Canada Law Journal.

VOL. XXXV. MAY 15, 1899. NO. 10.

English juries have developed a new style of verdict in murder cases—"Guilty, but not premeditated," — and in the two cases the judge entered a verdict of "Wilful murder," and sentence of death has followed. We doubt whether the judge was even technically right. The verdict was, to say the least, inconsistent, and was probably intended as a verdict of "Manslaughter." It is surprising that the death sentence should have been carried out under the circumstances.

As the subject of legal education is now under discussion it may be interesting to refer to the course of study laid down for those desiring to enter the legal profession in Germany. In addition to the acquisition by the aspirants of a knowledge of the law and its practice, there is also the desirable provision that there should not be a too rapid addition to the number of the profession. A consideration of the German law on this subject would seem to indicate that at least so far as the latter consideration is concerned they have pretty well solved the difficulty. One of our exchanges gives the curriculum alluded to as follows: "They have to pass the final examination at a public school, which qualifies them for the universities. At the latter they are taught the theory of the law, and at the end of three years' study are admitted to a legal examination, after the passing of which they are appointed "referendar," and attached to one of the courts, to be employed in the preparatory services for a course of four years, during which time they are made familiar with all the various functions of the judges and advocates, and trained in their exercise. Having acquitted themselves satisfactorily in the preparatory work, they are admitted to a final examination. If successful at this very comprehensive and stiff test of their capacity and knowledge, they are appointed "assessors" to the court, and may then either apply to be entered in the list of advocates or wait until they get their appointment as judges." Something similar in this country would effectually work a cure for the ills complained of in Ontario.

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*

judges to the principle were, however, reflected in constant attempts to circumvent it by indirection, attempts which at one period in the history of the doctrine of pressure seem to have threatened to render it practically inoperative. (*e*)

2. Rationale of the doctrine.—From one standpoint it may be said that, as every creditor has a right to go to his debtor and get his debt, if he does so bona fide, (*a*), the law regards a transfer made in consequence of a creditor's importunity as being induced not by a desire to defraud other creditors, but by a desire to satisfy a just demand.

"If, in a fair course of business, a man pays a creditor who *comes to be paid*, notwithstanding the debtor's knowledge of his own affairs, or his intention to break, yet, being a fair transaction in the course of business, the payment is good; for the preference is there got, *consequently*, not by design. It is not the object; but the preference is obtained, in consequence of the payment being made at that time." Suppose a creditor presses his debtor for payment, and the debtor makes a mortgage of his goods; that is, and, at any time, may be a transaction in the common course of business, without the creditors knowing there is any act of bankruptcy in contemplation; and therefore good. It is not to be affected by what passes in the mind of the bankrupt." (*b*)

From another standpoint, and with a view to circumstances which quite commonly attend a transfer made in compliance with a request of the creditor, it is proper to say that the debtor yields to the real coercive influence of his desire to escape some aggressive proceedings by the creditor, which will injure his business or affect his personal liberty. (See the cases cited in III. post.)

But from whichever side we approach the question, it is clear that, upon the whole, the effect of pressure in legalizing a payment or other transfer by an insolvent is that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the law, from which fraudulent intention alone arises the invalidity of the transaction. (*c*)

---

v. *Crouch* (1809) 11 East 256. An assignee of an insolvent cannot receive property transferred by him to a creditor in consequence of his pressing for payment, although the jury find that the insolvent contemplated bankruptcy. *Strachan* v. *Barton* (1856) 11 Exch. 647.

(*e*) See the remarks of Martin, B., in *Strachan* v. *Barton* (1856) 11 Exch. 647.

(*a*) *Strachan* v. *Barton* (1856) 11 Exch. 647.

(*b*) *Rust* v. *Cooper* (1777) 2 Cowp. 629, per Ld. Mansfield (p. 635.)

(*c*) *Bills* v. *Smith* (1865) 6 P. & S. 314, per Cockburn C.J. (p. 321); *Bank of Toronto* v. *McDougall* (1865) 15 U.C.C.P. 475; *Davidson* v. *Ross* (1876) 24 Grant 22 (p. 64); *Clemmow* v. *Converse* (1869) 16 Grant 547.

3. Pressure not necessary to validate payments made in the ordinary course of business.—"It has never been suggested that a payment in the ordinary course of trade, the honouring bills of exchange presented at their maturity, or the payment of debts which had become due inthe usual and customary manner, or payments, or payments made in fulfilment of a contract or engagement to pay in a particular manner or at a particular time, were open to any objection on the ground of their being voluntary, even although they were made without any express demand by the creditor —unless, indeed, the creditor had at the time notice of an act of bankruptcy committed by the debtor." (*a*) [This principle is to some extent embodied in the Ontario Assignments Act of 1897, sec. 3 (1).]

Payments of debts by a trader as they become due, for the purpose of keeping himself in good credit for the time, are sustained as valid, because they are not made "in favour of certain creditors as against others, but in the hope that if he can keep his business going, something may turn up to extricate him from his embarassments." (*b*)

4. Materiality of inquiry, whether arrangement assailed originated with debtor or creditor.—In considering whether the act of the debtor was voluntary, it is important to ascertain from which party the proposition for the arrangement alleged to be fraudulent originated. (*a*)

The existence of that disposition on the part of the insolvent to favour the debtor which must be established in order to validate a transfer on the eve of bankruptcy, is generally shewn by the fact that the step or proposal towards the disposal of the property in favour of the creditor proceeds from the insolvent debtor. (*b*)

In *Ex parte Griffith* (*c*), the evidence shewed that Griffith, a

---

(*a*) *Ex parte Blackburn* (1871) L.R. 12 Eq. 358, per Bacon, C.J.B. S.P., *Alderson* v. *Temple* (1768) 4 Burr. 2235. *Davidson* v. *McInnes* (1875) 22 Grant, Ch. 217: *Ex parte London, &c., Co.* (1873) L.R. 16 Eq. 391.

(*b*) *Tomkins* v. *Saffery* (1877) 3 A.C. 213, per Lord Blackburn (p. 235).

(*a*) *Crosby* v. *Crouch* (1809) 11 East 256; *Mogg* v. *Baker* (1838) 4 M. & W. 439.

(*b*) *Johnson* v. *Fesenmeyer* (1858) 25 Beav. 88. *Strachan* v. *Barton*, (1856) 11 Ex. ch. 647, per Alderson, B. (p. 657). Cf. also *Mogg* v. *Baker* (1838) 4 M. & W. 439. Where a debtor, two days before one of his bills falls due, goes to the drawer, and informs him that he is insolvent, and the drawer thereupon declares that he must pay the bill, and that if the debtor would do this, he, the creditor, would be security to the other creditors for so much as the estate would produce, a verdict finding that the payment was fraudulent will not be set aside. *Singleton* v. *Butler* (1806) 2 B. & P. 282.

(*c*) (1883) 23 Ch. D. (C. A.) 69.

traveller for a London firm, to whom his employers were largely indebted, and to whom they had previously given authority to collect certain debts, not specifically mentioned, which their customers owed them, was summoned to town by a letter, stating that they were seriously embarrassed, and wished to discuss the situation. During the discussion Griffith asked them to authorize him to obtain the money due to him by collecting certain specified debts. The firm at first refused to do so, but at length, on the very day before signing the petition, assigned the debts to him. It was held that the purpose of the assignment was clearly to give Griffith a preference, and that it was therefore invalid, under the statute of 1869, and would have been so even under the old law.

In *Tomkins* v. *Saffery*, (*d*) the facts of which are stated in sec. 5, post, Lord Cairns considered that, even supposing legal pressure might be predicated of such a case, the evidence shewed clearly that the payment was made as a part of parcel of machinery set in motion by the debtor himself when he announced, in compliance with the rules of the Stock Exchange, that he was a defaulter, and, also in accordance with those rules, made his Stock Exchange creditors the persons to judge of the disposition of properties, and surrendered the sum which they required him to pay. (p. 225)

No bona fide pressure is established where a debtor tells one of his creditors that he is about to stop payment, and, upon the creditors threatening to commence proceedings if he does not fulfil a promise, made when the debt was contracted, to furnish security, transfers two bills of exchange to the creditor and files a petition seven days afterwards. (*e*)

It has been assumed in one case that an absolutely crucial test of the validity of a transfer is the fact that the scheme attacked "originated in the will of the creditor." (*f*) Usually there is no difficulty in applying this test, as the dealings between the parties,

(*d*) (1877) 3 A.C. 213.

(*e*) *Ex parte Hall* (1882) 19 Ch. D. (C.A.) 580.

(*f*) *Whitney* v. *Toby* (1884) 6 Ont. Rep. 54, quoting language of Patterson, J.A., in *Davidson* v. *Grant* (1869) 24 Grant 22, p. 64. A verdict for the transferee creditor will not be set aside where the transfer was made in pursuance of negotiations begun by the sending of a letter requesting the debtor to call and arrange matters. *Campbell* v. *Barrie* (1871) 31 U.C.Q.B. 279. This case was overruled in *Davidson* v. *Ross*, 24 Grant 22, (see sec. 31 post) but this special point was not adverted to.

so far as it is necessary for a court to consider them, nearly always begin with a direct demand made by the creditor, independently of any antecedent action on the debtor's part. A more difficult question presents itself where the debtor has commenced negotiations with the creditor contemplating future financial transactions which the creditor would be naturally unwilling to enter into without a settlement of his existing claims. Will the mere fact that a proposition by which means are provided for the liquidation of the debt, as a part of the arrangement by which the creditor is to render financial assistance to the debtor, "originated in the mind of the creditor" validate the payments made in pursuance of the arrangement? This question has been answered in the affirmative in *Whitney* v. *Toby*, sup., where, so far as the report shews, the creditor had not directly demanded payment or put any stronger compulsion on the debtor than was implied in the fact that he refused to make any further advances unless the existing debt was provided for. The decision seems to be of very questionable authority, and it is submitted that the cases referred to above strongly point to the conclusion that a creditor ought not to be allowed to obtain a preference in this way, even by a demand.

5. Formal schemes contravening policy of bankruptcy law not validated by pressure—A formal scheme for the distribution of the assets of a debtor, who is on the eve of bankruptcy, otherwise than according to the provisions of the bankruptcy law, is not validated by any amount of importunity or coercion. Hence the fact that a Stock Exchange has framed a rule binding its members, in the event of their becoming defaulters, to prefer their Stock Exchange creditors to all others, will not enable the official assignee of that body to retain, as against the assignee in bankruptcy, a sum of money paid over by an insolvent broker in compliance with that rule. (*a*)

6. That pressure after an act of bankruptcy has been committed, is ineffectual, follows from the general principle under which the title of the trustee or assignee relates back to the time of such an

(*a*) *Ex parte Saffery* (1877) 4 Ch. D. (C.A.) 555; S.C. sub. nom. *Tomkins* v. *Saffery*, 3 A.C. 213.

act. (*a*) Hence a bank to which money is paid by a person acting ostensibly as a friend desirous of saving the bankrupt, a customer of the bank, from a criminal prosecution on a charge of obtaining credit under false pretences, but in reality as the bankrupt's agent, cannot, as against the trustee in bankruptcy, retain the money, where it appears that the act of bankruptcy upon which the petithe act of bankruptcy, had ceased to be the property of the debtor tion was subsequently filed has been committed prior to the payment and was known to the bank. (*b*) So a transfer of money to a creditor, who is the employee of the transferor, partly for safe keeping and partly to secure him in case the debtor cannot continue in business, amounts to an act of bankruptcy, and cannot be validated by the fact that the creditor brought back the money, and refused to accept it as a deposit unless he was authorized to pay himself, and declared that he would not work any longer for his employer unless his request was acceded to. (*c*)

7. Doctrine enures only to benefit of pressing creditor himself—A deed whereby a debtor, being pressed, conveys estates in trust to sell and pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy, is an act of bankruptcy, but valid, so far as regards the protection of the pressing creditor. (*a*)

8. Payment made under pressure by surety valid—A request by a surety that the money for the payment of which he is ultimately responsible may be paid over by the debtor to the creditor, prevents such payment by the debtor from being voluntary just as much as a request by the creditor himself. (*a*) The fact that the obligees of a surety's bond had never threatened to resort to him for payment at the time when he demanded security from the debtor,

---

(*a*) See Robson on Bankruptcy, pp. 556, 557: Yate Lee on Bankruptcy, pp. 261-264.

(*b*) *Ex parte Wolverhampton Bkg. Co.* (1884) 14 Q.B.D. 32, distinguishing *Ex parte Caldecott*, 4 Ch. D. 150, on the ground that no act of bankruptcy had been committed when the payment was made.

(*c*) *Ex parte Halliday* (1873) L. R. 8 Ch. App. 283.

(*a*) *Morgan* v. *Horseman* (1810) 3 Taunt. 241.

(*a*) *Edwards* v. *Glyn* (1859) 2 El. & El. 29. Compare *Roe* v. *Smith* (1868) 15 Grant 344.

and that he did not actually discharge the bond until some time afterwards will not invalidate the transfer of the security. (*b*)

9. Pressure, effect of, where debt not yet due—The fact that the debt the payment of which was demanded was not due is merely one of the circumstances to be considered by the jury as bearing upon the fraudulent intent of the debtor. (*a*)

"In cases where the payment has been made before the debt was due, that circumstance has sometimes been relied on as an indication that the payment is voluntary, and at other times has been said to be immaterial, but neither in the one case nor in the other do these facts of themselves furnish any criteria; they are only ingredients in the whole question upon which the jury are to come to a determination." (*b*)

The fact that the debt for which a security was given on the demand of the creditor was not yet due is sometimes mentioned among the reasons assigned for avoiding the transaction. (*c*)

10. Fraud not conclusively negatived by proof of pressure—A necessary deduction from the principle that evidence of pressure is admitted for the purpose of rebutting the presumption of fraudulent intent on the debtor's part is, that it is still open to the attacking creditor to shew that the transfer, although made under pressure, was actually fraudulent. (*a*)

"The motives and intentions of the bankrupt may be material or immaterial, or, to speak accurately, may be more or less material, according to his situation, to the nature of the threat, and the degree and period of urgency by the creditor." (*b*)

Thus a threat of proceedings is not always conclusive proof that the payment was not voluntary. It may still be a question for the jury to say whether the payment was made under fear of compulsion or voluntarily, with a view to favour the creditor, as

---

(*b*) *Thompson* v. *Freeman* (1786) 1 T.R. 155.

(*a*) *Strachan* v. *Barton* (1856) 11 Exch. 647. S.P., *Hartshorn* v. *Slodden* (1801) 2 B. & P. 582. *Crosby* v. *Crouch* (1808) 11 East 256. *Ree* v. *Smith* (1868) 15 Grant 344.

(*b*) *Cook* v. *Rogers* (1831) 7 Bing. 438, per Aldersen, B.

(*c*) See *Powell* v. *Calder* (1885) 8 Ont. Rep. 505.

(*a*) That a note given under pressure was ante-dated, and that some of the notes it was given to cover were not yet due is some evidence of fraud. *Clemmow* v. *Converse* (1869) 16 Grant 547.

(*b*) *Cook* v. *Rogers* (1831) 7 Bing. 438, per Alderson, B. (p. 449).

where the debtor is not placed in a better situation by yielding to the threats. (*c*) So where the evidence is that numerous and pressing applications for payment had been made by the preferred creditor before the payments impugned, a verdict for the plaintiff [the assignee in bankruptcy] will not be set aside on the ground of misdirection, in that the trial judge charged that, "notwithstanding there had been pressure and importunity on the part of the defendant, the question they had to consider was, whether the payments were made in consequence of that pressure and importunity or whether they were voluntary, and with a view to give a fraudulent preference to the defendant over other creditors." (*d*)

Of course this principle is still more readily applied under a statute like the English Bankruptcy Act of 1869, since if it appears as a matter of evidence that the transfer was actually made "with a view of" preferring a creditor, it cannot be said that the efficient cause of the transfer was the creditor's demand. (*e*) Hence a finding by a jury that the creditor did not make the payment impeached with a view to give the payee a preference over the other creditors is conclusive as to his right to retain the money, although there is another finding that the payment was "voluntary and without real pressure. (*f*)

11 **Absence of pressure not conclusive evidence of fraud**—"In the great majority of cases, the question of fraudulent preference would be determined by the fact of the payment having been made spontaneously by the debtor without pressure on the part of the creditor. Unexplained, a payment so made would carry with it the presumption that the intention of the debtor was to act in fraud of the bankrupt law. . . . But it by no means follows that, because, in the majority of cases, the absence of pressure by the creditor may properly lead to the inference that the debtor

(*c*) *Cook* v. *Rogers* (1831) 7 Bing. 438, following on this point *Thornton* v. *Hargreaves* (1806) 7 East 544, where the debtor gave a bill of sale of the whole of his stock, and was consequently obliged to break up his business immediately afterwards. (See sec. IV, post.)

(*d*) *Cook* v. *Pritchard* (1843) 5 M. & G. 329. The party to object to the judge's assumption of the fact that pressure was applied in such a case would be the plaintiff not the defendant, for the assumption is in favor of the latter. Ibid.

(*e*) See *Ex parte Boon* (1879) 41 L.T.N.S. 42.

(*f*) *Ex parte Bolland* (1871) L.R. 7 Ch. App. 24. Compare remark of Hagarty, C. J. O., in *Long* v. *Hancock* (1885) 12 Ont. App. 137, that, whether pressure was shown or not, a finding by a jury or trial judge that there was an intent to delay &c. should not lightly be set aside.

intended to act in fraud of the law, that circumstance must necessarily be conclusive in a case where other circumstances are found sufficient to rebut the inference of fraudulent intention. For it must be borne in mind that the true question in all these cases is whether the intention with which the payment was made was to defeat the operation of the bankrupt law."

12. Pressure before voluntary delivery of security is completed, effect of—In *Bayley* v. *Ballard*, (*a*), where a trader in contemplation of bankruptcy, and without solicitation, put three cheques into the hands of his clerk to be delivered to a creditor, but before they were delivered, the creditor called upon the trader and demanded payment of his debt, it was held that, the intention to give a voluntary preference not being consummated, the payment was valid. But Parke, B., in *Cook* v. *Rogers*, (*b*) said he could hardly consider this ruling to be law.

13. Transfers of interests which cannot be reached by legal process, such as a share of the debtor in the possible profits of a contract for work to be performed, are not a fraudulent preference, whether made under pressure or not. (*a*)

14. Pressure of a company by a director, effect of—The fact that a director of an insolvent company pressed for his debt will not prevent a payment made to him from being invalid as an undue preference. The only way in which a director can exercise pressure is by ceasing to be a director and then demanding his money. (*a*)

15. Creditor's knowledge of debtor's insolvency, effect of—The knowledge of a creditor that a debtor is embarrassed is clearly not a conclusive reason for refusing to give effect to the doctrine of pressure. "If a man is failing in his circumstances that is a very good reason for pressing him." (*a*) But the courts have gone still

---

(*a*) *Bills* v. *Smith* (1866) 6 B. & S. 314, Cockburn, C.J. To the same effect see remarks of Spragge, C.J.O., and Burton, J.A., in *Brayley* v. *Ellis* (1884) 9 App. Rep. 565.

(*a*) 1 Camp. 416.

(*b*) (1831) 7 Bing. 438 (p. 446).

(*a*) *Blakeley* v. *Gould* (1897) 24 Ont. App. 153; aff'd 27 S.C.R. 682 (trial court had found that the assignment was valid because made under pressure).

(*a*) *Gaslight Imp. Co.* v. *Ferrell* (1870) L.R. 10 Eq. 168.

(*a*) *Yeates* v. *Grove* (1791) 1 Vesey 280 (per Ld. Thurlow). See also *Segsworth* v. *Meriden, &c., Co.* (1883) 3 Ont. Rep. 415.

further in upholding the efficacy of pressure. In a case decided in 1858, Romilly, M. R, laid down the rule as follows:

"If the creditor, although he knows that the debtor is insolvent, presses and insists upon having a security for his debt, and the debtor yield to that pressure, and give the security, although it may be well known to both at the same time, that the effect will be to give that particular creditor an advantage over the other cre tors of the insolvent, the transaction is perfectly good and valid." *Johnson* v. *Fesenmeyer*, 25 Beav. 88.

Speaking with reference to the English Bankruptcy Act of 1869, Vice-Chancellor Malins, considered the law to be perfectly settled that, if there was a bona fide negotiation for security, and the security was given on the very eve of bankruptcy, and the person taking the security knew the debtor was hopelessly insolvent, the transaction is valid, everything being dependent upon the bona fides of the transaction. (*b*)

16. **Pressure to obtain performance of existing contract**—It is well settled that, "if there be a precedent duty, either by contract or otherwise, to make an assignment or return of the specific goods to the creditor, such an assignment or return can never be construed as a fraudulent preference." (*a*) The reason of this doctrine is that, like pressure, the antecedent obligation negatives the voluntary character of the act of giving the transfer, by referring it to the fulfilment of the obligation. (*b*)

A fortiori a payment cannot be impeached, where it is made not

---

(*b*) *Smith* v. *Pilgrim* (1876) 2 Ch. D. 580. [As a matter of fact the creditor did not know of the debtor's insolvency in this case.] To the same effect see *Ex parte Boyd* (1889) 6 Morrell's Bankr. Cas. 209 (Mellish, L. J.) In *Segsworth* v. *Meriden, &c., Co.* (1883) 3 Ont. Rep. 413, the court seems to be of the opinion that there is a material difference between knowing and merely having the means of knowing that the debtor was insolvent. But this cannot be a correct doctrine if we are to infer that the means of knowledge were such as the creditor was bound, as a prudent business man, to avail himself of. Under the Manitoba Assignment Act, the doctrine is that, as it leaves the doctrine of pressure untouched it is immaterial whether the creditor had or had not notice of the debtor's insolvency. *Stephens* v. *McArthur* (1891) 19 S.C.R. 446. In view of the express terms of sec. 8 of the Dominion Insolvent Act of 1864 (see 31 post) it may possibly be inferred that pressure will not validate a conveyance within its purview if the creditor was aware that the debtor was insolvent. See *Payne* v. *Hendry* (1873) 20 Grant Ch. 142.

(*a*) *Griffith* v. *Holmes*, Bankruptcy p. 431, quoted with approval in *Patterson* v. *Kingsley* (1878) 25 Grant 425.

(*b*) Patterson, J. A., in *Brayley* v. *Ellis* (1884) 9 Ont. App. 565, (p. 594). See also *Bills* v. *Smith* (1865) 6 B. & S. 314: *Toovey* v. *Milne* (1819) 2 B & Ald. 683: Also *Edwards* v. *Glyn* (1859) 2 El. & El. 29 (per Erle J.), the facts of which are stated in sec. 23, post.

only in pursuance of an antecedent agreement, but also in response to the demand of the creditor, (*c*) So although an assignment of all the debtor's property is fraudulent and an act of bankruptcy, even when made under pressure, (see IV. post), it is otherwise where it is made in furtherance of an antecedent contract. (*d*) But an assignment by way of security will be set aside where the taking of it was deliberately postponed until the debtor was in a state of insolvency, and the intention from the very first, was that it was not to be taken until the circumstances of the debtor should render it necessary to do so, (*e*) or where the giving of the security was postponed in order to prevent the impairment of the debtor's financial status. (*f*) Such an assignment, however, will be upheld, where the creditor has been making further advances to the debtor on the faith of the agreement that the security was to be given when called for. (*g*) That the pressing creditor has taken additional security for his debt will not affect his rights where there is no abandonment of the original contract. (*h*)

II.—*What circumstances constitute legal pressure.*

17. Generally—In considering the general effect of the decisions which have defined the scope of the doctrine of pressure it is necessary to bear in mind the fact that the word "voluntary" which was used by Lord Mansfield (see sec. 1 ante) to describe one of the essential ingredients of a fraudulent preference is ambiguous in meaning. On the one hand it is apparent that the mental condition which is denoted by this word suggests as its antithesis the mental condition which exists when the debtor has lost, by reason of some external influence of a positively coercive nature, a substantial part of his power to exercise his will freely in chosing between alternative courses of conduct. In this point of view the operation of

---

(*c*) *Bills* v. *Smith* (1865) 6 B. & S. 314: *Hunt* v. *Mortimer* (1829) 10 B. & C. 44: *Vacher* v. *Cocks* (1830) 1 B. & Ad. 145: *Allan* v. *Clarkson* (1870) 17 Grant Ch. 570. (See also sec. 32, post.)

(*d*) *Harris* v. *Rickett* (1859) 4 H. & N. 1: *Brayley* v. *Ellis* (1882) 1 Ont. Rep. 119; aff'd 9 App. Rep. 565.

(*e*) *Webster* v. *Crickmore* (1898) 25 Ont. App. 97. Compare *Breese* v. *Knox* (1897) 24 Ont. App. 203.

(*f*) *Ex parte Fisher* (1872) L.R. 7 Ch. App. 636. Compare the British Columbia case cited in sec. 33 *post*.

(*g*) *Ex parte Wilson* (1875) 33 L.T.N.S. 62.

(*h*) *Ex parte Seals* (1864) 10 L.T.N.S. 315

pressure can be established only by showing that the debtor, when he granted the preference, was under a real apprehension that his person or his business would have suffered some serious detriment if he had refused to comply with the creditor's demand. That this conception of an involuntary conveyance predominates in the earlier cases is, we think, impossible to deny, (*a*) and in the modern decisions under the English Bankruptcy Acts of 1869 and 1883, and statutes modeled upon them, there seems to be some tendency to return to the older tests. (*aa*)

On the other hand the word "voluntary" may signify merely the negation of absolute spontaneity, and this conception of its import leads us to a meaning of the word "pressure" which does not necessarily suggest compulsion, as that term is usually understood, but merely implies that the debtor did not act of his own motion in making the assignment.

If therefore we are to define the word "pressure" by contrasting it with the opposite conceptions, which are both indicated by the word "voluntary," one of its significations will be found to raise the question whether the freedom of the debtor's will was in a real sense destroyed, while, if its other signification is adverted to, the question presented is simply whether the debtor acted under an external influence which, although it may have induced him to adopt one particular course rather than another, cannot, without an abuse of terms, be said to have deprived him of his freedom of will. (*b*)

(*a*) See remarks of Bacon, C.J.B., in *Ex parte Craven* (1870) L.R. 10 Eq. 644 and of Lord Chelmsford in *Johnson* v. *Fesenmeyer* (1858) 3 De G. & J. 13 (p. 25) Compare also the language used in *Alderson* v. *Temple* (1768) 4 Burr. 2235 *Reed* v. *Ayrton* (1817) Holt 503 : *Crosby* v. *Crouch* (1808) 2 Camp 166.

(*aa*) In *Ex parte Griffith* (1883) 23 Ch. D. 69, Sir George Jessel remarked during the argument of counsel that, in order to establish pressure, it must be shewn that there was "coercion" which controlled the debtor's will. So under section 71 of the Victoria Insolvency statute, (a copy of sec. 92 of the English Bankruptcy Act of 1869), it has been held that there must be "real genuine pressure." *Mackay* v. *Jellie* (1890) 17 Vict. L. R. 91 : *Davey* v. *Walker* (1892) 18 Vict. L. R. 175 ; cases which both assume that there is no legal pressure exercised by a threat of proceedings, which the creditor has no actual intention of instituting.

(*b*) There seems to be a lack of precision in such a dictum as this : "It is impossible to declare the minimum of language or conduct on the part of a creditor which will be strong enough to *remove the volition* of the debtor." *Campbell* v. *Barrie* (1871) 31 U. C. Q. B. 279 per Wilson C.J. (p. 293, quoted with approval in *In re Hurst* (1876) 6 P.R. 329. In view of the actual decisions cited in sec. 20, even such statements as these fall short of complete accuracy. "I apprehend that a voluntary payment is a payment simply by the act and will of the party making it ; and that, if there is anything to *interfere with or control this will*, then it is not a voluntary payment." *Strachan* v. *Barton* (1856) 11 Exch. 647, 652, per Alderson B. (quoted with approval by Lord Chelmsford in *Johnson* v. *Fesenmeyer* (1858) 3 G. & J. 13) :

Considering the idea which is conveyed to the non-legal mind by the word "pressure", it is most unfortunate that this term has come to be used to express indifferently the influence which may make a conveyance involuntary in the latter as well as the former sense. (*c*) The consequence has been that, although the question whether pressure was applied is one of fact, and therefore for a jury in the first instance (see post 24) the courts have often found themselves in the anomalous and inconvenient position of being obliged to uphold a conveyance, though no pressure in the popular sense of the word is established. (*d*) A general statement of the circumstances under which legal pressure exists can only be made entirely accurate by the use of some qualifying epithet, (*e*) or by some form of words which takes due account of the double meaning of "voluntary." (*f*)

18. Criminal Prosecution, danger of—It has never been questioned, and often directly decided, that a conveyance induced by a threat of a prosecution is not voluntary. (*a*)

But whether the expectation that a criminal may feel that, if his offence is discovered, he will be prosecuted is of itself a coercive influence amounting to pressure in the legal sense, is a question upon which the authorities are in conflict.

"If the pressure was *such that it overweighed the debtor's own inclination, and induced him to pay against his will,* that would be sufficient pressure within the meaning of the bankruptcy laws." *Green* v. *Bradfield* (1844) 1 C. & K. 449, per Tindal, C.J.

(*c*) Lord Chelmsford alludes regretfully to the retention of the term "pressure" "although it is now only calculated to mislead, as it has been decided that the only one question in cases of this description is whether the act is voluntary on the part of the bankrupt." *Johnson* v. *Fesenmeyer* (1858) 3 De G. & J. 13, p. 25.

(*d*) *Boydell* v. *Gillett* (1835) 2 Cr. M. & R. 579: *Ex parte Bolland* (1871) L. R. 7 Ch. App. 24.

(*e*) "The amount of pressure is not a matter of very considerable importance, because to make the transaction fraudulent, the preference must proceed voluntarily from the bankrupt himself, which it does not if he was induced to do it by the pressure of the debtor whether it be much or little." *Johnson* v. *Fesenmeyer* (1858) 25 Beav. 88, per Romilly M. R.

(*f*) A fraudulent preference "arises where the debtor in contemplation of bankruptcy, that is knowing his circumstances to be such that bankruptcy must be, or will be, the probable result, though it may not be the inevitable result—does, *ex mero motu*, make a payment of money, or a delivery of property to a creditor, not in the ordinary course of business, and without any pressure or demand on the part of the creditor." *Nunes* v. *Carter* (1866) L.R. 1 P. C. 348, per Lord Westbury.

(*a*) *Ex parte De Tastet* (1831) Mont. 138: *Ex parte Caldecott* (1876) 4 Ch. D. (C.A.) 150: *In re Boyd* (1885) 15 L.R. Ir. 521: *Ex parte Boyd* (1889) 6 Morrell's Bankr. Cas. 209: *Clemmow* v. *Converse* (1869) 16 Grant 547: *Ivey* v. *Knox* 1885) 8 Ont. Rep. 635: *Bank of Toronto* v. *McDougall* (1865) 15 U.C.C.P. 475.

The Irish Court of Appeal has laid it down broadly that the mere apprehension of consequences, civil or criminal, to the debtor himself will not validate a payment, where the other circumstances bring it within the rule against fraudulent preference, and held that an act of fraudulent preference is committed by a trader who, after having forged acceptances or bills, takes up the instruments before their maturity and before the holder ascertains the fact of the forgery, without any active pressure and simply for the purpose of suppressing the evidence of his crime. (*b*)

But this decision cannot be regarded as good law in view of several later decisions by the English Court of Appeal. In one of these it was declared that if a debtor, on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has stolen from his master or from anybody else, and does restore the money, it was impossible to hold that such a payment could be treated as a fraudulent transfer. (*c*) A few years later the same court held that, as the relation between a defaulting trustee and a co-trustee is not that of debtor and creditor, a sum of money transferred to repair the breach of trust is not fraudulent, whether it was made under pressure or not. (*d*) And quite recently the same doctrine has been reiterated, the court expressly declining to rule that the fact of their having been no actual threat of a prosecution constituted a ground for distinguishing the case from those which preceded it. (*e*) It is true that these were all cases in which the defaulter held a fiduciary relation to the person to whom the money was restored, but the language of James, L.J., as quoted above, and of the judges in *Ex parte Taylor*, sup. shews that this

(*b*) *Ex parte Hibernian Bank* (1863) 14 Ir. Ch. 113. Blackburne, L.J., said: "The law necessarily deals with his acts and with his motives only so far as they tend to evince his intention; but I think that the fears or hopes that form the bankrupt's reasons for his resolution cannot alter or qualify its effect, or shew the absence of volition in the act which the law holds to be fraudulent. So far from doing so, they shew his reasons and motives for the illegal act which he has determined to commit."

(*c*) *Ex parte Stubbins* (1881) 17 Ch. D. 58 per James, L.J. (p. 69).

(*d*) *Ex parte Taylor* (1886) 18 Q.B.D. (C.A.) 295, followed (with some reluctance) in *Ex parte Ball* (1887) 35 W.R. (C.A.) 264. S.P., *The Molson Bank* v. *Halter* (1890) 18 S.C.R. 88 (Fournier and Patterson, JJ., dissenting on the special ground that, on a proper construction of the statute, the effect of the transaction, not the intent of the debtor, was the material point. See sec. 32 post).

(*e*) *New's Trustee* v. *Hunting* (1897) 2 Q.B. (C.A.) 27.

circumstance is not regarded as a material differentiating factor. To the same effect see *The Molson's Bank* v. *Halter*, sup. (*f*)

19. Civil action, danger of—It is also well settled that a conveyance made by a debtor, under a reasonable impression that the consequence of his refusing to make it will be the institution of a suit to enforce the claim against him, is not voluntary. Such an impression may be, and usually is, the result of a direct threat by the creditor. (*a*) It is not necessary that the threat should relate to the immediate future, (*b*) nor will the mere fact that a creditor, after threatening to wind up a company, has postponed proceedings in the hope of its being reconstructed, avoid a subsequent confession of judgment in his favour. (*c*) See, however, sec. 16, ante.

That the debtor acted under an erroneous impression as to the intentions of the creditor will not prevent the conveyance from being involuntary. (*d*)

The fact that the pressure was resisted in one instance is immaterial, if the debtor finally came to the conclusion that the threats of the creditor would be put into execution. (*e*)

Assignments in cases in which a debtor yields to his desire to avoid the unpleasant consequences of civil proceedings, after

---

(*f*) As to the application of the maxim, *In pari delicto, potior est conditio possidentis aut defendentis*, in such cases as these, see *Ex parte Caldecott* (1876) 4 Ch. D. (C.A.) 150.

(*a*) *Reynard* v. *Robinson* (1833) 9 Bing. 717: *Johnson* v. *Fesenmeyer* (1858) 25 Beav. 88: *Brayley* v. *Ellis* (1882) 1 Ont. Rep. 119, aff'd 9 Ont. App. 565: *Segsworth* v. *Meriden Co.* (1883) 3 Ont. Rep. 413: *Slater* v. *Oliver* (1884) 7 Ont. Rep. 158: *Cascaden* v. *McIntosh* (1892) 2 B.C. 268: *Stephens* v. *McArthur* (1890) 6 Man. L.R. 496, rev'd in 19 S.C.R. 446, but not on this point. The principle has been declared to have no application where the creditor's threat of legal proceedings is no real compulsion, as where the effect of a homestead Act would be to absorb the greater part of the property, and leave practically nothing for the creditor. *Doll* v. *Hart* (1890) 2 B.C. 32. But this case is quite opposed to the rationale of the doctrine as well as to the general current of authority. The essential question is not whether the suit would benefit the creditor, but whether it would be detrimental to the debtor's business. In this point of view it is quite immaterial what the creditor will secure by the proceedings. The commercial standing of a debtor must be impaired by an action having the effect of disclosing his inability to pay his debts, and no ground can be suggested for supposing that his unwillingness to bring on such a disclosure can be at all diminished by his consciousness that the creditor's judgment will be unproductive.

(*b*) *Reynard* v. *Robinson* (1833) 9 Bing. 717.

(*c*) *Edison, &c., Co.* v. *Bank of B.C.* (1895) 3 B.C. 460, reversed, but on another ground. See sec. 33 post.

(*d*) *Thompson* v. *Freeman* (1786) 1 T.R. 155.

(*e*) *Johnson* v. *Fesenmeyer* (1858) 25 Beav. 88.

those proceedings have actually commenced, are of course within the general principle. (*f*)

20. **Mere demand without threat of suit amounts to pressure**—Descending one step lower in the scale of coercive influences, we find it laid down that "the simplest request may be sufficient if payment was the result of that request." (*a*) In other words a "demand or request made by a creditor, although not accompanied by any threat, or expressed in angry or even very urgent terms is still sufficient to deprive the act of a voluntary character." (*b*) Or to adopt the statement of the same judge on another case, "an earnest request by a creditor, although not accompanied by a threat or remonstrance or very positive demand." (*c*) This principle holds, although the creditor is on the most friendly terms with the debtor. (*d*)

(*f*) *Ex parte Jenkins* (1885) 3 W.R. 523; *Morgan* v. *Brundrett* (1833) 5 B. & Ad. 289.

(*a*) Pollock C.B. in *Strachan* v. *Barton* (1856) 11 Exch. 647, (citing *Crosby* v. *Crouch* 5 B. & Ad. 289). S.P. *Ex parte Helder*, 24 Ch. D. 339, per Brett M.R. (p. 343). *Davidson* v. *Ross* (1876) 24 Grant Ch. 22; *Gibbons* v. *McDonald* (1892) 20 S.C.R. 587, aff'g 19 Ont. Rep. 290: 18 Ont. App. 159. The following statement by Porter M.R. (Ireland) seems to be irreconcilable with the cases cited in this section: "Though something amounting to pressure by the creditor was needed to get rid of the doctrine of fraudulent preference, very little preference indeed would suffice, provided an actual application, with some circumstances of urgency, was shewn." *In re Boyd* (1885) 15 L.R. Jr. 52.

(*b*) *Ex parte Craven* (1870) L.R. 10 Eq. 644, per Bacon, C.J.B.

(*c*) *Ex parte Blackburn* (1871) L.R. 12 Eq. 358, per Bacon, C.J.B.

(*d*) *Boydell* v. *Gillett* (1835) 2 Cr. M. & R. 579. A verdict finding a transfer of property not to be voluntary will not be set aside, where the evidence is that the debtor had owed money to his son before marriage and had given him a bond for the amount which, when he married, he had settled on his wife, and that subsequently the son, upon learning that the property in question had been released from a mortgage, had, at the suggestion of the trustees of the marriage settlement, requested his father to transfer the property in satisfaction of the bond. *Belcher* v. *Prittie* (1834) 10 Bing. 408. Commenting on the contention that there was no importunity Park J. pointed out that "urgency depends on the station in which each party stands, and a very little act on the part of the son would be as strong towards a father as if a stranger had threatened to arrest him." A case involving the same transfer afterwards came before the Court of Chancery, and a similar ruling was made: *Bannatyne* v. *Leader* (1841) 10 Sim. 350. An instruction has been approved, by which the judge left it to the jury to say whether the assignment originated with the insolvent to the defendant, as a favoured creditor, or whether it originated in the request of the defendant; and told them that "pressure" of the creditor was not necessary, but that, if it originated with the insolvent, it could only have been made by way of voluntary preference. *Mogg* v. *Baker* (1838) 4 M. & W. 439; 2 Exch. 691. According to Parke B., in *Van Casteel* v. *Booker* (1848) 2 Exch. 691, this case decided that it is not necessary that there should have been any "pressure" on the part of the creditor, or apprehension on the part of the insolvent, that he would be in a worse condition by not making the payment.

Statements of the doctrine that a bare application by the creditor amounts to pressure which validates a payment or transfer are often accompanied by expressions negativing the necessity of proving that the debtor was in fear of an action. (*e*)

A fortiori will a bona fide demand validate an assignment, though not followed by the actual inception of legal proceeding. (*f*) Or, to express the rule in terms still more general, pressure may exist without the use of "any urgency of a disagreeable nature." (*g*)

As the greater includes the less, it follows that a transfer must be valid where the creditor, although he says nothing explicitly as to resorting to legal remedies, makes his application in such terms or under such circumstances that the debtor is justified in believing that an action will sooner or later be brought against him. (*h*)

Pressure may also be predicated of a case in which the debtor will be placed in an exceptionally embarrassing position if he does not comply with the creditor's demand. Thus a payment to an attorney is not "voluntary" within the meaning of 7 Geo. 4, c. 57, sec. 3, where, bein , asked to defend two actions against the debtor, he said he would not go on without money. (*i*) So the desire of the debtor to keep the business going in the expectation that something may turn up which may extricate him from his embarrassments is recognized as a motive which, if its existence is established, will rebut the inference of fraud. (*j*) A fortiori will a conveyance be valid where the pressing creditor was in a position to hamper the debtor's business seriously, if his request had been denied, as where he refused to give up property stored in his warehouse by the debtor, if his claim was not satisfied, and the immediate possession of the property was of vital importance to the debtor. Under such

---

(*e*) *Stephens* v. *McArthur* (1891) 19 S.C. 446. See also *Cosser* v. *Gough*, cited in note to *Thompson* v. *Freeman* (1786) 1 T.R. 155 (p. 156): *Smith* v. *Payne* (1795) 6 T.R. 152: *Strachan* v. *Barton* (1856) 11 Exch. 647: *Mogg* v. *Baker* (1038) 4 M. & W. 348. Contra, see *Doll* v. *Hart* (1890) 2 B.C. 32, but clearly erroneously.

(*f*) *Ex parte Scudamore* (1796) 3 Ves. Jun. 85. S.P., *Green* v. *Bradfield* (1844) 1 C. & K. 449.

(*g*) *Strachan* v. *Barton* (1856) 11 Exch. 647, per Alderson B. (p. 651): *McWhirter* v. *Thorne* (1869) 19 U.C.C.P. 303: *Van Casteel* v. *Booker* (1848) 2 Exch. 691.

(*h*) *Ex parte Craven* (1870) L.R. 10 Eq. 648: *Johnson* v. *Fesenmeyer* (1858) 25 Beav. 88; (1858) *Brown* v. *Jowett* (1895) 3 B.C. 44; *Beattie* v. *Wenger* (1897) 24 Ont. App. 72: *Reed* v. *Ayrton* (1817) Holt 503.

(*i*) *Troup* v. *Brooks* (1830) 4 C. & P. 320.

(*j*) See Ld. Blackburn in *Tomkins* v. *Saffery* (1877) 3 A.C. 213 (p. 235).

circumstances, it is immaterial whether the legal right of the warehouseman to force the whole debt in this way is doubtful(*k*). Similarly, legal pressure is established where a wholesale merchant holds back goods ordered by a retail dealer, and demands a cash payment on account of a debt which is already double the amount which, according to a prior stipulation, it was not to exceed, and so produces in the mind of the buyer an impression that goods which he needs in his business will not be furnished without such payment. (*l*)

21. Pressure ineffectual, if collusive [Compare also sec. 4 ante, and secs. 32 and 33 post]—Proof that the hostile attitude of the creditor was merely simulated, as a result of a secret understanding between the parties, will of course prevent the operation of the doctrine of pressure. (*a*)

III. *Preference not validated by pressure unless actually induced by it.*

22. Generally — Agreeably to the general theory of legal causation, a preferred creditor who relies on the doctrine of pressure must shew not only that he made a demand upon the debtor, but that the assignment impugned was made in consequence of that demand.

If the payment "is made in consequence of the act of the creditor, it is not voluntary." (*a*)

"The test is, would the bankrupt have made the payment without the creditor's coming. If he would not, he cannot be said to have made the payment by way of fraudulent preference." (*b*)

(*k*) *McFarlane* v. *McDonald* (1874) 21 Grant 319.

(*l*) *Keays* v. *Brown* (1875) 22 Grant 1c.

(*a*) *Graham* v. *Candy* (1862) 3 F. & F. 206, per Erle, C.J.: *Davies* v. *Gillard* (1891) 21 Ont. Rep, 431: [rev'd 19 App. Rep. 432, but not on this point]: *Ivey* v. *Knox* (1885) 8 Ont. Rep. 635: *Ex parte Hall* (1883) 23 Ch. D. 701 Cotton L.J. p. 703: *Ex parte Reader* (1875) L.R. 20 Eq. 763: *Clemmow* v. *Converse* (1869) 16 Grant 547. A default judgment in an action by the debtor's father-in-law will not be pronounced collusive, as a matter of law, where there is evidence that the debtor kept hoping on to the last, and, until his goods were actually seized, never really believed that his father-in-law would proceed to extremities. *Ex parte Lancaster* (1883) 25 Ch. D. 311: The fact that the creditor is also the solicitor of the debtor makes no difference in a case of fraudulent preference, except that it gives greater facilities to the parties to disguise a voluntary transaction under the appearance of a demand and submission, and that it therefore requires to be watched with more cautious jealousy. *Johnson* v. *Fesenmeyer* (1858) DeG. & J. 13.

(*a*) *Van Casteel* v. *Booker* (1828) 2 Exch. 691.

(*b*) *Strachan* v. *Barton* (1856) 25 L.J. Exch. 182, 11 Exch. 647, per Alderson, B.: Compare *Kinnear* v. *Johnson* (1862) 2 F. & F. 753, Erle, C.J.: *Tomkins* v. *Saffery* (1877) 3 A.C. 213, per Ld. Blackburn (p. 235); *Bills* v. *Smith* (1865) 6 B. & S. 314: *Long* v. *Hancock* (1885) 12 Ont. App. 137.

Hence the fact that previous demands have been made is immaterial where the reasonable inference is that the payment finally made was not made in consequence of the pressure of that demand. (*c*) But an interval of six weeks between the demand for and the execution of a bill of sale will not render the transaction voluntary, where there has been no abandonment of the demand in the meantime. (*d*)

23. Concurrence of pressure with other moving causes, effect of.—But an assignment is none the less valid because the pressure of the creditor was not the sole moving cause of the transaction, and the debtor, in granting the preference, was influenced by mixed motives. A payment must be perfectly voluntary to be invalid; and such is not the case when other motives tend to bring about the payment besides the debtor's own wish. (*a*) Hence it is proper to instruct a jury that their verdict ought to be for the payee if the payment was made under the influence of the pressure and importunity of the defendant, and also with a desire to give him a preference in the event of a bankruptcy (*b*); and that, if the bankrupt, although contemplating bankruptcy, was pressed for and handed over the money in consequence of that pressure, there was no fraudulent preference, and that it would not be a fraudulent

---

(*c*) *Ex parte Halliday* (1873) 8 Ch. App. 283: S.P., *Ex parte Hall* (1882) 19 Ch. D. (C.A.) 580.

(*d*) *Ex parte McKenzie* (1873) 28 L.T.N.S. 486, per Mellish, L.J. Compare secs. 16 and 19 ante.

(*a*) *Edwards* v. *Glyn* (1859) 2 El. & El. 29: *Harman* v. *Fishar*, (1774) Cowp. 117, per Ld. Mansfield (p. 123.) "Unless it can be made clearly apparent that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment" cannot be impeached, even although it be obviously in favour of a creditor per Blackburn, C. J. B., in *Ex parte Blackburn* (1871) L. R. 12 Eq. 358, (quoted with approval by Mellish, L. J. in *Ex parte Topham* (1873) L. R. Ch. App. 614,) and in *McFarlane* v. *McDonald* (1874) 21 Grant 319: *Ex parte Hill* (1883) 23 C. D. (C.A.) 701, per Cotton, L. J. (p. 703). In this case Bagallay, L. J., thought that Mellish, L. J., if he meant (as noted above) to adopt the expressions of Blackburn, C. J. B. without qualification, had gone too far. The Act, he pointed out, did not say with the *sole* view, but with *a* view, which meant, he considered, that the substantial object or view must be the giving the creditor a preference, and that the mere fact that there may have been also some view of an advantage to be gained by the person who makes the preference does not prevent the application of the section. Cotton, L. J., doubted whether the Chief Judge had intended to lay any particular stress on the word "sole", but said that, in his own view, it was not necessary to shew that the debtor's sole motive was to give a preference to the creditor.

(*b*) *Brown* v. *Kempton* (1850) L. J. C. P. 169.

preference if he yielded to the joint motives of pressure and inclination. (*c*)

Where a loan, made for the specific purpose of tiding a debtor over a business crisis, does not avert bankruptcy, the return of the money is not a fraudulent preference, where the debtor in restoring it, acted partly from a desire to do what was honourable, and partly out of deference to the representations of one of the guarantors of the debt that it could not be used safely or honourably. (*d*)

24. Whether the debtor acted under pressure a question of fact—The question whether the preference was due to the bona fide pressure of the creditor or was accorded voluntarily by the insolvent is one of fact, and usually for the jury, (*a*) that is, if there is any doubt as to the real object of the parties. (*b*)

"If the act was spontaneous on the part of the debtor, and there are no circumstances to rebut the presumption which arises from the act having been purely voluntary on his part, the jury should be told to infer that the preference thus given was fraudulent and wrongful. But if there are circumstances by which the presumption may be rebutted, these circumstances, whatever they may be, are for the consideration of the jury, and cannot properly be withdrawn from them." (*c*)

The judge cannot state the degree of urgency which is required in any particular case. (*d*)

IV. *How far a conveyance of an insolvent debtor's whole property is valid. (See also sec. 16, ante).*

25. General rule applied in England—In England the rule is well settled that a transfer of the debtor's whole property (*a*)

(*c*) *Strachan* v. *Barton* (1856) 25 L. J. Exch. 182; 11 Exch 647.

(*d*) *Edwards* v. *Glyn* (1859) 2 El. & El. 29.

(*a*) *Johnson* v. *Fesenmeyer* (1850) 25 Beav. 88.

(*b*) *Ansell* v. *Bean* (1831) 8 Bing. 87; S. P. *Ex parte Taylor* (1886) 18 Q. B. D. (C. A.) 295; *Ex parte Craven* (1870) L. R. 8 Eq. 648; *Brayley* v. *Ellis* (1885) 9 Ont. App. 560; *Lang* v. *Hancock* (1885) 12 Ont. App. 37; *Cook* v. *Rogers* (1831) 7 Bing. 438; *Hale* v. *Alnutt* (1856) 18 C. B. 505; *Pennell* v. *Heading* (1862) 2 F. & F. 744, Erle C. J.: *Bank of Toronto* v. *McDougall* (1865) 15 U. C. C. P. 475.

(*c*) *Bills* v. *Smith* (1865) 6 B. & S. 314, per Cockburn C.J. (p. 321).

(*d*) *Strachan* v. *Barton* (1856) 11 Exch. 647.

(*a*) *Lindon* v. *Sharp* (1843) 6 M. & G. 895; *Goodricke* v. *Taylor* (1864) 2 De G.J. & S. 135; *Woodhouse* v. *Murray* (1867) L.R. 2 Q.B. 634; *Rust* v. *Cooper* (1777) Cowp. 629; *Alderson* v. *Temple* (1768) 4 Burr. 2235; *Young* v. *Fletcher* (1805) 3 H. & C. 732; *Newton* v. *Chandler* (1806) 7 East 138, following *Butcher* v. *East*, 1 Doug. 294; *Thornton* v. *Hargreaves* (1800) 7 East 544; *Ex parte Mackenzie* (1873) 28 L.T.N.S. 486; *Stanger* v. *Wilkins* (1854) 19 Beav. 626; *Ex parte Wright* (1876) 3 Ch. D. 70; *Ex parte Foxley*, L.R. 3 Ch. 515; *Smith* v. *Cannan* (1853) 2 El. & Bl. 35; *Ex parte Wensley* (1862) 1 De G.J. & S. 273; *Smith* v. *Timms* (1863) 1 H. & C. 849; *Johnson* v. *Fesenmeyer* (1858) 25 Beav. 88. See, however, *Ex parte Boyd* (1889) 6 Morrell's Bankr. Cas. 209.

or of the principal part of it (*b*) is not validated by proof that the creditor exercised pressure upon the debtor, unless there is also some equivalent for the assignment (*c*), as where there is an agreement for future advances to aid the debtor in carrying on his business (*d*), or where the object of the assignment is to release the debtor's property from a charge already on it by raising money to pay off the claims of creditors who are pressing for payment. (*e*) The theory to which this rule is usually referred is that such an assignment, as it incapacitates the debtor from carrying on his business, must necessarily have the effect of defeating and delaying the other creditors, and therefore amounts to an act of bankruptcy (*f*), or, at all events, must be followed by an immediate act of bankruptcy (*g*), and is, in that particular sense, fraudulent against the bankrupt laws. (*h*)

(*b*) *Compton* v. *Bedford* (1762) 1 W. Bl. 362; *Stanger* v. *William* (1854) 19 Beav. 626; *Smith* v. *Timms* (1863) 1 H. & C. 849.

(*c*) *Woodhouse* v. *Murray* (1867) L.R. 2 Q.B. 634.

(*d*) *Ex parte Foxley* (1868) L.R. 3 Ch. App. 515; *Mercer* v. *Peterson* (1884) 3 Exch. 104, disapproving dictum of Lord Campbell to the opposite effect in *Bittlestone* v. *Cook* (1853) 6 E. & B. 296; *Pennell* v. *Reynolds* (1862) 11 C.B.N.S. 709; *Martin* v. *Williams* (1869) 32 L.T.N.S. 350; *In re Colemere* (1865) L.R. 1 Ch. App. 128.

(*e*) *Whitmore* v. *Claridge* (1863) 31 L.J.Q.B. 144; 33 L.J.Q.B. 87.

(*f*) *Butcher* v. *Revett* (1779) 1 Doug. 295; *Worseley* v. *De Mattos* (1758) 1 Burr. 467; *Lomax* v. *Buxton* (1871) L.R. 6 C.P. 106; *Jones* v. *Harber* (1870) L.R. 6 Q.B. 77; *Young* v. *Fletcher* (1865) 3 H. & C. 732; *Woodhouse* v. *Murray* (1867) L.R. 2 Q.B. 634 (p. 641, per Mellor, J.); *Stewart* v. *Moody* (1835) 1 Cr. M. & R. 777; *Smith* v. *Timms* (1863) 1 H. & C. 849. "Acts of bankruptcy arising from fraudulent assignments are confined to acts of a fraudulent nature under the statute of Elizabeth, with an immediate object to defeat creditors; to such as are fraudulent under the Bankrupt Acts, being made with the object of preventing an equal distribution of the bankrupt's effects under his bankruptcy, which he knows must occur; and, lastly, to those where there is a transfer of property, which must necessarily in its results be known to the bankrupt to lead to the delay and disappointment of all the creditors, with the exception of that particular individual to whom the transfer is made. Such a transfer is also an act of bankruptcy, upon the principle that a man is bound to contemplate the necessary result of his own acts." *Young* v. *Waud* (1852, 8 Exch. 221, per Parke, B.) "The principle on which the cases have been decided is that, though there may be absence of fraud in fact, (that is, intentional fraud), yet when the effect of such a consequence is to put it entirely out of a man's power to go on with his business, and to meet his creditors, there he must be taken to have intended the consequence of what he has done; and though not guilty of intentional fraud, or, as we call it, moral fraud, yet he is guilty of fraud against the policy of the bankrupt law, which is that there should be an equal distribution among all the creditors." *Woodhouse* v. *Murray* (1867) L.R. 2 Q.B. 634, per Cockburn, C.J., p. 638.

(*g*) *Alderson* v. *Temple* (1768) 4 Burr. 2235; *Lindon* v. *Sharp* (1843) 6 M. & G. 895; *Lomax* v. *Buxton* (1871) L.R. 6 C.P. 106 (p. 112).

(*h*) *Rust* v. *Cooper* (1777) 2 Cowp. 629, per Ld. Mansfield (p. 632).

But in the present connection it is also important to note that the rule may also be rested on the more general principle that, as even the carrying into effect of a threat of process puts an insolvent in no worse situation than an actual transfer of goods so extensive as to necessitate the breaking up of his business, the reference may permissibly be drawn that, as the debtor will not redeem himself from any present difficulty by the Act making the transfer,—the true motive for such an act when really done under pressure,—he does not make the transfer by reason of the threat, and that it is a voluntary preference. (*i*)

26. Effect of Canadian cases—The English doctrine is fully accepted in New Brunswick (*a*) and in Manitoba. (*b*) The Ontario cases turning upon the Dominion Insolvent Act were also to a similar effect, (*c*) though it was also held that the intent to defeat and delay the other creditors is not a *necessary* inference from the fact that the trader's whole property was covered by the assignment. (*d*)

But, under the Rev. Stat. of Ontario 124, sec. 2, it has been held by the Court of Appeal, in a short opinion, in which no reasons are stated, that where pressure is established, it is immaterial that the conveyance was of the whole of the debtor's property. (*e*) In an earlier case, (*f*) decided under a similar provision in Rev. Stat. Ont. 118, sec. 2, Ferguson, J., expressed the opinion that the cases cited by counsel to the point that pressure could not validate a transfer of the whole of a debtor's property, only decided, so far as they could by possibility be considered to have any application to the case, whether an act of bankruptcy had been committed, as defined by the English Bankruptcy Acts, and that they really had not any application. This precise aspect

(*i*) *Thornton* v. *Hargreaves* (1806) 7 East 544.

(*a*) *McLeod* v. *Wright* (1877) 17 New Br. (1 P. & D.) 68.

(*b*) *Roe* v. *Massey Mfg. Co.* (1892) 8 Man. L.R. 126. In *Stephens* v. *McArthur* (1891) 19 S.C.R. 446, a case under the Manitoba Act, the security upheld covered *all* the debtor's effects, but this circumstance was not specially commented upon, in the opinions of the judges.

(*c*) *Davidson* v. *McInnes* (1875) 22 Grant 217; *McWhirter* v. *Royal Canadian Bank* (1870) 17 Grant 480; *In re Hurst* (1876) 6 P.R. (Ont.) 329: *Payne* v. *Hendry* (1873) 20 Grant 142.

(*d*) *Archibald* v. *Halden* (1871) 31 U.C.Q.B. 295.

(*e*) *Davies* v. *Gillard* (1891) 19 Ont. App. 432, rev'g S.C. 21 Ont. Rep. 431.

(*f*) *Brayley* v. *Ellis* (1882) 1 Ont. Rep. 119: 9 Ont. App. 532.

of the question was not adverted to by the Court of Appeal in this case; but if the theory of Ferguson, J. is the one on which the ruling in *Davies* v. *Gillard* was based, the present writer ventures to think that its doctrine rests upon a very insufficient foundation. The motive and intent of the debtor is, after all, the ultimate question to be decided in cases of this type, and under the principle stated in *Thornton* v. *Hargreaves*, sup., a conveyance of so much of the debtor's property as to disable him from continuing his business cannot, upon any reasonable view of the meaning of the words, be regarded in any other light than as betokening an "intent to defeat, delay, etc., his creditors." From this standpoint it is wholly immaterial that the English cases were decided with reference to the fact that such a conveyance amounts to an act of bankruptcy. A transaction may entail different legal consequences, according as it is viewed with more especial reference to one or other of several principles equally germane to the circumstances presented. The mere fact that the Ontario statute invalidates transfers made with an intent to defeat, etc, creditors by means of a single, direct statement, while the English statute reaches the same goal by the two stages of a provision declaring such transfers to be acts of bankruptcy and of a provision that, after such an act, the assets of the debtor vest in the official who is to hold them for the benefit of the creditors at large, does not, it seems to us, constitute an adequate reason for holding that, in respect to a question of this kind, the two statutes should receive a different construction. (*g*)

27. Qualifications of the general rule—Under any circumstances in which the reasons of the rule cease to be applicable the operation of the rule itself is suspended. Thus an assignment of a trader's effects, under pressure, is not an act of bankruptcy where it is plain that the object of the debtor was to stave off bankruptcy and to secure money to carry on his business, (*a*) or where it does

---

(*g*) In *Long* v. *Hancock* (1884) 12 Ont. App. 137; 12 S. C. R. 532, the mortgage which was attacked covered the whole of an embarrassed company's assets, but the differentiating effect of this circumstance was not considered directly either by the Ontario Court of Appeal or by the Supreme Court, the rights of the parties being made to turn upon the question whether the conveyance was *designedly* fraudulent or made with the bona fide purpose of procuring funds to keep the business going.

(*a*) *Woodhouse* v. *Murray* (1867) L.R. 2 Q.B. 634, per Cockburn, C.J. (p. 639).

not actually produce an incapacity for carrying on business, as where it leaves the debtor enough property to buy other stock. (*b*)

Usually, of course, the considerations upon which a conveyance of the debtor's whole property is, as a general rule, deemed to be invalid, have no application where only a portion is conveyed. (*c*)

V. *Statutes with reference to which the doctrine of pressure has been discussed.*

In the following subdivision we shall state succintly the substance of the statutory provisions with reference to which the doctrine of pressure has been discussed and the construction placed upon them, so far as it has a bearing on the subject matter of this article.

28. **English Bankruptcy Acts preceding the Statute of 1869**—It will be sufficient for our present purpose to note that the English Bankruptcy Acts which preceded the general law of 1869 contained no provision expressly relating to fraudulent preferences, and that nearly all the cases on which the doctrine of pressure was discussed turned upon the effect of the provision (first enacted in 1 Jac. 1, c. 15, sec. 2, and subsequently incorporated in 6 Geo. 4, c. 16, sec. 3, and in 12 & 13 Vict., c. 106, sec. 67), that a fraudulent conveyance, &c., "with intent to defeat or delay creditors" was an act of bankruptcy.

29. **English Insolvent Debtor's Act (7 Geo. 4, c. 57, sec. 32)**—By this provision assignments were avoided, if made within three months before imprisonment, if the debtor "being in insolvent circumstances should '*voluntarily* convey' any property for the benefit of any particular creditor."

It was held that the word "voluntary," denoted either an assignment made without such valuable consideration as is sufficient to induce a party acting really and bona fide under the influence of such consideration, or an assignment made in favour of a particular

---

(*b*) *Carr* v. *Burdiss* (1834) 1 Cr. M. & R. 43; *Young* v. *Waud* (1852) 8 Exch. 221.

(*c*) *Hooper* v. *Smith* (1763) 1 W. Bl. 441 [a half]; *Hale* v. *Allnutt* (1856) 18 C.B. 505 [a third]; *Smith* v. *Timms* (1863) 1 H. & C. 849.

creditor spontaneously, and without any pressure on his part to obtain it." (*a*)

30. English Bankruptcy Acts of 1869, sec. 92, and 1883, sec. 43: Irish Act of 1872, sec. 53 (all practically identical)—These statutes, besides re-enacting in sec. 2 (*a*) provisions of the earlier statutes defining acts of bankruptcy, introduced the entirely new provision that all conveyances, payments, &c., made within a period of three months before bankruptcy, if made "with a view to giving the creditor a preference over other creditors should be deemed fraudulent and void as against the trustee appointed under the Statute."

The bearing of this statute upon one of the two ingredients of a fraudulent preference as defined by Lord Mansfield (sec. 1 *ante*) is sufficiently obvious. It altered the old rule as to contemplation of bankruptcy into a rule which exposed the payment to be impeached for a period so long as three months. (*b*) So also it was soon decided that the saving clause in favour of purchasers, &c., in good faith had changed the old law to the extent that the persons therein designated are entitled to retain the money or property transferred, even though the transfer was made without any pressure. (*c*) But as regards the effect of the clause in relation to the other of those ingredients the views of judges exhibit not a little vacillation and inconsistency (*d*) and even now it can scarcely be said that the law has been restored to anything like the same precision which it had attained before the legislature intervened.

Soon after the Act came into force, it was laid down categorically, that so far as the matter of voluntariness is concerned the statute

---

(*a*) *Ansell* v. *Bean* (1871) 8 Bing. 87 per Tindal, C.J. (p. 91). (In this case the application of pressure by the creditor was held to negative the theory that the conveyance was voluntary in the second of these senses.) Other cases decided with special reference to this statute are the following: *Boydell* v. *Gillett* (1835) 2 Cr. M. & R. 579: *Troup* v. *Brooks* (1830) 4 C. & P. 320: *Reynard* v. *Robinson* (1833) 9 Bing. 717: *Mogg* v. *Baker* (1838) 4 M. & W. 348: *Van Casteel* v. *Booker* (1848) 2 Exch. 691.

(*a*) In regard to the effect of this section the following remark of James, L.J. may be quoted: "A mere voluntary transfer, impeachable only on the ground that it is a preference of a particular creditor, has never been held to be in itself a fraud, or an act of bankruptcy. It may be impeached on the ground that it is voluntary, but it is impossible to hold that a mere voluntary transfer is of itself an act of fraud." *Ex parte Stubbins* (1881) 17 Ch. D. 58 (p. 68).

(*b*) *Butcher* v. *Stead* (1875) L.R. 7 H.L. 839, per Ld. Cairns (p. 847).

(*c*) *Butcher* v. *Stead* (1875) L.R. 7 H.L. 839, per Ld. Cairns (p. 846).

(*d*) The clause is justly described by an Irish judge as a "singularly constructed" one. In *re Boyd* (1885) 15 L.R. Ir. 521 (p. 558).

has not altered the law as it stood before. (*e*) And this view was adopted by Lord Cairns: "The act appears to have left the quesquestion of pressure as it stood under the old law, and indeed the use of the word 'preference,' implying an act of free will, would, of itself, make it necessary to consider whether pressure had or had not been used." (*f*) In another case Mellish, L.J., was inclined to think that, if all the authorities were examined, "voluntarily," in the technical sense which it had under the old law meant practically the same thing as "with the view of," &c. (*g*)

But in the important case of *Ex parte Griffith*, (*h*) the Court of Appeal declared its dissatisfaction with the method of exposition previously adopted, and while not denying that, under appropriate circumstances, the doctrine of pressure was applicable after, as before, the passage of the statute, strongly deprecated "the metaphysical exploration of the motives of people" upon which the courts had embarked, and declared that it was, as Sir George Jessel expressed it, the duty of judges to "look to the intention of the Act, and not entangle themselves in an inquiry as to the precise views and intentions of the parties in order to see what was the motive of the transaction, and what the law was before the statute." The learned judge said that, sitting as a jury, he was of opinion that the mind of the employé was "influenced, not by the demand of Griffith for a preference, but by the desire to accede to the demand and to give him a preference." The words of Lindley, L.J., are even stronger: "I emphatically protest against being led away from the words of the section by any argument that the standard which the Legislature has laid down is equivalent to the standard of the old law. It may be so, but the language is different, and our duty is to construe that language."

The language of the judges in this case left it very uncertain how far they considered the law to have been altered by the statute but this uncertainty was to a great extent removed by another

---

(*e*) *Ex parte Craven* (1870) L.R. 10 Eq. 648.

(*f*) *Butcher* v. *Stead* (1875) L.R. 7 H.L. 839, p. 849. A like construction has been placed on the corresponding provision of the Irish Act: *In re Boyd* (1885) 15 L.R. Ir. 521. Porter M.R. also considered that the word "prefer" denoted "to place in a position of relative advantage," and in no way involves a consideration of motive. But quœre, see sec. 35 post.

(*g*) *Ex parte Bolland* (1871) L.R. 7 Ch. App. 24.

(*h*) (1883) 23 Ch. D. (C.A.) 69. (The facts are stated in sec. 4 ante.)

decision rendered soon afterwards, in which it was distinctly laid down that the effect of the legislation was to consolidate or codify the law relating to fraudulent preference. (*i*) Construing the words, "with a view," etc, Bowen, L.J., said:

"There are only three conceivable meanings which these words can have. (1) They may conceivably mean the case where the debtor has present to his mind as one view, among others, the giving a preference to the particular creditor. I do not think that is the true interpretation of the words. (2) Another possible construction of the words is to read them as equivalent to 'with the view'—the real, effectual, substantial view—of giving a preference to the creditor, the word *a* being equivalent to *the*. I think that is the correct interpretation. (3) The other conceivable construction is to treat them as equivalent to 'with the sole view.' . . . Is the expression 'with a view' convertible into 'with the sole view'? My answer is that the latter words are not in the Act, and I do not wish to lay down that they mean the same thing as the words which are in it."

The position of the Court of Appeal was still more precisely defined in *Ex parte Taylor*, (*j*) where it refused to accept the position that, "on the true construction of this section, if a debtor who is unable to pay his debts as they become due, out of his own money makes a payment in favour of one creditor, that of itself shews that he must have intended to prefer the creditor, and that court ought not to take into account any of the subsidiary matters which they were formerly in the habit of taking into account in determining whether a transaction was a fraudulent preference." Lord Esher said:

"The doctrine of fraudulent preference grew up from the decisions of judges, and the Act was intended to codify these decisions, and yet it is argued that they have been all swept away, and that we ought now to look at nothing but the words of sec. 48, and not make any inquiry into the actual intention of the bankrupt in making the payment in question. . . . . What is meant by 'with a view'? It is the same thing as 'with an intent.' The moment you come to this, that you have to perform the metaphysical operation of finding out what a man's intent was, surely then you ought not to throw away all the tests which have been adopted by great and careful judges for the purpose of doing this. You cannot throw out of account the fact that a man was threatened with something which he would not at all like in order to see whether he did not act with the dominant view of getting rid of that pressure."

(*i*) *Ex parte Hill* (1883) 23 Ch. D. 701, per Bowen, L.J.

(*j*) (1886) 18 Q.B.D. 295.

The exposition of the statute, therefore, which is now accepted is that, "to ascertain whether there has been a fraudulent preference, it is necessary to consider what the dominant or real motive of the person making the preference was; whether it was to defraud some creditors or for some other motive." (*k*) The older decisions are considered to be useful as guides, but are to be regarded so far only as they are in accordance with the Act itself, and throw light upon it. (*l*) One important respect in which those decisions are apparently of no authority is that, contrary to the rule prevailing before the passage of the Act, (see especially sec. 25, *ante*), the actual intention of the debtor is the material point to be settled, and that the doctrine that a man must be taken to have intended the natural consequences of his acts does not apply to the construction of the clause upon which we have been commenting. (*m*)

31. **Canada—Dominion Insolvent Act**—Several clauses of these statutes have been considered in connection with the doctrine of pressure. Sec. 3 of the Act of 1864 (equivalent to sec. 86 of the Act of 1869, and sec. 130 of the Act of 1875) ran as follows: "All gratuitous contracts or conveyances . . . made by a debtor afterwards becoming insolvent, . . . within three months next preceding the date of the assignment, . . . and all contracts by which creditors are injured, obstructed or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability, or having probably cause for believing such inability to exist, or having such inability as public and notorious, are presumed to be made with intent to defraud his creditors."

The presumption of a fraudulent intent under the section was held to be rebutted by proof of pressure. (*a*)

Sec. 8, sub-s. 3 of the Act of 1864 (equivalent to sec. 88 of the Act of 1869, and sec. 132 of the Act of 1875) avoided contracts or conveyances with intent fraudulently to impede, obstruct or delay creditors in their remedies, or with intent to defraud any of them, or which had the effect of impeding, etc., or of injuring them.

(*k*) *New, Prance, and Gerrard's Trustee* v. *Hunting* (C.A. 1897) 2 Q.B. 270, per Smith, L.J. See also the remarks of Baggallay, in *Ex parte Hill* (1883) 23 Ch. D. 701, and of Porter, M.R., *In re Boyd* (1885) 15 L.R. Ir. 521 (p. 548).

(*l*) *Ex parte Griffith* (1883) 23 Ch. D. (C.A.) 69.

(*m*) *New, Prance, and Gerrard's Trustee* v. *Hunting* [1897] 2 Q. B. (C. A.) 27. What the relation of this doctrine may be to the principles discussed in sec. 25 is an interesting question which has yet to be considered.

(*a*) *McFarlane* v. *McDonald*, 21 Grant Ch. 319; *McWhirter* v. *Royal Can. Bk.* (1870) 17 Grant Ch. 480; *McWhirter* v. *Thorne* (1869) 19 U.C.C.P. 303.

Under this section, also, proof of pressure was held to be admissible to negative fraudulent intent. (*b*)

Sec. 8, sub-s. 4 of the Act of 1864 (equivalent to sec. 89 of the Act of 1869, and sec. 133 of the Act of 1875) made null and void transfers of property by any person, "in contemplation of insolvency" whereby the creditor "obtains an unjust preference over the other creditors."

The phrase, "in contemplation of insolvency," was interpreted to mean that the Act assailed must be done with the intent of defeating the general distribution of effects which is provided for by the Act (*c*).

It was held in several cases that the presumption, as declared by this section, was rebuttable by proof of pressure. (*d*)

A different construction, however, commended itself to the Court of Appeal in *Davidson* v. *Ross* (*e*) their decision being based upon the fact that the legislature had omitted all reference to the intent of the debtor and simply declared that the transfer should be void if the effect was to give the transferee an unjust preference. "The object of the law," said Patterson, J., "is to make it the duty of a trader who, from the knowledge which he has of his own affairs or the intentions of his creditors, has reason to apprehend that proceedings under the Insolvent Act will be taken against him, or that he may have to resort to that Act for relief, to do nothing which will prejudice the ratable distribution of his assets, by giving one creditor a preference over another, and if, under such circumstances, he gives a preference, he does so in contemplation of insolvency, whether he does so from a desire to favour the preferred creditor, or only because that creditor has succeeded by urgency in overcoming his reluctance to give the preference" (p. 69).

(*b*) *Newton* v. *Ontario Bank* (1868) 15 Grant 283; *Roe* v. *Smith* (1868) 15 Grant 344; *Clemmow* v. *Converse* (1869) 16 Grant 547; *Archibald* v. *Haldan* (1871) 31 U.C.Q.B. 279.

(*c*) *McWhirter* v. *Thorne* (1896) 19 U.C.C.P. 303. For a case in which the evidence was held to negative the inference that the debtor made the transfer impeached "in contemplation of insolvency," see *Patterson* v. *Kingsley* (1878) 25 Grant 425.

(*d*) *Allan* v. *Clarkson* (1870) 17 Grant 570; *Campbell* v. *Barrie* (1871) 31 U.C.Q.B. 279; *In re Hurst* (1876) 6 P.R. 329; *Keays* v. *Brown* (1875) 22 Grant 10. But in the last cited case, and in *Davidson* v. *McInnes* (1875) 32 Grant 217, Vice-Chancellor Blake regretted that, under the authorities, the doctrine of pressure was applicable under this section, as it tended to bring about results which the statute seemed to be intended to prevent.

(*e*) (1876) 24 Grant 22.

A similar conclusion was arrived at in New Brunswick. (*f*)

In *McCrae* v. *White* (*g*) Strong, J., declared that he could not agree with the views of the judges of the Ontario Court of Appeal, saying that, leaving the earlier authorities out of account, the construction placed by them upon the section was inconsistent with its language, inasmuch as a creditor who obtained payment as the direct result of the pressure to which he subjected his debtor could not be regarded as having obtained an "unjust" preference. The soundness of these views was also doubted by Gwynne, J., in the same case. Moreover it is difficult to see how the decision of the Priv. Council (referred to in sec. 35 post) upon words of a similar tenor in the Queensland Act can be reconciled with the theory of the Ontario Court of Appeal. Upon the whole, therefore, it would seem to be quite as likely as not that, if the Insolvency Act had remained in force, *Davidson* v. *Ross* would, sooner or later, have been overruled.

32. **Ontario Assignments Acts**—Secs. 1 and 2 of the Assignment Act of Ontario, the only ones with which we are concerned in this article, represent, with some alterations, the statute known as the Indigent Debtors' Act of Upper Canada, (22 Vict. c. 96, Consol. Stat. U. C. c. 26, secs. 17, 18.) The first of these sections makes null and void a confession of judgment etc. by an insolvent given voluntarily or by collusion with a creditor, with intent to defeat or delay his creditors or give one or more of them a preference. This provision has been incorporated without change in Rev. Stat. Ont., 1877, c. 118, sec. 14, in Rev. Stat. Ont. 1887, c. 124, sec. 1, and in Rev. Stat. Ont. 1897, c. 147, s. 1.

Under this section a cognovit is invalid, though obtained under threat of proceedings, where no part of the creditor's claim was due at the time of demand, and both parties knew that the state of the debtor was financially hopeless. The pressure under such circumstances resolves itself into this: that the creditor suggested an evasion of the law which would enable him to obtain priority and preference over the other creditors, and the debtor acquiesced in and adopted that suggestion. There is, therefore, a joint act of such a character as to come within the term collusive. *Meriden Silver Co.* v. *Lee* (1883) 2 Ont. Rep. 451.

(*f*) *McLeod* v. *Wright* (1877) 17 New Brunsw. (1 P & D) 68, per Allen, C.J. and Weldon, J.; Wetmore, J. diss.

(*g*) (1883) 9 S.C.R. 22.

The words "voluntarily or collusively" should be read in the alternative, and a cognovit collusively given, is void, though pressure was used. (*a*)

Sec. 18 of the Indigent Debtors' Act made null and void, as against creditors generally any gift, conveyance, etc., with intent to defeat or delay his creditors, or give one or more of them a preference. This section was incorporated unaltered in Ont. Rev. Stat. 1877, c. 118, sec. 2.

In the earlier cases decided under this section the presumption of fraudulent intent was, without any serious controversy, held to be rebutted by proof of pressure. (*b*)

But in *Brayley* v. *Ellis* (*c*) a case decided in 1884, the influence of *ex parte Griffith* and *ex parte Hill* in the preceding year, (sec. 30 *ante*), made itself felt, and the Ontario Court of Appeal was equally divided on the point, Spragge, C.J.O., and Burton, J.A., holding that evidence of pressure was admissible as bearing on the intent of the debtor, while Patterson and Morrison, J.J.A., took the other view, misunderstanding, as the later cases conclusively shew, the real significance of the utterances of the English Court of Appeal. (*d*) The arguments of Spragge, C.J.O., at p. 577 of his opinion, seem to us conclusive that the former construction of the statute is the correct one.

In *Long* v. *Hancock* (*e*), the Court of Appeal was still divided in opinion on the subject.

But when this case came before the Supreme Court (*g*) the judges all reasoned upon the assumption that the doctrine of pressure was applicable under the statute, and one of them, Gwynne, J., expressed an emphatic disapproval of the views of Patterson, J.A., upon the subject.

In the Ontario Statute of 1885 (c. 26, s. 2) the words "or which have such effect" were added after "preference," and the section so amended appears in Rev. Stat. Ont. c. 124, sec. 2.

(*a*) *Martin* v. *McAlpin* (1883) 8 Ont. App. 675, rev'g S.C. 3, Ont. Rep. 499. Compare sec. 33 post.

(*b*) *Clemmow* v. *Converse* (1869) 16 Grant 547; *Bank of Toronto* v. *McDougall* (1865) 15 U.C.C.P. 475; *Totten* v. *Bowen* (1882) 8 Ont. App. 602; *Slater* v. *Oliver* (1882) 7 Ont. Rep. 158.

(*c*) (1884) 9 Ont. App. 565.

(*d*) (1884) 9 Ont. App. 565.

(*e*) (1884) 12 Ont. App. 532.

(*g*) (1885) 12 S.C.R. 137.

In one case in the Queen's Bench Division Armour, J., held that, in construing this Act, a court ought to look only at the effect the assignment impugned had upon the other creditors, and disregard any such consideration as that the assignment was made in good faith or through pressure, &c. (*h*) But this theory did not obtain a footing in the higher courts, which continued to hold that the entrance of a wrongful intent rebuttable by proof of bona fide demand. (*i*)

The Ontario Statute, 54 Vict. ch. 20, omitted the amendment added in the Act of 1885 substituted for sec. 2, four distinct provisions. The general effect of sub-secs. 1 and 2 was to avoid transfers by an embarrassed debtor with the intent to "defeat, delay," &c., his creditors, or with the intent to give the transferee an "unjust preference." It was also declared (sub-secs. 3 and 4) that any transaction "having the effect of giving the transferee a preference should, if entered into sixty days before an action is brought to impeach it, or an assignment is made for the benefit of the debtor's creditors, be 'presumed' to have been made with the intent" to defeat, &c., and "to be an unjust preference, whether the same was made voluntarily or under pressure."

Under these provisions it was soon decided without difficulty that, where a transfer of goods was made more than sixty days before it is impeached as fraudulent, or before an assignment for the benefit of creditors, the doctrine of pressure may still be invoked in favour of the transferee. (*j*)

In regard to the nature of the presumption referred to in sub-secs. 3 and 4, the view of the majority of the Court of Appeal is that it is rebuttable, (*k*) but not by evidence which merely goes to prove that the debtor acted under pressure. (*l*) Proof

(*h*) *River Stave Co.* v. *Sill* (1886) 12 Ont Rep. 557, per Armour, J.

(*i*) *Gibbons* v. *McDonald* (1887) 18 Ont. App. 159, aff'g 19 Ont. Rep. 290, and aff'd in 20 S.C.R. 587: *The Molson's Bank* v. *Halter* (1890) 18 S.C.R. 88. The latter case declared that the words "or which have such effect" refer only to the preceding clause, and not to the provision respecting the "defeating, delaying or prejudicing creditors" (compare secs. 31 and 35).

(*j*) *Beattie* v. *Wenger* (1897) 24 Ont. App. 72.

(*k*) *Lawson* v. *McGeogh* (1893) 20 Ont. App. 470.

(*l*) *Webster* v. *Crickmore* (1898) 25 Ont. App. 97. In this case Moss, J.A., (with whom Osler and McLennan, J.J.A., agreed) said. "The object of the Legislature in enacting the amendments was to abolish the application of the doctrine of pressure in support of any transaction having the effect of a preference made within sixty days before an action to impeach it, but to leave the law untouched as regards transactions not coming within the sixty days' limit." . . . . "There is, in effect, a declaration that the same presumption shall be made in the case of a transaction under pressure as in the case of a transaction shewn to be the outcome of the voluntary or spontaneous act of the debtor." Burton, C.J.O., held that the presumption was rebuttable by evidence of pressure, thereby qualifying what he was reported to have said in *Lawson* v. *McGeogh*, *supra*.

that the pressure was applied within the sixty days to secure the performance of a contract to give security, which was entered into before the sixty days began to run, will, upon the general principle explained in sec. 16 ante, be effectual to validate an assignment,(*m*) except where the giving of the security was postponed under circumstances from which an intent to defeat the operation of the statute may be inferred. (*n*)

In consequence of the decision in *Lawson* v. *McGeogh*, a final alteration was made in the Act, and in the Rev. Stat. Ont. of 1897, c. 147, sec. 2, by the insertion of the words "prima facie" after "presumed."

The effect of this change has not yet been discussed in the courts. Apparently it leaves untouched the rule enunciated in *Webster* v. *Crickmore*, sup.; but, considering that the doctrine of the Court of Appeal was not established by a unanimous judgment, and that it is still uncertain what view the Supreme Court may take of the matter, one cannot but regret that the last revision was not so worded as to preclude the possibility of any future controversy regarding the intention of the Legislature.

33. British Columbia Assignments Act—This Act (Consol. Stat. c. 51) is virtually identical with that of Ontario as it stood in Rev. Stat. Ont. 1877, c. 118.

The word "collusion" in sec. 1 means "agreement, or acting in concert," and, as the provision in the alternative, pressure is no answer to a charge of fraudulent preference, if collusion is proved. (*a*)

Under sec. 2, the doctrine of pressure is applicable. (*b*)

34. Manitoba Assignments Act—This Act follows very clearly that of Ontario as it stood in Rev. Stat. Ont., c. 124.

According to Strong, J., in *Stephens* v. *McArthur*(*a*), the words "which has such effect" are to be construed as applying to a case

---

(*m*) See Osler J. A. in *Lawson* v. *McGeogh* (1893) 20 Ont. App. 464 (p. 471).

(*n*) *Beese* v. *Knox* (1897) 24 Ont. App. 203.

(*a*) *Edison, &c., Co.* v. *Westminster, &c., Co.* (1896) A.C. 193, reversing on this special ground 3 B.C. 460, and holding that an agreement between the debtor and creditor, the effect of which was that the bank should have a judgment, and that the judgment should have a priority, so that the creditor might be in a position to protect the company and keep it going, invalidated confession of judgment.

(*b*) *Doll* v. *Hart* (1890) 2 B. C. 32: *Cascaden* v. *McIntosh* (1892) 2 B. C. 268: *Brown* v. *Jowett* (1895) 4 B. C. 44.

(*a*) (1891) 19 S.C.R. 446.

in which that has been done indirectly, which, if it had been done directly, would have been a preference within the statute. In this case, also, the majority of the Court held "irresistible" the argument that, "if it is once demonstrated that the word preference means *ex vi termini* a voluntary preference, the class of deeds, acts, etc., which are to be avoided as having the effect of a preference must also be restricted to such as are spontaneous acts or deeds of the debtor." It was considered that, if it had been the intention of the Legislature to make such an alteration of the law as to avoid all transactions which might result in giving precedence to active and diligent creditors, who should, by pressing their claims, obtain priority over others, such a change would have been enunciated in clear and explicit language. Patterson, J., adhering to the opinion he had expressed in *Brayley* v. *Ellis*, see sec. 33, held that "preference" was merely the equivalent of "priority," and did not involve the notion of spontaneity.

35. Other Colonial Insolvency Acts—The doctrine of pressure is applicable under the Queensland Insolvency Act, sec. 8, avoiding all alienations made within six months before insolvency by a debtor in contemplation of insolvency, "and having the effect of preferring any then existing creditor to another." By "preferring" it is held that a "fraudulent preferring" is meant. (*a*) Under the Jamaica statute, however, (11 Vict., c. 28, sec. 67,) which invalidates transfers made within six months of insolvency, and contains no provision whatever respecting preferences, there is presumably no room for the application of the doctrine of pressure. (*b*)

Sec. 71 of the Victoria Insolvency statute of 1871 is a copy of sec. 92 of the English Bankruptcy Act of 1869, and, as regards the applicability of the doctrine of pressure, has been construed in the same manner. (*c*)

36. United States Bankrupt Law of 1867—Sec. 35 of this Act, (the whole of which was repealed in 1874), invalidated conveyances made with intent to give a preference to any creditor, and transactions calculated to

(*a*) *Bank of Australasia* v. *Harris* (1861) 15 Moore P.C.C. 97.

(*b*) See *Nunes* v. *Carter* (1866) L.R. 1 P.C. 348.

(*c*) *In re Schlieff* (1880) 6 Vict. L.R. (1 P. & M.) 51 : *Michael* v. *Oldfield* (1887) 13 Vict. L.R. 793 : *Mackay* v. *Jellie* (1890) 17 Vict. L.R. 91 : *Davey* v. *Walker* (1892) 18 Vict. L.R. 175.

defeat the operation of the Act, wherever the creditor had reasonable cause for believing that the debtor was insolvent. (Compare the section of the Dominion Insolvent Act, referred to at the beginning of sec. 31, ante.)

Under this section it was uniformly held that the doctrine of pressure was not applicable. (*a*)

The decisions upon the Bankrupt Act of 1800 were the same on this point as those of the English Courts. (*b*)

37. Concluding remarks—Upon the whole it seems extremely doubtful whether the doctrine of pressure is not productive of more harm than good. The theory upon which the law recognizes it, viz., that the active, diligent creditor who is prompt to secure himself the moment his debtor falls into difficulties is a highly meritorious personage, is certainly not beyond dispute. Such a man, by pushing a debtor to the wall, frequently converts what might have proved to be a merely temporary embarrassment into irretrievable insolvency, and to that extent impairs the effective wealth of the community. And even where the debtor is so deeply involved that there is no reasonable hope of his ever fully satisfying the claims against him, it seems quite contrary to the plainest principles of natural justice that one creditor should be allowed to aggrandize himself at the expense of the others merely because he happens to be possessed of more observant faculties, or, it may be, a harder heart. The unfairness and unreasonableness of the existing rule is also set in a strong light by the fact that the ability of a creditor to safeguard his interests by importuning his debtor depends very largely upon mere accidents of locality. A creditor who lives in the same town as his debtor is in a much more favourable situation for discerning the signs of approaching failure than one who lives at a distance. Upon foreign creditors, in particular, the doctrine of pressure weighs very hardly, and, in view of the wide-reaching operations of modern commerce, it is scarcely too much to say that this fact alone is a sufficient reason for its total abolition by the Legislature.

(*a*) *Clarion Bank* v. *Jones* (1870) 21 Wall. 325; *Rison* v. *Knapp* (1870) 1 Dill. 186, and authorities cited in note.

(*b*) See *Phœnix* v. *Dey* (1809) 5 Johns. (N. Y.) 412.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

TRADE UNION—PICKETING—"WATCHING AND BESETTING"—"WRONGFULLY AND WITHOUT LAWFUL AUTHORITY"—INJUNCTION—CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875 (38 & 39 VICT., C. 86), SS. 3, 7—(CR. CODE S. 523 (*f*).

Lyons v. *Wilkins* (1899) 1 Ch. 255, is an old friend, having been previously reported on the appeal from the granting of an interlocutory injunction (1896) 1 Ch. 811, (see ante vol. 33, p. 546). The action was brought by the plaintiffs to restrain the defendants, members of a trades union, from watching and besetting the works of the plaintiffs, and also the works of a third person who worked for the plaintiffs, for the purpose of persuading workpeople, and such third person, to abstain from working for the plaintiffs. The action was tried in November, 1897, before Byrne, J., who postponed his decision until the judgment of the House of Lords in the celebrated case of *Allen* v. *Flood* (1898) A.C. 1, was given, when, notwithstanding that decision, he gave judgment in favour of the plaintiffs, making the injun...on perpetual, restraining the defendants from watching and besetting the plaintiff's premises for the purpose of persuading, or otherwise preventing, persons working for them, or for any purpose except merely to obtain or communicate information; and also from watching or besetting the premises of the third person for the purpose of persuading or preventing him from working for the plaintiffs, or for any purpose except merely to obtain or communicate information. This judgment the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.,) affirmed. It was argued, on the appeal, that the "watching and besetting" were not "wrongful and without lawful authority," and were, therefore, not illegal, but this objection was overruled, though the members of the court differ slightly in their reasons for arriving at their conclusion. A point was also made that the watching and besetting of the third person's premises gave the plaintiffs no right of action, but the Court of Appeal were agreed that a person in the position of the third person was as much within the Act as the employer himself.

RESTRAINT OF TRADE—REASONABLENESS OF COVENANT—PUBLIC POLICY.

Underwood v. *Barker* (1899) 1 Ch. 300, is an action brought to restrain the breach of a covenant in restraint of trade, whereby the defendant warranted that he would not, for the space of twelve months after leaving or being dismissed from the plaintiffs' employment, enter the service of anyone carrying on a business of the same nature as the plaintiffs' in the United Kingdom, France, Belgium, Holland, or Canada. The defendant having quitted the plaintiffs' employment, within twelve months entered the service of a firm in England carrying on a like business to that of the plaintiffs. The majority of the Court of Appeal (Lindley, M.R., and Rigby, L.J.,) thought the covenant was valid and not contrary to public policy, so far as England was concerned, and affirmed the interlocutory injunction granted by Kekewich, J. Williams, L.J., however, dissented, being of opinion that the covenant was unreasonable and invalid, and ought not to be enforced by injunction. The majority of the court lay it down that a covenant of this kind which is not wider than is reasonably required for the protection of the covenantee, will not be held void on the ground of its being contrary to public policy, unless some specific ground therefor is made out; whereas, Williams, L.J., maintained that the old rule is still in force that all covenants in restraint of trade are prima facie (if there is nothing more) contrary to public policy and void, and that in considering the legal effect of such covenants, their effect as a matter of public policy must be taken into account, in addition to the question of their reasonableness for the protection of the covenantee. Notwithstanding Lord Justice Williams to the contrary, the modern cases seem to have made considerable inroads upon the ancient doctrine.

MORTGAGE—SUBJECT TO LEASE—SURRENDER OF LEASE TO MORTGAGOR—GOODWILL OF BUSINESS—LOCKE KING'S ACT (17 & 18 VICT. C. 113) — (R.S.O. C. 128, S. 37.)

In re Bennett, Clarke v. *White* (1899) 1 Ch. 316, was a summary application to the court (North, J.,) on a point arising in the administration of an estate. The testator had in 1871 mortgaged a public house in fee to secure £1,507. The mortgagor was then the owner in fee of the premises subject to a lease for 31 years, and as underlessee he was at the time of the mortgage occuping the premises and carrying on business as a licensed victualler. The

good-will was not expressly included in the mortgage. On Jan. 24, 1873, the original lease was surrendered to the mortgagor, and he continued to carry on the business on the premises until his death in Nov., 1873, and it was thereafter carried on by the tenant for life under his will till 1897. The house and good-will were then sold by the trustee of his will for £11,500, of which £2,617 was fixed as the value of the good-will. The mortgagees were never in possession. The mortgage debt was paid off, and the question in dispute was whether or not the good-will was bound by the mortgage. North, J., decided that the good-will did not pass to the mortgagees, and they had never acquired it de facto by going into possession; and that, therefore, the mortgage debt was not chargeable on that part of the proceeds of the sale which represented the value of the good-will.

INFANT—FRAUD—PRACTICE—COSTS.

Woolf v. *Woolf* (1899) 1 Ch. 343, was an action brought against an infant to restrain him from wrongfully carrying on business in the name of "Woolf Brothers," or in any manner representing, or inducing the public to believe, that the business he carried on was the plaintiffs', or in any way connected with the plaintiffs. Judgment was given in favour of the plaintiffs, with costs, but on drawing up the order, the registrar, having referred to the original record in the case of *Chubb* v. *Griffiths*, 35 Beav. 127, on which Kekewich, J., assumed to act, ascertained that there was nothing in the pleadings in that action to show that the defendant was an infant, as stated in the report, and he accordingly desired the matter to be again mentioned to the court; and, after reconsideration, the learned judge adhered to his judgment, directing the defendant to pay the costs of the action notwithstanding his infancy. A like order was made in *Lipsett* v. *Perdue*, 18 O.R. 575.

CHATTEL MORTGAGE—MORTGAGE OF LAND AND FIXTURES—REGISTRATION—INVALIDITY OF MORTGAGE OF CHATTELS—BILL OF SALE ACT, 1854 (17 & 18 VICT. C. 36)—(R.S.O. C. 148.)

In *Johns* v. *Ware* (1899) 1 Ch. 359, the plaintiff claimed to be mortgagee of certain trade fixtures under a mortgage of land with the machinery. The mortgage contained a power to sell the machinery separately from the freehold. The mortgage was not registered under the Bill of Sale Act, 1854 (17 & 18 Vict. c. 36), (see R.S.O. c. 148). The plaintiff sought to

restrain the defendant, who was assignee of the mortgagor, for the benefit of creditors, from selling the fixtures, on the ground that they were covered by his mortgage. The defendant contended that the mortgage was void as to the chattels for want of registration under the Bill of Sale Act, and Romer, J., decided that this contention was well founded, and that according to the test laid down in *Ex p. Barclay*, L.R. 9 Ch. 576, a mortgage of land, coupled with a power to the mortgagee to sell separately from the land all or any part of the trade fixtures, is a mortgage of chattels which must be registered to be valid. In *Robinson* v. *Cook*, 6 O.R. 505, a mortgage of land and trade fixtures was held to be valid as to the fixtures without registration as a chattel mortgage, but it does not appear from the report that there was any power in the mortgage there in question to sell the chattels apart from the land.

WILL—CONSTRUCTION—GIFT OF LEGACIES, FOLLOWED BY GIFT OF RESIDUE OF REAL AND PERSONAL ESTATE—MORTGAGED ESTATE DEVISED FREE FROM INCUMBRANCES—MARSHALLING.

In re Smith, Smith v. *Smith* (1899) 1 Ch. 365 several points arising on the construction of a will were determined by Romer, J. By the will in question, after four legacies of £100, the testator made specific devises, freed from any incumbrance thereon at the time of his death, and declared if he should sell any of the properties so devised his trustees should out of his residuary estate stand possessed of a sum equal to the price received, upon the same trusts as declared concerning the property sold. The testator then gave all other the residue of his real and personal estate upon trust to pay four annuities of £250 to his sons, and out of the balance of such residue to pay the incumbrances, and thereafter to pay the residuary estate to his sons. The testator sold one of the specifically-devised properties for £9,800. His estate proved insufficient to pay all the beneficiaries in full.

Romer, J., held that the four legacies of £100 were charged upon the entire residue, that the four annuities of £250 were only given to the sons as part of the residue, and were, therefore, not payable until the £9,800 above referred to, and the mortgage debts on the properties specifically devised, had been provided for, and that the £9,800 must be treated as an ordinary legacy payable out of the residue. He also held that the rule laid down in *Lutkins* v. *Leigh* (1734) Cas. t. Tal. 53, that pecuniary legatees have priority over a devisee, although the devisee is entitled under

the will to have the incumbrance on the property devised paid out of the residue, applied in the present case the right not having been negatived by the testator, and that the devisees of the mortgaged property were not therefore entitled to compete with the pecuniary legatees.

WILL—POWER OF APPOINTMENT—EXERCISE OF POWER—DEFAULT OF APPOINTMENT—DECLARATION OF DONEE OF POWER—IMPLIED APPOINTMENT.

In re Jack, Jack v. *Jack* (1899) 1 Ch. 374 is a rather curious case, and illustrates how the legitimate intentions of people are sometimes frustrated by the law. Mrs. Beaumont had, under the will of her brother, Charles Jack, a power to appoint a sum of £15,000 among her three children in such shares as she might name, and, in default of appointment, the fund was to go to her three children equally. Mrs. Beaumont made her will in exercise of the power, and appointed one-third of the fund to her son until he should assign charge or otherwise dispose of it, and then over to his children, and one-sixth to each of her two daughters; and she stated in her will that she made no appointment of the remaining two-sixths of the £15,000, "as I wish them to pass directly to my said two daughters, so as to give them an immediate vested and disposable interest therein, and I also declare that neither my son nor his children (if any) shall take any share or interest in the said unappointed part of the said trust funds."

Notwithstanding this very plain expression of the intention of the donee of the power, Romer, J., held that the unappointed one-third passed as upon default of appointment among the three children equally, and that the son was not put to an election between the third appointed to him and his share of the unappointed one-third, nor was there an appointment of the one-third in favour of the daughters by implication, seeing that the donee of the power expressly declared that she did not make an appointment.

PARTNERSHIP—SALE OF BUSINESS TO SURVIVING PARTNER—GOODWILL, VALUE OF, HOW ESTIMATED.

In re David & Matthews (1899) 1 Ch. 378 was an arbitration matter, in which a case was stated by an arbitrator appointed to take the partnership accounts of a firm which had been dissolved. A firm of Letricheux & David formerly carried on business under that name. Letricheux died in 1876, and David & Matthews

entered into partnership under articles which provided that the style of the firm should be "Letricheux & David," and it was also provided that on the death of one of the partners a general account of the position should be made, including all effects and securities of whatsoever nature, the value to be estimated at the date of such decease by an appraiser. David having died in 1896, an appraiser was agreed on by the personal representatives of David, and Matthews, the surviving partner, and the same person was also appointed an arbitrator. The question stated by the arbitrator thus appointed was whether he ought to consider the question of goodwill, and, if so, whether in appraising its value he should do so on the footing that Matthews would be at liberty to carry on a rival business, but without any right to solicit customers of the old firm to continue to deal with him, or not to deal with the purchaser of the goodwill of the old firm, and whether or not he should value it on the footing that, if sold, Matthews would not be entitled to carry on business under the name of 'Letricheux & David.' Romer, J., was of opinion that the provision in the articles for the valuation of the assets on the death of a partner in effect constituted a contract for the sale of the partnership assets to the surviving partner, and that the goodwill was part of the assets, and should be valued; and that it should be valued on the basis of what it would have been worth if there had been no contract between the partners, that the surviving partner should purchase the share of the deceased partner in the business, and on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but would not be at liberty to use the name of 'Letricheux & David' nor solicit the customers of the firm.

TORT—MISREPRESENTATION—ACTION FOR TORT AGAINST DECEASED PERSON'S REPRESENTATIVES—WRONGFUL ACT DONE BY DECEASED—ESTATE OF DECEASED BENEFITED BY HIS WRONGFUL ACT—3 & 4 W. 4, c. 42, s. 2—(R.S.O. c. 129, s. 11).

In re Duncan Terry v. *Sweeting* (1899) 1 Ch. 387. Claim against a deceased person's estate to recover a sum of £250, on the ground that the claimant had been induced by the misrepresentations of the deceased to pay that sum for certain shares in a limited company which were worthless; and it was held by Romer, J., that the claim could not be maintained. If it had been a claim to rescind the contract and recover the price paid, *semble* the claim

could have been maintained (see R.S.O. c. 129, s. 11); but the claim as made was one for unliquidated damages, and not the less so because the claimant sought to establish that the measure of his damages was the price paid.

REPORTS AND NOTES OF CASES

Dominion of Canada.

IN THE EXCHEQUER COURT OF CANADA.

(On Appeal from the Nova Scotia Admiralty District.)

Burbidge, J.] [Jan. 16.

THE INCHMAREE STEAMSHIP CO., LTD., *v.* THE STEAMSHIP "ASTRID."

Maritime law—Collision—Extraordinary manoeuvre—Burden of proof respecting.

Where a collision has occurred, and where a manoeuvre at the time of the collision is attributed by the plaintiff to the defendant of so extraordinary a character that it can only be accounted for by supposing that some mistake had been made in giving an order, or in understanding the purport of a given order, the burden of proof as to such manoeuvre is upon the plaintiff.

R. C. Weldon, for appellants. *A. Drysdale*, Q.C., for respondent.

Burbidge, J.] [Jan. 17.

THE QUEEN *v.* ARCHIBALD STEWART AND OTHERS.

Expropriation—Filing new plan — Information — Amendment — Crown's right to discontinue—Costs.

Where issue has been joined and the trial fixed in an expropriation proceeding, the Crown may obtain an order to discontinue upon payment of defendants' costs; but the court will not require the Crown to give an undertaking for a fiat to issue upon any petition of right which the defendant may subsequently present.

S. H. Blake, Q.C., and *W. H. Lawlor* for motion. *B. B. Osler*, Q.C., and *M. O'Gara*, Q.C., contra.

Burbidge, J.] [April 10.

THE QUEEN *v.* JAMES WALLACE, WILLIAM A. ROSS, JOHN O'LEARY, AND MARY KELLY.

Expropriation—Tender—Sufficiency of—Costs—Mortgagees.

1. Where the amount of compensation tendered by the Crown in an expropriation proceeding was found by the court to be sufficient, and there was no dispute about the amount of interest to which the defendant was entitled, but the same was not tendered by the Crown though allowed by the court, costs were refused to either party.

2. Where mortgagees were made parties to an expropriation proceeding, and had appeared and were represented at the trial by counsel, although they did not dispute the amount of compensation, they were allowed their costs.

J. M. Clark and *A. W. Fraser* for Crown. *M. O'Gara*, Q.C., and *Wyld* for defendant Wallace. *John Bishop* for defendant mortgagees.

Province of Ontario.

HIGH COURT OF JUSTICE.

Armour, C.J., Street, J.] MURPHY *v.* PHŒNIX BRIDGE CO. [April 10.

Writ of summons—Service on foreign corporation—Business within Ontario—Servant—Agent—Rule 159.

A foreign corporation engaged in building bridges, which were partly in Ontario, had a temporary office in Ontario, in which their foreman and a man under his immediate direction and control, and subject to dismissal by him, whose duty it was to keep the time of the men employed in the work and to pay their wages, attended to the office part of their duties. The corporation sent this man money, which he deposited in a bank in Ontario to his own credit, and chequed it out for wages, and occasionally for other purposes of the corporation. After the work had been suspended and the foreman had left, this man was in Ontario under directions from the corporation "to clean up everything," and while there was served with the writ of summons in an action for negligence in the erection of one of the bridges outside of Ontario. Upon being examined as a witness by the plaintiffs, he said that he was the chief clerk in Ontario, though there "wasn't much clerkship about it."

Held, that he was to be deemed the agent of the corporation within the meaning of Rule 150, and the service was effective. Decision of MEREDITH, C.J., ante, reversed.

W. H. Blake, for defendants. *Mulvey*, for plaintiffs.

Moss, J. A.] ECKENSWEILLER *v.* COYLE. [April 12.

Appeal—Third party—"Party affected by the appeal"—Rules 799, 811—Notices—Duty of plaintiff as appellant—Duty of defendants.

The defendants, alleging that another person was liable to indemnify them against the plaintiff's claim, caused him to be served with a third party notice under Rule 209. The third party appeared, and an order was made under Rule 213 that he should be at liberty to appear at the trial, and such part as the judge should direct, and be bound by the result; that question of his liability to indemnify the defendants should be tried after trial of the action; and that pleadings should be delivered between the defendants and him. The judge who tried the case dismissed the action, but held the party bound to indemnify the defendants against any costs they incurred in action. The third party appealed from this judgment to a Divisional Court, and the plaintiff appealed to the Court of Appeal.

Held, that the third party was a "party affected by the appeal" of the plaintiff within the meaning of Rules 799 (2) and 811, and it was the plaintiff's duty to give the notices therein provided for; but there duty as regards the third party ended, unless he was in a position to demand some relief against him, and the third party was not, by the order made before the trial, placed in the position of a defendant so as to entitle the plaintiff to relief against him. But as the defendants, for their own convenience, brought the third party into the action, and did not procure him to be made a defendant, they should, if they desired to retain him before the court for the purposes of the plaintiff's appeal, do whatever might be necessary to that end beyond what was required of the plaintiff under Rules 799 and 811.

W. H. Blake, for plaintiff. *Masten*, for defendants. *J. H. Moss*, for third party.

Ferguson, J.] COPE *v.* CRICHTON. [April 24.

Equitable estate—Assignment of interest in land—Title—Right to possession—Subsequent mortgage—Notice—Registry laws—Limitation of actions—Commencement of statutory period—Tenancy at will.

The plaintiff's father, being in possession of a farm under an unregistered agreement with a loan company for the sale thereof to him, assigned the agreement and all his interest thereunder by way of security to one who gave a bond to reassign upon repayment of a small sum advanced. Neither the assignment nor the bond was registered. The money was repaid, but there was no reassignment. Subsequently on the 3rd April, 1886, the father assigned all his interest in the land to the plaintiff for good and valuable consideration, the plaintiff having no notice or knowledge of the previous assignment. This assignment was duly registered. The plaintiff lived on the farm with his father and mother, whom he had covenanted to maintain during their lives, until July, 1888, when he went

away, leaving his parents on the farm with no definite agreement or understanding, but with the expectation, as he said, that they would remain on the place and make the last two payments under the original agreement, and that when this was done the place would be his. In February, 1891, the father mortgaged the land to the person who had made the first advance to secure a larger sum, and the mortgage deed was registered. A few days later the loan company conveyed the land to the father, the purchase money having been paid in full, and the conveyance was registered. In February, 1892, the mortgagee died. In September, 1893, the plaintiff's father conveyed the land absolutely to the administrator of the mortgagee's estate, and this conveyance was also registered.

In an action against the administrator and the plaintiff's father to recover possession of the land and for a declaration that the last mentioned conveyance was void and a cloud upon the plaintiff's title;

Held, that the assignment to the plaintiff in 1886 gave him an equitable estate in fee and the right to possession, and after its execution the father and son both being on the place the possession would be attributed to the son.

2. That the registration of that assignment constituted notice to the mortgagee, and the mortgage did not affect the plaintiff's title or right to possession.

3. That after the plaintiff went away in July, 1888, the father had possession under him as tenant at will, and his tenancy did not terminate until July, 1889, and therefore the Real Property Limitation Act had not barred the plaintiff's right at the time this action was begun in 1898.

4. That the plaintiff having the equitable title and having the owner of the legal estate before the Court, was entitled to recover possession of the land.

Shepley, Q.C., and *Secord* for the plaintiff. *W. R. Riddell* and *D. Fasken* for the defendant Crichton. *J. E. Day* for defendant Cope.

Rose, J.] IN RE JONES AND CITY OF LONDON. [April 24.

Municipal corporations—By-laws—Meeting of council—Notice of—Notice of introduction of by-laws—Reading by-laws—Adjournment of meeting.

The notice calling a special meeting of the municipal council of a city at which two by-laws were passed regarding the number of tavern and shop licenses to be granted in the municipality, stated that it was "for the consideration of a by-law relating to tavern licenses."

Held, a sufficient notice.

Remarks by Chitty, J., in *Henderson* v. *Bank of Australia*, 45 Ch. D. at p. 337, referred to.

It was objected that notice of intention to introduce the by-laws should have been given and that they should not have received their three readings in one day.

Held, that these were matters of internal regulation and subject to the decision of the mayor or chairman of the council, and the only appellate tribunal was the council.

The Municipal Act provides, s. 275, that "every council may adjourn its meetings from time to time."

Held, that a meeting of the council might adjourn temporarily, without a formal motion to adjourn, by the consent of the majority of a quorum present; and, even if the adjournment in this case, announced by the mayor, was not by the consent of the majority, the validity of an objection grounded on the absence of such consent would be so doubtful that the Court should not in its discretion quash the by-law passed after the adjournment.

Talbot Macbeth and *G. N. Weeks* for the applicant. *T. G. Meredith* for the city corporation.

Boyd, C. STEWART *v.* OTTAWA AND NEW YORK R. W. Co. [April 24.

Railways—Expropriation of lands—"Owner"—Person in possession—Title—Jus tertii—51 Vict., c. 29, s. 103 (D).

By s. 103 of the Railway Act of Canada, 51 Vict., c. 29, the lands which may be taken without the consent of the owner shall not be more than 650 yards in length by 100 yards in breadth. The defendants desired to use for their railway a tract of land more than 650 yards long of which the plaintiff was in possession, and they alleged that a strip in the middle of the tract was ordinance land of the Crown, and therefore sought to expropriate two pieces, one on each side of the alleged ordinance reserve, which latter the plaintiff claimed as his own by length of possession.

Held, that the scheme of the Act is that the company shall deal with the person in possession as owner, and if the company propose to disturb that possession, it must be pursuant to the powers conferred by the Act; the matter of title is to be held in abeyance until a later stage in the expropriation proceedings. The company cannot, even in the case of defective title, ignore the person who actually occupies the land as owner, and proceed as if his interest had been duly invalidated by legal process on the part of the real owner. Though part of the land be held by a precarious tenure, yet where there is possession of the whole as one property, there should be but one set of proceedings and one arbitration, and the whole should be dealt with under the statute as the property of one and the same owner.

Osler, Q.C., and *Wyld* for the plaintiff. *D'Arcy Scott* for the defendants.

Divisional Court.] McEACHERN *v.* GORDON. [April 24.

Judgment debtor—Examination of, after assignment for benefit of creditors.

The making of an assignment for the benefit of creditors does not deprive a judgment creditor of his right to examine a judgment debtor for the purpose of getting a ca sa even if perhaps it may in some cases furnish a reason why an order for such examination should not be made.

Judgment of the County Court of Elgin affirmed.

Gibbons, Q.C., for the appeal. *Armour*, Q.C., and *W. L. McInnes* contra.

Meredith, C.J.] DOUGALL *v.* HUTTON. [April 25.

Local judge—Jurisdiction—Injunction—Rules 46, 47.

An appeal by the defendant from an order made by one of the local judges for the County of Essex restraining the defendant until the trial from carrying on the business of a grocer in the City of Windsor in alleged breach of a covenant with the plaintiff.

J. H. Moss, for the defendant, contended that, although the solicitors for both parties resided in the County of Essex, the local judge had no jurisdiction to grant an injunction for more than eight days, citing *Kohles* v. *Costello*, 32 C.L.J. 129 (decided on the 31st January, 1896, under the Rule then in force, 42 A 1419).

R. U. Macpherson for the plaintiff.

MEREDITH, C.J., held that the local judge had power to grant the injunction till the trial, *Kohles* v. *Costello* being no longer applicable, owing to changes made in the arrangement of the rules; see rules 46 and 47 of the present Consolidated Rules.

Meredith, C.J.] HODGE *v.* HALLAMORE. [April 28.

Appeal—Lis pendens—Refusal to vacate—R.S.O. c. 51, s. 99.

No appeal lies, by virtue of s. 99 of the Judicature Act, R.S.O. c. 51, or otherwise, from an order of a master or judge dismissing a motion made under s. 98 for an order vacating a certificate of lis pendens.

W. R. Riddell for the plaintiff. *J. R. Roaf* for the defendants.

Flotsam and Jetsam.

"Are you the defendant in this case?" asked the judge, sharply. "No, suh," answered the mild-eyed prisoner. "I has a lawyer hired to do de defendin'. I's de man dat done stole de ahticles."—*Washington Star.*