Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lyall v. Jardine and Company and others, from Hongkong; delivered July 7th, 1870.

Present:—

Lord Cairns.
Sir William Erle.
Sir James W. Colvile.

THEIR Lordships have, in the first instance, to advert to the circumstances under which leave to appeal was granted in this case. Nothing can be more important than that it should be understood that those who come before this Committee upon an *ex parte* application for leave to appeal should consider it their absolute duty to state, in the fullest and frankest way, every circumstance connected with the history of the case which possibly can have any bearing on the leave for which they ask. Now their Lordships do not mean to attribute, either to the Appellant, Mr. Lyall, or to his advisers, any intentional disregard of this duty, or any wish in the petition which they presented in the year 1868, to suppress any fact which they might have thought material; but, unfortunately, the petition is one which, when looked at, cannot be described otherwise than as a petition which was calculated to mislead the tribunal before whom it was heard. It states, in substance, that the Appellant, Mr. Lyall, had been adjudicated a bankrupt in London on the 18th of April, 1867. It does not suggest that that had been done, either on his own application, or upon an act of bankruptcy committed by him with a view to have the application made by a friendly creditor. It then proceeds to state, that while he was thus in England adjudicated a bankrupt on the 21st of May, 1867, creditors of his firm in Hongkong had filed a petition in the

Court of that Colony, for the purpose of making the firm bankrupts, and that on that petition they had been adjudicated bankrupts. He does not state that there had been any declaration of insolvency filed by the firm with a view to their bankruptcy in the Colony, or that he had given a power of attorney to his partner in the Colony, enabling him to take the proceedings proper to lead to a bankruptcy, or that there had been a conveyance or assignment of their property executed by the partners abroad, and by one of them as attorney for himself, with a view to bring about an adjudication in bankruptcy. It is treated as an adverse proceeding in the Colony, just as the proceeding in bankruptcy in London is treated as an adverse proceeding against Mr. Lyall. It then proceeds to state that "during the time of these "bankruptcy proceedings in the Colony, and from "thenceforward, Mr. Lyall had been residing in "England, had no notice of the adjudication, and "was thereby rendered unable to show cause against "the validity of the same within the time limited "by, and pursuant to, the provisions of the Bankruptcy Ordinance, 1864." It does not state that under the professed authority of the same power of attorney consent had been given in the Colony to expediting and making perfect, as far as consent could do it, the proceedings in bankruptcy; but it treats the whole of those proceedings as proceedings which Mr. Lyall would, in every way, have opposed and objected to had it been in his power. It assumes, rather than expressly states, that he had come before this tribunal at the earliest moment, for the purpose of protecting rights which had been infringed; and it does not state, what now appears to have been the case, that upon the 8th of July, 1867, Mr. Lyall, who must have known before of the power of attorney which he had given, had become aware that that power had been acted on, and that those proceedings in bankruptcy in the Colony had taken place, and that from the 8th of July, 1867, when he had this knowledge, until the 12th of May, 1868, a period of about ten months, he had remained quiescent, and had taken no step, either in the Colony or here, for the purpose of disputing the proceedings in bankruptcy. Under those cir-

cumstances, upon statements so eminently insufficient to put this tribunal in possession of a knowledge of all that had occurred, and aided, doubtless, by the view which seems to have been entertained by the advisers of Mr. Lyall, which, no doubt, was pressed upon their Lordships, that after the shorter period of a few weeks, mentioned in the Bankruptcy Ordinance, there was no remedy in the Colony, and the only remedy could be here, their Lordships granted the leave to appeal.

Stopping at this part of the case, their Lordships cannot but think that if the whole facts, which I have endeavoured to state, had been made known to their Lordships upon the face of this petition, they would have felt themselves unable, under the circumstances, to have granted the leave to appeal which was granted.

Passing, however, from that, their Lordships have next to consider whether, this leave having been granted, the appeal is one which they properly can entertain.

Now the Appellant is obliged to come here virtually confessing, at the outset, that if he is limited to the materials which were before the Judge in the Colony at the time that this adjudication was made, and if he is not allowed to import into the case the other facts with regard to the London bankruptcy, and its bearing upon what was done in the Colony, he is unable to sustain his appeal, and is unable to deny that the proceedings in the Colony were regular. In that view of the case they clearly would be regular. There was an assignment by the three partners of all their property, an assignment executed by two, and by one of the two as attorney for the third, under a power which clearly authorized him to execute that assignment. There was, therefore, an act of bankruptcy,—there was a trading; there were all the requisites proper to found a bankruptcy, and there was a proper adjudication upon those requisites, and upon those materials there would be nothing to argue.

Admitting that on the materials before the Judge the order was proper, the Appellant has to contend that this tribunal should look at the other facts which had occurred at the time, although they were not known to the Judge, viz., the English

bankruptcy and its bearing upon the Colonial proceedings; and he has to contend that, looking to the whole of those facts, the order is one which ought not to be supported. Now, their Lordships desire to intimate their opinion with great distinctness that that is not a purpose for which this tribunal can be resorted to. This is an appellate tribunal—an appellate tribunal, no doubt, which possesses large powers to admit in proper cases, by way of supplement, evidence upon points which upon the hearing may appear to require to be elucidated, but this is certainly not a tribunal to which resort can be made by those who are obliged at the outset to confess that they have no case for appeal as the matter stood before the Judge who heard the case in the Colony, and that their only ground for appeal is the introduction of other matters which were in no way before the Judge of primary instance.

Their Lordships further think that there is nothing whatever in the construction of the 182nd section of the Hongkong Bankruptcy Ordinance which would have prevented, but that there is everything which would have empowered the present Appellant, if he had been prepared to bring before the Judge in the Colony further evidence leading to a different conclusion from that to which the Judge arrived in adjudicating in the first instance, to have gone to the Judge in Hongkong within the prescribed period of twelve months, to have brought those further questions before him, to have taken his decision, by way of rehearing upon this new matter, upon the whole of the case; and then would have been the time, if the Appellant had been dissatisfied with the decision of the Court, that his right might have arisen to appeal to Her Majesty in Council.

Their Lordships observe that the case "In the matter of Carter," decided in the House of Lords, which was referred to in argument, does not appear to their Lordships to have any contrary bearing to the conclusion at which they have arrived. In that case it appeared that the bankrupt, having abstained from showing cause against the adjudication, although he was in the country, and might have done so within the shorter time appointed by the English statute, afterwards applied to the Com-

missioner in London within the twelve months, not upon any new materials, but simply for the purpose of disputing the propriety of the adjudication upon the materials upon which it was made, and against which he might have shown cause within the proper time. The House of Lords held that this was a course which was not open to him; and Lord Cranworth, in announcing the decision of the House of Lords, states expressly that it was only playing with words to treat that proceeding as anything but an appeal; that the second application to the Commissioner, without any change of the materials upon which it was to be supported, was simply appealing to the Commissioner from his own order, and upon the same materials; and that on the proper construction of the English Act, the course which ought to have been taken was to make an application in such a case to the Court of Appeal, viz. the Lords Justices, and not to the Commissioner. Those remarks have no relevancy to a case where the second application to the primary Court is made, not on the same, but on different materials.

Their Lordships, therefore, upon this ground alone, would feel themselves unable to entertain this appeal, and this observation is sufficient for its disposal. Their Lordships, however, are bound to add that, although they do not propose to travel out of their proper functions, and to decide as a Court of first instance upon the merits of a case, which never was brought before the Judge at Hongkong, they have not been satisfied by any argument which they have heard, that if this matter had been brought, with these new materials, before the Judge in the Court at Hongkong, it would have been the duty of that Judge to have superseded or annulled the bankruptcy. There appears to have been Act of Bankruptcy constituted, if not by the assignment made subsequent to the London bankruptcy, yet by the declaration of insolvency filed by the two partners upon the spot, and signed by them on behalf of their absent partner as well as of themselves; and that, at the time when there had been dispatched to one of those partners a power of attorney which clearly gave him authority to file a declaration of that kind. Their Lordships are not satisfied that the

circumstance, that before the proceedings in bankruptcy were taken in that Colony, there had been a London bankruptcy of Mr. Lyall alone, would necessarily have prevented, or ought properly to have prevented, the adjudication against the firm in the Colony. It might give rise to questions between the assignees under the two bankruptcies as to what were their relative rights of property, but their Lordships are by no means satisfied that it would not be altogether within the power and discretion of the Court, after a separate bankruptcy against one of the partners in England, to have a joint bankruptcy against the firm, upon proper materials, in the Colony, leaving it, of course, open to the English assignee to make any application as to the conduct of that bankruptcy, or the rights under it, which he might be advised to make; and they are not satisfied that it would lie in the mouth of Mr. Lyall—especially after the power of attorney which he executed, after the appearance made on his behalf under that power in the Court by counsel, after the consent given on his behalf under that power to the completion of the proceedings in bankruptcy in the Colony—in any way to quarrel with what had been done by those proceedings.

Upon the whole their Lordships are clearly of opinion that it is their duty to advise Her Majesty that this Appeal should be dismissed, with costs to be paid to the various Respondents. Their Lordships are informed that there is a sum of £300 deposited. Supposing the taxed costs of each Respondent amount to a larger sum than one-third of that amount, it will be divided rateably among the three Respondents.