Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of King v. *Henderson, from the Supreme Court of New South Wales; delivered 23rd June* 1898.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Appellant, in August 1896, brought the present action of damages against the Respondent, before the Supreme Court of New South Wales. The declaration sets forth that the Respondent falsely and maliciously, and without reasonable or probable cause, presented a petition to the Judge in Bankruptcy, praying that a sequestration order might be made in respect of the estate of the Appellant, according to the provisions of the New South Wales Bankruptcy Act of 1887, upon the allegation that the Appellant had committed an act of bankruptcy, inasmuch as he did not comply with the requirements of a bankruptcy notice procured at the instigation of the Respondent to be issued by one Alexander Hallen against the Appellant; that the Appellant showed cause against the said petition, and disputed the commission of the said act of bankruptcy, and that the said petition was dismissed; that it was afterwards ordered by the

Judge in Bankruptcy that the said bankruptcy notice should be set aside, and that it was thereupon declared by the Judge that the said act of bankruptcy had not been committed by the Appellant; that all proceedings in respect of said petition were, upon such dismissal and order and declaration as aforesaid, determined; and that the Appellant had, by reason of the premises, been damaged in his business and otherwise. The declaration was met by a note of pleas and demurrer for the Respondent, the terms of which it is unnecessary to recite.

Upon these pleadings the parties joined issue, and the case went to trial before Mr. Justice Cohen and a jury, on the 14th December 1896, when three witnesses, including himself, were examined for the Appellant. At the close of the Appellant's evidence, the Respondent moved for a nonsuit, which was allowed by the presiding Judge. On the 29th December 1896, the Appellant filed a rule *nisi*, calling upon the Respondent to show cause why the nonsuit should not be set aside, and a new trial granted. After hearing Counsel for the Appellant, the Court by a majority, consisting of Darley, C.J., and Owen, J., refused the rule. Stephen, J., was of opinion that the rule should be allowed to go on, in order that the points raised might be more fully argued.

It appears from the evidence that the Appellant, who had previously carried on business as a stevedore and wool presser, on the 2nd August 1893, entered into partnership, for the term of five years, with one William Collins, under the firm name of H. J. King & Co., for the purpose of carrying on the business of wool pressers, stevedores, and shipping agents, at Sydney and elsewhere. By the contract of co-partnery it was stipulated that Collins should, if he thought fit,

be at liberty to remain in his employment o shipping clerk in the office of the German Australian Steam Ship Company, and to accept any other similar position during the continuance of the partnership; and also that the Appellant should have the active conduct of the business of the firm, and should receive a salary of 400*l.* per annum, payable in equal monthly instalments. The Respondent was the manager of the German Australian Steam Ship Company. He was desirous of becoming a partner of the firm of H. J. King & Co., and it was in consequence of the refusal of his employers to allow him to accept that position that Collins became a partner. The Respondent was also agent for one Ernest Wood, a merchant in London, who, on the 14th August 1893, agreed to advance the sum of 500*l.* to the Appellant and Collins in loan, for behoof of the new firm. The advance was arranged by the Respondent on Wood's behalf. It does not appear that any capital was contributed by the Appellant; but Collins put into the business a sum of 200*l.*, which he borrowed from the Respondent.

On the 17th March 1894, the sum of 500*l.*, which Wood had agreed to lend to the firm, was paid to the Appellant and his partner, Collins; and, upon the same day they executed a bill of sale to Wood of the plant, stock-in-trade, machinery, fixtures and book-debts of the firm in security of the loan. The Appellant requested that the bill of sale should not be registered; and to that the Respondent, as representing Wood, consented. Further advances were subsequently made to the firm by Mr. Wood, through the Respondent; the entire loan amounting, on the 26th March 1896, to 1,599*l.* 11*s.* 6*d.* Of that date, the firm agreed that the bill of sale of the 17th

March 1894 should extend to, and stand as security for the whole loan then due to Mr. Wood.

In July 1894, Charles Taylor, who was recommended by the Respondent, became a member of the firm, under an agreement with the Appellant and Collins. He paid 1,000*l.* into the firm, and in return received the right to one-eighth share, and to a salary of 350*l.* per annum, payable by monthly instalments. During the following year, there was some unpleasantness between the Respondent and Mr. Collins, which resulted in the latter leaving the employment of the German Australian Company. Thereupon the Respondent informed the Appellant that Collins would have to leave the firm of H. J. King and Co., else he would not finance the business, and would "close down under his bill of sale." On the 5th June 1895, Collins retired from the firm, his interest having been purchased by the Appellant and his partner Taylor, for the sum of 250*l.* In order to meet that payment, the Respondent advanced 100*l.* in cash to the firm, who gave Collins their promissory note for the balance of 150*l.* It was proposed, at that time, that, in consideration of his advance, the partners of the firm should hold, at the disposal of the Respondent, part of the share in the business which they had purchased from Collins; but, although the matter was discussed between the Appellant and the Respondent, the arrangement does not appear to have been carried into effect.

In the beginning of the year 1896, the firm of H. J. King & Co., was evidently not in a prosperous condition. Hallen, one of their employés, who, in April 1895, had been injured on board a German ship which they were loading recovered judgment against the Appellant and Taylor for

341*l.* 18*s.* 9*d.* on the 20th February 1896. The injured man had been insured by the firm, but the Office with which the insurance was effected had gone into liquidation. After the judgment, the Appellant had interviews with the Respondent, at some of which Taylor was present, the object and result of which are thus explained by the Appellant in his evidence:—"I wanted "Defendant to lend me more money, as he had "done on many occasions. He declined. De- "fendant or Taylor proposed I should go out of "H. King & Co. It was in the beginning of "March. I had several interviews. I don't "know anything was said about money. I was "simply to go out of the business and get "nothing. I declined. Defendant pressed me "on many occasions to do this." On the 26th March 1896 the Respondent, acting on behalf of his constituent Mr. Wood, gave formal notice to the firm that, in default of immediate payment of the sum of 1,599*l.* 11*s.* 6*d.*, then due to Mr. Wood he would take possession of the chattels and things comprised in the indenture of the 17th March. Default having been made, the Respondent entered into possession. The Appellant states in his evidence, "I did not con- "sider the firm indebted to Wood in 1,599*l.* odd;" but the statement can hardly be accepted, because the witness admits that the amount named stood in the books of the firm at the credit of Wood, and it is not disputed that on the 26th March 1896, his partner Taylor, executed, on behalf of the firm, an acknowledgment which was indorsed upon the original bill of sale, to the effect that the debt then due to Wood amounted to 1,599*l.* 11*s.* 6*d.* On the 30th March 1896, the Appellant sent a letter to the Respondent, making an offer (which was declined on the same day) to pay a specified sum as in full discharge

of the liabilities of his firm. In that letter the Appellant wrote that, if the Respondent could not see his way to accept the offer therein made to him " I shall feel constrained to sequestrate the " estate for the protection of the creditors."

On the 7th April 1896, Hallen, under the provisions of the " Bankruptcy Acts 1887–1888," took out a Bankruptcy notice against the Appellant, requiring him to make payment of the sum of 341*l.* 18*s.* 9*d.*, for which he, Hallen, held a joint and several decree against the Appellant and his partner, Taylor, within seven days after service of the notice, excluding the day of notice. The notice was served on the Appellant, upon the following day, the 8th of April. Their Lordships may observe, that there is no evidence beyond the following facts, which are not conclusive, tending to support the averment made by the Appellant in his declaration, to the effect that such notice by Hallen was procured or issued at the instigation of the Respondent. The Respondent on the 2nd April 1896, gave to Sly and Russell, who conducted the present suit on his behalf in the Court below, his promissory note for 150*l.*, as an advance to Taylor for whom they were then acting, in order to enable him to meet his liabilities under Hallen's decree. Sly and Russell, after correspondence with Hallen's solicitor, in regard to the sum which would be accepted from their client, on the 8th April 1896, endorsed the promissory note to him, in satisfaction of Taylor's indebtedness.

No payment having been made by the Appellant within the time prescribed by the notice, Hallen, on the 16th April 1896, presented a petition for sequestration of his estate to the Judge in Bankruptcy, in which he set forth that the Appellant was indebted to him in the sum of 191*l.* 18*s.* 9*d.*, being the balance of the sum of

341*l.* 18*s.* 9*d.* contained in the judgment aforesaid. On the 5th May 1896, the Appellant paid to Hallen the sum of 218*l.* 4*s.* 2*d.*, being in full of the balance of 195*l.* due by him, together with interest and costs. On the 11th May 1896, Hallen, who had by that time received payment of his debt, with interest and costs, withdrew his petition for sequestration.

On the 8th May 1896, the Respondent who was a creditor of the Appellant for the sum of 260*l.* 10*s.* due by promissory note of the 12th February 1896, filed, in that capacity, a petition for an order sequestrating the Appellant's estate. The petition set forth that, within six months before the date of its presentation, the Appellant had committed an act of bankruptcy, inasmuch as he had failed, within the period prescribed by the Act, after service of the Bankruptcy order by Hallen on the 8th April, to comply with the requirements of the notice, or to satisfy the Judge that he had a counter-claim, set-off or cross-demand, equal to or exceeding the amount of the judgment debt, which he could not set up in the action in which the judgment was obtained. The petition was opposed by the Appellant; and, on the 3rd July 1896, the Registrar in Bankruptcy, after hearing evidence, made an order to the effect that the petition of the Respondent "be and the same is hereby "dismissed out of this Court."

On the 7th August 1896, Mr. Justice Manning, sitting as Judge in Bankruptcy, made an order in these terms: "Upon motion made to me this "day on behalf of the above-named Hugh John "King" (the present Appellant) "and upon "reading the Bankruptcy notice herein dated the "seventh day of April last, and the affidavits of "the said Hugh John King and of Henry White "sworn on the sixteenth and eighteenth days of

" May last, and there being no appearance for the " judgment creditor, upon hearing Mr. Wise as " Counsel for the said Hugh John King: It is " ordered that the said Bankruptcy Notice issued " herein by the said Alexander Hallen on the " said seventh day of April last past, be and the " same is hereby set aside. And it is further " declared that no act of bankruptcy has been " committed by the said Hugh John King under " the said notice of the said seventh day of " April last past." From the terms of the foregoing order, it is obvious that the Respondent was no party to these proceedings; and it is not wonderful that Hallen, the judgment creditor who took out the notice, should not have appeared in them, seeing that he had obtained full payment of his debt with costs, more than two months previously. Independently of these considerations, their Lordships are of opinion that the order of the learned Judge, in so far as it declares that no act of bankruptcy had been committed by the Appellant, went beyond his jurisdiction, and was unwarranted by the Bankruptcy Act of the Colony. These Acts define, with great minuteness, the various ways in which an act of bankruptcy may be constituted, one of them being by a Bankruptcy Notice under Section 4 (2) of the principal Act. When an application is made for a sequestration order, which complies with the requirements of Sections 6, 7 and 8 of the same Act, ample discretion is vested in the Judge either to grant or refuse the petition; and, if a sequestration order be made, it may subsequently (Section 5 (II.)) be discharged or annulled. But, whilst the Judge may, in his discretion, competently refuse to follow up an act of bankruptcy by issuing a sequestration order, the Statutes give him no jurisdiction to annul an act

of bankruptcy, or to declare that it never was committed. There is no authority to be found for the procedure of the learned Judge, save in the 51st of the General Rules framed by the Court, which provides that "When the Judge "makes an order setting aside the bankruptcy "notice, he may at the same time declare that "no act of bankruptcy has been committed by "the debtor under such notice." Now the only power which the Court has to frame rules is confirmed by Section 119 of the Principal Act, and it is strictly limited to rules "for the "purpose of regulating any matter under this "Act." In the opinion of their Lordships, a rule empowering the Judge to make a declaration that no act of bankruptcy had been committed under the notice, is in no sense a regulation either framed or calculated to carry out the objects of the Act. It is, in their opinion, the new creation of a jurisdiction which the legislature withheld, it is inconsistent with and so far repeals the plain enactments of the statute, and it takes away from creditors the absolute right which the statute gave them of founding a petition for a sequestration order upon the bankruptcy notice.

Upon the hearing of this appeal, it was maintained for the Appellant, that the Orders of the Court below ought to be reversed, and the action remitted for new trial, upon two separate grounds; the first of these being that certain documentary evidence had been unduly rejected by the presiding Judge; and the second, that the learned Judge, instead of directing a nonsuit, ought to have submitted to the jury certain issues which were only fitted for their consideration. Their Lordships do not think that either of these objections, which they will notice in their order, is well-founded.

At the trial, the decision of the Registrar, dated the 3rd July 1896, dismissing the Respondent's petition for an order sequestrating the Appellant's estate was admitted without objection. But an objection was taken when the Appellant's Counsel tendered in evidence, "the full written judgment" delivered by the Registrar on that occasion. The document thus tendered was, in their Lordships' opinion, rightly rejected by the presiding Judge. Section 8, Sub-sections (2) and (4) of the New South Wales Act of 1887, give the Registrar no jurisdiction, except to grant or to dismiss a creditor's petition for sequestration. The terms of that clause and of these sub-sections are substantially the same with those of Section 7 sub-sections (2) and (3) of the English "Bankruptcy Act 1883;" and it was held by the Court of Appeal, in "*ex parte* Vitoria" (1894, 2, Q. B. D. 387) that the decision of the Registrar, affirming the insufficiency of the petitioning creditor's debt, did not constitute *res judicata*. Lord Esher, M.R., observed, "all that he (*i.e.* the Registrar) "can do is, to refuse to make a receiving order "in respect of the judgment debt. That is the "limit of his discretion. That being so, the "case does not come within the doctrine of *res* "*judicata* at all." In their Lordships' opinion, these observations are equally applicable to the statute of New South Wales. The order made by the Registrar on the 3rd July 1896, is very properly confined to a simple dismissal of the Respondent's petition. The reasons by which he was influenced, or which he may have thought fit to assign in delivering judgment, are immaterial, because they could not raise an estoppel against the Respondent; and the document tendered, if it had been admitted, would have amounted to nothing more than hearsay evidence of the

opinion of an individual upon points which he had no jurisdiction to determine.

In support of his other and more serious objection to the conduct and result of the trial, the Appellant's Counsel mainly relied upon the evidence, as showing or tending to show that, in presenting his petition for a sequestration order, the Respondent was actuated, not by an honest wish to secure payment of the debt which the Appellant owed him, but by a desire to effect the exclusion of the Appellant from the firm of H. J. King & Co. He maintained that the Respondent's resort to sequestration in bankruptcy, with that motive, and with that object constituted an abuse of the process of the Court, and a fraud; and that the Judge ought, in some form, to have remitted to the jury the question whether the Respondent had been guilty of such abuse and fraud, with the direction that, in the event of their answering the question in the affirmative, they ought to return a verdict for the Appellant.

Their Lordships do not dispute the soundness of the proposition that a Plaintiff or petitioner, who institutes and insists in a process before the Bankruptcy or any other Court, in circumstances which make it an abuse of the remedy sought, or a fraud upon the Court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or as fraud upon the Court. In the opinion of their Lordships, mere motive however reprehensible, will not be sufficient for that purpose; it must be shown that, in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable,

and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable.

In "*ex parte* Gallimore," (2 Rose 424) a tenant moved to set aside a Commission of Bankruptcy, issued at the instance of his landlord upon two grounds, (1) that he was not a trader, within the meaning of the statutes then in force, and (2) that the Commission had been taken out by his landlord, contrary to the good faith of their mutual contract, with the object of determining his mineral lease. The Lord Chancellor (Lord Eldon) directed issues to try the question whether the applicant was a trader. With regard to the second ground upon which the motion was based, the noble and learned Lord, in giving judgment, observed,—"I see no "reason why the process in Bankruptcy should not "be affected by the same species of fraud which "would affect and set aside any other process "in any other Court." In the subsequent case of "*ex parte* Wilbran" (5 Maddock, 1.), which depended before the Vice-Chancellor (Sir John Leach), a mercantile firm who were creditors of another firm arrested its individual partners, all of whom put in bail, with the exception of Wilbran, who remained in prison for two months, when he was made bankrupt by the incarcerating creditors. Wilbran then petitioned to supersede the Commission, on the ground that it had been unfairly used for the purpose of dissolving the partnership in so far as he was concerned. The petition was opposed by the creditor firm, who did not, apparently, dispute the fact that they desired and intended to put an end to Wilbran's connection with his firm, but pleaded that such motive was not a ground of interference, either on general equity, or as an abuse of the Commission. Sir John Leach, after conferring with the Lord Chancellor,

dismissed the petition. His Honour said, "that "a Commission was, in a qualified sense, a legal "right, like an action, and that Courts of Jus- "tice had no concern with the motives of parties "who asserted a legal right. In *ex parte* Har- "court, (2 Rose, 203) the bankrupt himself, "with a view to dissolve the partnership, pro- "cured a Commission to be issued against him. "Being the bankrupt's Commission it could not "stand. In *ex parte* Gallimore (2 Rose 424) "the Commission was used for a fraudulent "purpose. He fully adopted the principle of "these cases. Here it appeared that the peti- "tioning creditors, having no concert with the "other partners, desired to operate a dissolution, "considering it an advantageous measure for "them that the bankrupt should not continue "in a firm with which they had large dealings. "There was, in this, no fraud, and it is not "enough that there be a bye motive, unless "there be fraud."

The very intelligible principle which was recognised in *ex parte* Wilbran, does not appear to their Lordships to have been departed from in any of the subsequent decisions which were brought under their notice by the industry of the Appellant's Counsel. Motive cannot in itself constitute fraud, although it may incite the person who entertains it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result; and it is not the motive, but the course of procedure which leads to that result, which the law regards as constituting fraud. In *ex parte* Davis (3. Ch. Div. 461) the Court of Appeal refused to make an adjudication in Bankruptcy, where it was clearly shown that the proceeding had been used and was meant to be used for the illegitimate and fraudulent purpose

of extorting money from the debtor. And, again, in *ex parte* Griffin (12 Ch. Div. 480) the same Court, although there was a good petitioning creditor's debt, and an act of Bankruptcy had been committed, refused to make an adjudication. The ratio of the decision was thus explained by Lord Justice James,—"I think I "never knew a case so transparent as to the fraud "with which the whole thing was conceived, and "the oppression which it was intended to exer-"cise. It would, I think, be a shocking thing "for any Court of Justice in a civilised country "to be made the instrument of proceedings like "these."

Counsel for the Appellant argued, with great plausibility, that on the trial of a case like the present, involving the inquiry whether the proceedings complained of were taken without reasonable and probable cause, it is within the province of the jury and not of the Judge, to find the facts upon which the question of probable cause depends, and that it is for the Judge, upon these facts, to determine the question of law. The rule was so laid down by the House of Lords in *Lister* v. *Perryman* (4 E. & I. Ap. 521). Their Lordships admit the propriety and cogency of the rule in any and every case where the facts admit of its application. But it appears to them that the circumstances of the present case, as these are disclosed in the evidence of the Appellant, are very different in their character from the facts, as appearing in the evidence, with which noble and learned Lords had to deal in *Lister* v. *Perryman*. It certainly is not the duty of the presiding Judge to submit any issue of fact to the jury which is not fairly raised by the evidence. There is, no doubt, evidence by the Appellant tending to show that the Respondent, in petitioning for a sequestration order, was

influenced by a desire to get the Appellant out of the firm of H. J. King & Co. But their Lordships have been unable to find in the evidence, any fact or circumstance calculated to raise the question whether, in petitioning for sequestration of the Appellant's estate, the Respondent had committed a fraud upon the law or upon the Court; and, in their opinion, the learned Judge would not have been justified in raising such an issue, even if he had been invited to do so.

Their Lordships are satisfied that, in point of fact, no such issue was raised by the Appellant, in either of the Courts below. There is no reference to it in the note made by the presiding Judge of the argument of the Appellant's Counsel against the Respondent's motion for a nonsuit; and, what is of more importance, it is not raised in the memorandum for a rule *nisi* which was filed by the Appellant. In that document, it is pleaded (Art. 7), that the learned Judge ought to have ascertained by the verdict of the jury, whether the Respondent presented his Bankruptcy petition for the concealed purpose of forcing the Appellant out of the partnership of H. J. King & Co.; and also (Art. 11) ought to have directed the jury that "the presentation of "a petition for an ulterior private purpose other "than the equal distribution of a debtor's assets "is a fraud upon the Court of Bankruptcy." A direction in these terms, would, according to their Lordships' opinion have been clearly erroneous. A desire and intention, on the part of the petitioning creditor, to terminate a partnership connection between the debtor and a firm which owed money to him and to Mr. Wood whom he represented as agent, is simply a bye-motive, which would not taint his procedure, unless there were proof of positive fraud, which is absent in this case. It was not necessary for

the learned Judge to submit any question to the jury as to the alleged motive of the Respondent; because, on the assumption that it did exist, which has never been seriously disputed, there are no legal grounds for coming to the conclusion that the Respondent had acted without reasonable and probable cause.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from. The Appellant must pay to the Respondent his costs of this appeal.