[HIGH COURT OF AUSTRALIA.]

MUNTZ . . . . . APPELLANT;
PLAINTIFF,

AND

SMAIL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE. *March* 18, 19, 22, 23; *April* 2.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Insolvency—Fraudulent preference—"With a view to prefer"—Disposition made to carry out legal obligation—Insolvency Act 1890 (*Vict.*) (*No.* 1102), *sec.* 73—*Insolvency Act* 1897 (*Vict.*) (*No.* 1573), *sec.* 116—*Equitable assignment of future fund—Registration—Book Debts Act* 1896 (*Vict.*) (*No.* 1424), *sec.* 2.

In order that a disposition of property made by a debtor in insolvent circumstances to one of his creditors may be a fraudulent preference within the meaning of sec. 73 of the *Insolvency Act* 1890 (Vict.), the giving of a preference must be the substantial object which the debtor desires to achieve. The motive or reason which induces that desire is irrelevant.

The defendant, a cattle salesman, on behalf of a principal sold cattle to A., advancing the purchase money himself and receiving from A. a promissory note for the amount of the advance, and also entering into a verbal agreement with A. that A. would re-sell the cattle through the defendant, who might repay himself the amount of the advance out of the purchase money. A. having come into insolvent circumstances, instructed his solicitor to call a meeting of his creditors. Two days afterwards, being requested by other creditors to allow them to take some of the cattle in payment of their debts, he refused to do so on the ground that it would not be fair to the other creditors. Eight days afterwards and within a month of his insolvency, and before the

promissory note became due, A., at the request of the defendant, and believing that he was thereby fulfilling his obligation to the defendant, and that it would be wrong to do otherwise, sold the cattle through the defendant who received the purchase money and applied it in discharge of A.'s liability to him. In an action by the trustee in insolvency of A. against the defendant:

Held (*Isaacs* J. dissenting), that A. had made a fraudulent preference in favour of the defendant, and that the trustee was entitled to recover the amount received by the defendant as purchase money for the cattle.

Quære, whether the agreement as to the re-sale of the cattle through the defendant amounted to an assignment to the defendant of the purchase money which might be paid on the re-sale of the cattle, and, if so, whether the agreement should have been in writing and registered under the *Book Debts Act* 1896 (Vict.).

Per Isaacs J.—The agreement amounted to an equitable assignment, and did not require registration either under the *Instruments Act* 1890 or the *Book Debts Act* 1896.

Judgment of the Supreme Court (*à Beckett* J.): *Muntz* v. *Smail*, 29 A.L.T., 223, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by Thomas W. Muntz, trustee of the insolvent estate of David Eyles, against Walter G. Smail, impeaching a transaction by which Smail sold certain cattle for Eyles and received and retained a sum of about £852, the proceeds of such sale, as being a fraudulent preference, and alternatively on the ground that the transfers of the cattle so sold by Smail were made with intent to defeat or delay creditors.

The facts are fully set out in the judgments hereunder.

The action was heard before *à Beckett* J., who gave judgment for the defendant (*Muntz* v. *Smail* (1)), and from this judgment the plaintiff now appealed to the High Court.

Duffy K.C. and *Mann*, for the appellant. The transaction attacked here was a fraudulent preference within the meaning of sec. 73 of the *Insolvency Act* 1890. The disposition was made with a view of giving the respondent a preference within the meaning of that section. *à Beckett* J. found that Eyles's motive

(1) 29 A.L.T., 223.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

was to carry out his engagement with the respondent. But the motive is unimportant. Motive was only important in the case of pressure by the creditor, and by sec. 116 of the *Insolvency Act* 1897 pressure no longer supports a preferential payment. The only question is whether the disposition was made with the intention of giving the creditor a preference: *Sharp* v. *Jackson* (1); *Stewart & Walker* v. *White* (2), that is, with the knowledge that the result would be to give a preference. In *Gow* v. *White* (3) it was held that the intention of the insolvent was to carry on his business if he could, and that was held not to constitute a fraudulent preference. To hold that a payment made because the debtor thought he lawfully ought to pay is not a preference, is to go back to motive. In *In re Vautin*; *Ex parte Saffery* (4), it was held that the dominant intention of the debtor was to fulfil an obligation which he believed he was under to his creditor. But there is no question of dominant intention here. There is no doubt about the intention here, the only doubt is as to the motive: *In re Tweedale*; *Ex parte Tweedale* (5), where a bill of sale was given by the debtor to correct an error in one given some time previously, the debtor believing that he was under a legal obligation to do what he did, may be supported on the ground that he did not want to put the creditor in a better position. Here the evidence shows that the intention was to put the creditor in a better position. Eyles was not bound to allow the respondent to sell his cattle when he did. His only obligation, if any, was to sell through the respondent, but the time of sale was at his own option. The promissory note was not yet due so that Eyles could not have thought that he was bound to sell the cattle then. In *In re Cohen* (6) it was held that the real intention of the debtor in making the payment complained of was to enable him to carry on his business and finally to pay all his creditors equally. *Tompkins* v. *Saffery* (7) disposes of the position that the fact that a debtor thinks he is bound to make a payment renders the payment not a preference. If the decision of *à Beckett* J. were right the section would be of

(1) (1899) A.C., 419, at p. 421.
(2) 5 C.L.R., 110.
(3) 5 C.L.R., 865.
(4) (1900) 2 Q.B., 325.
(5) (1892) 2 Q.B., 216.
(6) (1908) V.L.R., 171; 29 A.L.T., 187.
(7) 3 App. Cas., 213.

no practical use to creditors. The use of the word preference presupposes that there is some motive actuating the debtor to give a preference, so that the only case to which the section would apply would be when the debtor makes the payment for no reason whatever. In *In re W. Blackburn & Co.; Backley's Case* (1), *Wright* J. pointed out that payment made under a sense of moral obligation is nevertheless a fraudulent preference, and that the obligation must be, or at least be believed by the debtor to be, a legal one to take the payment out of that category. Here there was no more than a sense of moral obligation.

[ISAACS J. referred to *In re Lake; Ex parte Dyer* (2); *In re The Stenotyper Ltd.*; *Hastings Bros.* v. *The Stenotyper Ltd.* (3); *Lord Halsbury's Laws of England*, vol. II., p. 284.]

This payment is also obnoxious to sec. 71 of the *Insolvency Act* 1890 as being made with intent to defeat or delay his creditors within the meaning of sec. 37. The intent to defeat and delay is obvious on the evidence.

[ISAACS J.—On the findings of the Judge the case is not brought within those sections: *Alton* v. *Harrison* (4).]

Starke, for the respondent. This question should be looked at from the point of view of whether the transaction was honest. The hardship will be if the respondent has to account for the proceeds of these cattle which were bought with his money. On the purchase of the cattle by Eyles, the respondent charged the proceeds of them, whenever they might be sold by Eyles, with the payment of the sum advanced by the respondent. That amounted to an equitable assignment of the proceeds, that is, of a fund to come into existence at some future time. Such an assignment although verbal is good, and notice is not necessary to render it perfect as between the assignor and the assignee: *Ryall* v. *Rowles* (5); *Warren's Choses in Actions*, p. 78; *Field* v. *Megaw* (6); *Riccard* v. *Pritchard* (7); *Gurnell* v. *Gardner* (8); *Heath* v. *Hall* (9); *Tibbits* v. *George* (10); *Brandts, Sons & Co.* v. *Dunlop*

(1) (1899) 2 Ch., 725.
(2) (1901) 1 K.B., 710.
(3) (1901) 1 Ch., 250.
(4) L.R. 4 Ch., 622.
(5) Wh. & T.L.C., 6th ed., vol. II., pp. 840, 843, 848.
(6) L.R. 4 C.P., 660.
(7) 1 K. & J., 277.
(8) 9 Jur. N.S., 1220.
(9) 4 Taunt., 325.
(10) 5 A. & E., 107.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Rubber Co. (1); *In re Irving*; *Ex parte Brett* (2); *Instruments Act* 1890, sec. 169; *Holroyd* v. *Marshall* (3); *Weir on Bills of Exchange*, p. 20.

[GRIFFITH C.J. referred to *Tailby* v. *Official Receiver* (4).

ISAACS J. referred to *Hunt* v. *Mortimer* (5); *Ex parte Hall*; *In re Whitting* (6); *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (7); *Johnson* v. *Union Fire Insurance Co. of New Zealand* (8); *Ex parte Griffith*; *In re Wilcoxon* (9); *Fisher on Mortgages*, p. 42; *In re Thornton* (10).]

In determining whether a disposition of property amounts to a fraudulent preference under sec. 73 of the *Insolvency Act* 1890, the question is what was the state of mind of the debtor when he made the disposition? *Sharp* v. *Jackson* (11); *In re Cohen* (12); *Bills* v. *Smith* (13). Was his dominant view to give the particular creditor a preference? Although the result may be to give a preference that is unimportant.

[GRIFFITH C.J.—Must not a man be presumed to intend the natural consequences of his act?]

The presumption may be rebutted by the evidence as to the surrounding facts.

Here the Judge has found that the dominant view of the debtor was to carry out a contract with the respondent, and the evidence supports that finding.

The only effect of sec. 116 of the *Insolvency Act* 1897 is that in considering whether a disposition of property is a fraudulent preference pressure by the creditor not to be taken into account. Otherwise the section did not alter the law.

[GRIFFITH C.J.—In *Edwards* v. *Glyn* (14) it was held on facts similar to those here that the disposition was made under pressure.]

In *Bills* v. *Smith* (13) the jury found that although there was no pressure the debtor made the payment in order to carry out a

(1) (1905) A.C., 454, at p. 462.
(2) 7 Ch. D., 419.
(3) 10 H.L.C., 191, at p. 209.
(4) 13 App. Cas., 523.
(5) 10 B. & C., 44.
(6) 10 Ch. D., 615.
(7) 35 Ch. D., 191.
(8) 10 V.L.R (L.), 154; 6 A.L.T., 50.
(9) 23 Ch. D., 69.
(10) 13 L.T.N.S., 568.
(11) (1899) A.C., 419.
(12) (1908) V.L.R., 171; 29 A.L.T., 187.
(13) 6 B. & S., 314; 34 L.J.Q.B., 68.
(14) 2 El. & El., 29.

contract, and that was held to acquit him of fraudulent preference. See also *Vacher* v. *Cocks* (1).

In *In re Lake*; *Ex parte Dyer* (2), evidence of an intention to repair a breach of trust was held to defeat the presumption that the intention was to prefer. A payment may be made with more than one view in mind; that is implied in speaking of the dominant view. *Wace on Bankruptcy*, p. 246.

[ISAACS J. referred to *Ex parte Hill*; *In re Bird* (3); *In re Bell* (4); *Ex parte Tempest*; *In re Craven & Marshall* (5).]

The onus of proving a fraudulent preference is upon the appellant: *Ex parte Lancaster*; *In re Marsden* (6); *In re Laurie*; *Ex parte Green* (7); *In re Eaton & Co.*; *Ex parte Viney* (8); *In re The Stenotyper Ltd.*; *Hastings Brothers* v. *The Stenotyper Ltd.* (9). The fact that the disposition was made before the promissory note was due does not matter. That fact does not make a payment otherwise not so a fraudulent preference: *Lord Halsbury's Laws of England*, vol. II., p. 286; *Hartshorn* v. *Slodden* (10); *Strachan* v. *Barton* (11).

The Court should not interfere with the decision of the primary Judge because this is essentially a question of fact, viz., what was the operative and determining view with which the debtor made this disposition?

[ISAACS J. referred to *Ex parte Tempest*; *In re Craven & Marshall* (12).]

Duffy K.C., in reply. Assuming that a verbal assignment of a chose in action may be good in equity, there was no intention here to assign the moneys to come from the future sale of the cattle through the respondent, or to create a charge. See *Rodick* v. *Gandell* (13). Apart from the agreement as to cattle which were sold through other salesmen, there was no more than the ordinary agreement between a cattle dealer and a cattle salesman. There was no idea of creating a special fund out of which pay-

(1) 1 B. & Ad., 145, at p. 152.
(2) (1901) 1 K.B., 710.
(3) 23 Ch. D., 695, at p. 704.
(4) 10 Mor., 15.
(5) L.R. 6 Ch., 70, at p. 75.
(6) 25 Ch. D., 311.
(7) 67 L.J.Q.B., 431.
(8) (1897) 2 Q.B., 16.
(9) (1901) 1 Ch., 250.
(10) 2 B. & P., 582.
(11) 11 Ex., 647.
(12) L.R. 10 Eq., 648; L.R. 6 Ch., 70.
(13) 1 De G. M. & G., 763, at p. 779.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

ment should be made. If this was an equitable assignment then it is an assignment of a book debt within the meaning of the *Book Debts Act* 1896, and not having been registered, is invalid.

[He also referred to *Wace on Bankruptcy*, p. 249 ; *Ex parte Blackburn* ; *In re Cheeseborough* (1).]

Starke. The *Book Debts Act* 1896 only refers to assignments of choses in action, and only invalidates that part of a document which purports to assign a debt: *National Bank of Australasia Ltd.* v. *Falkingham & Sons* (2). On the facts of this case there is no debt which the Act could operate on. It is an assignment of a fund which may come into the hands of the respondent, and not of a future debt.

[He also referred to *Peat* v. *Jones & Co.* (3).]

Cur. adv. vult.

April 2.

The following judgments were read :—

GRIFFITH C.J. This was an action brought by the appellant, the trustee of the estate of David Eyles, an insolvent, against the respondent for a declaration that certain transactions which took place between the respondent and Eyles on the eve of the insolvency were a fraudulent preference within the meaning of the Insolvency Acts, and for consequent relief. The statement of claim alleged facts bringing the case within the words of sec. 73 of the *Insolvency Act* 1890. The defence traversed these allegations, and also pleaded that the payments attacked were made to and received by the defendant as a payee in good faith and for valuable consideration and in pursuance of a contract between him and the insolvent.

The facts of the case are not in dispute. Eyles was a cattle dealer whose practice was to buy cattle on credit. He had had many transactions with the respondent, who was a stock and station agent and cattle salesman. In December 1906 the respondent brought some cattle under the notice of Eyles, who said that he would buy them if the respondent would find the money for him. The respondent's evidence of what passed is as

(1) L.R. 12 Eq., 358. (2) (1902) A.C., 585. (3) 8 Q.B.D., 147.

follows:—"I said I would finance the transaction on the strict condition that I had right of re-sale, that in the event of any other auctioneer having a buyer he must get my consent to sale, and the proceeds would be taken to come to me. He said he would agree. I had told him I was to have [the] money as he re-sold." The cattle were accordingly bought, and respondent provided the necessary money. Some of them were subsequently sold by another agent, and the proceeds paid to respondent. There then remained 260 head in Eyles' possession, and his liability to respondent was represented by promissory notes amounting to £1,000, and payable on or about 13th January 1907.

On 27th December 1906 Eyles instructed his solicitor to call a meeting of his creditors. On the 29th a creditor named McNamara asked him for payment of an overdue promissory note given in payment for cattle, and Eyles told him that he could not pay and had arranged for the meeting of creditors. McNamara asked him if he had any of the cattle bought from him. Eyles said he had not. McNamara then asked if there were any of them which he could take instead, to which Eyles said "No," and added that it was known that he had called a meeting and could let none off the place.

On the same day he had an interview with one McNaughton, the manager for another of his creditors, whose evidence is as follows:—"I saw him in the presence of McNamara. I said 'I have come to see you for payment of our account in our office.' He said 'I am sorry that I can't pay you. I have placed my affairs in the hands of Argyle, solicitor, Tatura, to call a meeting of my creditors on the 10th January, as I want to be fair to everybody. I am going to give everything up. I won't have anything left. I will have to go and work.' I asked him had anyone been pressing him. He said: 'No.' I said: 'Wouldn't it have been better to call a meeting previously before going to a solicitor?' He said: 'Well, I had decided to have the whole matter settled up.' I said: 'Will you allow us to take the cattle and settle our account?' He said: 'No, that wouldn't be fair to the other creditors.' I said: 'Well, that is just the position I want you to take up, Mr. Eyles, and if you act straight as far as we are concerned, we will be kind with you.'"

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Griffith C.J.

At this time, therefore, Eyles knew himself to be insolvent, and entertained an honest intention not to prefer one creditor to another.

On 3rd January Eyles and respondent met. Their respective versions of the interview between them are as follows:—Eyles says: "Smail said he was sorry I had got into trouble, had buyers for the balance of the cattle. I said I didn't know whether I was doing right in selling them or not. He said: 'According to the arrangements you and I made you are justified in selling them.' Then I said I would sell. I thought I was doing right. He said C. W. Norton was buyer for the young cattle. He did not say who the buyer was for the others. Norton junior" (*i.e.*, C. W. Norton) "went up to the bank with Smail and myself. We talked over the price of cattle and came to an agreement after getting to the bank. We agreed as to the price and a sale note was made out. Smail said he had a buyer for the bullocks, and McIsaacs came in and said he was a buyer. Had a conversation with him about the price I wanted, £5 7s. 6d. He thought it was too much. We came to a bargain at £5 5s. 0d., and a sale note was made out." . . . . "By 'Thought I was doing right' I mean I thought I was carrying out the agreement I had made." Question—"Why at this stage of your finances did you allow Smail to sell the cattle and have the proceeds?" Answer—"I thought I was carrying out the agreement I had made." Respondent's version is as follows:—"He (Eyles) made some remarks as to whether he could now sell, whether it would be fair to the others. I said that I expected him to carry out his contract with me. I can't remember exactly what he did say, but it was to the effect mentioned, the conditions under which he bought and he was prepared to carry them out."

Besides the sale notes mentioned by Eyles a third sale note recording a sale of some of the cattle to C. W. Norton was made out and dated as of 31st December, but it was actually drawn up at about the same time as the others. The transaction to which it referred has been treated throughout as standing on the same footing as the others.

At the same interview respondent wrote out and procured Eyles to sign a document in the following terms:—

"Mooroopna, 3rd January 1907.—W. G. Smail, Nathalia.—Dear Sir.—Please apply proceeds of cattle sold through your agency to-day to retire current promissory notes and forward same to me without delay.—Yours sincerely, David Eyles."

Respondent received the proceeds of the whole of the cattle thus sold, and this action is brought to recover them from him.

It thus appears that on 3rd January Eyles, who on 29th December had thought it would be unfair to prefer one creditor to another, persuaded himself, or allowed himself to be persuaded, that it would be right to prefer respondent, and did so.

It remains to apply the law to these facts.

Sec. 73 of the *Insolvency Act* 1890, which substantially corresponds to sec. 92 of the English *Bankruptcy Act* 1869 and sec. 48 of the Act of 1883, provides that dispositions of property made by a debtor in insolvent circumstances in favour of a creditor "with a view of giving such creditor a preference over the other creditors" shall in certain events be deemed fraudulent preferences. Before the Act of 1869 the elements of a fraudulent preference were that the disposition should have been made in contemplation of bankruptcy, and should have been made voluntarily, or, as was sometimes said, *ex mero motu*. It was, therefore, a sufficient answer to show that the disposition was not voluntary; and this might be done by showing that it was made in consequence of pressure or importunity on the part of the creditor preferred. If both elements were present, pressure and a wish to prefer, the transaction was protected: *Brown* v. *Kempton* (1). After the passing of the Act of 1869 it was laid down that this doctrine still applied, and that pressure was sufficient to take the case out of the section. In 1874 the Queensland *Insolvency Act* was passed, which, while adopting sec. 92 of the English Act of 1869, added as a proviso that pressure by a creditor should not be sufficient to exempt any transaction from the operation of the section. The effect of this proviso was considered in the case of *Stewart and Walker* v. *White* (2). A similar proviso was added to sec. 73 of the Victorian Act in 1897 (Act No. 1513, sec. 116).

In *Ex parte Griffith*; *In re Wilcoxon* (3), the Court of Appeal

(1) 19 L.J.C.P., 169. (2) 5 C.L.R., 110. (3) 23 Ch. D., 69.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Griffith C.J.

laid down the rule that in determining whether a transaction amounted to a fraudulent preference the Court ought to have regard simply to the statutory definition contained in sec. 92 of the Act of 1869. The cases of *Vacher* v. *Cocks* (1); *Brown* v. *Kempton* (2); *Bills* v. *Smith* (3); *Ex parte Tempest*; *In re Craven and Marshall* (4), all of which were relied upon by the respondent, were cited to the Court on behalf of the creditor, but in vain. I have often protested against taking the facts of one case as decisive of the law applicable to another, but a more complete resemblance between the facts of that case and the present can hardly be conceived. Sir G. *Jessel* M.R. said (5), that the mind of the debtor was influenced not by the demand of the creditor for a preference, but by his desire to accede to the demand and to give him a preference.

In *Ex parte Hill*; *In re Bird* (6), *Baggallay* L.J. said:—"All that sec. 92 says is that the conveyance must be made 'with *a* view of giving such creditor a preference'; it does not say with the *sole* view. I understand it to mean that the substantial object or view must be the giving the creditor a preference, and that the mere fact that besides that view there may have been also some view of an advantage to be gained by the person who makes the preference does not alter the case or prevent the application of sec. 92." *Cotton* L.J. said (7):—"It is suggested that there was another motive in the wish of Bird" (the debtor) "to obtain a more liberal creditor than Feldman as the holder of the first bill of sale, but in my opinion that will not do. The Act requires only that the substantial motive of the transaction should have been the wish to prefer the creditor, and you cannot get rid of the provision by showing the existence of some such other motive as that which is suggested."

Bowen L.J. said (8):—"I should prefer keeping to the word 'view' instead of 'motive,' though in nine cases out of ten the words may come to the same thing. . . . It is a very difficult matter to prove that the dominant motive was the sole motive, and I think the true test under sec. 92 is this: (1) had the debtor

(1) 1 B. & Ad., 145.
(2) 19 L.J.C.P., 169.
(3) 6 B. & S., 314; 34 L.J.Q.B., 68.
(4) L.R. 6 Ch., 70.
(5) 23 Ch. D., 69, at p. 72.
(6) 23 Ch. D., 695, at p. 701.
(7) 23 Ch. D., 695, at p. 703.
(8) 23 Ch. D., 695, at p. 704.

a view of giving a preference to the creditor? and (2), was that the operative effectual view?" Finally he said that he came to the conclusion that the bill of sale in question in that case was executed by the debtor with the view, amongst others, of preferring the creditor, and that that was "the dominant and substantial view."

In *Sharp* v. *Jackson* (1), Lord *Halsbury* L.C. adopted the language of Lord *Esher* M.R. in the Court of Appeal in the same case (*New, Prance and Garrard's Trustee* v. *Hunting* (2)):—"The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors." He also quoted and adopted the view expressed by Lord *Cairns* in the case of *Butcher* v. *Stead* (3):—"The Act appears to have left the question 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." Lord *Macnaghten* expressed the same opinion. Lord *Shand* said (4):—"It seems to me that by a stream of authority it has now been settled, whatever may have been the case a number of years ago, that it is necessary to consider, as *A. L. Smith* L.J. said, what was the dominant or real motive of the person making the preference; and I think that the dominant or real motive which led to the granting of this deed was that the bankrupt intended to protect himself. I think that was the true purpose he had in executing it."

These cases establish that the question to be determined, so far as it depends on the state of mind of the debtor, is: What was the substantial object which he desired to achieve by the act alleged to be a preference? The words "intention," "view," "object," "motive," "purpose," have all been used by learned Judges in

(1) (1899) A.C., 419, at p. 421.
(2) (1897) 2 Q.B., 19.
(3) L.R. 7 H.L., 839, at p. 846.
(4) (1899) A.C., 419, at p. 427.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Griffith C.J.

different cases, sometimes as if they were synonymous, and confusion has arisen from not distinguishing between an intention and the motive which induces that intention. But I think that the phrase "substantial object which he desired to achieve" expresses what was meant by all of them.

In the case of *Sharp* v. *Jackson* (1) the disposition attacked was the conveyance of an estate to make good a breach of trust which had been committed by the debtor, and the Court held, on the evidence, that the question of preferring the beneficiaries was not substantially present to his mind at all. It is a matter of daily experience that men often do acts desiring to achieve a particular object, and incidentally achieve a result quite different from that which was contemplated. It is quite possible for a man to be impelled to do an act that results in a preference to a creditor by a desire to achieve a quite different result. The fact may be difficult of proof, but if it is established he cannot be said to have acted with the view to prefer. In my opinion it is essential to bear in mind the distinction between the motive or reason which induces a man to desire to achieve a particular object and the desire itself. The object desired is alone relevant for the present purpose. All the later cases cited to us, including *In re Cohen* (2), are illustrations of the application of the principle established by the cases to which I have referred.

Applying this principle to the present case, it is, in my opinion, abundantly clear that the debtor deliberately preferred the respondent, and that he was induced to do so by being led to believe that under the circumstances it was the proper and honest thing to do. In short, having been persuaded that he ought to prefer the respondent, he desired to do so, and did so. Preference was the very object which he desired to achieve. It certainly was his dominant and substantial object, and I am unable to discover any other object, as distinct from motive.

It was contended that a desire to perform a supposed contractual obligation may be regarded as a separate and distinct object to be achieved. This may be so if the idea of preference is absent from the debtor's mind, or is so far subordinated to the

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

(2) (1908) V.L.R., 171; 29 A.L.T., 187.

main object as to be practically lost to sight. But that is not this case.

The learned Judge from whom this appeal is brought thought that the debtor's motive was to fulfil his obligations under an agreement which he had made with respondent, and that he did the acts complained of because he thought it would be wrong to do otherwise. I agree, but for the reasons already stated I think both facts immaterial.

If the argument of the respondent were to be accepted, every debtor would, in effect, be a law to himself. Any debtor who thought, or could be persuaded to think, that it was his duty to prefer a particular creditor by keeping a bargain or supposed bargain with him could effectively do so, which would be reducing the law to an absurdity.

If this case had fallen to be decided under the Act of 1890 without the amendment of 1896, it might perhaps have been contended that the persuasion exercised by the respondent amounted to pressure, and that this was sufficient to protect the transaction. In *Ex parte Hall*; *In re Cooper* (1), however, *Jessel* M.R. ridiculed the notion that a request made by a creditor to a debtor who was to his knowledge about to stop payment could be called pressure, observing that it would be a different matter if the creditor did not know of the state of the debtor's affairs. He thought that a payment so obtained was a fraudulent preference. *Baggallay* L.J. was of the same opinion.

The whole argument of the respondent is based upon the persuasion which induced the debtor to make a preference that he would not otherwise have made. The effect, it is said, was to distract his mind from the notion of preference, and concentrate it on the notion of duty. So regarded, it is pressure or nothing, and the Act of 1897 says that pressure is not sufficient. This alone would be decisive of the case.

This conclusion is entirely in accord with the views expressed by my brother *Barton* and myself in the case of *Stewart and Walker* v. *White* (2). In that case no question arose of any other substantial object which the debtor desired to achieve, and being of such a nature as to exclude from his mind or relegate to the

(1) 19 Ch. D., 580. (2) 5 C.L.R., 110.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Griffith C.J.

background the notion of preference. The principle established by *Sharp* v. *Jackson* (1) did not come into consideration at all.

Mr. *Starke*, however, set up another answer to the appellant's case. He contended that the agreement made before the purchase of the cattle amounted in law to an equitable assignment of the moneys to be realized by the subsequent sale of them. No reference is made in the judgment of *àBeckett* J. to this point, and Mr. *Mann*, who appeared for the appellant in the Supreme Court, says that it was not raised there. Mr. *Starke* says that it was. I think that it is plain that, if it was raised at all, it was raised not as an independent answer to the action, but as a matter relevant to determine the dominant view of the debtor. In this connection the case of *Hunt* v. *Mortimer* (2) was cited, in which *Parke* J. held that the facts established an equitable assignment of a future fund, and that payment of the fund to the equitable assignee was not a fraudulent preference. The other Judges put the case on the ground that the payment in question was made in fulfilment of a special contract, and was not voluntary. In the present case, if this had been set up as a substantive defence, evidence might, and probably would, have been given as to the details of the previous transactions between the parties, which would have been very material for the purpose of determining whether the conversation of December was intended by the parties to have the effect of an equitable assignment of future purchase moneys. Assuming the point to be open, Mr. *Duffy* made two answers: (1) that, assuming a verbal assignment to be good, the test whether an agreement operates as an equitable assignment or not is whether the parties intended that it should have that effect, and that the evidence in this case negatives such an intention; and (2) that under the Victorian *Book Debts Act* 1896 an assignment of a future debt is void unless in writing and registered. I have already quoted the relevant evidence on the subject, and in my opinion it entirely fails to establish any such intention. It appears to me that the agreement to effect sales through the respondent was a mere collateral agreement. Although performance of it would have given the respondent the opportunity of protecting himself against loss by retaining the

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

(2) 10 B. & C., 44.

purchase money of the cattle when passing through his hands, I do not find anything to suggest that the idea of assigning the future purchase money itself was present to the mind of either party. The letter of 3rd January strongly supports this view. It is not, therefore, necessary to determine the question under the *Book Debts Act* 1896, but I have great difficulty in seeing how the case can be taken out of the words "any debt due or to become due at some future time to any person on account of or in connection with any profession trade or business carried on by such person."

In my judgment the appeal should be allowed.

BARTON J. There are, I think, only two questions in this case. First, were the payments by the insolvent to the respondent, one of his creditors, made "with a view of giving such creditor a preference over the other creditors"; secondly, were the moneys paid the subject matter of an equitable assignment by the insolvent to the respondent made in December some time before Eyles became unable to pay his debts. It will be convenient to deal first with the second contention, which if made good would dispose of the whole case. To begin with, I doubt very much whether it was open to the respondent to raise the question on this appeal. It is not raised in the statement of defence, which relies merely on a contract. The reasons of *àBeckett* J. for the judgment under appeal make no word of allusion to such an assignment, and the absence of mention of a ground really contested as covering the whole case would be a strange thing on the part of any Court, and especially so in the case of the learned Judge who heard this case below. Then, although counsel for the respondent strongly asserts, and no doubt believes that it was seriously raised, counsel for the appellant is just as positive that it was not raised at all. Then we are not told, nor does it appear on his Honor's notes, that any application for an amendment of the defence was made at the hearing. I am inclined to believe that if the matter was mentioned, it was as a circumstance tending to show that at the time of the payments the main object of the insolvent was not a preference of the respondent. It is not by any means clear that it would be fair to allow the question to be

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Barton J.

raised now, but as I am of opinion that it cannot prevail and therefore the appellant cannot be prejudiced, I will say a few words on it. It is plain to me that the *Book Debts Act* 1896 (No. 1421) is fatal to the contention. The moneys to arise from the re-sale of cattle were clearly included in the definition of book debts in sec. 2 of that Act as debts "due or to become due at some future time" to Eyles, the suggested assignor, "on account of or in connection with" a "business carried on" by him, namely, that of cattle-dealer, and as "future debts of the same nature although not incurred or owing at the time of the assignment or transfer." Under sec. 3, no assignment or transfer, whether absolute or conditional, of book debts due or to become due to any person, is to have any validity in law or in equity unless it has been registered by the Registrar-General. The definition (see sec. 2) is not affected by the fact that a debt is not entered in a book, but it is clear no assignment or transfer of debts within the definition can have any validity in Victoria unless the terms of this Act have been complied with. I do not wish it to be inferred that I think the evidence shows that the parties even intended this agreement as an equitable assignment. But as the *Book Debts Act* seems conclusive, it is not necessary to say more as to the other aspect of the point than that I agree with the view expressed by the Chief Justice.

I pass to the question on which the judgment under appeal was given. It is clear that Eyles, by his own evidence, was on 27th December unable, to his own knowledge, to pay his debts as they became due from his own moneys. The transactions impeached were within three months—even within a month—of the adjudication on his petition in insolvency. If they were payments made to a creditor "with a view of giving such creditor a preference over the other creditors," each such payment must be deemed a fraudulent preference void as against the appellant, the trustee: *Insolvency Act* 1890, sec. 73—corresponding with sec. 92 of the English Act of 1869, and sec. 48 of the Act of 1883. The only question raised is as to the view with which the payments were made. In *New, Prance and Garrard's Trustee* v. *Hunting* (1) Lord *Esher* M.R. indicates that "intention," "view," and "object"

(1) 1897) 2 Q.B., 19, at p. 27.

are practically the same thing, and that the question is whether the debtor had in fact "the intention to prefer" certain creditors. He had just said that the question whether there had been a preference "depends, not upon the mere fact that there had been a preference, but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor, but that he has fraudulently done so." The sentence last quoted must be taken in connection with the terms of the section, which make the question whether the preference is "fraudulent" or not depend, not on the question of fraud in fact, but on the three conditions of the state of the debtor's affairs at the time of the preference, the occurrence of an adjudication within three months, and the existence of the "view to prefer." Obviously, also, the "state of mind" of the debtor at the time refers to the view, or intention, or object, with which he did the thing impeached. The passage cannot be read with any other meaning. Now, when the same case went to the House of Lords, *sub nom.*, *Sharp* v. *Jackson* (1), Lord *Halsbury* L.C., quoted the passage with approval, and the House concurred unanimously with his judgment. The transaction in that case was held to have been carried out, not with a view to prefer, but under a dominant and overwhelming sense of imminent peril; pressure, not by a creditor, but by his own apprehension of that peril. I may say in passing that there is no assertion that this case presents any similar feature. So far as pressure of a creditor may now be material in view of sec. 116 of the Act of 1897, it is not even alleged here. So far as a certain sort of self-pressure may be relied on, I shall speak of it presently.

In the case cited only one of their Lordships uses the word "motive" as applied to the mind of the debtor, that is Lord *Shand*, who speaks of the "dominant or real motive"; but in the same sentence his Lordship shows that he uses that word to describe the debtor's intention to protect himself. And I may say at once that, while the distinction between motive and intention has not been very strictly adhered to in the many cases on the subject, the former word has in most instances been used as the equivalent of the latter. That being understood, the inac-

(1) (1899) A.C., 419, at p. 421.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Barton J.

curacy is merely colloquial. It is not the motive, in the strict sense of the word, that we are to discover, it is the view, in the sense of object or intention. As Lord *Esher* puts it in the case first cited, "What had he obviously in view?" If he had more than one object, what was the main and substantial one? See *Ex parte Hill*; *In re Bird* (1), in which *Bowen* L.J. says:—"We have to look to the words of sec. 92, and they are, with a 'view of giving such creditor a preference over the other creditors.' 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 this 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 this is the correct interpretation; (3) The other conceivable construction is to treat them as equivalent to 'with the sole view or sole motive.' I should prefer keeping to the word 'view' instead of 'motive,' though in nine cases out of ten the two words may come to the same thing. Is then 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. . . . But if we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea." And he puts the following as the true test under sec. 92 (2):—"(1), had the debtor a view of giving a preference to the creditor? and (2), was that the operative effectual view"? To my mind that is beyond question the true construction of the section. I add some words used by *Lindley* L.J. in *Ex parte Griffith*; *In re Wilcoxon* (3):—"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

(1) 23 Ch. D., 695, at p. 704. (2) 23 Ch. D., 695, at p. 705.
(3) 23 Ch. D., 69, at p. 73.

the standard of the old law. It may be so, but the language is different, and our duty is to construe that language. I by no means wish to be understood as expressing an opinion that the old decisions are of no value as guides; of course they are; I only protest against their being substituted for the Statute."

What, then, was the "operative effectual view" of the debtor in making these payments? I entertain no doubt that the substantial, if not the only view, was to give the respondent an advantage over the other creditors. A meeting of creditors was impending, and Eyles had, since giving instructions to summon it, expressed to another creditor his desire "to be fair to everybody;" his intention to "give everything up." This must mean to let all his assets be distributable among all his creditors. He would not consent to let this creditor take some cattle to settle his account. It "wouldn't be fair to the other creditors." The same day he meets the same creditor, McNaughton, with another, McNamara. To the latter he owes nearly £120 on a bill dishonoured three weeks previously. He refused to let this creditor have any cattle for his debt. "It was known that he had called a meeting, and could let none go off the place." Thus before the transactions of 31st December and 3rd January he perfectly appreciated the position, and his duty not to prefer anyone. Then, on the last mentioned date, he has the conversation with the respondent, the two versions of which the Chief Justice has stated. The question to him evidently was whether he was "justified in selling" the cattle, whether he "was doing right" if he did so, in view of his agreement with the respondent, or as the latter puts it, "whether it would be fair to the others." What were all these questions for, if we recall his expressions to McNaughton and McNamara, unless it was to decide whether to give or not to give a preference to Smail by letting him sell the cattle and keep the proceeds. It may be that his *motive* was benevolent, that he had persuaded himself that it would be an honourable thing to do—but what was the thing *in view*? In my judgment clearly a preference which would enable Smail to have all his debt but a few pounds, leaving only a little over £300 worth for the rest of the creditors.

But it is argued that the excellence of the debtor's motive exempts the transaction. First, does the transaction come liter-

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Barton J.

ally within the section? If it does, any "motive" that is not in truth the "view" with which the thing was done is immaterial, and in this case such a motive cannot override the operative effectual intention to prefer. Next, such a motive cannot be converted into a pressure, not being pressure by a creditor, such as would exempt the transaction, first because it is idle to contend that mere self-persuasion of the sort will suffice for that purpose; and next because the admission of such a defence would practically subvert the law. It would make the insolvent, and not the Court, the arbiter of such transactions. That is not the purpose for which Judges have held that the state of the debtor's mind is to be ascertained. The real purpose is to ascertain whether, in the state of his mind, the intention to prefer is dominant. That once ascertained, what have we to do with the debtor's actuation by this motive or that, when he has done with clear intention the thing that once so done the Statute makes fraudulent?

I confess that I cannot distinguish this case in its salient facts, on its merits, or as to the law which applies to it, from the case of *Ex parte Griffith*; *In re Wilcoxon* (1), already cited, and which I think we may safely follow. I am therefore of opinion that this appeal must be allowed.

O'CONNOR J. The substantial matter for determination in this appeal is whether the learned Judge of first instance was right in deciding that the transfer and payment challenged in the statement of claim were not fraudulent preferences within the meaning of sec. 73 of the *Insolvency Act* 1890. It was attempted to support the judgment on another ground, namely, that the agreement under which the money for purchasing the cattle was first advanced by Smail to Eyles must be taken to create a charge enforceable in equity on the proceeds in respondent's hands of cattle sold under the agreement. It is possible to put that complexion on the facts in evidence, but that is not, in my opinion, the reasonable inference to draw from them. Taking all the evidence together, I am satisfied that the parties never intended that such a charge should be created, and I am strengthened in this view by observing that there is no reference to it in the

(1) 23 Ch. D., 69.

evidence, and that the learned Judge, although Mr. *Starke* raised the question, avoids any finding in respect of it in his judgment. I propose, therefore, to direct my observations solely to the ground on which Mr. Justice *à Beckett* based his decision. The issue raised by that ground is partly of law and partly of fact, and as to the latter the determination turns in no way upon personal credibility or demeanour of witnesses, but upon the inference to be drawn from facts which are practically undisputed. Under these circumstances this Court is free to consider the whole matter on its merits. As to the vital portions of the evidence there is little dispute. The agreement between the insolvent and Smail, in so far as it is material, bound the former to place his cattle in the latter's hands for sale with the right to retain proceeds to the amount of the advance. At the end of December 1906 the insolvent knew he was in insolvent circumstances, and had instructed his solicitors to call a meeting of creditors on 10th January following. In addition to other debts he was then liable to six different firms of auctioneers besides Smail on promissory notes given for purchase of cattle, which had been bought by him through them. Under these circumstances McNaughton, manager for one of the firms, Muntz Bros., saw him on 29th December, and to him the insolvent made a full statement of his debts, his debtors, and his assets, and informed him of his intention to call a meeting of his creditors on the date mentioned. McNaughton asked that some of the cattle should be handed over to his firm in payment of their debt, but the insolvent declined to take that course, alleging that he intended to keep all his property for division amongst his creditors. On the same day another cattle auctioneer, McNamara, standing in the same position as a creditor, had a similar interview with him and with a similar result. Five days afterwards Smail and his manager called on the insolvent. They appear to have discussed the position with him, and urged their right to have the cattle bought through them handed over to them for sale in accordance with the agreement. After some discussion he determined then to abandon his design of keeping all his property for division amongst his creditors generally, and yielding to Smail's persuasion handed over to him for sale certain cattle so bought, sub-

H. C. OF A. 1909.

MUNTZ v. SMAIL.

O'CONNOR J.

sequently authorizing him by letter to liquidate the promissory notes out of the proceeds. The learned Judge states that the insolvent gave as his reason for taking this step that "he thought that he was carrying out the agreement he had made," also, that on a doubt being suggested by him to Smail, "as to whether he could sell—whether it would be fair to others," the latter said that he expected him to carry out his contract with him to which the insolvent had in substance replied "he remembered the conditions under which he had bought, and was prepared to carry them out." These are the material facts to which the law is to be applied. The rights of the general body of creditors represented by the assignee against a creditor who has been preferred are contained in section 73 of the *Insolvency Act* 1890. In all respects but one the facts are admittedly within the section. But the respondent denies that the insolvent made the transfer and payment "with a view of giving Smail a preference over other creditors" within the meaning of the Act. There can be no doubt at the present day as to the interpretation of these words, which are the same as those of the English *Bankruptcy Act* 1883, nor can there be any doubt as to the general principles on which the provisions of the section are to be applied to the facts. The judgment of Lord *Halsbury* L.C. in the House of Lords in *Sharp* v. *Jackson* (1), is universally accepted as a correct exposition of the law, and this Court in *Stewart and Walker* v. *White* (2) and *Gow* v. *White* (3), in construing similar words in the Queensland *Bankruptcy Act*, has followed that interpretation. Lord *Halsbury* L.C. approves and adopts the words of Lord *Esher* M.R. in delivering judgment in the case in the Court of Appeal. "The question," he says, "whether there has been a fraudulent preference depends, not upon the mere fact that there had been a preference, but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have in-

(1) (1899) A.C., 419, at p. 421. (2) 5 C.L.R., 110. (3) 5 C.L.R., 865.

tended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend." The word fraudulently used in this connection means of course "in contravention of the section"—no more. The key note of that interpretation is in the last sentence of the quotation. The Court must find out what the creditor "really did intend" in making the transfer or payment. In a large number of instances that is not difficult, but there is a class of cases in which the ascertainment of the real intention of the debtor is no easy matter, cases in which, although the debtor must be aware that the transfer or payment will have the effect of preferring one creditor to the others, he makes it not with that end in view, but to effect some other object altogether different, his mind being set on the achievement of that other object and giving no heed to the effect of the payment as a preference. In many instances the real intention stands out so clearly as to be unmistakeable. But there are necessarily many on the border line in which the disentanglement of motives, reasons and inducements with the view of arriving at the real intention of the insolvent has proved a complex and unsatisfactory inquiry. In such cases Judges have occasionally wandered far afield into what *Bowen* L.J. has described in *Ex parte Griffith*; *In re Wilcoxon* (1) as "the old metaphysical exploration of the motives of people," and in many of the reported cases inaccuracy in the use of such words as "intention," "motive," "inducement," has made it difficult to extract the principle of the decision. I shall therefore not attempt to discuss all the cases cited, believing as I do that the safest and simplest method of dealing with the matter is to follow the section as closely as possible, reading it in the light of Lord *Esher's* clear and simple exposition. Where the evidence points to the existence in the debtor's mind of several intentions it may become necessary for the Court to inquire which is the "dominant intention," to adopt an expression used by some of the Judges. But whether described as the "real intention" or the "dominant intention" the thing to be ascertained is always the same. What was the end the debtor had set his mind on attaining by means of the payment or transfer? Was the

(1) 23 Ch. D., 69, at p. 74.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

O'Connor J.

preference of the particular creditor the end in itself? Or was that incidental merely to the achievement of some other end to be accomplished by means of the payment or transfer? The ground taken by the respondent was that the insolvent's "dominant intention," as disclosed by the evidence, was not to prefer Smail to the other creditors, but to discharge the legal obligation under which the agreement with Smail had placed him, and which he believed it would be wrong to disregard. In support of this ground Mr. *Starke* sought to bring the facts within a class of cases in which it had been decided, under many differing sets of circumstances, that preference was not the dominant intention. It is unnecessary to deal with all the cases of that class that were cited, but an examination of the principal decisions is essential to the proper consideration of the argument. *Bills* v. *Smith* (1) was strongly relied on as turning on similar facts, the intention there being, as was found by the jury, to fulfil a legal obligation to pay a certain sum on a particular day. The question was raised in the form of an objection to Mr. Justice *Blackburn's* direction to the jury. The latter found, in effect, that the payment was made by the bankrupt *bonâ fide* and without any intention of giving a preference to the creditor preferred. In the course of the summing up the learned Judge had directed the jury that, if the bankrupt had paid the debt simply in the discharge of the obligation he had entered into to pay on a given day, without any view of giving a preference to this particular creditor at the expense of the rest, the payment could not be a fraudulent preference within the meaning of the bankruptcy law. The Court held the direction to be right. It is difficult to see how the case helps the respondent. The account of the facts is meagre. It must, however, be assumed that the jury followed the learned Judge's direction, which laid down the law in substantially the same terms as Lord *Halsbury's* statement of it in the case I have quoted. As they found that the payment was made merely in discharge of a contractual obligation to pay on a particular day, it must be taken to have been established by the evidence to their satisfaction that that, and not the preference of the creditor, was the real intention of the insolvent in making

(1) 6 B. & S., 314.

the payment. In *Ex parte Taylor*; *In re Goldsmid* (1) the payment was made by the bankrupt to repair a breach of trust, and so save himself from exposure, and perhaps criminal prosecution. The evidence established that his dominant intention was to save himself. There is nothing to show that the consideration of the claims of his creditors generally as against that of the creditor actually preferred was present to his mind when he made the payment. In *In re Tweedale*; *Ex parte Tweedale* (2), the transfer impeached was the giving of a bill of sale by a bankrupt to his wife in correction of an error in one given *bonâ fide* by him to her some time previously, it being proved that he felt himself under an obligation to make the correction. As to what his intention was there was no evidence except that he was advised and he believed he was under an obligation to so correct the security, and that he wished and intended to fulfil that obligation. The Court of Appeal held that such facts negatived an intention to fraudulently prefer one creditor to the others. *In re Vautin*; *Ex parte Saffery* (3) is a decision of a Court of first instance only. Mr. Justice *Wright* found on the facts that the debtor, believing himself, although mistakenly, to be under a binding obligation to make a certain payment, his dominant intention was to fulfil that obligation and not to prefer one creditor to the others. In my opinion it is questionable whether the facts as stated in the report justified that inference. The learned Judge admits that in arriving at that conclusion on the facts before him he had gone somewhat beyond any of the decided cases. Whether the decision is or is not of much authority, even on a similar set of facts, it can be no authority in a case such as this where, as I shall point out later, the claims of the particular creditor preferred and of the main body of creditors are in the insolvent's mind and carefully weighed and considered before the transfer and payment are made. In *Sharp* v. *Jackson* (4) the decision of a Court of Appeal, consisting of Lord *Esher* M.R., and *A. L. Smith* and *Chitty* L.JJ., was affirmed in the House of Lords in the judgments from which I have already quoted. There, as in *Ex parte Taylor*; *In re Goldsmid* (1), the bankrupt had

(1) 18 Q.B.D., 295.
(2) (1892) 2 Q.B., 216.
(3) (1900) 2 Q.B., 325.
(4) (1899) A.C., 419.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

O'Connor J.

committed breaches of trust the discovery of which was certain and imminent. Two days before his bankruptcy he transferred by deed part of his estate for the purpose of raising money to make good these breaches. The Court held that the deed was not a fraudulent preference because the object of the bankrupt in executing it was not to prefer some creditors to others, but to shield himself from the consequences of his breaches of trust. There appeared to be nothing in the facts to indicate that in executing the deed he had anything in his mind other than the attainment of that object.

The view of the facts upon which it is contended that the transfer and payment in this case are within the class to which I have referred is well put in Mr. Justice *à Beckett's* judgment in these words (1):—"I believe that the debtor's motive here was what he has stated it to have been, to fulfil his obligations under an agreement which he had made with the creditor." Later on the learned Judge states his finding with more particularity:—"I think that, on being reminded by the defendant of the circumstances under which the defendant had bought the cattle for him, and the arrangement then made, he honestly formed a different opinion, and considered that it would be wrong of him to refuse to sell through the defendant." The circumstance relied on, therefore, in the respondent's favour is that the debtor's "motive"—which word I assume his Honor uses in the sense of "intention"—in making the transfer and payment was to fulfil a legal obligation to Smail which he honestly believed he would not be justified in evading. To decide that, on evidence such as is before us in this case, the debtor has not contravened the section would be equivalent to holding that an insolvent may take into his consideration the claims of all his creditors, and if he determines honestly that one is legally entitled to payment to the disadvantage of the others, he may lawfully make that payment, and the general body of creditors have no remedy. Fortunately, however, something much more than the existence of an honest belief on the debtor's part in the binding nature of the obligation to make the transfer or payment is required to bring the facts within the class of cases which I have been discussing. It must be shown

(1) 29 A.L.T., 223, at p. 224.

that the intention to fulfil the obligation was the dominant intention, the intention that filled the insolvent's mind to the exclusion of any but an incidental consideration of the aspect of the transaction as a preference. With every respect for the opinion of the learned Judge, I can see no facts from which an inference could fairly be drawn that such was the condition of the debtor's mind in this case. His obligation under his contract with Smail was purely legal; there is nothing to show that he looked upon it as more binding on him in any sense than any other legal obligation. Nor is there anything to indicate that he regarded its fulfilment as necessary to save him from disgrace or punishment or dishonour. It is clear also that while deliberating on the course to take he had in his mind all the time the position and claims of his other creditors. That aspect of any transfer or payment to any one creditor was kept prominently before him during the interviews with McNaughton and McNamara when he determined to preserve his property for distribution amongst all his creditors, and refused to make the transfers which they asked in their own several interests. When a few days afterwards Smail persuaded him to change his mind about preserving his property for all his creditors and to transfer a portion of it to him, the same aspect of the matter must have been before him. Indeed, the evidence, as I view it, indicates with a clearness not often found in these cases the operation of the insolvent's mind in forming the intention to make the transfer and payment which have been questioned. With a full knowledge of his position and a clear appreciation of the effect of making a transfer or payment to any one creditor, he determined to reserve his property for all. A few days afterwards at the persuasion of one creditor he altered his view. Being convinced that that creditor had by reason of his contract a greater claim on him than the others, he determined to make to him the transfer and payment that was requested. It may be assumed that his reason for taking that course was that he believed himself under the legal obligation to take it. Actuated by that reason the object which he set himself to attain was the placing of Smail in that position of advantage as compared with the other creditors which he believed to

H. C. OF A. 1909.

MUNTZ v. SMAIL.

O'Connor J.

be his due. In other words his dominant intention in making the transfer to Smail and authorizing him to pay himself out of the proceeds of sale was to prefer Smail to the general body of his creditors. Taking that view I am of opinion the learned Judge in the Court below ought to have found that the transfers and payments impeached amounted to a fraudulent preference. Under the circumstances the appeal must be allowed, the judgment appealed against set aside, and the relief granted which the appellant has claimed.

ISAACS J. In my opinion this appeal should be dismissed. The case as to transfer of property with intent to defeat and delay the insolvent's creditors fails hopelessly.

In view of *Alton* v. *Harrison* (1), affirmed in *Ex parte Games*; *In re Bamford* (2) and *Maskelyne & Cooke* v. *Smith* (3), the facts of the case as sworn to and as found by the learned primary Judge place it quite outside the Statute of Elizabeth. With respect to sec. 37 (ii.) of the *Insolvency Act* 1890, actual and not merely constructive intent is necessary to be proved, the onus of proof resting on the appellant. This is settled by *Morris* v. *Morris* (4) on a corresponding provision in the New South Wales *Bankruptcy Act* 1887, sec. 4, and in accord with the Victorian cases of *Michael* v. *Oldfield* (5) and *Davey* v. *Danby* (6). The findings of *àBeckett* J. entirely negative any such intent, and not only is there abundant evidence to sustain the finding, but there is none, in my opinion, which would reasonably sustain a contrary conclusion.

With respect to fraudulent preference, the appellant has also the onus of establishing it: *Ex parte Lancaster*; *In re Marsden* (7), and *In re Lake*; *Ex parte Dyer* (8), where *Rigby* L.J. says:— "It is necessary to the case of the trustee in bankruptcy that he should make out that the governing motive in the mind of the bankrupt in the transaction in question was to prefer one creditor before others."

(1) L.R., 4 Ch., 622.
(2) 12 Ch. D., 314, at p. 324.
(3) (1903) 1 K.B., 671, at p. 677.
(4) (1895) A.C., 625.
(5) 13 V.L.R., 793; 9 A.L.T., 136.
(6) 13 V.L.R., 957, at p. 962; 9 A.L.T., 163.
(7) 25 Ch. D., 311.
(8) (1901) 1 K.B., 710, at p, 716.

The issue raised by the appellant in the action on the question of fraudulent preference was whether or not the insolvent Eyles paid the several sums claimed "with a view of giving Smail a preference over his creditors." That is a pure question of fact and has been found against him. He is, therefore, in the position of having to meet not merely an adverse finding of fact, but the additional circumstance that it was a fact as to which the burden of proof lay upon him, and as to which his own witness testified against him. The authorities bearing on the duties of the Court were reviewed and the duty stated in *Dearman* v. *Dearman* (1) last December (see particularly the judgment of the learned Chief Justice), and without repeating what was there said, it appears to me impossible for us to reverse the findings of the learned primary Judge. Unless we disregard the consideration that *à Beckett* J. saw and heard the witnesses, and are prepared without hearing or seeing him to convict the trustee's own witness of perjury, the facts directly sworn to and found cannot be displaced, and they cover the whole ground.

Whether the agreement made between Eyles and Smail constituted an equitable charge which, after insolvency and apart from the order and disposition clause, would have given Smail a right to specific performance, or whether it was merely a personal undertaking to resell through Smail, leaving Smail to collect the purchase money, and alternatively an undertaking to re-sell through another agent approved by Smail, the proceeds being handed to Smail, is, I think, perfectly immaterial on the point of fraudulent preference. The central consideration of the agreement which was made long before Eyles had any idea of insolvency, and as part of the bargain to make any advance at all which alone enabled him to purchase the cattle, was that for Smail's better security of repayment, the re-sale by Eyles in his cattle-dealing business should be in one of the ways mentioned. It was an honest and not unusual bargain to make; and without dishonesty on Eyles' part could not have been departed from. The real question here may be succinctly stated to be whether the law compels a man to be dishonest against his will. The appellant's argument comes to this, that "with a view of giving

(1) 7 C.L.R., 549.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Isaacs J.

a preference" is equivalent to "voluntarily give an advantage," irrespective of motive; that "voluntarily" means "not under pressure," and therefore, there being no pressure here, or if there were the law making pressure immaterial, the advantage was a "fraudulent preference" within the meaning of the Act. It is argued that, even allowing for the fact of the agreement to re-sell through Smail, involving his receipt of the proceeds, as an element in affording him some security of repayment in the sense that it created at the least a binding contract to act as Eyles acted, the advantage given to Smail was still "voluntary," because it was quite open to Eyles to refuse to carry out his collateral contract—honest as it was and not contrary to any law when made, that he carried out his agreement *intending* to give Smail the advantage contracted for—and therefore it was a fraudulent preference.

The whole matter depends on the construction of a few words in sec. 73 of the *Insolvency Act* 1890, namely, "with a view of giving such creditor a preferene over the other creditors."

A good deal of argument was addressed to us with respect to the expression "with a view," as to whether "view" meant "intention" or "motive," or some similar word. In my opinion not very much turns on the difference between these words. There is probably a subtle distinction between all of them which may have its value in the field of metaphysics, but for the purpose of fraudulent preference is really immaterial. The phrase "with a view" was not newly coined for the occasion of the English *Bankruptcy Act* 1869; it was employed by Lord *Mansfield* in the very first of the series of cases in which he laid the foundations of this branch of the law—*Alderson* v. *Temple* (1) (in 1768), and in *Rust* v. *Cooper* (2) (1777). It was also employed by *Wilde* C.J. in his charge to the jury in *Brown* v. *Kempton* (3), and was sustained by the Court. "View" was used by Lord *Mansfield* as interchangeable with "design" and "object" (*Rust* v. *Cooper* (2)), and with "motive" (*per* Lord *Mansfield* in *Harman* v. *Fishar* (4)), and *per Cockburn* C.J. in *Bills* v. *Smith* (5); *Crompton* J. in *Edwards* v. *Glyn* (6); *James* L.J. in *Ex parte Tempest*; *In re*

(1) 4 Burr., 2235.
(2) 2 Cowp., 629.
(3) 19 L.J.C.P., 169.
(4) 1 Cowp., 117.
(5) 6 B. & S., 314, at p. 324; 34 L.J.Q.B., 68.
(6) 2 El. & El., 29.

Craven & Marshall (1); *Jessel* M.R. in *Ex parte Griffith*; *In re Wilcoxon* (2); *Cotton* L.J. and *Lopes* L.J., in *Ex parte Hill*; *In re Bird* (3); *A. L. Smith* L.J. in *New, Prance and Garrard's Trustee* v. *Hunting* (4); Lord *Shand* in *Sharp* v. *Jackson* (5); *Cozens-Hardy* J. in *In re The Stenotyper Ltd.*; *Hastings Bros.* v. *The Stenotyper Ltd.* (6); *Rigby* L.J., *Vaughan Williams* L.J., and *Stirling* L.J. in *In re Lake*; *Ex parte Dyer* (7); also as synonymous with various other words, as "desire": *per Parke* B. in *Brown* v. *Kempton* (8); and "wish," by *Compton* J. in *Edwards* v. *Glyn* (9), and *Cotton* L.J. in *Ex parte Hill*; *In re Bird* (3). Surely all these distinguished Judges were not fundamentally wrong. But the truth is, as Lord *Halsbury* said in *Sharp* v. *Jackson* (10), quoting Lord *Esher*, "whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to *prefer* certain creditors." And again (11): "It seems to me clear therefore that he made this conveyance not with the 'intention' or 'view' or 'object' *or whatever it may be called* of preferring those persons, but for the sole purpose of shielding himself. Under these circumstances, what he did is not a fraudulent preference within the *Bankruptcy Act*." Therefore it comes to be a mere question of what is meant by "preference." If "preference" was the dominant "aim" or "intention" or "object" or "view" or "purpose" or "motive" the transaction is struck at; otherwise not.

Now it is essential to remember that merely giving an advantage to a creditor is not necessarily "preferring" him. If it is assumed, to begin with, that the insolvent intended to "prefer" the creditor, the matter is ended. But that is the very thing to be ascertained. It is, however, frequently assumed, and the argument for the appellant here assumes, that "preference" and "advantage" are identical. They are not, and the assumption that they are breeds all the confusion. Every preference connotes an advantage, but it is not every advantage which amounts to a

(1) L.R. 6 Ch., 70, at p. 75.
(2) 23 Ch. D., 69, at p. 72.
(3) 23 Ch. D., 695.
(4) (1897) 2 Q.B., 19, at p. 29.
(5) (1899) A.C., 419, at p. 427.
(6) (1901) 1 Ch., 250, at p. 255.
(7) (1901) 1 K.B., 710.
(8) 19 L.J.C.P., 169.
(9) 2 El. & El., 29.
(10) (1899) A.C., 419, at p. 421.
(11) (1899) A.C., 419, at p. 422.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Isaacs J.

preference. "Advantage" looks at the transaction from the creditor's side; "preference" from the debtor's. If, for instance, the "advantage" is one which the debtor is compelled by law or by contract, or by coercion of men or circumstances to bestow, or which he confers in order to avoid unpleasant consequences to himself, he does not give it with a view to "prefer" the creditor. Lord *Macnaghten* said in *Sharp* v. *Jackson* (1) "the word 'preference' in itself involves and imports a free choice." Lord *Cairns*, in *Butcher* v. *Stead* (2), in a passage referred to by Lord *Halsbury* in *Sharp* v. *Jackson* (3), said that the word "preference" implies an act of free will. Lord *Cairns* in that passage quoted with approval the case of *Ex parte Topham*; *In re Walker* (4), where *Mellish* L.J. observed:—"It is still necessary, upon the true construction of the 92nd section of the *Bankruptcy Act* 1869, to prove that the preference was voluntary, so that *the motive actuating the debtor must be the wish that the creditor should be preferred.*"

Lord *Halsbury* most emphatically stated his assent to what Lord *Cairns* said, and went further, by showing how the contrary view would impute absurdity to the legislature. It had been argued—just as it has been argued here—that there being no pressure, the preference was free and voluntary; that if there were mixed views, one being an intention to put one creditor in a better position than another it was a fraudulent preference; that "view" was distinct from "motive," and that a debtor must be taken to intend the consequences of his acts. But these contentions were rejected; and the Lord Chancellor said that, if the legislature had so desired, it could have enacted that any "preference," or as he chose to term it any "greater advantage," to one creditor should be a preference void under the Statute. But his Lordship could see no such intention in the Statute. And then the learned Lord Chancellor said (5), what I think of the highest importance on the question, namely, that:—"As Lord *Cairns* said, subject to certain express alterations which it then made in the previous state of the law, it did intend to bring with

(1) (1899) A.C., 419, at p. 427.
(2) L.R. 7 H.L., 839, at p. 846.
(3) (1899) A.C., 419.
(4) L.R. 8 Ch., 614, at p. 618.
(5) (1899) A.C., 419, at p. 423.

it all those conditions which, certainly, for something more than a century, have been imputed to these transactions, which must be regarded as fraudulent under the bankruptcy law;" and he adds, "the state of the law from that time until the present, I think, has not been a subject of doubt."

If I may venture, without presumption, to add my concurrence to that last observation, I do so unhesitatingly. The law as to what is a "preference" has never been the subject of judicial doubt so far as I can ascertain. No better example can be obtained on the point of principle than *Sharp* v. *Jackson* (1) itself. Lord *Halsbury* refers (2) to "the mere voluntary deciding (I will not use the word 'preferring') to pay one creditor and leave another unpaid." It is true in some of the cases you find the word "preferring" used to indicate that some advantage has been given, but the House of Lords has drawn pointed attention to the proper use of the term. The facts of the case were simplicity itself. Prance, one of the members of a firm of solicitors, on 29th March 1894 executed a deed conveying an estate to make good in full a sum of £4,200 owing to an estate for breach of trust. The firm knew for some years that they were insolvent, and two days after they voluntarily petitioned for sequestration and were accordingly adjudicated bankrupt. Of course, Prance, as a solicitor and a business man, knew perfectly well what he was doing, and that he was paying one creditor in full while others would go short. It would be idle to imagine that he did not know that the creditor was in fact receiving an advantage over others; indeed, Prance had it very vividly present to his mind that unless that creditor did receive full payment, although the others would get so much the less, very unpleasant consequences might happen to himself. He intended that the particular creditor should receive this advantage. But the point was, as the Lord Chancellor said (3):—"What were the reasons why it" (the deed) "was executed?" As it appeared he was taking the step of giving this advantage, not for the purpose of benefitting the creditor, but because he "was thinking of something else" (4), it was held to be no "preference." "Thinking of

(1) (1899) A.C., 419.
(2) (1899) A.C., 419, at p. 426.
(3) (1899) A.C., 419, at p. 421.
(4) (1899) A.C., 419, at p. 424, *per* Lord *Halsbury*.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Isaacs J.

something else" meant, of course, as a reason for giving the advantage. Now, as Lord *Halsbury* said, this had been the law for over a century. Lord *Mansfield* in *Harman* v. *Fishar* (1), referring to a letter of the bankrupt, says:—"It is in terms a declaration that he means to give a *preference*. This the law does not allow."

"Preference," as already pointed out, connotes a free choice. It is the voluntary selection for advantageous treatment from among the debtor's general creditors of one creditor who stands in no different position from the rest, and having no more right to exceptional consideration than they. The word "voluntary" is not found in the section, but is inherent in the word "preference," and has been so held from Lord *Mansfield's* time to the present day. It was used by him in *Thompson* v. *Freeman* (2), where his words were:—"A bankrupt when in contemplation of his bankruptcy cannot by his *voluntary act favour* any one creditor;" and therefore a delivery over of goods to satisfy a debt, because made under even a groundless apprehension of process, was not a voluntary preference, or in the language of the House of Lords, not a true "preference" at all. "Voluntary" is an ambiguous word, and is capable of various significations according to the connection in which it is used—as, for instance, with reference to a contract, or a conveyance, or a payment, or a contribution, or an appearance before a tribunal, and its variable meaning is exemplified by the judgment of Lord *Russell of Killowen* C.J., in *Attorney-General* v. *Ellis* (3), and the cases there cited.

Being so uncertain in its meaning Parliament intentionally avoided it, as is pointed out by *Mellish* L.J. in *Ex parte Bolland*; *In re Cherry* (4), where he said, referring to the words "with a view of giving a preference":—"Those words, no doubt, have been used because the word 'voluntarily' was a deceptive word, having a *technical meaning* different from its common meaning, so that a payment which any ordinary person would call voluntary might in the technical sense not be so." I have already quoted the words of the same learned Lord Justice in *Ex parte Topham*; *In re Walker* (5) as to the meaning of voluntary. In

(1) 1 Cowp., 117, at p. 125.
(2) 1 T.R., 155, at p. 157.
(3) (1895) 2 Q.B., 466, at pp. 469, 470.
(4) L.R. 7 Ch., 24, at p. 27.
(5) L.R. 8 Ch., 614.

Edwards v. *Glynn* (1) *Crompton* J. stated the principle in brief but precise terms:—"A payment cannot be considered as perfectly voluntary when other motives tend to bring it about besides the debtor's own wish." That is the technical meaning referred to by *Mellish* L.J.

It is the will or wish—the *voluntas*—of the debtor to select for preferential treatment one creditor in order to favour him at the expense of the rest—the state of mind of the debtor which causes him to "prefer" one creditor to another—which is the "view to give a preference" struck at by the Statute. If the appellant be right—that the mere deliberate payment in full is enough to stamp it as a fraudulent preference—then all the cases as to pressure and mixed motive have been wrongly decided. There is really no escape from this dilemma. There was no magic in the fact of pressure except that it was evidence that the payment was not voluntary. Lord *Cairns* L.C. in *Butcher* v. *Stead* (2) said "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." Lord *Halsbury* in *Sharp* v. *Jackson* (3) said:—"It becomes no longer a voluntary act, but an act under pressure," that was the pressure of fear—not of creditors. Lord *Chelmsford* C. in *Johnson* v. *Fesemeyer* (4) said:—"The term 'pressure' . . . is now only calculated to mislead, as it has been decided, that the only question in cases of this description is, whether the act is voluntary on the part of the bankrupt; and as *Alderson* B. explains the term in *Strachan* v. *Barton* (5), 'a voluntary payment' (and this of course applies equally to the case of a voluntary act of preference) 'is a payment simply by the act and will of the party making it, and if there is anything to interfere with or control this will, then it is not a voluntary payment."

Therefore pressure was nothing more than evidence that the advantage to the creditor was not given voluntarily. A mere demand by a creditor was equally effectual to take it out of the class of voluntary payments: *Mogg* v. *Baker* (6). But effective pressure, though coupled with a desire to give the creditor a

(1) 2 El. & El., 29, at p. 52.
(2) L.R. 7 H.L., 839, at p. 846.
(3) (1899) A.C., 419, at p. 426.
(4) 3 De G. & J., 13, at p. 24.
(5) 11 Ex., 650.
(6) 4 M. & W., 348.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Isaacs J.

preference, was sufficient to relieve: *Brown* v. *Kempton* (1), because the payment was not wholly voluntary. Even the presence of an actual "desire," which must at least to some extent include "a view," to give a preference was held by the powerful Court in that case to be quite consistent with an absence of fraudulent preference, because the pressure that existed was such as to be a materially operating element in determining the debtor's mind. It is consequently evident that the appellant's contention negatives most—and I think all—of the decisions on fraudulent preference. The alteration in the law made by sec. 116 of Act No. 1513 merely denies to pressure the exculpatory effect it formerly had, but otherwise leaves the law as it was. In this case nothing is rested on pressure either by *à Beckett* J. or myself, nor as I understood the argument, did the respondent rely on it.

What then in the result is the effect of the cases up to and including *Sharp* v. *Jackson* (2), as to the proper construction to be placed on the statutory words already quoted? This is not I think uncertain. In *Ex parte Topham*; *In re Walker* (3)—already cited as approved by Lord *Cairns*,—*Mellish* L.J. adopted the observations of the Chief Judge in *Ex parte Blackburn*; *In re Cheesebrough* (4), in which it was said that the qualification or condition—that is, "the view to *prefer*"—is "the very life and essence of the enactment," and that "the act of the debtor is alone to be considered,—the *object and purpose* for which the payment is made can alone be inquired into—and although it is perfectly legitimate, and in all cases requisite, that all the attending circumstances should be carefully investigated, *yet if the act done can be properly referred to some other motive or reason* than that of giving the creditor paid a *preference* over the other creditors, then I conceive neither the Statute, nor any principle of law or policy, will justify a Court of law in holding that the payment is fraudulent or void." From that time onwards, down through the whole series of decisions—notably *Ex parte Griffith*; *In re Wilcoxon* (5); *Ex parte Hill*; *In re Bird* (6), until *Sharp* v. *Jackson* (2),—the rule approved by *Mellish* L.J. in *Topham's*

(1) 19 L.J.C.P., 167.
(2) (1899) A.C., 419.
(3) L.R. 8 Ch., 614.
(4) L.R. 16 Eq., 358, at p. 364.
(5) 23 Ch. D., 69.
(6) 23 Ch. D., 695.

Case (1), with the exception of substituting "dominant" or its equivalent for "sole" in another part of the passage, has been affirmed. In *Griffith's Case* (2), *Jessel* M.R. first stated that there was *no obligation* to assign the debts, which at once distinguishes it in principle from this case, and then having so far cleared the ground, asked for what purpose where they assigned? Clearly to give him "*a preference*" is the answer. He adds (2):—"If it was made with a view to *prefer* the creditor and also with some additional view it may be that it is not within the Statute. But the additional motive may have been so trifling that it ought not to be taken into account at all." *Bowen* L.J. protested against metaphysical speculation and turned to the practical question whether the debtor had a view to *prefer* one creditor to the others. His judgment was plainly rested on the fact that in the case before him "preference" was the mainspring, and in his opinion, the only spring of the debtor's action. In *Ex parte Hill*; *In re Bird* (3), *Cotton* L.J. said:—"The Act requires only that the substantial motive of the transaction should have been *the wish to prefer* the creditor." *Bowen* L.J. held (1) that the Act did not make it a fraudulent preference merely because the debtor had present in his mind as one view among others the giving a preference to the particular creditor; and (2) it did mean to include transactions where it was the real, effectual, substantial view, the dominant view. In *Ex parte Taylor*; *In re Goldsmid* (4), *Lopes* L.J. said:—"Every one who studies sec. 48" (which corresponds with sec. 73 here), "must come to the conclusion that the *animus* with which the particular thing is done by the debtor is an essential element in considering whether it is a fraudulent preference. *The mere making of a preferential payment is not a fraudulent preference.* The substantial motive of the debtor in making it must be looked at. If the substantial motive is to *prefer* the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference."

Since *Sharp* v. *Jackson* (5) there have been two cases which

(1) L.R. 8 Ch., 614.
(2) 23 Ch. D., 69, at p. 72.
(3) 23 Ch. D., 695, at p. 703.
(4) 18 Q.B.D,, 295, at p. 302.
(5) (1899) A.C., 419.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Isaacs J.

must upon the appellant's argument have been wrongly decided. The first is *In re The Stenotyper Ltd.*; *Hastings Brothers* v. *The Stenotyper Ltd.* (1), a decision of *Cozens-Hardy* J. (now Master of the Rolls). A company known to be insolvent issued to one of its creditors, debentures, intending of course to pay him off, and knowing he would thereby be paid off, but as it was for the purpose of freeing the chairman of the company from his obligation as surety, it was held to be no fraudulent preference. Said the learned Judge (2):—"The view of giving the particular creditor a *preference* must be the guiding and main *motive* operating upon the mind of the debtor;" and "*the Court is bound to look at the motive and not at the result.*" The other case is *In re Lake*; *Ex parte Dyer* (3), a decision of the Court of Appeal—*Rigby* L.J., *Vaughan-Williams* L.J., *Stirling* L.J. There a debtor voluntarily, as the report states, and without any request or pressure, and with the deliberate intention of repaying in full a trust estate moneys which he had misappropriated, made good a sum of £2,000, and soon after became bankrupt. It was held that as it was not the bankrupt's "governing motive," or "desire," or "dominant view," or "intention," as it was variously termed, by the Lords Justices, to *prefer* the creditor, and because he did it "under a sense of duty," or "a sense of avoidance of shame," or "a sense of his obligation to make good that breach of trust" (4) it was held not to be a fraudulent preference. The appellant here would have argued, and consistently with the view of my learned brothers it should have been held in that case, that as the act was done with the full intention of paying that creditor in full, the matter was at an end.

Now there is the principle—Was the debtor's dominant view, call it motive or what you will, to *prefer* the particular creditor, or was he substantially influenced by some other consideration?

I state that principle analytically thus:—

1. Ascertain the state of the debtor's mind—whether you designate it "view," "intention," "wish," or "motive," is unimportant—as to his real actuating reason for doing the act challenged which gives the creditor a special advantage.

(1) (1901) 1 Ch., 250.
(2) (1901) 1 Ch., 250, at p. 255.
(3) (1901) 1 Q.B., 710.
(4) (1901) 1 Q.B., 710, at p. 718.

2. If you find that his real actuating reason was a desire to "prefer" the creditor, it is a "preference," and if the debtor's situation answers the other conditions of the section it is a "fraudulent preference." How he developed that desire, whether by gratitude or by personal friendship, is immaterial if "preference" was in fact the debtor's real object or design.

3. If you find that the real reason was something other than to "prefer" the creditor, as for instance, to escape peril or obloquy, or to honestly perform contractual obligations which actually or are *bonâ fide* believed to confer a right to a special advantage, it is not a "preference," and therefore not a "fraudulent preference," and is outside the section.

In *Rust* v. *Cooper* (1) Lord *Mansfield*, in terms that are now classical in all branches of the law, observed that "the law does not consist in particular cases; but in general principles, which run through the cases, and govern the decision of them."

I apply the test of the principle to the present case. McNaughton, the manager for Muntz, came to Eyles on 29th December and asked him to pay him off. Eyles refused as it would not be fair to other creditors. That was an absolutely correct position, because Muntz had no special contract of any kind entitling him to exceptional treatment. McNaughton also informed Eyles that he would be doing an illegal act if he permitted Smail to sell his cattle, and Eyles then said there was no fear of his doing that. On 3rd January, however, Smail saw Eyles and told him he had buyers for the cattle. Eyles demurred and said he didn't know whether he was doing right in selling them or not. Evidently McNaughton's warning impressed him, and even without that Eyles was manifestly disposed to treat all his creditors fairly, and not to overstep the requirements of the law. Smail reminded him of the specific agreement between them, and stated that he would be justified in selling. In other words that the insolvency law did not forbid a sale in view of the agreement. Then Eyles said he would sell. He swears "I thought I was doing right. By thought I was doing right I mean I thought I was carrying out the agreement that I had made." He is then specifically asked "Why at this stage of your finances did you allow Smail

(1) 2 Cowp., 629, at p. 632.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Isaacs J.

to sell the cattle and have the proceeds?" His answer was "I thought I was carrying out the agreement I had made." He gave on the same day a written authority to apply the proceeds to retire the current promissory notes which were not due till 11th and 13th January. The subsequent maturity of the notes is a circumstance which may be taken into account as one of the facts in ascertaining the dominant view, but it has no other effect in law.

The learned primary Judge, who heard and saw the witness called by the trustee, believed him, regarded him as a witness of truth and found as follows (1):—"I believe that the debtor's motive here was what he has stated it to have been, to fulfil his obligations under an agreement which he had made with the creditor. I think that when he first contemplated insolvency, he did not intend to sell his cattle through the defendant, considering that it would be wrong to the other creditors to do so. I think that on being reminded by the defendant of the circumstances under which the defendant had bought the cattle for him, and the arrangement then made, he honestly formed a different opinion, and considered that it would be wrong of him to refuse to sell through the defendant." The learned Chief Justice agrees with these findings of fact, but thinks them immaterial. I, on the contrary, think them decisive as far as the facts are concerned. If I were at liberty to reconsider the evidence for myself I should find it hard to discover any other course which Eyles could honestly pursue. To have flagrantly broken faith with Smail, and left the proceeds of his special advance for general distribution, contrary to the original arrangement, seems to me an alternative which no honourable business man could contemplate.

Now, on these facts, was the re-sale of the cattle through Smail a fraudulent preference?

Without revolutionising the established law on the subject I am unable to see how it can be.

It has been up to the present regarded as definitely settled that where the debtor's dominant motive was to fulfil a previous obligation contracted while solvent, or an obligation which he *bonâ fide* believed to exist, it negatived the supposition of his

(1) 29 A.L.T., 223, at p. 224.

acting with a view of giving a "preference." In that case the creditor is already entitled, or is by the debtor believed to be entitled by law to the advantage, and so the debtor does not elect to prefer him.

The cases are direct and are not doubtful. I cite some in order of date. In *Ex parte Tempest*; *In re Craven & Marshall* (1), *James* L.J. says:—"Whatever were the circumstances of the debtor in February, it is impossible to hold that a conveyance then made in pursuance of an agreement entered into in December, in consequence of an application made by the creditor in December, is *a purely voluntary act* of the debtor so as to be a fraudulent preference. The motive of giving a security always is to make the secured creditor safe and better off than other creditors. The case might have been different if he had been asked, 'Would you have executed the deed if there had been no agreement in December?' and had replied, 'That agreement made no difference; it had nothing to do with my executing the deed.'"

In *Ex parte Kevan*; *In re Crawford* (2), *Mellish* L.J. said:—"It is difficult to say that any part of this payment was a fraudulent preference, because, as to £2,350, it was a payment in pursuance of a previous agreement, and it is the same as if it had been paid in August, when the agreement was made, at which time Crawford had no thought of stopping. It is clear, therefore, that that payment was not a fraudulent preference." *James* L.J. agreed.

In *Re Fletcher*; *Ex parte Suffolk* (3), *Vaughan-Williams* J. said:—"No doubt there are abundant cases which show that if a debtor makes a payment or transfers property to a creditor *under a sense of obligation* to do so that is sufficient to negative a fraudulent preference. But, in my opinion, the obligation which the debtor conceives that he is satisfying must be an obligation which appears to him—whether in fact it is so or not—legally binding on him—a legal obligation. A debtor has no right to return goods to vendors because he thinks it a fair thing to do." *Henn-Collins* J. (now Lord *Collins*) concurred.

(1) L.R. 6 Ch., 70, at p. 75. (2) L.R. 9 Ch., 752, at p. 758.
(3) 9 Morr. 8, at p. 11.

H. C. OF A. 1909.

MUNTZ v. SMAIL.

Isaacs J.

Re Vingoe & Davies (1), is to the same effect.

In *In re Vautin*; *Ex parte Saffery* (2), *Wright* J. said:— "Whether there was a legal contract effected or not," (that is to repay the £1,000), "I think the cases justify me in holding that if the bankrupt in good faith and on reasonable grounds believed he was legally bound, then, even if he was not legally bound, that prevents the payment being a fraudulent preference, because it prevents the *preference* being the dominant view."

This position is not regarded with doubt in any direction that I have been able to discover, and is stated as unquestioned law in Lord *Halsbury's Laws of England*, vol. II., pp. 284 and 285; a work which affords support to all the propositions I have stated. The opinion of Chancellor Kent was clearly in accord with it (see *Riggs* v. *Murray* (3).) Among the myriad instances that must have occurred in Great Britain of debtors paying a particular creditor in full in order to keep a special obligation, not one case has been produced where such a payment has been held a fraudulent preference. This will be the first case to say so.

This is sufficient to end the matter, and I am prepared to rest my judgment upon the consideration above stated apart from any opinion as to whether the agreement created any equitable charge, or was invalidated by the *Book Debts Act* 1896.

If it be necessary to determine whether the agreement amounted to an equitable charge upon the proceeds, I am of opinion it did. The basis of the transaction of Eyles' purchase was that the proceeds of the cattle should be applied in payment of the notes. That necessitated, according to the natural course of things, that the notes should not be dishonoured, and therefore that some time before their due dates the cattle should be resold either through Smail or some other agent approved by him, and the proceeds appropriated in the first instance to discharge the notes. Eyles says "The proceeds were to go to him." Without this term of the agreement, the bargain would never have been made, the cattle never bought, and they or their proceeds would not have come into the estate. The sale was not made upon Eyles' general credit (see *Hunt* v. *Mortimer* (4)). It was, in my

(1) 1 Mans., 419.
(2) (1900) 2 Q.B., 325, at p. 328.
(3) 2 John. Ch., at p. 577.
(4) 10 B. & C., 44.

opinion, an equitable assignment to secure Smail. Being verbal it is not struck by Part VI. of the *Instruments Act* 1890. Applying not to any "debt" owing by a possible purchaser, but to the proceeds when either in the hands of Eyles or his agent, it was not concerning a "book debt" within the meaning of the *Book Debts Act* 1896. Consequently it was an assignment which, on the principle of *Alexander* v. *Steinhardt, Walker & Co.* (1), and *Palmer* v. *Culverwell, Brooks & Co.* (2), and other cases of that class gave, as between Smail and Eyles, an equitable security to Smail.

àBeckett J. did not find it necessary to determine the law on the latter branch because he thought the fraudulent preference argument failed without it, and I agree with him. But he found all the facts, and it is a mere question of law whether they amounted to an equitable charge or assignment. If, however, the fulfilment of an agreement valid and binding be not sufficient to displace the notion of a preference, I do not see why even an equitable assignment should. The view taken by the majority seems to me to apply as much to the one case as the other, because in either case the "intention" of the debtor to give the advantage is precisely the same. His obligation also is the same, and the result should be the same.

In my opinion the judgment of *àBeckett* J. was correct and should be affirmed.

Appeal allowed. Judgment appealed from reversed. Judgment for plaintiff with costs. Respondent to pay appellant's costs of appeal.

Solicitors, for appellant, *Dugdale & Creber* for *A. C. Tuthill*, Shepparton.

Solicitors, for respondent, *A. Grant & Son* for *M. Grant*, Nathalia.

B. L.

(1) (1903) 2 K.B., 208.

(2) 85 L.T., 758.