Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mullen v. The National Bank of Australasia, from the Supreme Court of South Australia, delivered December 15, 1869.

Present:

LORD CHELMSFORD.
LORD JUSTICE GIFFORD.
SIR ROBERT J. PHILLIMORE.
SIR JAMES W. COLVILE.

IN this case an action was brought by the Plaintiffs, the Respondents, against the Defendant, the Appellant, this being the third trial of the action; the evidence on the part of the Plaintiffs was in substance this:—first of all, certain cheques were put in which were clearly connected with the £733 and interest, for which the action was brought, the cheques were signed by the Defendant, but connected with an account called "Nilan's Estate." In addition to these cheques being put in, Mr. Young, the general Manager of the Bank, was examined; he stated that the Defendant called upon him, made a distinct admission of his indebtedness, and promised to pay the debt.

This evidence, if uncontradicted, was enough to support a verdict.

On the other hand, the only evidence on the part of the Defendant was the Defendant's own testimony; and if his account was to be believed, no doubt the verdict would have been the other way. But the question of credibility was one entirely for the jury; and there is this remark to be made on the subject, namely, if Mr. Young was to be believed, and that took place between the Defendant and Mr. Young which he states, it is wholly inconsistent with the account which the Defendant

afterwards gave in his evidence, as to what took place between himself and Mr. Nairne.

According to all reasonable probability, if that had taken place between himself and Mr. Nairne which he says did take place, he would have mentioned that fact to Mr. Young at the interview to which Mr. Young deposes. He contradicted Mr. Young, but did not allege that he mentioned what he stated to have taken place between himself and Mr. Nairne.

In this state of things we have the summing up of the learned Judge, who says that he was satisfied with the verdict. There is some complaint of misdirection in which the second learned Judge, who sat on the motion for a new trial, does not concur. It is quite clear that such misdirection (if misdirection it was) was of a nature which could have had no really material effect upon the verdict, and that in point of fact, taking every circumstance into consideration, the matter was left fairly to the Jury, it being simply this and nothing else,—was or was not Mr. Young to be believed as to what he said the Defendant had said to him at the interview with him, or, on the other hand, was the Defendant to be believed?

Some observations were made as to Mr. Nairne not being called. It appears that Mr. Nairne was a friend of the Defendant, that the Defendant had been a guarantee for him, and that Mr. Nairne had been discharged by the Bank. It was not incumbent on the Bank, if they did not choose to call Mr. Nairne to contradict the Defendant. The Defendant, if he had chosen, might have called Mr. Nairne to support him. He did not choose to do so; and of course it was not incumbent on him to do so.

Under these circumstances, the question was one entirely for the Jury; they gave their verdict after it was fairly put before them, and their Lordships certainly can see no reason for concluding that that verdict was against the weight of the evidence.

For these reasons their Lordships will recommend to Her Majesty that this Appeal shall be dismissed with costs.