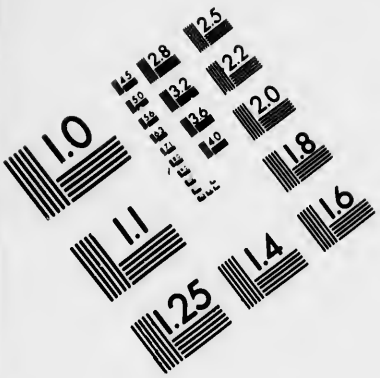

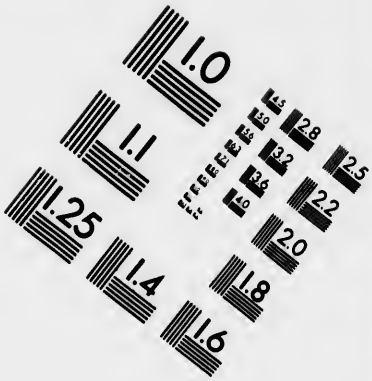

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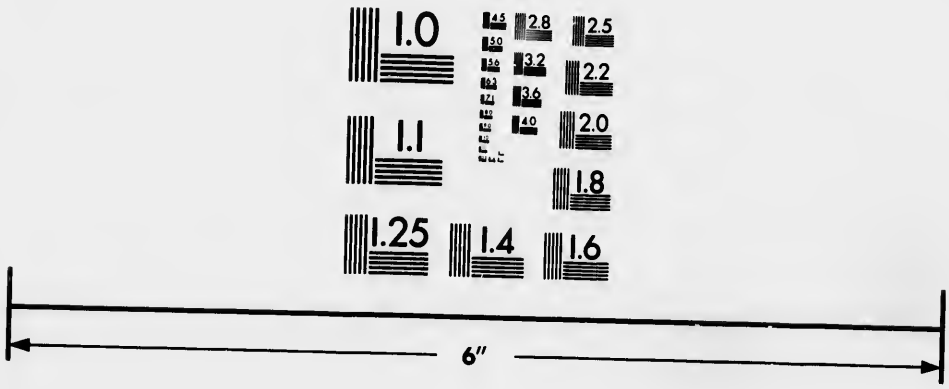

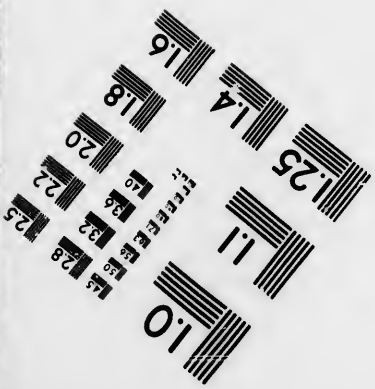

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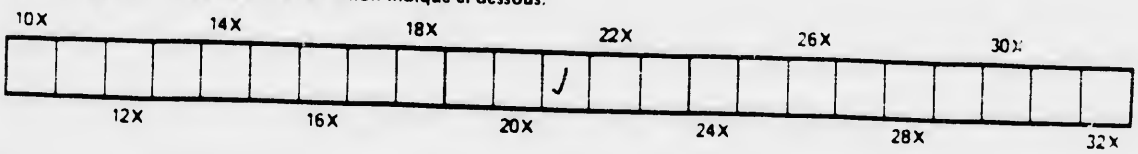

SYNOPSIS OF THE LAW RELATING TO FRAUDULENT CONVEYANCES MADE TO DEFEAT OR PREFER CREDITORS IN THE PROVINCE OF ONTARIO.

Prepared for the Students of the Law School at Osgoode Hall by the Lecturer on Equity.

Lecturer: A. H. MARSH, Q.C.

WHAT PROPERTY IS AFFECTED BY THE STATUTE.

13 Elizabeth, Cap. 5, passed for the protection of creditors, and for the purpose of avoiding fraudulent transfers of property made by a debtor for the purpose of delaying, hindering or defrauding his creditors, affected all transfers of all property, whether real or personal, *which was exigible in execution*, so as to be capable of being made available for creditors. Therefore, as legal and equitable process became from time to time more far-reaching, the operation of the Statute became correspondingly more and more extended. See *Davidson* v. *McGuire*, 7 App. R. at pp. 101-2; *Warnock* v. *Klæpfer*, 15 App. R. 325, *et seq.*, and *May's Fraudulent Conveyances* (2nd ed.) 23.

It follows from this that if the property transferred be of such a character that it is not exigible in execution at the time of the transfer, such transfer will not be obnoxious to the Statute of Elizabeth; and the same result follows with reference to our Provincial Statute touching Fraudulent Assignments and Preferences. Therefore an assignment (by way of security) of the *profits expected to be made* out of a contract to do work does not fall either under the Statute of Elizabeth or under our Provincial Statute *in pari materia*, for there is no legal process by which the subject matter of the assignment could *at the date of the assignment* be reached by creditors; the assignor might never do the work; there might be no profits; if, at the date of the assignment in question, the assignor had made an assignment in trust

for his creditors no interest in the expected profits would have passed to the creditors' assignee: *Blakely* v. *Gould*, 24 App. R. 154. Affirmed on appeal, 27 S. C. R. 682.

Future Book Debts appear to fall within this category; so also *property which is to be acquired in the future, e.g.*, future stock in trade; but with regard to these, see the provisions of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897, Cap. 148, secs. 11 to 14.

The Statutes in question are directed against fraudulent alienations of property whereby the debtor diminishes his estate and do not touch the case of his neglecting or refusing to enrich himself, for example, by the acceptance of a legacy: *Bain* v. *Malcolm*, 13 O. R. 444.

Preference Permitted by the Statute of Elizabeth.

This Statute of Elizabeth does not prevent an insolvent debtor from making a preferential transfer of his property for the purpose of favouring one or more creditors to the detriment of his other creditors: *Middleton* v. *Pollock*, 2 Chy. D. at p. 108; *McMaster* v. *Clare*, 7 Gr. at p. 558; *Gurofski* v. *Harris*, 27 O. R. at p. 206.

History of Provincial Legislation.

After considerable conflict of authority our Courts held that where an insolvent debtor conveyed his property to a purchaser for valuable and adequate consideration, the Statute would not apply, even though both grantor and grantee entered into the transaction for the express purpose of defeating the creditors of the grantor, provided that there was a *bonâ fide* intention that the title to the property should pass to the grantee: *Dalglish* v. *McCarthy*, 19 Gr. 578; *Smith* v. *Moffatt*, 28 U. C. R. 486.

This induced our Legislature to enact a declaratory Statute which is now embraced in R. S. O. Cap. 115, sec. 3.

Previous to this our Legislature had passed a Statute relating to Fraudulent Transfers of Property and Preferences of Creditors. This Statute was first consolidated into C. S. U. C. Cap. 26, secs. 17 and 18, and afterwards into R. S. O. (1877), Cap. 118. Subsequently it was included, in an amended form, in R. S. O. (1887), Cap. 124, secs. 1 and 2, and R. S. O. (1897), Cap. 147, secs. 1 and 2.

The said Statute as contained in C. S. U. C. and in R. S. O. (1877), Cap. 118, was framed (in so far as it dealt with fraudulent transfers to defeat creditors) upon the lines of 13 Eliz., but

it was in this feature more restricted in its operation than 13 Eliz., as the latter Statute covered transfers both of realty and of personalty, while the Provincial Statute was confined in its operation to personalty alone; on the other hand it was more extended in its operation than the Statute of Elizabeth, inasmuch as it forbade, while the Statute of Elizabeth permitted the preference of one creditor over another.

The effect of the Provincial Statute as contained in R. S. O. (1877), is explained in an article in 3 Can. L. T. 324.

The said revision of 1887 contained, and the revision of 1897 now contains, many additional provisions which had not been contained in the previous revision; thus it enacted by section 3 (1) of that Statute that the same shall not apply (a) to an assignment made for the rateable payment of the creditors of the assignor, (b) nor to any *bonâ fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers, (c) *nor to any payment of money to a creditor*, (d) nor to any transfer of property made in consideration of any present actual *bonâ fide* payment of money, (e) or by way of security for any present actual *bonâ fide* advance of money, (f) or which is made in consideration of any present actual *bonâ fide* sale or delivery of goods or other property; provided that the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

The latter part of this sub-section appears to set at rest a question regarding which there was a divergence of judicial opinions, namely, whether mere inadequacy of consideration was sufficient to invalidate a sale of property made by an insolvent debtor, or whether the inadequacy in order to have that effect must be so great as to afford evidence of *mala fides*. See *Carradice* v. *Currie*, 19 Gr. 108; *Merritt* v. *Niles*, 28 Gr. 346; *Crawford* v. *Meldrum*, 3 E. & A. 101.

Purchase is Valid unless Fraudulent Intent of Purchaser is Established.

Where there is a purchase of property from an insolvent debtor for valuable consideration, the Court requires clear proof of fraudulent intent on the part of the purchaser before it will set aside the purchase, and the fact that the vendor was to the knowledge of the purchaser insolvent at the time of making the sale and transfer is of itself insufficient to cause the conveyance to be set aside: *Hickerson* v. *Parrington*, 18 App. R. 635; and see judgment of Osler, J., in *Campbell* v. *Roche*, 18 App. R. at p. 654.

The same doctrine was also applied where the purchaser of the property knew that the vendor was in embarrassed circumstances, and where the purchaser was a creditor of the vendor, and he retained the amount of his claim out of the purchase money, and thereby acquired a preference over other creditors: *Lewis* v. *Brown*, 10 App. R. 639.

Where a business man is in involved circumstances he cannot protect his business assets from his creditors by forming a joint stock company and transferring those assets to the company in consideration for shares in the company, for in such case, if the intent be to defeat, hinder or delay creditors, the company will be treated as the mere alias or agent of the transferor, and the said assets will be available to his creditors, subject, however, to the rights of the company's creditors: *Rielle* v. *Reid*, 28 O. R. 497.

If a conveyance or security falsely states the consideration, this casts upon the defendant the onus of establishing beyond reasonable doubt that there was valuable consideration, and the unsupported evidence of the defendant will not be sufficient for that purpose: *Gignac* v. *Iler*, 29 O. R. 147.

Purchase Money or Mortgage Money may be Applied in Preferring Creditors.

By section 3 (2) of the revision of 1897, a rider is added, that in case of a valid sale of goods, securities, or property, and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor under circumstances which would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made.

This applies, however, only to a payment or transfer to a creditor of some consideration other than money, for it must be remembered in this connection, that it has already been provided by section 3 (1), that the Act does not apply to any *payment of money* made by an insolvent debtor to his creditor, and therefore it is permissible for an insolvent debtor to sell or mortgage his property for money, and then to pay or cause the purchaser or mortgagee to pay that money to one of his creditors, and even though his so doing should give a preference to that creditor over all his other creditors, yet the transaction is perfectly legal and valid with regard to all the parties thereto.

This doctrine has been carried so far that it has been held that

where an insolvent debtor makes sale or mortgage of his property for the purpose of using the purchase money or mortgage money, to prefer certain of his creditors (other than the purchaser or mortgagee), the sale or mortgage cannot be successfully attacked under the Statute, even though the purchaser or mortgagee knew of the debtor's intent to effect such preference: *Johnson* v. *Hope*, 17 App. R. 10; *Campbell* v. *Roche*, 18 App. R. 646; 21 S. C. R. 645; *Burns* v. *Wilson*, 28 S. C. R. at p. 216.

In *Campbell* v. *Roche* (18 App. R. at pp. 654-5-6), Mr. Justice Osler, says: "The fact that a debtor is insolvent, or on the eve of insolvency, does not affect his power to borrow money on the security of his property, and to give a valid security therefor, even though the lender may know, or have reason to know the state of his affairs, provided always that the latter is ignorant of any intention on the part of the former to contravene the provisions of the Statute, for then the security is taken for a present actual *bonâ fide* advance in money * * *. As the Act has not forbidden the preference of a creditor by the payment of his debt in money, a security given by a debtor for money lent for that purpose, is not invalidated by the Act * * *. The Legislature has chosen to except from the operation of the Act, 'any payment of money to a creditor,' and I do not think we should be justified in interpolating the expression '*bonâ fide*' in that clause, in order to infer that if the creditor had notice that the debtor was in a state of insolvency when he made it; it was a payment *mala fide* and forbidden by the Act."

It is not necessary, in order to bring a case within the protection of section 3 (1) of the Act, that the money should have come into the manual possession of the debtor and have been paid over by him to the creditor; it will be sufficient if the debtor raises the money by mortgaging his property to some third person, and such third person, under the direction of the debtor, pays the money to the creditor: *Gibbons* v. *Wilson*, 17 App. R. 1; *Johnson* v. *Hope*, 17 App. R. 10.

If, however, the circumstances shew that the *scheme was devised by the mortgagee or purchaser or his agent*, for the purpose of evading the provisions of the Statute, the payment will not be treated as a *bonâ fide* advance or payment of money within the meaning of the statutory exception: *Burns* v. *Wilson*, 28 S. C. R. 207.

Endorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor by the debtor within the meaning of section 3 (1): *Davidson* v. *Fraser*, 23 App. R. 439; 28 S. C. R. 272.

A payment by the insolvent's own cheque would probably be a payment of money within the meaning of the Act: *Davidson* v. *Fraser*, 23 App. R. at p. 443.

With reference to the effect of paying money or giving a promissory note as consideration for a transfer of property, Mr. Justice Ferguson says:—"In *Walker* v. *Niles* (18 Gr. 210), it was virtually held that the giving of a note as part of the consideration in a chattel mortgage transaction when it was accepted in the place of money was tantamount to advancing the money, and the same thing has, I think, been held in other cases": *Building and Loan Association* v. *Palmer*, 12 O. R. at p. 6.

Security not Impeachable unless Secured Creditor had Notice of Insolvency.

A transaction, entered into by a person in insolvent circumstances, is not impeachable by a creditor unless the *creditor proves that the person claiming the benefit of the transaction had notice or knowledge of the insolvency* and did not act in good faith: *Johnson* v. *Hope*, 17 App. R. 10; *Ashley* v. *Brown*, 17 App. R. 500; *Lamb* v. *Young*, 19 O. R. 104.

It would appear to be a logical presumption that the notice in question should be actual notice of the insolvency and not merely implied or constructive notice thereof, for, the question which has to be determined is a question of intent, and a person's intent cannot, ordinarily, be deemed to be affected by the latter sort of notice; but "If the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent": *National Bank of Australasia* v. *Morris*, 1892, A. C. at p. 290.

A mere suspicion that the transferee knew of the insolvency is not sufficient, there must be affirmative evidence thereof: *McRoberts* v. *Steinoff*, 11 O. R. at p. 372; *Burns* v. *Mackay*, 10 O. R. 170; *Attorney-General* v. *Harmer*, 16 Gr. 533; but see *Merchants' Bank* v. *Clark*, 18 Gr. 594; approved of in *Morton* v. *Nihan*, 5 App. R. 20, 28; and *Rice* v. *Bryant*, 4 App. R. 542, 554.

This rule (that knowledge of the insolvency must be shewn to exist as well on the part of the transferee as on the part of the transferor) *applies as well where the transfer operates to give one creditor a preference over others, as where* (by reason of its being made in pursuance of an absolute sale) *it operates to defeat, hinder, delay or prejudice creditors.* Thus, where a mortgage was made

to a creditor by an insolvent debtor to secure payment of one of his past debts, together with a small present advance, and the effect was to pay that creditor in full, and thereby give him a preference over other creditors, the mortgage was held to be unimpeachable, *because the mortgagee did not know of the mortgagor's insolvency when he took the mortgage: Gibbons* v. *McDonald*, 19 O. R. 291; 18 App. R. 159; 20 S. C. R. 587.

In *Burns* v. *Mackay*, 10 O. R. 167 (approved of in *Johnson* v. *Hope*, 17 App. R. 10), it was held that even when there was no present advance, and the *mortgage was given to a creditor by an insolvent debtor wholly for a past indebtedness*, yet the mortgage could not be successfully impeached by a creditor, unless he shewed that *both parties thereto were united in a fraudulent intent*. See also *McRoberts* v. *Steinoff*, 11 O. R. at p. 372.

Where, however, a *conveyance is voluntary*, it is only necessary for the creditor attacking the same to shew *fraudulent intent on the part of the grantor*: *Oliver* v. *McLaughlin*, 24 O. R. 41.

Valuable Security given up by Creditor in Consideration of Payment.

By section 3 (4) it is enacted that in case *any payment* has been made to the creditor of an insolvent debtor which is void under the Act, and any *valuable security* was given up by the creditor in consideration of the payment the creditor shall be entitled to have the security restored, or its value made good to him before, or as a condition of the return by him of the payment so improperly made.

The liability of the endorser of a promissory note made by the debtor and held by the creditor as security for his claim is not a "valuable security" within the meaning of this sub-section; what is there referred to is some property of the debtor which has been given up to him or of which he has had the benefit: *Beattie* v. *Wenger*, 24 App. R. 72.

By section 3 (5), it is enacted that the Statute shall not affect *any payment of money* to a creditor, where such creditor by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any *valid security* which he held for the payment of the debt so paid unless the value of the security is restored to the creditor, nor shall it apply to the substitution in good faith of one security for another security for the same debt, so far as the debtor's estate is not thereby lessened in value to the other creditors.

Presumably the "valuable security" referred to in sub-section 4 and the "valid security" referred to in sub-section 5 are both to be confined to security upon property of the debtor. See *Beattie* v. *Wenger*, 24 App. R. 72.

Advance to Enable Debtor to Continue Business.

By the same sub-section 5 it is enacted that the Statute shall not invalidate a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the *bonâ fide* belief that the advance will enable the debtor to continue his trade or business, and to pay his debts in full. See *Ross* v. *Dunn*, 16 App. R. 552; *Kalus* v. *Herget*, 1 App. R. 75; *Long* v. *Hancock*, 12 App. R. 137; 12 S. C. R. 532; *Ex p. Wilkinson*, 22 Chy. D. 788.

Following Property or its Proceeds into the Hands of Third Persons.

Where an insolvent debtor made a transfer of his property to a third person under such circumstances that the transfer could be set aside under the provisions of the Act, it was held that if before action brought for the purpose of setting aside such transfer, the property in question had been sold to a *bonâ fide* purchaser, the original transferee could not be made to account to the creditors of the insolvent debtor for the proceeds of the said property which had come to the hands of such transferee: *Davis* v. *Wickson*, 1 O. R. 369; *Stuart* v. *Tremain*, 3 O. R. 190; *Robertson* v. *Holland*, 16 O. R. 532; *Tennant* v. *Gallow*, 25 O. R. 56; *Taylor* v. *Cummings*, 27 S. C. R. 589; and *Union Bank* v. *Barbour*, 34 Can. L. J. 326.

It was held, however, that where the transfer in question was a fictitious one, made, not to a creditor of the insolvent transferor, but to a third person, under such circumstances that the transferee would hold the property or the proceeds thereof in trust for the transferor, then such transferee could be called to account to the creditors of the transferor, provided that either the property in question or the proceeds thereof were in the hands of the transferee at the time of the commencement of the action: *Masuret* v. *Stewart*, 22 O. R. 290; and see *Taylor* v. *Cummings*, 27 S. C. R. 589; and *Union Bank* v. *Barbour*, 34 Can. L. J. 326.

The application of the doctrine of these cases induced the Legislature to intervene by an enactment which was contained in R. S. O. (1887) Cap. 124, sections 7 and 8, the effect of which was that when an action was brought by an assignee for creditors, attacking a fraudulent conveyance or fraudulent preference, or by a creditor (under the authority of a Judge's order) in the name of the assignee, then if the transferee of the property in question (defendant) had sold or disposed of such property, the plaintiff might seize or recover the moneys or other proceeds realized therefor as fully and effectually as he could have seized or recovered the property in question if it were still remaining in the possession or control of the defendant.

This provision was found to be ineffective to protect creditors, because it did not apply unless the insolvent debtor had made an assignment for the benefit of his creditors, and accordingly the Legislature extended the remedy of creditors by an Act (58 Vic. Cap. 23, sections 1, 2, 3 and 4), which came into force on the 16th day of April, 1895 (now contained in the revision of 1897, Cap. 147, sec. 10). This Statute enacts that in case of a transfer of any property which in law is invalid against creditors, if the person to whom the property was transferred shall have sold or disposed of, realized or collected, the same or any part thereof, the money or other proceeds realized by such person may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the original transfer was made, and such right to seize and recover shall belong not only to an assignee for the general benefit of the creditors of the said debtor, but shall exist in favour of all creditors of such debtor in case there is no such assignment.

Where there has been no assignment for the benefit of creditors, and the proceeds realized as aforesaid are of a character to be seizable under execution, they may be seized under the execution of any creditor issued against the debtor, and shall be distributable amongst the creditors under the Creditors' Relief Act, and the Acts amending the same or otherwise.

Where there has been no assignment for the benefit of creditors, and whether the proceeds realized as aforesaid are or are not of a character to be seized under execution, an action may be brought therefor by a creditor (whether an execution creditor or not), on behalf of himself and all other creditors, or such other proceedings may be taken as may be necessary to render the said proceeds available for the general benefit of the creditors; but this

section shall not apply as against innocent purchasers of the property.

The following is an attempt to paraphrase the existing statutory provisions touching this subject:

A. Where there is an assignment for creditors.

(1) The assignee may bring an action to recover from a fraudulent transferee of the debtor's property, the proceeds of a sale of such property, made by such transferee, in any case in which he could have recovered the property itself if it had remained in the possession of the debtor.

(2) If the assignee declines to bring such action any creditor may, by order of a Judge, at his own risk, in the name of the assignee, bring such action for his own benefit.

B. Where there is no assignment.

(1) Any creditor of an insolvent debtor may bring an action to recover, from a fraudulent transferee of the debtor's property, the proceeds of a sale of such property, made by such transferee, in any case in which he could have recovered the property itself if it had remained in the possession of the debtor.

(This is provided by sec. 10 (1), but it would seem that any such action by an individual creditor must be subject to the provisions of sec. 10 (3), that the action must be on behalf of the plaintiff and all other creditors, and to render such proceeds available for the general benefit of creditors.)

(2) Any execution creditor of such debtor may, without action and under his execution against the debtor, seize such proceeds if they are of a character to be seizable under execution, and such proceeds shall thereupon become distributable under the Creditors' Relief Act.

(3) Any creditor of such debtor may

(*a*) bring an action on behalf of himself and all other creditors to render such proceeds available for the general benefit of creditors, whether they are or are not of a character to be seized under execution; or

(*b*) take such other proceedings as may be necessary for that purpose;

but not as against innocent purchasers of the property.

A discussion of these clauses of the Statute will be found in 15 Canadian Law Times, 210 *et seq.*

As indicating possible limitations in the operation of these clauses of the Statute, reference may be made to *Exchange Bank* v. *Stinson*, 8 O. R. 667, and *Exchange Bank* v. *Counsell*, 8 O. R. 673.

Since the passing of the amending Statute the right of an assignee for creditors to call a transferee of property to account for the proceeds of such property as has been disposed of by him before the commencement of the action to set aside the transfer, has been discussed in the case of *Meharg* v. *Lumbers* (23 App. R. 51), in which it was held that when an assignment of book debts is set aside as a preference, in an action by an assignee for creditors, the preferred creditor must pay to the assignee all moneys collected by him under the preferential security before the attack upon it. Chief Justice Meredith was of opinion that this would follow without the necessity for any statutory provision touching the obligation to account; he says (pp. 53-4), "The effect of the setting aside of the assignment of the book debts in this case is that the assignment becomes, and is, utterly void, and that being so, it follows that the moneys collected by the defendant are the proceeds of part of the property vested in the assignee by force of the assignment, and he is entitled to treat the defendant as holding them in trust for him." This view is concurred in by Mr. Justice Osler (p. 63), and Mr. Justice Maclennan, although personally doubting, thought (p. 65) that this must follow from the decision of the Supreme Court in *Clarkson* v. *McMaster*, 25 S. C. R. 96; Mr. Justice Burton thought that apart from the effect of section 8 of R. S. O. Cap. 124, the view expressed by Chief Justice Meredith should prevail, but that the effect of section 8 is to circumscribe the right to an account (pp. 58, 62-3); Chief Justice Hagarty thought that the plaintiff's right to such an account was clearly given to him by section 8.

Doctrine of Pressure.

The "*doctrine of pressure*" which is applied to the working of the Statute relating to fraudulent preferences, makes it almost ineffective for the purpose of preventing preferential transfers of property, in cases which do not fall within the operation of the provisions of Cap. 147, sec. 2 (4), hereinafter referred to.

This doctrine is based upon the ground that in order to bring a case within the Statute, the intent to defraud or to prefer must exist in the mind both of the transferor and the transferee, and if the transfer be made on account of the importunity or threats of the creditor, then the transferor can not be said to have made the transfer with intent to prefer a creditor, but he did it rather with a view of escaping the pressure of that creditor.

Where a transferor is criminally liable for misappropriating

money, any security given by him for the return of the money, may be supported under the doctrine of pressure, as the fear of penal consequences, is, of itself, sufficient pressure to take from the security the character of a voluntary preference: *Molson's Bank* v. *Halter*, 18 S. C. R. 88; and see *Ex p. Taylor—Re Goldsmid*, 18 Q. B. D. 295; *Halwell* v. *Tp. of Wilmot*, 24 App. R. 628.

It appears to be now settled that a *mere request* by the creditor without even a threat of legal proceedings, is sufficient to take away from a preference any fraudulent character: (*Molson's Bank* v. *Halter*, 18 S. C. R. pp. 94-5; *Davies* v. *Gillard*, 21 O. R. pp. 435-6; 19 App. R. 432; *Stephens* v. *McArthur*, 19 S. C. R. pp. 453-4; *Beattie* v. *Wenger*, 24 App. R. at p. 76; *Gignac* v. *Iler*, 29 O. R. 147;) and this is so, however desperate the affairs of the debtor may be at the time, and notwithstanding the creditor's knowledge of the debtor's insolvency: (*Davies* v. *Gillard*, 21 O. R. pp. 435-6; 19 App. R. 432; *Stephens* v. *McArthur*, 19 S. C. R. p. 456;) and also notwithstanding that the property comprised in the preferential security is all the property owned by the debtor: (*Davies* v. *Gillard*, 19 App. R. 432;) provided always that the pressure exercised by the request was not a mere sham brought about by collusion between the debtor and the creditor: (*Davies* v. *Gillard*, 21 O. R. p. 436.) In order that a preference shall be deemed an unjust preference within the meaning of the Act, the giving of it must be the spontaneous act of the debtor not originating in a demand or some other step or active interference of the creditor: (*Molson's Bank* v. *Halter*, 18 S. C. R. p. 95; *Stephens* v. *McArthur*, 19 S. C. R. pp. 446, 453, 463.)

Mr. Justice Osler in a recent case says with reference to the doctrine of pressure: "Whenever it is available to support an instrument attacked as being an unjust preference, I consider the law thereon in this Province to be as it is stated in such cases as *McCrae* v. *White* (1883), 9 S. C. R. 22; *Long* v. *Hancock* (1885), 12 S. C. R. 532; *Molson's Bank* v. *Halter* (1890), 18 S. C. R. 88; and *Slater* v. *Oliver* (1884), 7 O. R. 158." *Webster* v. *Crickmore*, 25 App. R. at p. 100.

A recent judgment of the Judicial Committee of the Privy Council deals with the doctrine of pressure in a case in which an insolvent debtor had consented to judgment in favour of one of its creditors, a bank. The Statute touching the matter was one providing against a case where an insolvent debtor "voluntarily *or by collusion* with a creditor" gives a confession of judgment "with intent thereby to give one or more of the creditors of any

such person a preference over his other creditors." The judgment says:—"If the appellant's case had only been that there was a fraudulent preference of the bank, the pressure by the bank might have been an answer to it; but their Lordships do not see how pressure alone can be an answer to a case which alleges collusion. The Statute is in the alternative. The confession of judgment may be given either voluntarily or by collusion with a creditor. In either case, if there is the intent to defeat or delay creditors or to give a preference over other creditors, the confession is made null and void against creditors. In *Gill* v. *Continental Gas Co.* (L. R. 7 Ex. 337), Lord Bramwell said that the word 'collusion' only signified agreement. In their Lordships' opinion 'collusion' in this section means agreement or acting in concert": *Edison General Electric Co.* v. *Westminster, etc., Co.*, 1897, A. C. 193.

There appears to be nothing in this which is inconsistent with the cases previously cited.

Provincial Legislation Operates Concurrently with the Statute of Elizabeth.

Our Statute relating to fraudulent conveyances and preferences has, by the amendments already referred to, been so extended in its operation as to cover both realty and personalty. The result is that comparatively few cases can now arise in this Province in which the Statute of Elizabeth will require to be applied, as our Provincial Statute is *in pari materia* therewith, and is broader in its scope than the Statute of Elizabeth.

The cases under the Statute of Elizabeth are, however, still applicable to conveyances to delay, hinder or defraud creditors (as distinguished from conveyances to prefer creditors), and they are probably more favourable to the attacking creditor than those under the Provincial Statute.

The most material statutory provisions now in force relating to fraudulent transfers to defeat creditors, or to prefer one creditor over another, other than those already mentioned, may be epitomised as follows: Every transfer of any property made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full *with intent* to defeat, hinder, delay, or prejudice his creditors, or made to or for a creditor, *with intent* to give such creditor an unjust preference over other creditors, shall be void as against the creditors who are damnified by such transfer, and if any such transfer made to or for a creditor *has the effect* of

giving such creditor a preference over other creditors, it shall, with respect to any proceeding taken to impeach the transfer within sixty days thereafter, or if the debtor within sixty days after the transfer makes an assignment for the benefit of creditors, be presumed *primâ facie* to have been made with the intent aforesaid, and to be an unjust preference within the meaning of the Act, whether the transfer was made voluntarily or under pressure. (Cap. 147, sec. 2 (1), (2), (3), (4).)

This provision of the Statute leaves the doctrine of pressure to still have full operation and effect save only in those cases in which a transfer of property has the effect of giving a creditor a preference over other creditors, and where proceedings have been taken to impeach such transfer within sixty days thereafter, or if the debtor within sixty days after such transfer makes an assignment for the benefit of his creditors: *Beattie* v. *Wenger*, 24 App. R. 72.

A question arose with regard to the construction of the original Statute (54 Vic. Cap. 20), whether the presumption of intent which in certain cases was raised under the provisions of that Statute was rebuttable or irrebuttable. The Statute provided that *if the transaction has the effect of giving a creditor a preference* it shall under the circumstances therein mentioned be *presumed to have been made with the intent to prefer* and to be an unjust preference *whether the same be made voluntarily or under pressure.*

It appears to be quite clear that the presumption mentioned in the Statute arises only in the case of an insolvent debtor preferring one or more of his creditors, and that it has no application to the case of such a debtor making a transfer of property by way of sale or settlement which has the effect of defeating, delaying or prejudicing his creditors, unless the purchaser be a creditor who retains his claim out of the purchase money and thereby obtains a preference, because the Statute provides that under the circumstances therein mentioned the transaction shall be presumed to be an *unjust preference, "whether the same be made voluntarily or under pressure."*

Mr. Justice Maclennan holds that the presumption in question is aimed solely at the doctrine of pressure, and that the presumption does not arise with reference to a transfer which has the effect of preferring a creditor, but which may be supported upon some other doctrine than that of pressure: *Lawson* v. *McGeoch*, 20 App. R. 464.

In this case, Mr. Justice Osler holds that the presumption is

general, and is not confined to cases of pressure, and that the presumption is irrebuttable. Chief Justice Hagarty and Mr. Justice Burton in the same case fail to determine whether the presumption is general in its scope, or whether it is confined to cases of preference, but they both hold that it is rebuttable in all cases, while Mr. Justice M'clennan holds that it is irrebuttable in every case of preference which is sought to be supported upon the doctrine of pressure alone. (See also *Webster* v. *Crickmore*, 25 App. R. 97.)

All of the Judges, however, were of the opinion that a transfer by way of mortgage which was given within the sixty days mentioned in the Act, and which had the effect of preferring a creditor, was not open to attack, when it appeared that the *mortgage was made pursuant to an antecedent agreement* made more than sixty days before the transaction was attacked, and when the mortgagee had no notice of the insolvency of the debtor.

This moot question, whether the statutory presumption of intent is rebuttable or irrebuttable, has now been solved by a change in the wording of the Statute, introduced into the Revised Statutes of 1897 (Cap. 147, sec. 2 (3) (4)), whereby it is provided that the intent shall be *primâ facie* presumed.

Security Given Pursuant to Prior Agreement.

As shewing how a security, which would otherwise be an unjust preference and void, may be valid and effective because given in pursuance of a prior agreement to which it relates back, reference may be made to *Clarkson* v. *Stirling* (15 App. R. 234), *Embury* v. *West* (15 App. R. at pp. 360-1), and *Lawson* v. *McGeoch* (20 App. R. 464).

Such a security will be validated by such an agreement if the mortgagor believed that by reason of the agreement he was under an obligation to give the security: *Re Tweedale*, 1892, 2 Q. B. 216; but see *Exp. Fisher*, L. P. 7 Chy. 636.

If the creditor voluntarily abstains from enforcing such an agreement with a view of protecting the debtor's credit, or refrains from enforcing it until insolvency is imminent, the security, when given, will not be validated by the prior agreement. See *Clarkson* v. *Stirling*, 15 App. R. at p. 237, and cases there cited.

An agreement to give security, made in good faith, may, even though it is indefinite in its terms, avail to rebut the presumption of intent to prefer; but where the giving of security, pursuant to such agreement, is deliberately postponed in order to avoid injury

to the debtor's credit or to avoid the statutory presumption, the agreement to give the security is of no avail: *Webster* v. *Crickmore*, 25 App. R. 97.

A chattel mortgage given by an insolvent debtor to his creditor, by way of security, less than sixty days before a general assignment for the benefit of creditors, cannot be sustained as against the creditors' assignee, even though it was given pursuant to a prior *agreement that on default of payment or on demand the debtor would give such chattel mortgage*, which agreement was made more than sixty days before the assignment; and such a mortgage will not be validated by pressure at the time of procuring the agreement, if both parties then knew of the debtor's insolvency, and if the creditor took his security in that form for the purpose of evading the provisions of the Act as to the effect of an assignment within sixty days: *Breeze* v. *Knox*, 24 App. R. 203.

Insolvent Circumstances.

The phrase "insolvent circumstances" as used in the Act means nothing more than "unable to pay his debts in full," and both expressions refer to the condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts, if that property were sold under legal process at a sale fairly and reasonably conducted: *The Dominion Bank* v. *Cowan*, 14 O. R. 465; and see *Warnock* v. *Kloepfer*, 14 O. R. 288; 15 App. R. 394; 18 S. C. R. 701.

Who is a Creditor that may be Attacked?

The Court, in defining the position of a creditor whose preference was forbidden by the Act, held that a surety for an insolvent debtor who has not paid the debt for which he is surety, is not a creditor whose preference is forbidden by the Act: *Hope* v. *Grant*, 20 O. R. 623; *Campbell* v. *Roche*, 18 App. R. at p. 656, and cases there cited.

This led to an amendment of the Act whereby it is provided that such creditor shall include any surety and the endorser of any promissory note or bill of exchange, who would, upon payment by him of the debt, promissory note or bill of exchange, become a creditor of the person giving the preference. (55 Vic. Cap. 25; now R. S. O. 1897, Cap. 147, sec. 2 (5).

Where a security is given by a trustee to his *cestui que trust* for trust funds which have been misappropriated by the trustee,

this security cannot be set aside as a fraudulent preference, because a trustee and his *cestui que trust* do not stand in the relation of debtor and creditor, within the meaning of the Statute: *Molson's Bank* v. *Halter*, 18 S. C. R. 88; *Ex p. Taylor—Re Goldsmid*, 18 Q. B. D. 295; *Ex p. Stubbins*, 17 Chy. D. 58; *New, Prance, etc.* v. *Hunting*, 1897, 2 Q. B. 19; *Halwell* v. *Tp. of Wilmot*, 24 App. R. 628.

Who is a Creditor that May Make an Attack?

A plaintiff may establish his status as a creditor by shewing that there is an implied contract on the part of the insolvent debtor to indemnify the plaintiff against a mortgage on lands conveyed by the plaintiff to the debtor: *Oliver* v. *McLaughlin*, 24 O. R. 41.

A mortgagee is not a creditor who can attack an alleged fraudulent transfer made by his mortgagor, unless he first establishes by evidence that the mortgaged property is an insufficient security for payment of his claim: *Clark* v. *Hamilton, etc., Society*, 9 O. R. 177; *Crombie* v. *Young*, 26 O. R. 194.

A person who has a right of action against an insolvent debtor for tort is not a creditor who can maintain an action under our Statute to impeach a transfer of property made by the debtor: *Ashley* v. *Brown*, 17 App. R. 500; and see *Cameron* v. *Cusack*, 17 App. R. 489; but such a person can maintain such an action under the Statute of Elizabeth, for the latter Statute is not, like our Provincial Statute, limited in its operation to the claims of creditors only, but it is a Statute for the avoiding of fraudulent conveyances, etc., contrived to "delay, hinder or defraud creditors *and others* of their just and lawful *actions, suits*, debts, accounts, *damages*, penalties, forfeitures," etc. See *Ashley* v. *Brown*, 17 App. R. at p. 503; and *Gurofski* v. *Harris*, 27 O. R. 201; affirmed on appeal, 23 App. R. 717.

It follows, therefore, that one who has obtained a judgment in an action for tort cannot maintain an action to set aside a transfer of property made by the judgment debtor previous to the obtaining of the judgment and which has the effect of preferring another creditor, for he has no status to maintain an attack under our Provincial Statute, and he cannot maintain an attack under the Statute 13 Eliz., because that Act does not forbid the preferring of one creditor to the prejudice of another: *Gurofski* v. *Harris*, 27 O. R. 201; affirmed on appeal, 23 App. R. 717; and see *Montgomery* v. *Corbit*, 24 App. R. 311.

A person claiming unliquidated damages against the assignor for breach of contract is not a creditor within the meaning of the Act, and he cannot, after the making of an assignment for the benefit of creditors, bring an action against the creditors' trustee to ascertain the damages and rank for the amount upon the estate: *Grant* v. *West*, 23 App. R. 533; *Magann* v. *Ferguson*, 29 O. R. 235.

Not only is a preferential conveyance not open to attack by a person who at the time of the conveyance had only a right of action in tort for damages, but a conveyance may also be sustained against such a claimant when the conveyance was made for the purpose of implementing a prior contract, made for valuable consideration, before the claimant's claim arose (*e.g.*, a contract to convey in consideration of receiving support), even though such contract could not have been specifically enforced: *Montgomery* v. *Corbit*, 24 App. R. 311.

Quære, what would be the result in such a case if the conveyance was purely voluntary, and if the grantor had no creditors other than such claimant? See *Montgomery* v. *Corbit*, 24 App. R. at p. 324.

A creditor whose claim arose after the conveyance in question cannot succeed in setting aside that conveyance upon the ground that there are still in existence other creditors whose claims were in existence before the date of the conveyance, unless those prior creditors could themselves have impeached the transaction, which, in the absence of actual intent to delay, hinder or defraud creditors, they could not do if the grantor was solvent immediately after making the conveyance: *Vinden* v. *Fraser*, 28 Gr. 502; and see *Struthers* v. *Glennie*, 14 O. R. 726; and *Collard* v. *Bennett*, 28 Gr. 556; *Darling* v. *Price*, 27 Gr. 331; and *Masuret* v. *Mitchell*, 26 Gr. 435.

Voluntary Settlements.

In the absence of actual intent to defeat, delay or hinder creditors, a voluntary settlement made by a settlor in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against an attack by creditors under 13 Eliz., although debts due at the date of the settlement may to a considerable amount remain unpaid: *Kent* v. *Riley*, L. R. 14 Eq. 190; and see *Freeman* v. *Pope*, L. R. 5 Chy. 538; *Bank of Montreal* v. *Davis*, 9 O. R. 556; and *Ex p. Mercer*, 17 Q. B. D. 290.

If, however, such a conveyance be made with a view to putting

the property beyond the chances and uncertainties of business in which the grantor is engaged or is about to become engaged, the conveyance cannot be supported: *Ferguson* v. *Kenny*, 16 App. R. 276.

A voluntary conveyance of part of his estate made by a retired and successful hotel-keeper to his wife at a time when he was in solvent circumstances, but was, after some months of idleness, about to take up the hotel-keeping business again, was upheld as against subsequent creditors, the grantor's subsequent insolvency being caused by loss by fire: *Fleming* v. *Edwards*, 23 App. R. 718.

"Where a voluntary settlement is made with a view to the uncertainties of business by a person about to engage in business, the settlement will be very closely inquired into; and where it embraces the whole of the settlor's property it will be difficult to resist the conviction that it was made in order to hinder and defeat creditors in the event of business proving unsuccessful, so far as the withdrawal of the settled property would have that effect * * *. *Parties are to be taken to contemplate that which is the natural consequence of their acts*": *Campbell* v. *Chapman*, 26 Gr. at pp. 242-3.

"A person must be taken to intend what is the natural consequence of his acts. Therefore, although there was no such intention, still if I saw that the necessary effect of the deed was to defeat or delay creditors, I must see in the execution of the deed an intention to do so": *Per* North, J., in *Re Maddever*, 27 Chy. D. at p. 526.

Intent to Defraud—How Rebutted.

The Court must *take into consideration all the surrounding circumstances* and come to a conclusion therefrom whether the conveyance was made with the *intent to defeat*, etc. See *Re Johnson*, 20 Chy. D. 389; *Carr* v. *Corfield*, 20 O. R. 218.

"Where the prospect that the person subject to the liability will be called upon is so remote that it would not enter into any one's calculations, I do not say that the existence of the *contingent liability* would make a settlement bad. For instance, if a person had taken shares in the Glasgow Bank at a time when everybody believed them to be a valuable property, it would be difficult to hold that a settlement made by him while the Bank was in good credit was invalid, though the liability turned out ruinous": *Per* Lord Selborne, L. C., in *R* [illegible]*idler*, 22 Chy. D. at p. 79; but see *Crombie* v. *Young*, 26 O. R. 194.

Where a husband gave a bill of sale to his wife to secure advances made by her, and it was afterwards found that this bill of sale was invalid, and the husband immediately before his bankruptcy gave a new bill of sale in substitution for the former one, this was held to be valid *because the debtor believed himself to be under an obligation to make the new bill of sale: Re Tweedale*, 1892, 2 Q. B. 216; but see *Ex p. Fisher*, L. R. 7 Chy. 636.

In order that an assignment of the whole of a debtor's property as security for an existing debt may be held to be not fraudulent on the ground that the assignee agreed to make further advances to the assignor, it is not necessary that the agreement to make such advances should be technically binding at law or in equity; a *bonâ fide* promise is sufficient: *Ex p. Wilkinson*, 22 Chy. D. 788.

Where a chattel mortgagee sells under the power of sale in his mortgage, and after payment of his mortgage claim applies the surplus in payment of an unsecured debt due by the mortgagor to him, this is not a preference within the meaning of the Act, because there was no agreement between the mortgagor and mortgagee that such a course should be pursued, and therefore there could not be said to be any gift, conveyance, assignment or transfer of anything made with intent to defeat, hinder, delay or prejudice the creditors of the assignor: *Stephens* v. *Boisseau*, 23 App. R. 230; affirmed 26 S. C. R. 437.

Debtor of Insolvent Purchasing Claims for Purpose of Set-off.

Where a person is in insolvent circumstances, a debtor of his, having knowledge of such insolvency, may, at any time before the insolvent makes an assignment for the benefit of creditors, purchase outstanding liabilities of the insolvent for the purpose of setting them off against his own liability; and after an assignment for creditors has been made by the insolvent the purchaser may so set off the said liabilities, so previously purchased by him, against the claim made upon him by the assignee for creditors: *Thibaudeau* v. *Garland*, 27 O. R. 391.

How Plaintiff is to Establish his Claim.

When the plaintiff as a judgment creditor attacks an alleged fraudulent transfer made by his debtor, he is not usually able to maintain his action and prove his own status by merely adducing

in evidence the judgment which he has obtained against the transferor, for although that judgment is conclusive to establish as against the transferor and third persons (including the transferee), that the plaintiff is a creditor of the transferor, yet it is no evidence as against the transferee of any of the allegations upon which that judgment was based; it is evidence that on the date when judgment was entered the transferor was indebted to the plaintiff, but it is no evidence of the nature of the indebtedness or the time when it was incurred, and it is usually necessary for the plaintiff to adduce evidence of these facts as against the transferee in order to establish that the transfer was fraudulent as against himself: *Allan* v. *McTavish*, 28 Gr. 539; 8 App. R. 440.

Relief Granted to Execution Creditor and to Simple Contract Creditor.

Where a creditor attacks a transfer as fraudulent he may shew that he is an execution creditor, in which case he may maintain his action in his own name alone, and the effect of a successful judgment will be to set aside the fraudulent transfer and leave his execution to operate thereon; or, if he be not an execution creditor, he must sue on behalf of himself and all other creditors, and his relief will be confined to setting aside the transfer, leaving him to resort to some independent proceeding to obtain execution against the property: *Oliver* v. *McLaughlin*, 24 O. R. 41.

A simple contract creditor may, on behalf of himself and all other creditors, bring an action for a declaration of the invalidity of his debtor's assignment or transfer, even though at the time of bringing such action his debt be not yet due: *Macdonald* v. *McCall*, 12 App. R. 593.

It would appear that the proposition contained in *Oliver* v. *McLaughlin*, that a simple contract creditor can obtain no further relief in a fraudulent conveyance action than a mere declaration of the invalidity of the conveyance, leaving him to resort to an independent proceeding to obtain execution against the property, must be confined to cases where the plaintiff's claim is not yet due and payable, because where the plaintiff's claim is due and payable there is a well-settled practice of the Court to give him judgment for the recovery of his claim, which judgment goes on to provide for the taking of an account of the claims of all creditors, and in default of payment of those claims, for a sale of the lands in question one year after the date of the judgment, unless it should appear that any creditor other than the plaintiff has a

fi. fa. against the lands of the debtor in the hands of the proper sheriff which he would be entitled to enforce at an earlier date, in which case the sale should take place at such earlier date. See *Porte* v. *Irwin*, 8 P. R. 40.

Parties to Action.

When a simple contract creditor brings an action to set aside an alleged fraudulent conveyance made by his debtor, it is necessary for him to make both the debtor and the grantee parties defendant: *Gibbons* v. *Darvill*, 12 P. R. 478; but see *Faulds* v. *Faulds*, 17 P. R. 480; where an action is brought by an assignee for creditors, to set aside an alleged preferential transfer, the insolvent debtor is not a proper party: *Beattie* v. *Wenger*, 24 App. R. 72.

Constitutionality of the Statute.

After a considerable divergence of judicial opinion upon the subject, it has been finally determined that section 9 of R. S. O. (1887) Cap. 124, (now R. S. O. Cap. 147, sec. 11) is within the power of the Ontario Legislature to enact, so long as it does not conflict with any bankruptcy legislation of the Dominion of Canada; and presumably the balance of that Statute stands upon the same footing: *Attorney-General of Ontario* v. *Attorney-General of Canada*, 1894, A. C. 189.