THE DOCTRINE OF PRESSURE.

I. *General Principles.*

1. Origin of the Doctrine of Pressure—Prior to the passage of the Bankruptcy Act of 1869, the materiality of pressure as evidence of a fraudulent intent in preferring a creditor was discussed in England entirely with reference to the doctrine which Lord Mansfield began to apply towards the close of the eighteenth century, that a conveyance of property, made voluntarily and in contemplation of bankruptcy, was contrary to the spirit, though not the letter, of the existing statutes, and therefore void. (*a*) The doctrine, as thus stated, necessarily implies that there are two essential elements in a fraudulent preference, and that a conveyance cannot be impeached, if it was not voluntary, although the debtor, at the time when he made it, was fully aware that his affairs were in a hopelessly embarrassed condition. (*b*) In spite of the protests of many eminent judges, (*c*) this rule firmly entrenched itself in the law of bankruptcy, and has survived the codification of that law by the Act of 1869. (*d*) The objections of individual

(*a*) In one of the earliest cases on the subject, he held that to send two promissory notes to a creditor on the morning of the day when an act of bankruptcy was committed, without the priority of such creditor or any call on his part for the money, was a fraudulent preference. *Harman* v. *Fisher* (1774) 1 Cowp. 117.

(*b*) "If a creditor acts in pursuance of a contract or engagement, or otherwise under such circumstances that he cannot have a choice, the payments are evidently not the result of preference." *Vacher* v. *Cocks* (1830) 1 B. & Ad. 145, per Bayley, J. (p. 152). The cases treat the doctrine of pressure "as one necessarily arising from the primary and natural import of the word 'preference' as meaning a voluntary act on the part of the debtor, and, therefore, as a term which is not applicable to an act brought about by the active influence of the creditor." *Stephens* v. *McArthur* (1891) 19 S.C.R. 546, per Strong, J. (p. 453), citing particularly *Bank of Australasia* v. *Harris*, 15 Moo. P.C. 116, and *Nunes* v. *Carter*, L.R. 1 P.C. 342, (see s. 35, inf.) Cf. *Johnson* v. *Fesenmeyer* (1858) 25 Beav. 88.

(*c*) So late as 1831 we find Tindal, C.J., referring with manifest approval to the opinion said to have been expressed by Lord Eldon, that Lord Mansfield's doctrine was a fraud on the Act of Parliament. *Cook* v. *Rogers* (1831) 7 Bing. 438. It should be noted that the statute of 13 Elizabeth, ch. 5, has no application to the cases with which pressure can enter as a material element, for the existence of a valuable consideration is necessarily implied in the circumstance that there is a debt to be paid or secured. See *Hale* v. *Allnutt* (1856) 18 C.B. 505; *Johnson* v. *Fesenmeyer* (1858) 25 Beav. 88.

(*d*) The following statements may be cited in illustration of the text: "If goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." *Hartshorn* v. *Slodden* (1801) 2 B. & P. 582, per Ld. Alvanley. "To defeat a payment or transfer made to a creditor, the assignees must shew it to be fraudulent against the body of creditors entitled under the flat by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy." *Van Casteel* v. *Booker* (1848) 2 Exch. 691. Where the evidence shows that the debtor yielded to pressure, it is unnecessary to submit to the jury the question whether the payment was made in contemplation of bankruptcy. *Crosby*