Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of William John Watson v. *Alfred Sandeman (official assignee of the insolvent estate and effects of William Marshall), from the Supreme Court of New South Wales; delivered 10th December*, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THEIR Lordships are of opinion that there is no cause for sending this case back for a new trial upon the ground that the verdict was against the weight of evidence.

It appears to their Lordships that there was sufficient evidence to warrant the jury in finding that Marshall was insolvent at the time when the promissory notes were paid. In their Lordships' opinion, the definition of insolvency given by Mr. Justice Willes, in the case cited from the 10th House of Lords' Reports 425, is correct; and there was sufficient evidence for the jury to find that Watson at the time of the payment of the promissory notes knew that Marshall was not able to pay them in the ordinary course of business, and consequently that he was then insolvent.

The direction of the learned Judge that the case was one of alienation was, in their Lordships' opinion, erroneous. There was no alienation by Marshall to Watson of any portion of the funds that were to arise from the sale of

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his station. An equitable assignment of a debt or an alienation of property may be made without writing—by words alone; but their Lordships are of opinion that upon the evidence there was nothing to show that there was any assignment or alienation to Watson of any part of the insolvent's property. The promissory notes were made payable at the bank. That was an authority to the bank to pay them; but making them payable at the bank did not amount to an assignment to Watson of any portion of the funds which the bank were authorised to receive on the sale of the station. Their Lordships are, therefore, of opinion that there was a misdirection upon that point; but that, as will be presently shown, was immaterial, as the payments were void under the 12th section of the 5th Vict., No. 17.

The next question is, was there a payment by Marshall to Watson. There were two promissory notes and a cheque. The first was dated the 4th of February 1878, for 234*l.* 11*s.* 10*d.*, and became due on the 7th of May. The second, being for 510*l.* 8*s.* 1*d.*, was dated the 13th of February 1878, and became due on the 16th of May. It appears that at the time when the notes became due the bank had no assets of Marshall sufficient to enable them to take them up. The promissory notes had been lodged with the bank, and the bank, as stated in the guarantee, had discounted them for Watson. Honour, the manager of the bank, says that the promissory notes were lodged at the bank, and he knew that they were coming due; and that he told Sempill, who was Watson's agent, that they would not be paid unless further security was given. The guarantee was given on the day on which the first promissory note became due—the 7th of May. It was in these words: "In consideration of your "protecting Mr. William Marshall's promissory

" notes due on the 7th and 16th instant, for the " following sums, 234*l.* 11*s.* 10*d.* and 510*l.* 8*s.* 1*d.*, " in all 744*l.* 19*s.* 11*d.*, made in our favour and " discounted at your bank on our behalf, we " hereby guarantee that, in the event of the sale " of Marshall's property not realising sufficient to " liquidate the bank's claim, we will repay " the said City Bank the sum of 744*l.* 19*s.* 11*d.*" Honour further states that the bank had a mortgage to secure 2,000*l.*, and further advances that on the 7th of May he operated by debiting the insolvent's account with the bill for 234*l.* 11*s.* 10*d.*—meaning the promissory note. He says " We honoured in consequence of the " guarantee next, on 16th May,"—that was the second promissory note,—" for 510*l.* 8*s.* 1*d.*, also " on guarantee." The promissory notes do not appear to have been endorsed by Watson to the bank. They were lodged with the bank in the ordinary course of business, and the bank discounted them, and when they were honoured the payments were in effect made to Watson and not to the bank.

It was contended that the insolvent told the bank not to settle with Watson until the station was sold. If by that he meant that the bank were not to take up on his account the promissory notes which were made payable at the bank, it would have been a revocation of the bank's authority to pay them at maturity; but it is clear that the insolvent intended that the notes should be paid out of the proceeds of the sale of the station, and that both the insolvent and Watson, at the time when the check was given for the balance, treated the notes as having been honoured on account of the insolvent. Their Lordships think that the payments must be treated as having been made to Watson, and not to the bank; that the promissory notes were paid by the bank on account of Marshall to Watson,

and that the bank, at the time when they paid them, had authority from Marshall to take them up. Even if they had not, the payment was subsequently ratified by Marshall before his petition of insolvency; and Watson, by the settlement in account, is estopped from saying that they were not so paid. Honour in his evidence in effect states that the payment of the notes was made to Watson. He says, " If I " had not paid Watson there would have been " to the credit of the insolvent the sum of " 1,060*l.* 5*s.* 4*d.* less 130*l.* or thereabouts." (Record, p. 7.)

Then comes the question, whether Marshall, at the time of the payments, knew that he was insolvent. The case does not come within the 8th section of the 5th of Victoria No. 17, but within the 12th section. To render a payment made by an insolvent before sequestration fraudulent and void, so as to entitle the assignee to recover back the money from the payee, it is necessary that the insolvent should at the time have had knowledge of his insolvency. The 25th Victoria, chapter 8, section 1, has been referred to; but that Act does not render void any transaction which was not void under the previous Act, and therefore to make the payments by the insolvent before the sequestration void they must have been made by the insolvent with knowledge of his insolvency. Strictly speaking, therefore, the learned Judge ought to have asked the jury whether Marshall did know of his insolvency or not at the time when the payments were made; but he did not do so, and there is no finding of the jury that Marshall knew of his insolvency. The learned Judge asked the jury whether Watson knew of the insolvency at the time when he was paid; and the jury found that Sempill, that is Watson's clerk, knew of the insolvency when the security for the bills was given, and that Watson knew of the

insolvency when the cheque was paid. That, in effect, was a finding that Watson knew of the insolvency when the bills and cheque were respectively paid; but there is no finding that Marshall knew of it.

If Marshall was insolvent and Watson knew of the insolvency, the circumstances are such that Marshall must have known of it. Marshall knew that he was not able to take up the promissory notes in the ordinary course of business, and that the bank had no sufficient assets of his to take them up, and he knew all the circumstances relating to his affairs as much as Watson did. There may be a case in which a man may know of another's insolvency, and yet the insolvent himself may not know of it; but it is not suggested that there was any material fact known to Watson or Sempill which was not known to the insolvent. The facts upon which the jury found that Watson knew of the insolvency were sufficient to have justified them in coming to the conclusion that Marshall knew of it. Indeed, if the case were to go back merely to have the question submitted to the jury whether Marshall knew of the insolvency, and the jury were to find upon the same evidence that Marshall did not know of it, it appears to their Lordships that that finding would be against the weight of evidence, and that the Court would be right in such a case in awarding a new trial. If a finding of a jury that Marshall did not know of it would be against the weight of evidence, it would be worse than useless for their Lordships to send the case back in order to have the question submitted to a jury.

The observations which have been made with regard to the promissory notes apply still more strongly to the cheque. Their Lordships, therefore, think that when the two promissory notes and the cheque were paid, Marshall knew

that he was in a state of insolvency; consequently that the payments were void, and that the assignee was entitled to recover back the amount from Watson.

Under these circumstances their Lordships think that the Court was right in refusing to make the rule for a new trial absolute, and they will therefore humbly advise Her Majesty to dismiss this Appeal and to affirm the decision of the Court below. The Appellant must pay the costs of the Appeal.