or his bank clerks in debiting a cheque to the wrong account, and an adjusting entry put the matter right. This item may therefore be put aside.

The second of the four occasions was on 1st September 1947 when, as a result of debiting a cheque for £2,025, the trust account was shown as overdrawn by £1,994 2s. 9d. Next day there was

(1) (1933) 49 C.L.R. 49.

(2) (1933) 49 C.L.R., at p. 62.

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a deposit by Price of £2,024 14s. 0d., which put the account in credit again. This deposit is said to be a payment having the effect of giving a preference, a preference to the extent of £1,994 2s. 9d. From the evidence it appears that on the same day as the cheque for £2,025 was honoured and debited, namely, 1st September, Commins was given the deposit to cover it consisting of a bank cheque of £1,946 2s. 4d. and three other cheques. They were transmitted to him in the manner already described so that the cheque on the trust account might be honoured. It is therefore obvious that there was no preferential payment of an existing debt, no preference over other creditors brought about by the transaction. It may clearly enough be inferred, too, that the moneys involved were all trust moneys and, whether properly applied or not, neither the payments in or the payment out belonged to Price. But that involves a matter for separate discussion over another or other items.

The third occasion was on 16th September 1947, when a payment out of £8,169 13s. 1d. and another of £10 put the trust account in debit £1,142 4s. 10d. On the same day, by a cheque for £1,150 drawn on the office account and debited to that account and credited to the trust account, the debit balance of £1,142 4s. 10d. was turned into a small credit balance. The corresponding result in the office account was a debit of £1,792 14s. 1d. It would be tedious as well as needless to recount the details of the entire transaction to which these entries relate. The short effect is that Price at his peril had to account for £8,169. He told Commins of his need to do so and discussed ways and means. He required a bank cheque for the amount for which he was liable. To cover it he borrowed £4,096. There was at the same time £2,743 at the credit of the trust account. Commins took from him an office account cheque in blank to wait till the end of the day to see how much more was needed. He gave Price the bank cheque for £8,169 and afterwards filled in the blank cheque for £1,150. Upon these facts clearly there could be no preference. The actual result was to increase the amount owing by Price to the bank by £1,150.

The fourth occasion when a debit balance was shown in Price's trust account was on 15th October 1947, the eve of his arrest. The account debits under that date a cheque for £2,029 7s. 4d., producing a debit balance of £2,003 14s. 3d. Next day a credit of £2,300 appears. This is what is said to effect a preference. Here again the evidence is that, because he had to obtain a bank cheque or to meet his own cheque for the amount debited, £2,029 7s. 4d.,

Price set to work to find money and did so by borrowing it. He placed the amount of £2,300 in Commins' hands on the afternoon of the same day, 15th October 1947, though the credit appears as of the next day. Again there is no case of preference. So far as the trust account is concerned the case of the Official Receiver appears to us clearly to fail.

The office account presents a very much larger number of items which are said to amount to preferences. The account was very active and, within the six months before the bankruptcy petition it was frequently overdrawn to a greater amount than the agreed value of the security, £680. The Official Receiver claims that payments into the account in reduction of this excess resulted in giving a preference to the respondent over other creditors. But so far as a payment into the office account operated to reduce the overdraft below the value of the security he does not claim that it gave a preference. He does not do so because he takes it that the respondent bank obtained no advantage over other creditors from the payment of an indebtedness on overdraft for which it was in any case adequately secured.

The Official Receiver put forward several alternative methods for ascertaining the amount of the void preferences which he alleged. One was to take a point of time at which the amount of the overdrawings rose above £680 and then take the point at which the overdraft next fell below that figure, and to find the highest sum which the overdraft reached between those two dates. The difference between the latter sum and £680 was treated as the amount to which the respondent bank had been preferred by the deposits. Another method was to treat each payment into the account while the overdraft stood above £680 as a preference, or in the case of a deposit reducing it below £680 as a preference *pro tanto*. The result was to produce a larger total, because a deposit reducing the overdraft, but not below £680, would be counted as a preference, although afterwards another payment out of the account increased the overdraft before the point of time when at length it was again reduced below £680. Such movements in the account were disregarded by the first method. A third alternative method disregarded payments into the account representing trust moneys, *protestando* however that this should not be done.

We have come to the conclusion that, with the exception of the item of £390 paid in as the account closed, which was held by the learned Judge of the Court of Bankruptcy to be a void preference, none of the deposits had the effect of giving the respondent bank a preference priority or advantage over the other creditors of Price.

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They were not, in our opinion, payments made to the bank independently of the arrangement by Price with Commins that the latter should honour cheques outstanding, but, on the contrary, they were made only to enable him to meet cheques which Price had given or was about to give. If Commins, as representing the bank, had accepted the amount deposited with him on any occasion and had forthwith closed the account he would have been guilty of a breach of faith with Price. Doubtless Price could not have complained legally of such a breach of faith ; for during the six months, and apparently for some time before, Price's banking transactions were rooted in dishonesty. But what is important here is the severability of the deposits from the payments out of the account ; the payments out which were entered as subsequent, whatever the actual sequence. It was rightly remarked by counsel for the respondent bank that Commins was not seeking to get money into the account for the benefit of the bank but out of it for the benefit of Price. This is true, we think, for the whole period up to Price's arrest. And that is one reason why the last payment, that of £390, credited next day stands on a different footing from the others. A not unimportant fact is that no cheque of Price's was ever dealt with by Commins' clerks or tellers in the ordinary course of banking business. They were all referred to him to be dealt with personally. In considering whether the real effect of a payment was to work a preference its actual business character must be seen and when it forms part of an entire transaction which if carried out to its intended conclusion will leave the creditor without any preference priority or advantage over other creditors the payment cannot be isolated and construed as a preference. Nor can it matter that in the particular circumstances, whether because of illegality or for any other reason, the law could not be invoked if the creditor did falsify the understanding or expectations of the debtor which formed the basis of the payment. If the creditor does carry on his relations with the debtor on the intended footing and so obtains in the result no preference priority or advantage over other creditors from the payment, the fact that it was open to him, without exposing himself to any legal remedy at the suit of the debtor, to interrupt the course of dealing or the progress of the transaction and thus secure for himself a preference, is not enough to show that the payment had the effect of giving such a preference priority or advantage. For *ex hypothesi* that was not its final effect in fact. In this case it may be remarked that when Price was arrested and his account was closed, the overdraft was greater than at the beginning of the six months.

A running account of any debtor who has reached insolvency must present difficulties under s. 95. A debtor who pays something off his grocer's account in order to induce the shop keeper to give him further supplies of groceries can hardly be held, as it seems to us, to give the grocer a preference, if that was the clear basis of the payment. If the grocer credited the money as a payment for the future deliveries instead of the past deliveries of groceries he would in the end be in exactly the same position and yet he could not be attacked as having received a preference. But without stating any principle with an application beyond the facts of this case, it is enough to decide that the payments into the office account possessed in point of fact a business purpose common to both parties which so connected them with the subsequent debits to the account as to make it impossible to pause at any payment into the account and treat it as having produced an immediate effect to be considered independently of what followed and so to be adjudged a preference.

Many of the deposits attacked as preferences were dealt with by the evidence specifically and the circumstances were gone into in detail. Others were left unexplained, except for what appeared on the face of the accounts. It would unnecessarily lengthen this judgment to deal with each item separately. The items fall, we think, into easily recognizable classes and it is enough to deal with the classifications. First there is a class of items where the particular circumstances leading to the making of the deposit appear pretty clearly from the evidence and show that the deposit was intended to cover, and did no more than cover, specific cheques which had come in or were coming in. In the greater number of cases within this class the deposit consisted of a cheque upon the trust account and under this head we think there can be no preference. A second class differs from the first only in the fact that the amount of the deposit more than sufficed to cover the particular cheques presented or impending the dangerous character of which was the prime purpose for the search for funds. The evidence does not explicitly deal with the application of the residue. A deposit to the credit of the office account made in the beginning of October 1947 provides an illustration at once of the boldness of the depredations committed in order to meet what were considered dangerous cheques, and of the fact that the whole purpose of Commins and of Price was to find means not of paying off the bank but of carrying on from day to day by honouring as many cheques as possible. On 1st October the office account was in debit to the extent of £1,535. Between 29th September and that date various cheques had been

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dishonoured and marked "present again". They amounted to more than £1,400. Other cheques were about to be presented. Price was acting for a purchaser of land who was ready to pay the balance of purchase money, £5,000, through him. It was decided by Commins and Price, so the latter said, to rely on this as a source of funds. Price gave Commins a cheque upon his trust account for £2,500, which Commins placed to the credit of the office account. To meet it a cheque for £5,000 was obtained from the client, a warrant of clearance for this cheque was hastily obtained and by taxi the cheque was conveyed to Marrickville and credited to the trust account so as to be there to meet the cheque for £2,500. It was a Thursday and it was not until the next Tuesday that the cheques presented amounted to £2,000 and before they exceeded £2,500 two more days passed. Now, we think that no question can arise about this sum of £2,500 so far as concerns the dishonoured and other cheques which Commins and Price had in view. The evidence does not tell us with particularity what they were. But it may be inferred that the sum of £2,500 was fixed by reference to the immediate necessities. On Saturday 11th October 1947 another deposit of £2,250 was made, from what source does not distinctly appear. But the inference is quite certain we think that so far as Commins and Price were concerned it was made as a result of an arrangement to meet large amounts entered as of Friday, that is, the previous day. We think that the only reasonable conclusion is that the whole £2,500 was paid to the credit of the office account in order to meet cheques coming in, that is to say, in order to enable Commins to sustain Price's pressing demands upon the office account.

Still another class of item is that which is left bare of direct evidence and where all that appears is that a deposit of an amount was made, the ostensible operation of which, if the sequence of entries accords with the sequence of the events which they purport to record, is to reduce an indebtedness on overdraft which exceeded the value of the security, namely, £680. Four items were picked out by the Official Receiver. An assumption was first made that the primary call or charge on each of these deposits were the cheques debited on the same day. An alternative assumption was made that it consisted of the cheques debited on the previous day. On the first assumption there would still be enough to reduce the excess over £680 overdrawn on each of the four occasions to make a total of £2,621 4s. 10d.; on the alternative assumption of £730 10s. 7d. With no more information before the Court than this, it was said that preference was the only inference. In this

conclusion we cannot agree. It must be borne in mind that no systematic attempt was made to prove all the facts as to each item on the credit side of the office account. In a very few banking days the influence of these deposits disappeared in consequence of the payment of cheques. There is the specific evidence of Price of the daily character of the consultations between him and Commins as to the cheques to be returned and those to be honoured and as to the course pursued. The burden of showing that a preference resulted is upon the Official Receiver, and we know that in the result there was none actually enjoyed by the bank. To infer that at a point the bank obtained one but that it was freely sacrificed by the spontaneous making of further advances by honouring cheques would we think be wrong. The true reading of the circumstances, we feel little doubt, is that the deposits were made on the footing that so far as the respective deposits would carry, the cheques coming in would be honoured, if it was not decided in consultation that to dishonour them was a safe and better course.

The respondent bank contended that no deposit to the credit of the office account out of trust moneys could be considered a preference because they were not moneys which would have been available to creditors and the respondent bank could obtain no preference over other creditors by receiving them in purported reduction of the overdraft. This argument must be dealt with in relation to the item of £390, the last paid to the credit of the office account and the subject of the cross appeal. Indeed, it can best be dealt with in connection with that item. But if correct it would have a very considerable effect on the result of the appeal, even if the view we have already expressed were wrong. For very large sums were paid into the office account from trust moneys, £16,803 we were told. A table used in argument definitely traces deposits amounting to £14,313 and shows that they came from the trust account. Before dealing, however, with the argument it is better to state the facts as to the £390. It was the cheque of a Mrs. Turner and it represented the balance of purchase money for a cottage she had bought. She handed it to Price on the day of his arrest, 16th October 1947, and he told Commins he had received it and would send it to him. Price was then arrested and it was decided at once that his office account should be closed. He says that he told Commins that the cheque should not now be paid into the account, but Commins pressed him for it and in the end in his absence managed to cajole his female clerks into giving it to him. Without this cheque the account would have closed with a debit of £1,210. It is clear enough that to pay it in could no longer

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serve any purpose of keeping Price afloat. It was done in Commins' own interest to reduce the overdraft.

If it had been Price's own money, the effect would have been to give a preference to the respondent bank over other creditors. The question whether such a use of other people's money is within s. 95 is not easy. In Price's hands the cheque and its proceeds were subject to a trust and Commins knew this. It is correct that if the cheque or its proceeds had been preserved and had remained identifiable they never would have been assets available to Price's creditors. The Official Receiver as trustee of his bankrupt estate could have made no title to them. Again, if in an identifiable form the money represented by Mrs. Turner's cheque had come to the latter's hands, it would have been subject to her right to follow it specifically.

On the other hand, Price having converted it, for we may take it that there was a conversion of the cheque for which he was at least vicariously responsible, Mrs. Turner, if she were unwilling to undertake the burden of proof involved in fixing the bank with accountability to her, could claim upon Price and after his bankruptcy prove in his estate and so add to the claims upon the assets. Again, unless the respondent bank be accountable to her for the proceeds of the cheque, and no attempt was made to show that a claim upon the bank has been made or admitted, then Price's debt to the bank has been reduced *pro tanto* ; and to that extent the bank has an advantage over other creditors. Further, if the payment is declared void and the money is paid to the Official Receiver, *non constat* that Mrs. Turner may not then claim on that very ground to trace the proceeds of the cheque into his hands.

In the particular instance of Mrs. Turner the identification of the fund applied as payment into Price's office account is much more certain and easier than in many other cases, the money there having passed through the trust account. In cases where it cannot be identified or in which Commins acting within the scope of his authority as branch manager of the respondent bank cannot be fixed with knowledge, the owner of the funds misappropriated has no other course than to prove in the bankruptcy.

On the whole it appears to us that the payment of a cheque representing trust funds into the office account, were it otherwise to operate to give a preference to the bank, would be within s. 95. It is within s. 95 because, although the same moneys could never but for the misappropriation have been available to the bankrupt's creditors, there would be a preference, priority or advantage effected in favour of the bank as a creditor, in making a payment

to it, when other creditors must prove and other creditors suffer the disadvantage of being exposed to the competition upon the assets of the proof of the defrauded owner of the funds. If the payment to the bank is undone at the suit of that owner, that would be another matter. If it is undone at the suit of the Official Receiver, then the owner may or may not be able to follow the moneys into his hands. That is a question involving matters of law and of fact and we are not now called upon to decide it in either branch. But for the reasons we have given we do not think that there was a preference as to any deposit but that of Mrs. Turner's cheque. Thus upon the view we take of the case, the question of the consequence of the payment coming from trust funds arises for decision only in relation to that item.

In our opinion it does not prevent its being a preference.

For these reasons we think the decision of the learned Federal Judge in Bankruptcy was right.

The appeal and cross appeal should be dismissed with costs. Costs to be set off.

Appeal dismissed with costs. Cross-appeal dismissed with costs. Costs to be set off.

Solicitors for the appellant, *Sly & Russell.*

Solicitors for the respondent, *Dibbs, Crowther & Osborne.*

J. B.