Expl
Gow & Chambers v White (1908) 5 CLR 865

[HIGH COURT OF AUSTRALIA.]

STEWART AND WALKER . . . . APPELLANTS;

AND

WHITE (TRUSTEE OF SPRINGALL, AN INSOLVENT) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Oct.* 4, 7, 8.

Griffith C.J., Barton and Isaacs JJ.

Insolvency Act 1874 (*Qd.*), (38 *Vict. No.* 5), *sec.* 107—*Fraudulent preference—Pressure by creditor—"With a view to" prefer—Intention or motive.*

A debtor, who was unable to pay his debts as they became due out of his own moneys, handed to creditors, who were aware of his financial position, and had for some time unsuccessfully used pressure, a series of small cheques payable at extended dates and representing the amount of the debt. The debtor having been adjudicated insolvent within six months:

Held, the payments were a fraudulent preference under the *Insolvency Act* 1874, sec. 107. The words "with a view to prefer" in that section refer to the intention or purpose of the debtor, and not to his motive bringing about that result.

Dictum in *Russell Wilkins & Sons Ltd.* v. *Outridge Printing Co. Ltd.*, (1906 St. R. Qd., 172), relating to the effect of pressure on the intention to prefer, overruled.

APPEAL from a judgment of *Cooper* C.J. sitting in the Insolvency jurisdiction of the Supreme Court of Queensland. The insolvent, Springall, trading as the South Brisbane Butter Company, had transactions with the appellants, a firm of butter merchants, during 1906. In April and May 1906 he bought goods from the appellants to the value of £1,091, and gave in part payment a cheque for £519 which was dishonoured. By December 1906 under severe pressure his debt to them had been

reduced to £606. At that date, while unable to pay his debts as they became due out of his own moneys, he gave the appellants a series of fifteen post-dated cheques, in all £661, which fell due and were paid at various times within two months. The Court held upon the evidence that the appellants were aware that the probable effect of the transaction would be to give them a preference over other creditors. On 5th June 1907 the debtor was on his own petition adjudged insolvent, with a deficiency of over £6,000, and the official trustee of his estate claimed the payments made to the appellants as fraudulent preferences. *Cooper* C.J. declared the payments fraudulent and void against the trustee; and he found as facts:—that the payments were made "with a view of giving" the appellants a preference over the other creditors "and under pressure by them," and that the payments were made "for valuable consideration but not in good faith within the meaning of sec. 107."

Lilley for the appellants. *Cooper* C.J. based his judgment upon that of the Full Court in *Russell Wilkins & Sons Ltd.* v. *Outridge Printing Co. Ltd.* (1), thinking that it bound him to interpolate "or by reason of pressure" after "with a view of giving such creditor a preference over the other creditors" in sec. 107. The finding of fact made by *Cooper* C.J. as to preference in these payments was therefore due to his having misdirected himself, in reliance on the erroneous decision of the Full Court.

There was in fact no intention shown on the part of the debtor to prefer the appellants. He was carrying on a lucrative butter contract with a certain firm, and his business was improving; he made these payments to the appellants in order to save the business as a going concern from the severe and continuous pressure they were applying. The cheques were payments of a recognized trade debt, made in the ordinary way of business, received honestly by the appellants, who were told by the debtor, and believed, that his only creditors were well secured by his assets, although in fact there were other larger creditors whose existence he concealed from them.

The elements of good faith and no pressure are immaterial

(1) 1906 St. R. Qd., 172.

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under sec. 107 unless and until the essentials of the first part of the section are proved in full detail. It must be shown that the debtor made the payments with the intention of giving a preference; whereas the evidence is all the other way, that his intention was to save the business from forced realization and keep it going at a profit. Pressure cannot be interpolated in the middle of the section; it was put in at the end of the section in order to negative the English rule under which the existence of any pressure completely excluded any consideration of preference. The decision in *Russell Wilkins & Sons Ltd.* v. *Outridge Printing Co. Ltd.* (1) would make every payment without exception a preference, because, if made voluntarily without pressure, it would be a preference, and if made under pressure, it would equally be a preference under the rule of law there laid down. The necessary proof of intention to prefer is lacking where it is shown that the only desire in the debtor's mind was to keep the business going: *Kinross, Official Assignee of* v. *Robjohns* (2); *Bills* v. *Smith* (3); *Castendyck* v. *Official Assignee of McLellan* (4); *Mynott, Official Assignee of* v. *Moa Dairy Factory Co.* (5); *In re Reimer* (6); *Butcher* v. *Stead*; *In re Meldrum* (7).

[ISAACS J. referred to *Brown* v. *Kempton* (8).]

"With a view to prefer" essentially demands a wish or motive to desire: *Ex parte Hill*; *In re Bird* (9); *Ex parte Griffith*; *In re Wilcoxon* (10). If pressure was the dominant motive, sec. 107 does not apply.

[ISAACS J. referred to *In re Fletcher*; *Ex parte Suffolk* (11). Where the debtor knew that if insolvency were to supervene the distribution would be disturbed by the payments made, this is *primâ facie* evidence of intention to prefer.]

That presumption is rebutted by the evidence, and *Cooper* C.J. was led to find intention to prefer, as a fact, solely by the erroneous view taken by the Full Court with regard to the effect of pressure. The test is whether the pressure was the dominant cause or motive of the payment; *New, Prance, & Garrard's*

(1) 1906 St. R. Qd., 172.
(2) 8 N.Z.L.R., 224.
(3) 6 B. & S., 314; 34 L.J.Q.B., 68.
(4) 6 N.Z.L.R., 67.
(5) 6 N.Z.L.R., 177.
(6) 15 N.Z.L.R., 198.
(7) L.R. 7 H.L., 839.
(8) 19 L.J.C.P., 169.
(9) 23 Ch. D., 695.
(10) 23 Ch. D., 69.
(11) 9 Morr., 8.

Trustee v. *Hunting* (1); *Sharp* v. *Jackson* (2); *In re Tweedale*; *Ex parte Tweedale* (3); *In re Arnott*; *Ex parte Barnard* (4).

[ISAACS J. referred to *In re Bell* (5).]

Feez and *O'Sullivan*, for the respondent. The debtor was insolvent in December 1906; and at that time he was not carrying on a lucrative or improving business, because between then and the date of filing his petition he went £5,000 more to the bad.

It is immaterial, even if true, that *Cooper* C.J. found it necessary to base his findings on *Russell Wilkins & Sons Ltd.* v. *Outridge Printing Co. Ltd.* (6). Leaving the pressure out of consideration, as sec. 107 directs, there is nothing left but a voluntary payment which necessarily was made "with a view to prefer." Where a payment prefers a creditor, the onus is on the person supporting the transaction to show that there was no view to prefer: *In re Eaton & Co.*; *Ex parte Viney* (7); *In re Lake*; *Ex parte Dyer* (8).

[*Lilley* referred to *In re Laurie*; *Ex parte Green* (9).

ISAACS J. referred to *Ex parte Lancaster*; *Re Marsden* (10); *Williams' Bankruptcy Practice*, 8th ed., p. 251.]

The burden of proving good faith is on the creditor: *Ex parte Tate* (11).

If there is an onus on the trustee, he has satisfied it by showing an imminent insolvency, a payment which injures the other creditors, not made in the ordinary course of business, not *bonâ fide* on the debtor's part, and under the suspicious circumstances of this series of post-dated cheques. The prior English rule that pressure cannot coexist with intention to prefer depended on the doctrine of dominant motive; this cannot apply to sec. 107, which was expressly framed to do away with that doctrine and its complications of motives upon motives: *Tomkins* v. *Saffery*; *Ex parte Saffery*; *In re Cooke* (12); *Butcher* v. *Stead*; *In re*

(1) (1897) 2 Q.B., 19.
(2) (1899) A.C., 419, at p. 426.
(3) (1892) 2 Q.B., 216.
(4) 6 Morr., 215.
(5) 10 Morr., 15.
(6) 1906 St. R. Qd., 172.
(7) (1897) 2 Q.B., 16.
(8) (1901) 1 Q.B., 710.
(9) 67 L.J.Q.B., 431; 5 Manson, 48.
(10) 25 Ch. D., 311
(11) 35 L.T., 531.
(12) 3 App. Cas., 213.

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Meldrum (1). The true question under that section now is, not as to the motive or desire of the debtor, but as to his intention, and pressure is excluded from consideration as an immaterial fact. [They referred to New Zealand *Bankruptcy Acts*, 48 Vict. No. 29, s. 27, and 49 Vict. No. 22, s. 13.]

Lilley in reply.

Cur. adv. vult.

GRIFFITH C.J. This is an appeal from the decision of the learned Chief Justice of Queensland, made upon a motion by the respondent, who is trustee of the property of one Springall, an insolvent, for a declaration that certain payments amounting to about £660, made by the insolvent within six months of insolvency to the appellants, were fraudulent preferences within the meaning of sec. 107 of the *Insolvency Act* 1874. The case was heard partly orally, and partly upon affidavit. The learned Chief Justice found as a fact that at the time when the payments were made the insolvent was unable to pay his debts as they became due out of his own moneys; that the payments were made with a view to prefer the creditors; and that they were not received by the creditors in good faith. He also found that the payments were made under pressure. Reliance was placed by the appellants upon the decision of the Supreme Court of Queensland in the case of *Russell Wilkins & Sons Ltd.* v. *Outridge Printing Co.* (2), which was to the effect that the fact of pressure was itself sufficient to bring the case within sec. 107. (That is, I assume, in the absence of good faith.) They contend that that decision was wrong, and that the learned Chief Justice decided the present case only upon its authority. He, however, found certain facts specifically, at the request of the appellants' counsel, amongst which was that the payments were made with a view to prefer the appellants over the other creditors, and under pressure. Sec. 107 is in these words :—" Every conveyance assignment gift delivery or transfer of property or charge thereon made every payment made every obligation incurred and every judicial proceeding taken or suffered by any debtor unable to pay

(1) L.R. 7 H.L., 839. (2) 1906 St. R. Qd., 172.

his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall if a petition for adjudication of insolvency be presented against such debtor within six months after the date of making taking paying or suffering the same and adjudication of insolvency be made on such petition be deemed fraudulent and void as against the trustee of the insolvent appointed under this Act but this section shall not affect the rights of a purchaser payee or incumbrancer in good faith and for a valuable consideration." The presumably relevant words in that provision are "payee in good faith." Then it proceeds:—"Provided that pressure by a creditor shall not be sufficient to exempt any transaction from the operation of this section."

Sec. 107 of the Queensland *Insolvency Act* is a transcript of sec. 92 of the English *Bankruptcy Act* 1869, with the addition of the proviso that pressure shall not be sufficient to exempt any transaction from the operation of the section.

Before the Act of 1869 the rule as to fraudulent preference was not expressed in any statutory provisions. Under the former law the elements of a fraudulent preference were that the transaction should be made by the debtor in contemplation of bankruptcy, and that it should be made voluntarily. The second element was sometimes expressed as being with a view of preferring the particular creditor. Under this law it became very material, in considering whether the payment was voluntary, to inquire whether it was made under pressure. For, if it was so made, the pressure might have been, and was generally held to be, sufficient to negative the existence of the element of voluntariness. The Act of 1869 substituted a definite rule for that to be collected from the decided cases. For the inquiry whether the act was done in contemplation of bankruptcy it substituted the inquiry whether the debtor was able to pay his debts as they became due out of his own moneys, and whether bankruptcy occurred within a prescribed period. For the inquiry whether the transaction was voluntary it substituted an inquiry whether it was made "with a view of giving" the creditors a preference over the other creditors. It was held in England that this sec-

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tion left the old rules as to pressure unaltered, so that, in determining with what "view" the act was done, it was still necessary to consider whether it was done voluntarily.

I pause to remark that the section contains two phrases open to different constructions. The words "with a view of giving" may mean "in order to effect the result of giving," or they may mean "actuated by a desire to give." In one sense the words refer to an intention, in the other to a motive. The word "prefer" also is capable of meaning either that one creditor is in fact put in a better position than others, or that the debtor likes one creditor better than another, and therefore desires to give him an advantage. In sec. 92 it is obviously used in the first sense, although in argument, and, I fear, in some of the cases, the latter sense has inadvertently crept in. This aspect, however, of the question really belongs to the word "view," and not to the word "preference."

I think that in many of the decided cases the word "view" has been used in both senses in the same judgment, and hence some confusion has arisen. The difference between the motive which induces an act and the end intended to be attained by the act is recognized by the statute law of Queensland, (see *Criminal Code*, sec. 23), and is very material in construing sec. 107 of the *Insolvency Act*.

The existence of pressure was material, not for the purpose of determining the result intended to be effected, but for determining the motive for effecting that result, *i.e.*, for determining whether the act was voluntary or not. When, therefore, it was declared by the Queensland Act that pressure should not be sufficient to exempt a transaction, the element of motive was in effect excluded from the new provisions. An act must either be voluntary or not voluntary, and if that fact is no longer material the word "view" can no longer refer to it.

It follows, I think, that the words "with a view of giving" in the Queensland section must be read as equivalent to "with an intention to give." In this regard I accept the reasoning of the learned Judges of the Supreme Court of New Zealand in the case of *Official Assignee of Kinross* v. *Robjohns* (1). I think that

(1) 8 N.Z. L.R., 224.

when a debtor, knowing that he cannot pay all his creditors in full, deliberately pays one of them, he intends the necessary consequences of his action, *i.e.*, he intends to give him a preference. And I think that under such circumstances he makes the payment with a view of giving the creditor a preference within the meaning of sec. 107. Under the Statute, however, the intention of the debtor to prefer the creditor is not decisive as it was under the old law. If the payment is made in good faith the creditor is protected. But, if the payment is made out of the ordinary course of business, and under such circumstances as to show that the creditor knew or had reason to suspect that the effect of it would be to pay him in full and leave other creditors unpaid, it is not made in good faith : *Tomkins* v. *Saffery* (1).

From this point of view pressure may be very material, not however, as affording conclusive proof that the payment is made with a view to give a preference, (which was the view of the learned Judges in *Russell Wilkins & Sons Ltd* v. *Outridge Printing Co.* (2)), but as affording material evidence on the question whether the transaction was made in good faith. To this extent I am unable to agree with the judgment in that case, though I think it was rightly decided on the whole facts.

In my opinion a payment made by a debtor who is unable to pay his debts as they become due from his own moneys, and which is not made in the ordinary course of business, and is made under such circumstances that the creditor has good reason to suspect that he is obtaining a preference from an insolvent debtor, is void under sec. 107. That is to say, the case is brought within the first part of the section, and the creditor cannot bring himself within the protective proviso.

All these circumstances occur in the present case. The debtor was undoubtedly unable to pay his debts as they became due from his own moneys, and when he paid the money, he must have known that the effect would in all probability be to pay those creditors in full, and leave the others unpaid. The payments were not made in the ordinary course of business ; they were made by giving a series of small cheques extending over a period of two months in respect of an old debt which the debtor

(1) 3 App. Cas., 213. (2) 1906 St. R. Qd., 172.

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had been unable to pay for some months. The creditors were aware of all these facts, and they must have had very good reasons for believing that they were getting an advantage over the other creditors. I think that, whatever view is taken of the findings of the learned Chief Justice, he was not only justified in finding that the payments were made with an intention to prefer within the meaning of the Statute, but on the facts, could not have properly come to any other conclusion. I think, therefore, that the appeal must be dismissed.

BARTON J. While I agree in the view of the facts taken by the Chief Justice of this Court, and think that they amply sustain the findings of *Cooper* C.J., I wish to add a few words on the case of *Russell Wilkins & Sons Ltd.* v. *Outridge Printing Co.* (1) out of respect to the Court which decided that case. I agree that this appeal must be dismissed on grounds which render it unnecessary to rely on the law there laid down, but I feel bound to go on to say that I cannot bring myself into accord with the conclusions there arrived at. Sec. 107 of the *Insolvency Act* 1874 is, as *Real* J. points out, a transcript of sec. 92 of the English Act 1869 with the addition of the second proviso, and divesting it of words which have no relation to the case of payments, it reads as follows:—"Every payment made . . . . by any debtor unable to pay his debts as they become due from his own moneys in favour of any creditor . . . . with a view of giving such creditor a preference over the other creditors shall . . . . be deemed fraudulent and void as against the trustee of the insolvent appointed under this Act," if a petition for adjudication of insolvency be presented against such debtor within 6 months after the date of making or paying the same and adjudication of insolvency be made on such petition. But "this section shall not affect the rights of a . . . . payee . . . in good faith and for valuable consideration Provided that pressure by a creditor shall not be sufficient to exempt any transaction from the operation of this section."

The Full Court of Queensland held (1) that the section must be read as if in lieu of the last proviso, the words "or by reason

(1) 1906 St. R. Qd., 172.

of pressure by such creditor" had been inserted in the body of the section after the words, "with a view of giving such creditor a preference over the other creditors." In other words, they treated the proviso as if, standing where it does, it had said that "pressure by a creditor, in place of a view on the part of the debtor of giving such creditor a preference over the other creditors, shall itself, if the other conditions abovementioned exist, suffice to vitiate the transaction." It is impossible to determine what was in the mind of the legislature except by what it has said, and I cannot agree that by anything it has said it has shown that it had in its mind anything like the words suggested in the judgment of *Real* J., any more than it had in its mind the words I have just set out. If it has said the one set of words, it has in effect said the other. With all respect, I cannot see how it has said either. The words of the proviso, being on their face clear, must be read to mean just what they say, or a context as plain or plainer must be pointed out to show that they mean less, or more, or something quite different. For that position there is no need at this day to cite any of the numerous cases which sustain it. But if the words do, as I think they must, in the absence of some such context, mean what they say, then in saying that pressure is not enough to take a transaction out of the section so as to save it, they certainly cannot mean that pressure is of itself enough to bring a transaction within the section so as to vitiate it.

I am of opinion that the proviso means no more than this, that pressure is to be taken into consideration with the other circumstances of the case; that where those circumstances disclose an intention to prefer, pressure is not to prevent their operating to bring a case within the section: that whether or not "a view to prefer" includes *only* an intention to prefer, it certainly does include such an intention. In my judgment it follows that where there is a payment which does in fact prefer the creditor paid to the other creditors, and such a payment is made intentionally by a debtor actually unable to pay his debts as they became due from his own moneys, and who evidently knows his position and the effect that the payment will have, he must be taken to have intended the preference that

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results, and therefore to have made the payment with a view to prefer; and the mere pressure of the creditor does not suffice to exempt the transaction. In other words, unless the payee has acted both for valuable consideration and in good faith, the transaction is void as against the insolvent's trustee impeaching it.

In the present case all the elemental circumstances concur upon the evidence and upon the findings of *Cooper* C.J., who had the advantage of hearing oral evidence in addition to the affidavits. These findings include one which negatives good faith on the part of the appellant creditors. I should be loth to interfere with them if I were in doubt, but I agree with them.

I am therefore of opinion that the appeal must be dismissed with costs.

ISAACS J. I agree that this appeal should be dismissed. The first question of law involved in this appeal is the construction of sec. 107 of the *Insolvency Act*, having regard to the proviso. The Act was passed in 1874 and the meaning attached to it then must be its meaning now. It has been held in *Russell Wilkins & Sons Ltd.* v. *Outridge Printing Co.* (1) that the effect of the proviso is to so modify the whole section as to declare any payment to a creditor, which is made by an insolvent debtor within six months of his insolvency and solely as the result of pressure, and with no desire in fact to prefer the creditor, a fraudulent preference. By that decision pressure is either made conclusive evidence of intention to prefer, or is erected into a separate or co-ordinate ground of invalidity. The reasoning by which the Supreme Court arrived at its conclusion may be thus stated. In England the Act of 1869 was held to enact that pressure by a creditor was sufficient in all cases to exempt a transaction from the operation of the fraudulent preference section; therefore when the Queensland legislature added the proviso to sec. 107 in these words:—"Provided that pressure by a creditor shall not be sufficient to exempt any transaction from the operation of the section," it meant to reverse the English rule; and lastly, reversal meant that pressure should have exactly the opposite effect, or in other

(1) 1906 St. R. Qd., 172.

words, as pressure *ipso facto* preserved the transaction in England, therefore pressure *ipso facto* avoided it in Queensland.

The words of the proviso read in their ordinary sense have no affirmative operation. They merely declare that pressure of itself shall not suffice to prevent a transaction from being a fraudulent preference.

Before the English Act of 1869 was passed the law on this subject was laid down in the leading case of *Brown* v. *Kempton* (1) decided in 1850 by a very strong Court. In that case *Parke* B., who delivered the judgment of the Court, laid down that pressure was immaterial unless it operated on the bankrupt's mind in inducing him to make the payment, and that if a payment were made under the influence of pressure, and also with a desire to give a preference in the event of bankruptcy, there was no fraudulent preference, because the payment was not voluntary.

In 1856 in *Hale* v. *Allnutt* (2) the case of *Brown* v. *Kempton* (1) was followed, *Jervis* C.J. saying:—"There is not, therefore, sufficient ground for coming to the conclusion that the pressure of the defendant exercised no influence upon the mind of the bankrupt; and, if it did exercise any, there was no fraudulent preference." In 1859 in *Edwards* v. *Glyn* (3) the Court of Queen's Bench followed *Brown* v. *Kempton*.

Then came the Act of 1869, which used language different from that found in the older law. Still the cases upon that Act up to 1874—the material period for ascertaining the meaning of Parliament in this case—followed the rule in *Brown* v. *Kempton* (1). In *Ex parte Tempest*; *In re Craven & Marshall* (4), it was expressly approved and followed by *James* and *Mellish* L.JJ., and its principle was made the basis of their decision in *Ex parte Bolland*; *In re Cherry* (5). In the last mentioned case, *Sir G. Mellish* L.J. said:—"If there has been such a demand as partly influenced the bankrupt in making the payment so that he did not make it *entirely voluntarily*, the payment is not a fraudulent preference."

These cases show most clearly to my mind that in the first

(1) 19 L.J.C.P., 169.
(2) 18 C.B., 505, at p. 527.
(3) 2 E. & E., 29.
(4) L.R. 6 Ch., 70.
(5) L.R. 7 Ch., 24, at p. 26.

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place to escape the consequences of what otherwise would be a fraudulent preference, it was always necessary, if pressure were relied on, to show that it exerted influence on the debtor's mind —some influence was sufficient—it need not be the dominating influence; but in order to operate as an exempting force, it had to be an effective element in the transaction to some extent, and that deprived the transaction of its voluntary character and prevented the preference being fraudulent. This is put very clearly by *Vaughan Williams* J. in *In re Bell*; *Ex parte the Official Receiver* (1) in 1892. He said:—"I cannot help feeling a sort of envy of those Judges who had to decide questions of fraudulent preference in days gone by, and in which one of the plainest and most simple of rules was laid down to guide them. The rule was laid down by Baron *Parke* in the case of *Brown* v. *Kempton* (2), which enabled one, the moment one had arrived at the conclusion that honest pressure had something to do with bringing about the payment, to hold that the payment in question was not a fraudulent preference."

The learned Judge goes on to say that later cases alter the test and says "that the law is well established now, and that one has to ascertain in each case what was the dominant motive which operated on the bankrupt's mind when he made the payment in question."

He uses the expression "dominant motive." I prefer to say "real view," that is, the real intention or purpose of the debtor, as far as interchange of words can express the idea. In *Ex parte Hill*; *In re Bird* (3), *Baggallay* L.J., says:—"The substantial object or view must be the giving of the creditor a preference." *Bowen* L.J. (4) adopts the expression "the real effectual, substantial view of giving a preference to the creditor." All the Lords Justices hold distinctly that it need not be the sole view. I am not sure however whether, having regard to the observations of Lord *Halsbury* and Lord *Macnaghten* as to *Butcher* v. *Stead* (5), the case of *Sharp* v. *Jackson* (6), does not establish that even now under English law where real pressure exists, and

(1) 10 Morr., 15, at p. 17.
(2) 19 L.J.C.P., 169.
(3) 23 Ch. D., 695, at p. 701.
(4) 23 Ch. D., 695, at p. 704.
(5) L.R. 7 H.L., 839.
(6) (1899) A.C., 419

exerts any influence on the debtor whereby he is induced to make the payment, the transaction is outside the fraudulent preference section. It is not necessary in this case to decide that.

But it is quite apparent that from the earliest case to the latest whenever pressure was proved the person relying upon it as an exculpatory fact, was called upon to show that it did in fact operate upon the mind of the debtor so as in some measure to coerce him. If so the payment was not voluntary and was protected.

Now *Real* J. seems to stop at this point, and assume that, because a payment was made by reason of pressure, there could be no intention to prefer—that, in other words, pressure was inherently inconsistent with an intention to prefer. Having once made this assumption he not unnaturally proceeded to seek for a construction that would give some effect to the proviso. As it was not necessary to call in aid the proviso to prevent the operation of something that could not exist simultaneously with pressure, he held that it must have the effect of invalidating the transaction.

But to begin with the assumption that pressure is inherently inconsistent with an intention to prefer is not well founded. Pressure is certainly consistent with an actual preference ; it may be the very cause of the debtor deliberately doing something which he knows will have the effect of preferring, and so may co-exist with actual intention to prefer, and then in one sense the preference is voluntary because the debtor is quite free, if he so chooses, to adopt the course of at once placing his insolvent estate in the hands of the law for equal distribution amongst his creditors. But because the act is not voluntary in the strict sense, the preference is not regarded in English law as fraudulent. We need only turn back for a moment to the English cases that were open to the Queensland Parliament in 1874 to see how the Courts recognized the possible co-existence of pressure and of intention or desire to prefer. In the passage I have already quoted from *Brown* v. *Kempton* (1), *Parke* B. in so many words adverted to the instance of a payment being made under the influence of pressure, and also with a desire to give a preference in the event of bankruptcy. So too in the cases in which that decision was

(1) 19 L.J.C.P., 169.

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followed. And though not material to ascertaining what the legislature meant in 1874, it is not out of place in this connection, to point out that in *Sharp* v. *Jackson* (1) Lord *Macnaghten's* judgment shows that in his opinion there might, alongside the intention to protect himself from pressure, be in the debtor's mind a secondary view of preferring creditors. The true position then is this: That in 1874, prior to the passing of the Act, the law was declared to be that a payment, where there was pressure in fact, operating to some extent upon the debtor's mind, was exempt from the fraudulent preference law, whether there was any other view or purpose or not—even though that other view or purpose was to prefer the creditor. Now in 1874 the legislature declared that pressure should not any longer be sufficient to exempt. In my opinion, the only effect of that was that the fact of there being pressure was henceforth, for the purpose of determining whether a preference was fraudulent, to be ignored and treated as legally non-existent. It was to be discarded from consideration as having any protective effect in law. If, after treating the mere fact as non-existent, the circumstances nevertheless disclose any view or purpose to prefer, however it has arisen, whether as the result of pressure or not, the transaction is obnoxious to the Statute—if not, there is no fraudulent preference because no intention to prefer. There cannot be a fraudulent preference without intention to prefer; and under the present law of Queensland, such an intention is not overcome by the fact that it has been caused by pressure, nor by the fact that there was pressure which to some extent and together with the debtor's desire to prefer independently existing actuated the payment.

Once a real intention to prefer is established, howsoever it has come into existence, that is so far sufficient, and the law makes no allowance for its having originated even in the pressure of the creditor, and *a fortiori* if it is merely accompanied by such pressure. But without a view to prefer, an actual preference is not fraudulent. The law is not so inconsistent as to say that a payment made without pressure may not be voluntary, but if made under pressure must be regarded in all cases as voluntary. I therefore think on principle that the rule of law laid down in

(1) (1899) A.C., 419.

Russell Wilkins & Sons Ltd. v. *Outridge Printing Co.* (1) cannot be supported.

Some reliance was placed by the learned Judges who decided the *Russell Wilkins Case* and by counsel here on the New Zealand case of the *Official Assignee of Kinross* v. *Robjohns* (2) as supporting the Queensland decision. A careful examination of the New Zealand case leads me to the conclusion that, so far as it is an authority at all upon the Queensland Statute, it looks in quite the opposite direction. The Court in *Robjohns' Case* did not simply inquire whether the payment was induced by pressure, and so end the matter. They examined the evidence closely to ascertain whether in fact the bankrupt had a view to prefer his creditor. They found that he had, because he deliberately did what he knew would give a preference to that creditor. They also found that he was pressed to do it, that it was an enforced preference, but still it was a preference within the meaning of the New Zealand Act, which recognized that a payment with a view to prefer might be either voluntary or under pressure. The important point is that the New Zealand Court did not merely ask whether there was pressure causing payment, it thought it necessary to further inquire whether the payment was made in such circumstances as would lead to the inference that the debtor knew that the creditor would be preferred to other creditors, and therefore must be taken to have intended to prefer him; and then it applied the principle I have already adverted to, that, once given the intention, it matters not how it originated whether out of pressure or otherwise. This too is very strongly shown by the judgment in *Official Assignee of Mynott* v. *Moa Dairy Factory Co.* (3) cited and relied on in *Robjohns' Case*. In *Mynott's Case*, *Prendergast* C.J., says (4):— "The law of New Zealand certainly recognises that there may be more than one operating cause; for though the act be done under pressure it may still be done within the meaning of the amended provision, with a view to give a preference." That, would of course depend upon the facts of the case, but the effect of *Russell Wilkins Case* is that if done under pressure, it must

(1) 1906 St. R. Qd., 172.
(2) 8 N.Z. L.R., 224.
(3) 6 N.Z. L.R., 177.
(4) 6 N.Z. L.R., 177, at p. 184.

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necessarily be done as a fraudulent preference, which is a conclusion quite beyond the New Zealand authorities as I read them.

With reference to the argument that the debtor here was moved by the hope of pulling through, I would refer to the case of *In re Vingoe; Ex parte Viney* (1), which shows that a hope of pulling through does not necessarily negative an intention to prefer. It may be coupled with a desire to make the creditor safe in any case, and then a payment to him is a fraudulent preference.

Appeal dismissed with costs.

Solicitors, for the appellants, *W. H. Wilson & Hemming.*
Solicitors, for the respondent, *Thynne & Macartney.*

N. G. P.

[HIGH COURT OF AUSTRALIA.]

JEREMIAH KELLY . . . . . APPELLANT;
COMPLAINANT,

AND

SYDNEY WIGZELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1907.

BRISBANE, *Oct.* 10.

Griffith C.J., Barton and Isaacs JJ.

Brisbane Traffic Act 1905 (*Qd.*), (5 *Edw. VII. No.* 18), *sec.* 6—*Traffic Regulations*—"*Permitting*" *passengers in excess of prescribed number to travel on tramcar*—*Duty of tramway conductor*—*Variance between information and evidence as to place*—*Justices Act* 1886 (*Qd.*), (50 *Vict. No.* 17), *sec.* 48.

In a prosecution for an offence against a by-law which prohibits a conductor from permitting any person in excess of the maximum number prescribed to travel on a tramcar, the fact that there are more than the

(1) 1 Manson, 416.