[HIGH COURT OF AUSTRALIA.]

BANK OF AUSTRALASIA . . . APPELLANTS;

AND

THOMAS MURRAY HALL, TRUSTEE OF THE ESTATE OF JAMES ROBERTSON IN LIQUIDATION . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *May* 1, 2, 3.

Griffith C.J., Isaacs and Higgins JJ.

SYDNEY, *July* 29, 30, 31; *Aug.* 1, 19.

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

Insolvency—Security given over property of debtor for advances—Insolvency Act 1874 (*Qd.*) (38 *Vict. No.* 5), *secs.* 107, 108, 109, 112, 113, 140—*Ability to pay "debts as they become due" from his own moneys—"Reasonable and sufficient consideration given at the time"—"Good faith"—Debts, liquidated and contingent liabilities—Assets, realizable property, credit—Bills of Sale Act* 1891 (*Qd.*), *sec.* 4—*True statement of consideration—Secret defeasance.*

Where the validity of a conveyance by a debtor to a creditor is questioned under the *Insolvency Act* 1874 (Qd.), the words in secs. 107 and 108, "unable to pay his debts as they become due from his own moneys," mean that the debtor must at the time in question have had sufficient cash in hand or been able to obtain, by sale or pledge of his available assets, command of sufficient money to satisfy all debts that were anticipated to fall due and become ascertained in the reasonably immediate future.

Held, per Curiam (*Higgins* J. dissenting).—"Debts" in the above sections include any liabilities that would have been provable in insolvency if the debtor had been adjudicated insolvent at the time in question.

Under sec. 108 the words "reasonable and sufficient consideration" require that the debtor shall, in return for the property conveyed or pledged, receive from the creditor such consideration in money or realizable value as will make up to his estate substantially what the conveyance or pledge has taken from it.

Under sec. 109, the words "in good faith" mean that the creditor taking a conveyance or security from the debtor must prove that he took without knowing, or being put upon inquiry which would disclose, that the conveyance or security taken would or might defeat the claims of other creditors.

R. on 7th July 1905, being in need of money to pay wages to the miners in his colliery, applied for an advance from the A. Bank, which had financed

him for some years, and the manager whereof was familiar with all his affairs. The bank made him an advance of £937, and took a security for an amount comprising that sum and an old overdraft of £954. This, with a further advance of about £200 which was contemplated, but not stipulated for, would, it was stated, have been a full advance upon the assets assigned, stated as worth £4,800. At that time R. had other assets, including book debts worth £1,250, and furniture, an office, and small allotments of land, worth £350 in all; and there were debts then due of £450 and other debts soon accruing due of £600. In August a further sum of about £200 would fall due for current wages. Besides these assets R. was conducting a colliery business at a slight profit, and had a claim against P. for £1,800 as balance of purchase money of a ship, which, however, had since March 1905 been the subject of an action by P. against R. The action resulted in August 1905 in a judgment against R. for the rescission of the sale, the repayment of £700 deposit of purchase money, and the payment of damages and costs amounting to over £1,500. R. then presented a petition for liquidation.

Held, per Curiam (*Higgins* J. dissenting), that the security given to the bank was invalid under secs. 108 and 109 of the *Insolvency Act* 1874 (Qd.); that the debtor at the time of giving the security was unable to pay his debts as they became due out of his own moneys, and did not obtain a reasonable and sufficient consideration; and that the bank did not take the security in good faith.

Per Higgins J. :—The word "debts" in secs. 107 and 108, in the expression "unable to pay his debts as they become due from his own moneys," does not include contingent or other mere liabilities, but means debts in the ordinary commercial and legal sense, whether payable presently or in the future.

The words in sec. 108, requiring for the validity of a dealing before insolvency "a reasonable and sufficient consideration given at the time," do not, as applied to a security given by the insolvent, mean that the present advance must be equal, or nearly equal, or equivalent, or nearly equivalent, in amount to the amount secured. The object of the section was to prevent the favouring of certain creditors at the expense of the others. The test is, was the dealing a true bargain, each of the parties straining for his own benefit. On the facts, the trustee has not satisfied the burden of proof by showing that on the 7th and 8th July R. was unable to pay his debts.

Judgment of *Real* J. : *In re Robertson* ; *Ex parte Hall*, 1907 St. R. Qd., 76, affirmed.

APPEAL from a judgment of the Supreme Court of Queensland.

The trustee in insolvency of the estate of James Robertson moved the Insolvency Court to set aside certain securities given by the insolvent to the appellant bank as invalidated by secs. 107, 108, and 109 of the *Insolvency Act* 1874 and the *Bills of Sale Act* 1891, sec. 4.

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The sections of the *Insolvency Act*, and the circumstances under which the debtor gave the securities to the appellant bank, are fully set out in the judgments.

In the Insolvency Court *Real* J. declared the securities invalid, holding that the requirement of sec. 108 that the debtor shall be able to pay his debts as they become due "out of his own moneys" meant that he shall have not merely credit, but money available in ready cash or at call sufficient to pay the debts when they become payable; and that the requirement of sec. 108 that "reasonable and sufficient consideration" must be given for the security meant that an amount equal to the value of the security must be advanced: *In re Robertson*; *Ex parte Hall* (1). From this decision the bank appealed to the High Court.

The case was twice argued, first at Brisbane before *Griffith* C.J., *Isaacs* and *Higgins* JJ., and afterwards at Sydney before the Full Bench.

Feez and *Shand*, for the appellants. The giving of the securities was not a fraudulent preference under sec. 108 of the *Insolvency Act* 1874. On that date, 7th July 1905, the debtor had ample assets to pay his debts "as they became due."

The total property was worth over £7,000; and of this he pledged £4,800 worth to secure the bank in a charge of £1,890 and some small further advances; while the debts then owing were £430 and a debt accruing for railage of his coal. Apart from the *Kingswear* transaction it is clear that the debtor was well able to pay his debts at the time of giving the securities, which is the only date to which the inquiry as to his ability to pay debts is to be directed. The *Kingswear* transaction is excluded from any reasonable definition of the word "debts"; it created at most a mere contingent liability to be mulcted in damages and costs. No reasonable man, knowing that Robertson had a *bonâ fide* defence to Phillipson's claim, could on 7th July consider the £2,260 ultimately lost upon the *Kingswear* action a "debt" that would be coming due. "Debt" must mean a present liquidated claim.

[ISAACS J.—You cannot claim to exclude bills of exchange and

(1) 1907 St. R. Qd., 76.

promissory notes, shortly becoming payable, from the category of "debts." Phillipson had already, on 22nd March 1905, rescinded the contract and claimed his £700 back again.]

The contract was not rescinded till 10th August, when Phillipson elected to take a judgment for rescission instead of damages; he never at any time claimed the £700 as money had and received. He claimed in the alternative for unliquidated damages for fraud; it could not be said that on 7th July he would not elect for damages. Such an inchoate and indeterminate liability could not be termed a "debt" on 7th July. Under the English *Companies Act* 1860 debts "as they become due" mean debts that are actually due at the time: *In re European Life Assurance Society* (1).

The debtor is able to pay his debts "out of his own moneys" if he has such resources that in the ordinary course of business he is able to make enough profits or raise enough money on credit to pay the debts when they become payable; he is not bound to have money "at call" ready to pay, which was the basis of *Real* J.'s decision.

Phillipson's action against the debtor did not disclose any lawful right to rescind; furthermore the findings of the jury against the debtor, and the judgment for rescission, which was bad at law, were not in any way binding on the bank in the present question: *Ex parte Pearse* (2); *Urquhart* v. *Macpherson* (3); *Kerr on Fraud*, 2nd ed., pp. 367-8; *Taylor on Evidence*, 9th ed., § 1682.

Under sec. 108, "debt" does not include "liabilities," as under the Act of 13 Eliz. c. 5.

In any case the *Kingswear* transaction set up only a contingent liability: *Insolvency Act* 1874, sec. 140. A "liability" may be a "debt provable in insolvency" under sec. 140 in common with other debts; but that does not make it a "debt" within the meaning of sec. 108.

[ISAACS J. referred to *In re Charles* (4); *Jones* v. *Thompson* (5); *Hardy* v. *Fothergill* (6); *Ex parte Broadhurst*; *In re Broadhurst* (7).]

(1) L.R. 9 Ex., 122.
(2) 2 Deac. & Ch., 451.
(3) 3 App. Cas., 831.
(4) 14 East., 197.
(5) 27 L.J.Q.B., 234.
(6) 13 App. Cas., 351.
(7) 22 L.J. Bk., 21.

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"Due" in sec. 108 means "presently payable." A man is only bound by this section to provide for debts that he *knows* will accrue due; if it is *solvendum in futuro*, it must still be *debitum in praesenti*; *Ex parte Sturt & Co.*; *In re Pearcy* (1).

"Reasonable and sufficient consideration" under sec. 108 is satisfied if, at the time and under the circumstances of the transaction, the debtor obtained fair value for what he gave. An advance of £950 to meet a pressing liability, and an arrangement for further advances, enabling the debtor to safely carry on a lucrative business, is ample value for a charge of £1,850: *Bittlestone* v. *Cook* (2); *Dixon* v. *Todd* (3); *In re Donaldson* (4).

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

HIGGINS J. referred to *Ex parte Fisher* (6).]

It is clearly wrong to hold that sec. 108 requires that the property hypothecated must be only the exact value of the advance; the property and the advance need, at most, be reasonably proportionate.

[GRIFFITH C.J.—The objection taken is that the £1,850 charge was given, not only for the present advance of £950, but also for the past overdraft of £900.]

But if the debtor had gone to another bank and raised £1,850 upon the securities, thus paying off the overdraft and wages, this transaction would be clearly valid; it can make no difference that the debtor borrowed from the same bank to which he owed the overdraft; the result is the same. This disposition of property does not fall within sec. 108, but is, of course, liable to be caught by sec. 107 and the Statute of 13 Eliz. c. 5, if it was made in order to avoid the consequences of a verdict certain to go against the debtor; at that time the verdict in the *Kingswear* action was hardly even a probability, and could have been set aside if Robertson had not given up the fight and filed his schedule. An honest transaction, in which a fair equivalent was obtained for the debtor, to enable him to benefit the creditors by carrying on a good business, should not be brought within the mischief aimed at by sec. 108, if the debtor is made insolvent within six months

(1) L.R. 13 Eq., 309.
(2) 6 El. & Bl., 296, at pp. 309-311.
(3) 1 C.L.R., 320, at p. 324.
(4) 1 Q.L.J., 105.
(5) L.R. 1 Ch., 128.
(6) L.R. 7 Ch., 636.

by the consequences of an action for tort to which he had a good defence.

[GRIFFITH C.J.—The debtor's honest belief that he is bargaining for a fair equivalent can hardly be made the measure of "sufficient consideration" under sec. 108, which did away with all these questions of intention and *bona fides*, and substituted a test of the state of facts at the time of the transaction.]

The onus is on the trustee to prove that the consideration was not a fair equivalent: *Mercer* v. *Peterson* (1); *Wace on Bankruptcy*, 1904 ed., pp. 22, 252; *Ex parte King*; *In re King* (2): *Ex parte Johnson*; *In re Chapman* (3); *Jamaica (Administrator-General)* v. *Lascelles, De Mercado & Co.*; *In re Rees' Bankruptcy* (4); *Ex parte Wilkinson*; *In re Berry* (5); *Ex parte Lancaster*; *In re Marsden* (6).

Sec. 109 does not touch this transaction, as *Real* J. found that it was perfectly *bonâ fide* on both sides: *Butcher* v. *Stead*; *In re Meldrum* (7); *Tomkins* v. *Saffery*; *Ex parte Saffery, In re Cooke* (8).

Macgregor and *Graham* for the respondent (*Macgregor* at Brisbane only.) This legislation in insolvency was framed to deal more stringently with fraudulent preferences. The Queensland *Insolvency Act* 1874, sec. 107, went so far as to cut out the exception in sec. 92 of the English Act of 1869 where there had been pressure by the creditor. Sec. 108 was enacted to do away with the whole question of intention or *bona fides*, and to substitute for that the test of two facts, ability to pay debts, and sufficiency of consideration. "Preference" in this Act does not connote any state of mind in the debtor, but merely denotes the effect of giving the creditor an advantage. The phrase "debts as they become due" in sec. 108 indicates the continuous falling due of various debts in succession; and the period contemplated must be the six months named in the Act within which these transactions are liable to impeachment. It is not necessary to claim that a transaction can be impeached if the debtor is ruined

(1) L.R. 3 Ex., 104.
(2) 2 Ch. D., 256.
(3) 26 Ch. D., 338.
(4) (1894) A.C., 135.
(5) 22 Ch. D., 788.
(6) 25 Ch. D., 311.
(7) L.R. 7 H.L., 839.
(8) 3 App. Cas., 213.

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by some catastrophe within the six months; the position of the debtor on 7th July discloses sufficient to invalidate the securities then given to the bank, if the facts then developing are looked at in the proper light. The *Kingswear* liability was always a provable debt, which ripened into a judgment before insolvency. The claim for return of £700 was a debt actually due on 7th July, as Phillipson had then elected to rescind the contract of sale, and was willing and able to return the ship in the same condition as before.

[HIGGINS J. referred to *Street* v. *Blay* (1).]

There was total failure of consideration here. The fact that the debtor thinks he can successfully defend a claim properly brought against him, does not make that claim not a "debt." The £700 was immediately recoverable as money had and received, or, at any rate, as an immediate equitable debt as money obtained by fraud.

[*Feez.*—This money was rightly treated throughout the case as not so recoverable: *Jack* v. *Kipping* (2).

ISAACS J.—Phillipson had an election to sue in tort for damages, or to waive the tort and prove in the insolvency on the contract: *Ex parte Read*; *In re Paine* (3); *In re Blackpool Motor Car Co. Ltd.*; *Hamilton* v. *Blackpool Motor Car Co. Ltd.* (4).]

The remedies were interchangeable, but both rights of action were equally provable in insolvency as arising out of contract.

The verdict obtained for damages, although for a tort, was a "debt provable in insolvency" under sec. 140, which means the same as debt in sec. 108: *Ex parte Adamson*; *In re Collie* (5); *Insolvency Act* 1874 (Qd.), sec. 140. There is no distinction made in sec. 108 between the various kinds of debts, so long as they were on 7th July liabilities which were provable as debts in the supervening insolvency: *Peat* v. *Jones* (6); *In re British Gold Fields of West Africa* (7). The fact that the amount was not ascertained by judgment before 7th July did not make the *Kingswear* liability unliquidated, any more than in a case where a judgment has been obtained for such an amount as may be found to be due

(1) 2 B. & Ad., 456.
(2) 9 Q.B.D., 113.
(3) (1897) 1 Q.B., 122.
(4) (1901) 1 Ch., 77.
(5) 8 Ch. D., 807, at p. 819.
(6) 8 Q.B.D., 147.
(7) (1899) 2 Ch., 7.

on accounts being taken; the amount was always definite, though not yet formally ascertained. The continuous succession indicated by "as they become due" shows that the debts are not to be calculated on any particular day. The place of sec. 108 would not be adequately filled by the Statute 13 Eliz. c. 5; the two enactments treat the matter quite differently; knowledge, intention, *bona fides*, and all other states of mind are, under sec. 108, quite immaterial; the only transactions that are exempted are payments *bonâ fide* made in the ordinary course of business.

On the facts, there were so many debts accruing due from day to day, apart from the *Kingswear* liability, that the debtor was on 7th July virtually insolvent.

"Out of his moneys" in sec. 108 means such resources as the debtor can enforce immediate liquidation of; it cannot include book debts or the probability of being able to raise more credit upon his assets: *In re Washington Diamond Mining Co.* (1). The debtor's position depends on whether he *can* pay his debts, not on whether a balance-sheet will show a surplus of assets over liabilities.

The *Kingswear* was on 7th July the subject of a lawsuit, and had been condemned as unseaworthy, and was an eminently unrealizable asset; while the coal business was not a paying concern, but always in arrears.

"Reasonable and sufficient consideration" in sec. 108 is an absolute bar to giving security to cover an old debt as well as a present advance.

[HIGGINS J.—Any consideration that is legal and not illusory has long been treated as "sufficient"; adequacy of consideration is immaterial.]

That applies only in the law of contract; whereas the *Insolvency Act* treats the word "consideration" in an entirely different aspect. It aimed to secure the equal distribution of assets among the creditors without diminution; hence the consideration obtained must under sec. 104 be "a contemporaneous equivalent," and "the creditors must lose nothing by the assignment": *Dixon* v. *Todd* (2).

The transaction is also assailable under secs. 107 and 109,

(1) (1893) 3 Ch., 95. (2) 1 C.L.R., 320.

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because it was not made in "good faith." This does not require proof of actual fraud, but merely fraud in law, *i.e.*, the preferred creditor does not take in good faith if he takes knowing that, or recklessly without inquiring whether, the preference given to him will prejudice other creditors; "mere passive good faith is not enough:" *Butcher* v. *Stead*; *In re Meldrum* (1); *Tomkins* v. *Saffery*; *Ex parte Saffery, In re Cooke* (2); the bank manager should have made better inquiries, but preferred to take his chance, although he knew well that there was some danger.

The trustee is entitled to the costs of this appeal, as he would be liable to pay costs personally, even if he is the respondent: *Ex parte Angerstein* (3); *Ex parte Stapleton*; *In re Nathan* (4); *In re Mackenzie*; *Ex parte Hertfordshire* (*Sheriff of*) (5); *Williams on Bankruptcy*, 1904 ed., p. 312.

Feez in reply. The trustee should protect himself as to costs by taking indemnity from the creditors: *Ex parte Brown*; *In re Smith* (6).

[ISAACS J. referred to *Pitts* v. *La Fontaine* (7).]

The onus is not on the appellants to prove the presence of good faith in order to satisfy sec. 109 of the *Insolvency Act*. The bank were satisfied on 7th July after careful inquiry that the debtor's position, apart from a possible liability, which could neither be estimated nor guessed, was thoroughly solvent; and *Real* J. found that the debtor and the bank's manager acted with absolute honesty. "Debts" do not include all kinds of provable liabilities under sec. 108, which has no connection with sec. 140: *Ex parte Kelly & Co.*; *In re Smith, Fleming & Co.* (8).

[GRIFFITH C.J.—You would make "creditors" and "debts" refer to different subject matters in the various places where they occur in secs. 107 and 108.]

Sec. 108 is not concerned merely with a state of facts; it also has regard to intention: *In re Mills* (9); *In re Warren*; *Ex parte Trustee* (10); *In re Blackpool Motor Car Co.*; *Hamilton* v. *Black-*

(1) L.R. 7 H.L., 839.
(2) 3 App. Cas., 213, at p. 227.
(3) L.R. 9 Ch., 479.
(4) 10 Ch. D., 586.
(5) (1899) 2 Q.B., 566.
(6) 17 Q.B.D., 488.
(7) 6 App. Cas., 482.
(8) 11 Ch. D., 306.
(9) 5 Morr., 55.
(10) (1900) 2 Q.B., 138.

pool Motor Car Co. (1); *Ex parte Lancaster*; *In re Marsden* (2); *Wolmershausen* v. *Gullick* (3).

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Cur. adv. vult.

Aug. 19.

GRIFFITH C.J. This is an appeal from a decision of *Real* J., upon a motion of the respondent, the trustee in liquidation of James Robertson, for a declaration that certain securities dated 8th July 1905, given by the debtor to the appellants by way of mortgage, were invalid under the provisions of the *Insolvency Act* of 1874, and also, as to one of them, under the *Bills of Sale Act* of 1891. Secs. 107, 108, and 109 of the *Insolvency Act* are as follow:—

"107. Every conveyance assignment gift delivery or transfer of property or charge thereon made every payment made every obligation incurred and every judicial proceeding taken or suffered by any debtor unable to pay his debts as they become due from his own moneys in favour of any creditor or any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall if a petition for adjudication in insolvency be presented against such debtor within six months after the date of making taking paying or suffering the same and adjudication of insolvency be made on such petition be deemed fraudulent and void as against the trustee of the insolvent appointed under this Act but this section shall not affect the rights of a purchaser payee or incumbrancer in good faith and for valuable consideration Provided that pressure by a creditor shall not be sufficient to exempt any transaction from the operation of this section.

"108. Every conveyance assignment gift delivery or transfer of property or charge thereon made executed or given by any debtor unable to pay his debts as they become due from his own moneys in favour of any creditor or any person in trust for any creditor not being for a reasonable and sufficient consideration given at the time of making or giving the same shall if a petition for adjudication of insolvency be presented against such debtor within six months after the date of making executing or giving

(1) (1901) 1 Ch., 77, at p. 81. (2) 25 Ch. D., 311, at p. 318.
(3) (1893) 2 Ch., 514.

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the same and adjudication of insolvency be made thereon be deemed a fraudulent preference and shall be void as against the trustee of the insolvent under this Act and shall not be available to the creditor as against the trustee. . . .

"109. Every conveyance assignment gift delivery or transfer of property or charge thereon made executed or given by any debtor unable to pay his debts as they become due from his own moneys and the effect whereof is to defeat or delay the creditors of such debtor or to diminish the property to be divided amongst his creditors shall if a petition for adjudication of insolvency be presented against the debtor within six months thereafter be deemed fraudulent and void as against the petitioning creditor and if adjudication of insolvency be made on such petition shall also be deemed fraudulent and void as against the trustee in the insolvency unless in either case it shall be proved that such conveyance assignment gift delivery transfer or charge was in fact made in good faith proof whereof shall be upon the party alleging the validity of the transaction

"Provided that pressure by a creditor shall not be sufficient to protect any such transaction nor shall any such transaction acquire any validity by reason only that it was made or done in pursuance of an antecedent agreement."

Sec. 107 corresponds to sec. 92 of the English *Bankruptcy Act* of 1869. Secs. 108 and 109, under which the questions for decision arise, are peculiar to Queensland. The duty of the Court is to give effect to these enactments according to the expressed intention of the legislature.

The first subject for inquiry is whether on 7th July 1905 the debtor was able to pay his debts as they became due from his own moneys within the meaning of secs. 108 and 109. Robertson was a colliery proprietor at Torbanlea, near Maryborough, and the appellants had for some years been his bankers. His account was overdrawn and unsecured. In April 1905 he had been informed that the account could not be further carried on unless he gave satisfactory security, which he promised to do. On 7th July 1905 the account was overdrawn to the extent of £954 18s. On that day he had to pay a sum of £937 for wages due for the month of June to the employés in the colliery. At that time

book debts were owing to him to the amount of about £1,250, which were regarded as good. The debtor in his evidence said that he was unable to pay the wages without getting an advance from his customers who were indebted to him, which, I suppose, means without getting them to pay sooner than they would do in the ordinary course of business. On 3rd July the appellants' manager had informed him that before paying, *i.e.*, honouring a cheque for, the wages he must ask that the necessary securities be duly executed.

Robertson thereupon agreed to give the securities now in question, and on 8th July they were executed. They comprised the colliery and colliery plant, a half share in some land adjacent to the colliery, and a piece of land in a distant part of Queensland. In a balance sheet which the debtor had prepared as of 30th April these properties were respectively valued at £4,000, £640, and £160. The appellants' manager deposed on an examination held in the liquidation that he thought that £1,850 was a very full advance on these securities. He said, when examined upon the hearing of the motion, that he had not considered whether he would make any further advance upon them, but added, "I should say about £200 limit."

Besides the property comprised in this security the debtor had the following assets:—Book debts, as already stated, to the amount of £1,250, some household furniture which he valued at about £100, an office with furniture which he valued at the same amount, and sundry shares and small pieces of land which he valued in the whole at £159. He had also a claim against one Phillipson for £1,800, the balance of the purchase money upon the sale of a steamship named the *Kingswear*, which the debtor had sold to Phillipson in the preceding December for £2,500, receiving £700 in part payment and a bill of mortgage over the vessel to secure the balance. An action had, however, been commenced by Phillipson against Robertson in the Supreme Court on 22nd March, in which the plaintiff alleged that the contract had been obtained by fraud, and claimed a return of the £700, cancellation of the mortgage, and £1,000 damages for deceit, or in the alternative £3,500 for breach of warranty. On 7th July the action had been set down for trial and was to come on for trial

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on the 24th. The debtor's other obligations on 7th July amounted to about £435 due to sundry creditors, £399 15s. 3d. due to the Commissioner of Railways for the carriage of coal, but not payable until the 21st, and a further sum of £251 due to the Commissioner of Railways which was to be paid by a set-off of the price of coal to be delivered. He was also under a liability for the current wages accruing to the men employed in the colliery, and amounting to about £200 a week, although by usage they were not payable until the Friday after the 4th of each month, which in August would fall on the 11th. In addition to these debts Robertson had to provide during the month of July £200 or £300 for his solicitor's costs in Phillipson's action.

The respondent contends that under these circumstances the debtor was unable to pay his debts as they became due from his own moneys, even without regard to any question arising upon Phillipson's claim, and he further contends that in any event that claim must be taken into consideration in determining whether Robertson was or was not unable to do so. The appellants contend that this claim ought to be altogether disregarded in estimating the debtor's financial position on 7th July, and they say that if it is disregarded he was then solvent.

Apart from the *Kingswear* element of the case, it appears that the debtor was unable to pay out of any money then at his immediate disposal the wages payable on 7th July, and it is improbable that he could have collected a sufficient sum in respect of the book debts (£1,250) to enable him to make the payment, nor had he any available money to pay the overdraft due to the appellants, which was payable on demand. On the other hand, he was able, by mortgaging his unencumbered property, to satisfy the bank and to raise enough money to pay the wages and possibly £200 more. In order to meet his other liabilities presently payable he had nothing available but the chance of getting in a sufficient amount of the book debts. It was probably anticipated that a sufficient amount would be collected to pay the Railway Commissioner's claim on the 21st July (as actually happened), and the claim for £259 was to be satisfied by a set-off.

Phillipson's action came on for trial in July, and resulted in a verdict, given on 10th August, for the plaintiff for £700, the

amount of the instalment of purchase money paid, and £968 damages for fraud, with costs of action. The judgment was admitted in evidence without objection, and was treated as evidence against the appellants of the actual facts as existing on 7th July. It may be doubtful whether it was, strictly speaking, admissible evidence for this purpose, but no objection was taken either in the Supreme Court or this Court. It appears, then, that on 7th July the debtor was under liability to Phillipson for over £1,660. This was a debt provable in insolvency; that is to say, if the debtor had on that day become insolvent Phillipson could have proved in his estate for the amount of his claim which would have been ascertained in due course: *Jack* v. *Kipping* (1). Moreover, Phillipson, his creditor in respect of that debt, was a creditor in whose favour a fraudulent preference might have been made by payment of his claim with an intention to prefer him: *In re Paine*; *Ex parte Read* (2); *In re Blackpool Motor Car Co. Ltd.*; *Hamilton* v. *Blackpool Motor Car Co. Ltd.* (3). It was suggested that these cases are not good law, but I have no doubt as to the accuracy of the law as laid down in them. It follows that, since Phillipson was a creditor of Robertson within the meaning of sec. 107, the debt in respect of which he was such a creditor was also a debt within the meaning of secs. 108 and 109, and was one of the debts to be taken into consideration in determining whether the debtor was then able to pay his debts as they became due from his own moneys. It is impossible to contend that a creditor who can be preferred is not a creditor to whom others can be preferred. It was argued that only debts then actually payable and the amounts of which were then actually ascertained should be taken into consideration. One answer to this argument is that the matter for determination is the ability of the debtor, which is a state or condition that cannot be determined without having regard to all the facts. Another answer is that the debts referred to are not his debts "then" payable, but his debts "as they become due"—a phrase which looks to the future. No doubt, only the reasonably immediate future is to be looked to, but the anticipated verdict was not beyond this

(1) 9 Q.B.D., 113.

(2) (1897) 1 Q.B., 122.

(3) (1901) 1 Ch., 77.

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limit. It is not seriously contended that the debtor was, or had any prospect of being, able to pay this debt when it became due, *i.e.* when the amount was definitely ascertained, from his own moneys.

But, even if Phillipson had not been a creditor in the strict sense of the term, and if the obligation to him had not been a debt strictly so called, it would still, in my opinion, be impossible to apply the tests prescribed by secs. 107, 108, and 109 without taking it into consideration. The words "as they become due" require, as already pointed out, that some consideration shall be given to the immediate future; and, if it appears that the debtor will not be able to pay a debt which will certainly become due in, say, a month (such as the wages payable by Robertson for the month of July) by reason of an obligation already existing, and which may before that day exhaust all his available resources, how can it be said that he is able to pay his debts "as they become due," out of his own moneys?

It was suggested, but the argument was not pressed, that the debtor's affairs should be regarded from the point of view of a balance sheet of assets and liabilities. This is not what the Statute says. It has always been interpreted in Queensland to mean what it says, and the only English reported case on the point, *In re Washington Diamond Mining Co.* (1), is to the same effect. The question is not whether the debtor would be able, if time were given him, to pay his debts out of his assets, but whether he is presently able to do so with moneys actually available. The most favourable construction that can be put on the words "his own moneys" is that they include any moneys of which the debtor can obtain immediate command by sale or pledge of his assets.

Applying these principles to the present case, it is clear that on 7th July Robertson was not able to pay his debts as they became due from his own moneys. Apart from his obligation to Phillipson, the payments which he had to make during July were of such an amount that he probably would have been unable to pay the July wages in August without borrowing on the security of his assets, as indeed proved to be the case. When the time came for that payment he had no money in hand, and applied to the appel-

(1) (1893) 3 Ch., 95.

lants for assistance. Their manager was apparently disposed to give it on the security of an assignment of Robertson's book debts, but his principals refused to sanction the advance. If made, it would have left him without any available moneys to pay his other current debts. It was suggested that he might have raised money upon the other property already mentioned, but it is idle to pretend that the mortgage of the *Kingswear* was, pending an action to set it aside on the ground of fraud, an asset on which money could be raised. The other small pieces of property were equally unlikely sources for providing the necessary funds. All these facts throw a reflected light as to the actual state of the debtor's affairs on 7th July. And when they are taken into consideration, even without Phillipson's claim, they afford strong ground for contending that Robertson was then unable to pay his debts as they became due from his own moneys. When Phillipson's debt is taken into consideration the respondent's case becomes overwhelming.

The next subject of inquiry is whether the charges now impeached were made for a reasonable and sufficient consideration given at the time within the meaning of sec. 108. On that question sec. 109 affords very material assistance. The charge given was for a sum substantially double the amount of the present advance. It would, if valid, obviously have had the effect of diminishing the property divisible among Robertson's creditors to the extent of the charge for the past debts, *i.e.*, £954. The transaction was therefore *primâ facie* fraudulent under sec. 109. In my opinion a very heavy onus is undertaken by anyone who attempts to maintain that a consideration, the smallness of which renders a transaction *primâ facie* fraudulent, is nevertheless reasonable and sufficient. The appellants, however, contend that the *bona fides* of the transaction was found by the learned Judge of first instance, and was established by the evidence. In my opinion the *bona fides* affirmed by the learned Judge was not that which is meant in sec. 109. I think that a creditor, who takes a security for a past debt from a debtor whom he knows to be in such pecuniary circumstances that the security will defeat the debtor's other creditors, does not act in good faith within the meaning of that section. If he has no knowledge of any other creditors,

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and no reason to suspect their existence, a different conclusion would be drawn: *Butcher* v. *Stead* (1). But if he does know of them, the case of *Tomkins* v. *Saffery* (2) shows that the transaction cannot have the benefit of any protection afforded by the existence of good faith. The transaction in that case was void as an act of bankruptcy unless made in good faith. So, here, the transaction is void under sec. 109 unless proved to have been made in good faith. If the creditor knows of a transaction between the debtor and another person which may have resulted in a debt, although the debtor denies the existence of any such debt, and if the creditor knows that the security which he is taking will defeat that other person's claim if it exists, the case just cited shows that the same rule is to be applied as if the existence of the debt were known, and that the security is not taken in good faith. The creditor takes his chance, and must take the consequences—*à fortiori*, if he knows of a claim which is being actively asserted. In the present case it is admitted that the appellants were fully aware of Robertson's financial position and of Phillipson's claim. I am therefore of opinion that the appellants have failed to prove that the transaction impeached was made in good faith within the meaning of sec. 109. The learned Judge of first instance thought that both the bank manager and the debtor honestly believed that Phillipson's action would fail, and it was in this sense that he found that the parties acted in good faith. For the reasons already given, I think that this belief was irrelevant—just as irrelevant as if the action had been on a promissory note, and a defence had been pleaded as to which the debtor was sanguine of success.

Independently of sec. 109, I think that the securities impeached were not made for a reasonable and sufficient consideration given at the time. The object of this group of sections is to protect creditors, and ensure an equal distribution of a debtor's assets among them. The term "reasonable and sufficient" cannot, therefore, bear the same meaning as if it were used with reference to a transaction between two free and independent contracting parties, neither of whom owes any duty to other persons with

(1) L.R. 7 H.L., 839. (2) 3 App. Cas., 213.

respect to that transaction. In the case of *Dixon* v. *Todd* (1) this Court, expounding sec. 108, said :—" The effect is that a person in insolvent circumstances cannot make away with his property except for a contemporaneous equivalent. If he receives such an equivalent, his creditors, of course, lose nothing by the assignment."

I see no reason to depart from that exposition. In my opinion, in order that a consideration may be reasonable and sufficient within the meaning of sec. 108, it must be such that the property of the debtor presently available for the payment of other creditors is not substantially diminished by the transaction. Whether it is or is not so diminished must always be a question of fact. In the present case the effect of the transaction impeached was to leave the debtor with substantially less property available to satisfy his other creditors than he had before. It is true that there was a promise to make further advances of an undefined amount, but the promise was not capable of enforcement, and it was certainly not worth more than the £200 mentioned by the bank manager in his evidence. In my judgment it had no appreciable value. I think, therefore, that the transaction is brought within both sec. 108 and sec. 109. I do not express any opinion as to the points taken by the respondent with regard to the validity of the bill of sale under the *Bills of Sale Act* 1891.

The appeal should be dismissed with costs.

BARTON J. I have very little to add to the judgment just delivered, with which I entirely agree. But I would refer to the case of *Ex parte Griffith*; *In re Wilcoxon* (2), the headnote of which is as follows :—" In determining whether a transaction amounts to a fraudulent preference the Court ought now to have regard simply to the statutory definition contained in sec. 92 of the *Bankruptcy Act* 1869. The decisions on the subject before the Act may be useful as guides, but the standards laid down in them must not be substituted for that which is laid down in the Act." *Bowen* L.J., expressing more fully an opinion in which the two other members of the Court of Appeal were agreed said (3):—" Everybody knows that originally there was no

(1) 1 C.L.R., 320, at p. 324. (2) 23 Ch. D., 69.
(3) 23 Ch. D., 69, at p. 74.

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express statutory enactment in regard to fraudulent preference. But from the time of Lord *Mansfield* down to 1869 the Courts considered that certain transfers of property were frauds upon the bankruptcy law, though there was no statutory enactment upon the subject. Then came the *Bankruptcy Act* of 1869, and in that Act it was for the first time explained what was meant by fraudulent preference, and the Act uses very definite language. Now what is the method which has been pursued by judicial decisions since? I think it is very unfortunate. I do not say that it has led to any wrong decision, but I think that it has had a tendency to draw one's mind away from the true question. The first thing which the Courts did was to discuss the question whether the Act had altered the old law and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began what I may call the old metaphysical exploration of the motives of people. The Courts first adopted a supposed verbal equivalent for the words of the Statute, and then pursued the old inquiries as to what were the deductions which followed from the adoption of this verbal equivalent. And so we have been drawn into questions of pressure and volition, and at length in the present case we have got into a discussion as to what is the motive of a motive, whatever that may mean. I think it is a wiser policy to go back, as I do, in a humble spirit to the words of the Statute, and, without discussing motives of motives, inquire whether the transaction was entered into with a view to give the one creditor a preference over the others." This opinion amounts to a clear statement of the principles on which sec. 92 of the English Act of 1869—the equivalent of which is sec. 107 of the Queensland Act of 1874—is to be construed; and those principles are to be applied equally to secs. 108 and 109. I think the Chief Justice has, if I may say so, justly applied them. I have only to add that, with reference to the judgment in the action relating to the sale of the *Kingswear*, I should have thought it more than doubtful whether the findings of the jury contained in that document could have been rightly admitted as evidence against the appellants if objection had been taken before *Real* J. But the whole document was admitted by consent and was treated as evidence of all that it contained, and

in such circumstances it is before us for the purposes for which it was then allowed to be used. I agree that the appeal must be dismissed.

O'Connor J. I do not propose to deal with all the different aspects of the facts which were presented for our consideration. The case is of general importance, not by reason of its facts, but because of the questions of law raised on the interpretation of secs. 108 and 109 of the Queensland *Insolvency Act* of 1874. It is to these questions that I propose to address myself. An assignment of a debtor's property comes under the sections mentioned only, if at the time the debtor "is unable to pay his debts as they become due out of his own moneys." For the purpose of confining my judgment to the most important matters of law I shall assume that, but for the *Kingswear* transaction, the debtor would, at the time in question, have been able to pay his debts as they became due from his own money, though that is probably an assumption more in the appellants' favour than the facts would justify. In finding for the trustee under sec. 108 Mr. Justice *Real* took into consideration the debtor's liability under that transaction as it stood at the date of the assigment to the bank. The appellants contend that that could not legally be done inasmuch as the liability did not come within the meaning of the word "debts" as used in the sections mentioned. We have to determine whether that contention is right. The position of the *Kingswear* transaction at the date of the assignment was this. The ship had been sold some short time before by the debtor to Phillipson for £2,500 with a warranty of seaworthiness. The latter had taken possession of her and had sent her to another port for overhaul and repairs. In course of the repairs the unseaworthiness was discovered. Phillipson, who then had been some months in possession of the ship, on making the discovery notified the debtor of his intention to rescind the contract, and to claim a return of the £700 paid under it and damages for breach of warranty and fraudulent representation. The debtor disputed the claim, and Phillipson began his action in April 1905. Towards the end of the following June witnesses examined in Sydney on commission gave evidence on Phillipson's behalf in support of his

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complaint of unseaworthiness, and the debtor attended the commission. The case was set down for trial on the 24th July following. These facts were all known to the debtor and to the bank on the date of the assignments. It is no doubt true that if the facts were such that Phillipson was in a position at that time to rescind the contract and demand return of the £700 as on a total failure of consideration, the debtor's liability to pay that amount would be complete without the aid of any finding of a Court, and there would then have existed a liquidated debt, due by the debtor to Phillipson for that amount. But I am satisfied that the facts were not such as to put Phillipson in that position. His possession of the ship for many months and his dealings with her while in his possession made it impossible for him to take up the position that, on rescission of the contract the parties could be placed *in statu quo*, and that there had been a total failure of consideration. His right against the debtor was therefore a right to recover, not a liquidated amount, but an unliquidated amount by way of damages for breach of warranty and fraudulent misrepresentation arising out of the contract. Until determined by judgment of a Court no amount would be actually payable, and no "debt" —using that word in its narrow sense—would be in existence. But there can be no doubt that Phillipson's claim would be a liability provable in the administration of the debtor's estate under sec. 140 of the Act, and the question is, can such a liability be taken into account in considering the debtor's position under sec. 108? During the argument the controversy turned upon what is the proper interpretation of the word "debts." Like all general expressions it is capable of a narrow and a wide interpretation. The former would, strictly speaking, cover only money demands, fixed, liquidated, and payable at the material date. The latter would include such a liability as that of the debtor to Phillipson before the damages had been awarded. The case of *Ex parte Kemp*; *In re Fastnedge* (1) illustrates how the word "debts" will be held to have been used in a wider or a narrower sense according to the object of the enactment. In that case the meaning of "debts due to him," in the order and disposition clause of the *Bankruptcy Act* of 1869 was under consideration.

(1) L.R. 9 Ch., 383.

Mellish L.J. says (1):—"Now, the words 'debts due to him' are certainly words which are capable of a wide or a narrow construction. I think that *primâ facie*, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not. On the other hand, there can be no doubt that the word 'due' is constantly used in the sense of 'payable,' and if it is used in that sense, then no debts which had not actually become payable when the act of bankruptcy was committed would be included. Lastly, the expression 'debts due' is sometimes used in bankruptcy proceedings to include all demands which can be proved against a bankrupt's estate, although some of them may not be strictly debts at all."

This is also an example of the well known rule of interpretation that, where an ambiguity arises as to whether the legislature has used a general expression in its narrow or in its wider sense, the Court will place that meaning upon the expression which will most effectually carry out the object of the section. In such cases it becomes necessary to examine the context, the subject matter, and the object and purpose of the enactment as disclosed by its provisions. But before entering upon that examination I shall refer to two cases which not only illustrate the general rule but afford a guide to the sense in which the word has been used in the sections under consideration. In *In re Paine*; *Ex parte Read* (2) it became necessary to interpret the word "creditor" as used in sec. 48 of the *Bankruptcy Act* of 1883, a similar provision to sec. 107 of the Queensland *Insolvency Act* of 1874. It was contended that that word "creditor" meant an actual creditor, a person to whom money was actually payable at the time of the alleged preference, and did not include the person to whom money would be due on the happening of a contingency, a surety, for instance, who might be, but had not yet been called upon to pay. But *Vaughan Williams* J. decided against that contention. After referring to the object of the section he said (3):—"I think the legislature in enacting the section intended to prevent a pay-

(1) L.R. 9 Ch., 383, at p. 387. (2) (1897) 1 Q.B., 122.
(3) (1897) 1 Q.B., 122, at p. 124.

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ment to anybody who, but for such payment, would share in the administration of the bankrupt's estate. I think, therefore, that the word 'creditor' means any person who, at the date of the payment to him, would have had to come in and prove and rank with the other creditors in the bankruptcy. A surety would be such a person. I hold, therefore, that you may make a fraudulent preference by a payment to or for the benefit of a surety who has not yet been called upon to pay as surety. It is not disputed that at the date of the payment into the bank Barnard was a person who had a right of proof under sec. 37 in respect of his contingent liability as acceptor of the bill. He had a right, therefore, to share in the distribution of the bankrupt's assets; and under the circumstances I hold that the payment into the bank was a fraudulent preference of Barnard by the bankrupt."

That case was followed in *In re Blackpool Motor Car Co. Ltd.*; *Hamilton* v. *Blackpool Motor Car Co. Ltd.* (1). The same question was raised on the same section, and *Buckley* J., after considering all the other cases on the point, quotes the judgment of *Vaughan Williams* L.J. in *Read's Case* in full and follows it. These cases apply not only to sec. 107, but are a direct authority that the word "creditor" in sec. 108 means not only a person to whom money is then actually due by the debtor, but also a person to whom money is not then actually due, but who, by reason of the facts then existing, will be entitled to prove in the debtor's estate if bankruptcy supervenes. It does not, of course, follow that, because it is necessary for the effective operation of the section to interpret the word "creditor" in the wider sense, it must therefore be held that the word "debtor" was also intended to have the wider interpretation put upon it. But bearing in mind the general object of the section it is difficult to see why, if any liability of the debtor afterwards provable on his bankruptcy constitutes the person to whom he is liable a creditor within the meaning of the section, the liability itself should not constitute a debt for the purposes of the section.

Turning now to a general consideration of the enactment, its purpose is to secure the equal distribution of the debtor's assets amongst his creditors, and as a safeguard to their interests it

(1) (1901) 1 Ch., 77.

is in effect provided that any alienation of his property by the debtor during six months preceding the adjudication is open to the scrutiny of the Court if it takes place under the circumstances mentioned in secs. 107, 108 and 109. The governing circumstance in all three sections is the same, namely, that the debtor at the time of the transaction was unable to pay his debts as they became due out of his own moneys. Such a condition of affairs might well be described as impending insolvency, and the policy of the sections would appear to be that at such a crisis the debtor should not be allowed to so deal with his property as to prejudice the interests of those who, in the event of his subsequent insolvency, would be entitled to a share of it in distribution. In charging the Court with the duty of determining whether the debtor's affairs had reached that crisis at the time of the transaction impeached, it surely must have been intended that it should make as real an inquiry into the existence of the debts and of the moneys available to pay them as they became due as a man of business would make if he had to determine the same issue for himself, having due regard to the interests of all those who would be entitled to claim against his estate in the event of adjudication. It becomes apparent on reading the section that the word "debts" cannot be construed so literally as to include only amounts then actually due. It is conceded that the survey of the debtor's affairs must take into account debts for liquidated amounts, such as on promissory notes then maturing but not yet due. It must also be conceded that, even if "debts" is to be taken in its narrower sense, its meaning could not be restricted so as to include only the debts which the debtor admitted to be due or believed to be due. The elements of intent or belief do not arise under the section. The debtor's affairs are to be taken as they are, not as he believes them to be. It is obvious that these admissions must be made if the section is to be construed so as to involve any effective consideration of the debtor's financial position. For the same reason it is difficult to see how his position could in any business sense be ascertained without having regard to liabilities pending and provable as debts in the event of bankruptcy, but not yet fixed as liquidated amounts, as well as the debts then actually due. The *Kingswear* trans-

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action itself is a good illustration of the necessity for so extending the inquiry if effect is to be given to the object of the legislature. At the date of the transfers impeached in these proceedings Phillipson's claim, although one which would be provable in insolvency, was unliquidated and disputed by the debtor. But it was then evident that in three weeks' time it would be either a liquidated amount or at an end. If determined in Phillipson's favour there would be a judgment debt against the debtor of £700 at least, which would, beyond all question, put it out of his power to pay his liquidated and ascertained debts as they became due out of his own money. The Court no doubt must look at the facts of the transaction as they stood before the verdict, and judge them reasonably. But any fair examination of the debtor's position might well be expected to extend to the takings and obligations of his business for the ensuing month, and to take account of liabilities, which, although not yet liquidated and payable, must in all probability become so within a few weeks, in cases where their discharge would be likely to seriously diminish the funds available for payment of the debtor's actual debts as they become due. That was exactly the case with the *Kingswear* transaction in relation to the debtor's affairs, and I find it difficult to understand how any examination intended to ascertain the real state of his business could leave that transaction entirely out of consideration. I have, therefore, come to the conclusion that, in order to give any real effect to the object of the enactment, it is necessary to interpret the word "debts" in the wider sense which would include the *Kingswear* transaction.

Questions both of law and of fact have been raised as to the second issue under the section (108), namely, whether the debtor received "reasonable and sufficient consideration given at the time" for "making" the mortgage and transfers. I do not know of a clearer way of expounding the meaning of "reasonable and sufficient" in that section than in the words of my learned brother the Chief Justice with reference to them in *Dixon* v. *Todd* (1):— "The effect is that a person in insolvent circumstances cannot make away with his property except for a contemporaneous equivalent."

(1) 1 C.L.R., 320, at p. 324.

The object of the section is to ensure that, if a debtor unable to pay his debts as they become due from his own moneys wishes to transfer or mortgage to any creditor any portion of his property which would otherwise, in the event of adjudication, be distributable amongst all his creditors, he can do so validly only by then getting from that creditor some consideration, either in money or other tangible value, which will make up to his estate or business substantially what the mortgage or transfer has taken from it. The section would certainly fail to achieve that object if "reasonable and sufficient" were held to mean no more than what is conveyed in the well known legal phrases "good consideration" or "valuable consideration."

In this case then, the learned Judge, as he properly might, took account of the bank's undertaking to make further advances for carrying on the debtor's business as part of the consideration. It was for him to estimate its value, as well as to compare the amount of the advance then made with the fair mortgage value of the properties assigned, and I can see no reason to differ from the conclusion that, under all the circumstances, the mortgages and transfers were not made for reasonable and sufficient consideration given at the time. It follows that, in my opinion, the judgment on the whole section in favour of the trustee in insolvency must stand.

Now as to sec. 109. If the circumstances of a transfer to a creditor are such as to render it liable to be declared void under sec. 108, it is clear that the good faith of the parties cannot make it valid. But even if it should be found that the consideration for the mortgage and transfer given at the time was reasonable and sufficient, and that the respondent therefore fails under sec. 108, he urges that the facts in evidence clearly bring the transactions within sec. 109 in all other respects and the appellants have failed to establish the existence of that good faith which alone would make the section inapplicable. Whether or not the appellants have established that "good faith" on the part of both parties, proof of which the section has expressly imposed on those who allege the validity of the transaction, is a question of fact. But the cases have laid down rules for the guidance of Judges in dealing with that issue which it appears to me have made the conclusion

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proper to be arrived at in this case abundantly clear. In *Butcher* v. *Stead* (1) the House of Lords considered the meaning of the expression "good faith" as used in sec. 92 of the *Bankruptcy Act* of 1869 which protects "a payee in good faith and for valuable consideration." That was succeeded by *Tomkins* v. *Saffery* (2), involving the construction of the same section, which upheld and adopted the law as laid down in *Butcher* v. *Stead*. *Cairns* L.C., in the course of his judgment in *Tomkins* v. *Saffery* (3) said:—"But are they to be taken as payees 'in good faith,' within the meaning of this section? Of course I do not speak of good faith in a moral point of view. They may have believed the statement, and I am willing to take it that they did believe the statement of the bankrupt as to his having no other creditors. But are they payees in good faith according to the test which is laid down in this section, a test derived from the operation of the bankruptcy law? I take it that in order to give any meaning to the words 'in good faith' at the end of the section, your Lordships must hold those words to apply to the matters which are mentioned in the earlier part of the section. If you find a person receiving a payment in complete ignorance of, or without any means of getting information with regard to, the matters mentioned in the earlier part of the section, he may be a payee in good faith."

Again, Lord *Blackburn* says (4):—"It comes round to this, that I think (I am stating it in my own words, but it is very nearly what the Lord Chancellor has already said) that when they knew that the man was insolvent and unable to pay his debts, when they knew that this money was given them to prefer a particular body of creditors to all the other creditors, if there were others, they were then fixed with the knowledge of an infringement of the Statute, and although they were told by the man who afterwards became a bankrupt that he had no other creditors, they cannot get out of it; they took their chance. If he had told them the truth, and there had been in fact no other creditors, this transaction would have stood and been perfectly good; if he had any other creditors it would not stand. They knew all that it was

(1) L.R. 7 H.L., 839.
(2) 3 App. Cas., 213.
(3) 3 App. Cas., 213, at p. 226.
(4) 3 App. Cas., 213, at p. 237.

necessary for them to know, and I think they took their chance, and they must take the consequences."

In my opinion these passages apply directly to the expression "good faith" as used in sec. 109. It is immaterial that there was no want of "good faith" in a moral sense in either party. In order to succeed the transferee must go far beyond that and prove that there was that good faith which the bankruptcy law requires in such transactions as explained in the judgment I have quoted.

The transfers and mortgages impeached are clearly within the section unless the bank can establish the defence of good faith. Applying the principle laid down by Lord *Cairns* and Lord *Blackburn* to the facts proved in this case it is difficult to see how that defence can be established. The bank had a full knowledge of all the debtor's business. Indeed it would be carried on only by their aid, and they necessarily kept themselves informed of the condition of his affairs, and had at all times either the knowledge or the means of obtaining knowledge of his exact position in all his transactions. Having regard to his financial position at the time of the impeached securities, the effect upon his estate and his other creditors of giving the bank the securities, and the position of advantage as compared with other creditors in which the holding of the securities placed the bank, I find it impossible to say that the transfers were made in good faith within the meaning of sec. 109.

Holding these views it becomes unnecessary for me to refer to the questions raised by the bill of sale. On the whole case, therefore, I agree that the judgment of *Real* J., must be upheld and the appeal dismissed.

ISAACS J. The securities have been challenged by the trustee on various grounds. He contended that they are invalidated by secs. 107, 108, and 109 of the Queensland *Insolvency Act* 1874, and also by the *Bills of Sale Act* 1891.

Sec. 107 of the *Insolvency Act* prescribes as one of the conditions of avoidance that the act of the debtor shall be with a view of giving a creditor a preference over the other creditors; and this was negatived by an express finding of the learned Judge

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whose judgment is appealed from. That issue depends to a great extent on the credibility of the witnesses, and as there was abundant evidence to sustain it, I do not see my way to reverse the finding on this point.

Sec. 108 lays down among the essentials for avoiding an assignment that the debtor was unable to pay his debts as they became due from his own moneys, and that it was not made for a reasonable and sufficient consideration given at the time of making the assignment.

The onus of establishing both essentials is upon the trustee who seeks to invalidate the assignment: *Ex parte Lancaster*; *In re Marsden* (1); and *Ex parte Green*; *In re Laurie* (2). The question is whether he has satisfied this burden.

Real J. has held that the insolvent was on 8th July 1905, the date of giving the securities, in fact unable to pay his debts as they became due from his own moneys, but he has done so upon a view of the law, which, with deference to the learned Judge, appears to me to be erroneous.

His Honor says:—"The total amount of his liabilities, including these sums but excluding the action, was £1,085, and the total amount of the debts due to him was £1,200 odd—as good or equal to nearly £1,200 cash, for in substance all these debts were paid. But still it appears to me the Act requires, and I am bound to hold, that he must have moneys of his own or at call to pay his debts as they become due. They were in fact due and he had not the money in hand or at call, and therefore on that ground I hold that he was unable to pay his admitted debts from his own moneys. His debtors were so good for their liabilities that I think he could have got the money from them if he had asked for it. Yet technically it appears to me he was insolvent."

The action referred to in the passage quoted ended in the establishment of a liability of £700, the amount of part of the purchase money of a vessel called the *Kingswear* paid and ordered to be returned, and also £968 11s. 11d. damages for fraudulent misrepresentations as to the condition of the vessel by which the purchaser was induced to make the contract.

His Honor considered that, although money to the credit of a

(1) 25 Ch. D., 311. (2) 67 L.J.Q.B., 431.

man's banking account at call is practically his own money, yet money owing to him by private individuals and payable immediately, and which if asked for would be immediately paid, is not money of the debtor. In my opinion both classes of assets are on the same footing, and no legal distinction can be drawn between them. If a man by asking his debtor can get paid what is owing to him, there is no difference in law between a debtor who is a bank, and another debtor who is a merchant, or whatever his occupation may be. If the moneys so available are sufficient to pay the man's liabilities, then he is able to pay his debts out of his own moneys.

The Act requires the debtor to be able to pay his debts as they become due. This does not mean that he is always bound to keep by him in cash a sum sufficient to meet all his outstanding indebtedness however distant the date of payment may be. If at the time he makes the assignment, the debtor's position is such that he has property either in the form of assets in possession or of debts, which if realised would produce sufficient money to pay all his indebtedness, and if that property is in such a position as to title and otherwise that it could be realized in time to meet the indebtedness as the claims mature, with money thus belonging to the debtor, he cannot be said to be unable to pay his debts as they become due from his own moneys. In other words, if the debtor can, by sale or mortgage of property which he owns at the time of the assignment, change the form of the property into cash wholly or partly but sufficient for the purpose of paying his debts as they become due, that requirement of the section is satisfied.

Robertson's financial position on 7th July, that is just before giving the assignment, was as follows. His liabilities consisted of a bank overdraft £954 18s. and a further bank advance of £937 7s. 6d. for wages ; sundry creditors £1,085, from which had to be deducted £243 payable according to agreement in coal, leaving a net sundry indebtedness of £842. So far, the total is £2,734 5s. 6d. To this Mr. *Graham* claimed to add the *Kingswear* liabilities of £700 and £968 11s. 11d., and a further amount for solicitors' costs, which he estimated at about £250 up to 7th July. If these be added the total liabilities to be provided for on 7th July, and all rightfully payable at once except perhaps the costs—and these

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would be payable very shortly afterwards — amounted to £4,652 17s. 5d.

As against this, the greatest possible amounts procurable by the debtor to pay his liabilities by means of his own assets, whatever the ultimate value of the assets may have been, were £2,200, the amount which could have been drawn from the bank as against security, and £1,280 book debts, and also by a very fair concession on the part of Mr. *Graham*, say £172, being two-thirds of £259, the stated value of some additional assets mentioned in the statement of affairs. This would bring the total amount of cash available for the due satisfaction of the above mentioned liabilities to £3,652, and would leave a deficiency of £1,000. The only other possible asset was the *Kingswear*, which it was contended for the respondent ought not to be taken into consideration as a means of meeting Robertson's liabilities. For some time, while recognizing the probability of Robertson's insolvent position on 8th July, I was greatly pressed by the want of some direct evidence on the part of the trustee to countervail the sworn statement of the debtor in his statement of affairs that the vessel was on 30th August 1905 worth £1,500 as she then lay in Sydney Harbour. But further reference to the evidence does, I think, lead to the conclusion that at all events the vessel was not available as a present means of paying Robertson's debts as they became due. The debtor's petition presented on 12th August—only two days after the adverse judgment—states that he admits his inability to pay his debts on that date. There was since 8th July no new debt of extraordinary amount, and besides the bank debt of £1,400 17s. 7d., and the ordinary trade debts which continued and amounted to £1,182 6s. 8d., the only outside debts were apparently his own solicitors' costs, £250, and the *Kingswear* judgment and costs, £2,260, in all £5,093 4s. 3d., or only £440 6s. 10d. more than on 8th July.

Schedule H of his statement of affairs, dated 30th August 1905, sets out as one of the causes of insolvency that the adverse judgment rendered it impossible to obtain the necessary financial accommodation to pay his wages, which on the day after the verdict were something over £800. It appears from the evidence of Mr. Ridley, the bank manager, that he offered to pay the wages

and railage, in all about £1,100, on the security of the book debts, but apparently no one then thought of the *Kingswear* as a present available means of raising money, even to pay the wages.

As appears by schedule C the vessel was in fact held by Phillipson as security until Robertson's liability of £700 to him was paid. The only fair conclusion from these facts is, that whatever its actual value might ultimately be, it was as an immediate money-raising asset worth nothing to Robertson, and ought to be excluded from commercial considerations on 8th July for the purpose of paying his debts.

The main question on this branch of the case is whether the two sums of £700 and £968 11s. 11d. in respect of the *Kingswear* liability should be included amongst Robertson's debts on 8th July within the meaning of sec. 108. If not, his debts on that date would be reduced to £2,984 5s. 6d., and would be amply met by the book debts and the amount procurable from the bank on his free assets, which together would exceed £3,000.

If either of them is to be taken into account as a debt, the liabilities would exceed the power of the debtor to meet them.

It is necessary therefore to consider whether these two sums, or either of them, ought to be included as debts on 8th July.

It is contended for the appellant that the sums, and particularly the sum of £968 11s. 11d., became debts only when Phillipson obtained judgment, namely, 10th August 1905. The trial of the action began 24th July, and ended on 10th August, and the judgment rested upon a finding of fraud inducing the contract, and upon that finding the plaintiff obtained judgment rescinding the contract and ordering the defendant to pay £700 which had been paid to him in terms of the contract "now rescinded," and also the further sum of £968 11s. 11d. already mentioned, with costs.

Undoubtedly the Act in some sections recognizes a clear distinction between "debts" and "liabilities."

It is quite clear, too, on authority, that Phillipson's claims were not, until after the judgment, debts that would have supported a petition for insolvency: *Ex parte Charles* (1); *Ex parte Broadhurst* (2); *Jones* v. *Thompson* (3). And the appellants' case is

(1) 14 East., 197.

(2) 22 L.J. Bkcy., 21.

(3) 27 L.J.Q.B., 234.

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that, where the Act in secs. 107, 108, and 109 speaks of a debtor's inability to pay his debts as they become due, it refers to liquidated sums which have or will certainly become payable.

At first sight this contention has much force. But in *In re Poland* (1) the words "any creditor" were restricted to creditors under the bankruptcy, being construed as was said by *Turner* L.J., "in accordance with the circumstances to which the Act was intended to apply." Upon the same principle have been decided the cases of *In re Paine*; *Ex parte Read* (2), and in *In re Blackpool Motor Car Co. Ltd.*; *Hamilton* v. *Blackpool Motor Car Co. Ltd.* (3), which determined quite clearly that the word "creditor" in sec. 48 of the English *Bankruptcy Act* 1883 means any person who at the date when the charge or payment is made is entitled, if bankruptcy supervenes, to prove in the bankruptcy under sec. 37, and share in the distribution of the bankrupt's estate.

It was argued in regard to these two cases that the interpretation they give to the word "creditor" is not sound law, and also that, even if it be well founded in law, it does not affect the meaning of the word "debts" in the earlier part of the sections. As to the correctness of the decisions, I agree with the learned Judges who determined them that the history of the fraudulent preference section shows that the word "creditor" in that connection must receive the signification they attach to it.

The doctrine of fraudulent preference was rested by Lord *Mansfield* in 1768 in the case of *Alderson* v. *Temple* (4), upon fraud upon the law, and he said *inter alia* (5):—"It is defeating the *equality* that is introduced by the Statutes of bankruptcy." The judgment of *Cockburn* C.J., in *Bills* v. *Smith* (6), in 1865 traces the decisions down to that time and takes the same view. He says (7):—"For, it must be borne in mind that the true question in all these cases is whether the intention with which the payment was made was *to defeat the operation of the bankrupt law.* It is this intention to act in fraud of the law which stamps the preference of the particular creditor, however morally honest, with the character of fraud."

(1) L.R. 1 Ch., 356, at p. 358.
(2) (1897) 1 Q.B., 122.
(3) (1901) 1 Ch., 77.
(4) 4 Burr., 2235.
(5) 4 Burr., 2235, at p. 2240.
(6) 6 B. & S., 314.
(7) 6 B. & S., 314, at p. 319.

These authorities apply directly to sec. 107, and in secs. 108 and 109 the same words must have the same meaning, because all those sections are framed for the same object and levelled at the same thing, though with possibly different effect according to the varying circumstances.

But assuming the correctness of this construction of the word "creditor," it was maintained by Mr. *Feez* that debts in these sections were only such as were debts in the strict sense and would in their nature support a petition for insolvency.

I do not think this contention can be upheld. It would lead to confusion of terms in the sections themselves. The enactments are to regulate the duties between the person who is called uniformly the debtor, and the persons who are with equal uniformity called his creditors. The moneys which are payable by him to them are called debts. Whatever meaning is properly attributable to "creditor" must, as it seems to me, correlatively apply to "debtor," and therefore of necessity to debts. Reverting again to the history of the fraudulent preference sections, I think it can be distinctly discerned in the cases that the equality introduced by the Statute of Bankruptcy referred to by Lord *Mansfield*, and the cardinal question in cases of this kind as to whether the debtor intended to defeat the operation of the bankruptcy laws, determined not merely the quality of the act impeached but the nature of the obligation affected. The same reasoning applies to interpret both "debtor" and "creditor," and the indebtedness of the one to the other. The section operates, it is true, only in the case of an adjudication of insolvency within six months, but it assumes that the debtor is already insolvent in fact. There can be no valid reason for differentiating the relations of debtor and creditor, or the meanings of debtor and debt.

The extensive meanings to be given to such words in order to effectuate the objects of the legislature in relation to bankruptcy may be well gathered from the cases of *Hardy* v. *Fothergill* (1), and *Flint* v. *Barnard* (2).

Turning to the Act itself we find indications that distribution and discharge are the main objects aimed at by Parliament. The title of the Act is:—"To provide for the distribution of the Estates

(1) 13 App. Cas., 351. (2) 22 Q.B.D., 90.

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of Insolvent Debtors amongst their creditors, and their release from their debts, and for the punishment of fraudulent debtors and for other purposes."

Here, then, we have the three words debtors, debts, and creditors all used in correlation at the threshold of the Statute.

In sec. 47 it is expressly provided that the debt of a petitioning creditor must be a liquidated sum due at law or in equity. The appellants' argument would render this qualification unnecessary. In sec. 140 there is no doubt of the extensive nature of debts as provable in insolvency: *Jack* v. *Kipping* (1), following *Peat* v. *Jones & Co.* (2), as well as *Ex parte Adamson*; *In re Collie* (3), show that damages, even though unliquidated, arising from the debtor's fraudulent misrepresentation inducing the creditors to enter into a contract with the debtor, are provable. The actual cause of the damage is entering into the contract, though the right to be relieved from the loss would not exist but for the fraud, which in such case is a violation of the debtor's obligation of good faith in relation to the contract, and therefore provable. In sec. 152 and some following sections under the head "Dividends" the word "creditors" is obviously employed to denote all persons who have proved in the insolvency in respect of provable debts. It is they who are to be entitled to dividends in the distribution of the estate. Secs. 173 and 174 provide for the insolvent's release from all debts provable in insolvency with certain specified exceptions.

In view of these provisions it appears to me that secs. 107, 108 and 109 are merely for the purpose of effectuating the main objects of the Act as already mentioned. They must be read and construed with reference to those objects and as instruments to aid the ultimate intention of the legislature. So reading them, it appears to me impossible to separate the terms creditor, debtor, and debt, as Mr. *Feez* has invited us to do.

It may not be out of place to observe that the signification of the word "debt" in relation to fraudulent preference appears to have gradually extended. In Lord *Mansfield's* time only debts strictly so called were provable, and so were the only ones subject to the doctrine he is said to have originated. By the year 1808

(1) 9 Q.B.D., 113. (2) 8 Q.B.D., 147. (3) 8 Ch. D., 807.

the principle had been well established as Lord *Ellenborough* recognized. He said in *Crosby* v. *Crouch* (1), "Strictly, only the acts of a trader subsequent to his bankruptcy are void. Precedent acts supposed to be in contemplation of bankruptcy have likewise been invalidated; but this is an excrescence upon the bankrupt laws."

The subsequent history of the bankruptcy law shows a gradual extension by the legislature of the nature of the obligations which could be proved in bankruptcy, participate in the distribution of the bankrupt's property, and be released by his discharge. The "contemplation of bankruptcy" was the dominant idea; and this, whether in the later form of "view of preferring" or the actual effect as in sec. 108, always appears to bring together the debts which the debtor is unable to pay, and the persons to whom they are owing, in relation to the ultimate result of the bankruptcy law upon the indebtedness. These considerations all, in my opinion, conclude the law in favor of the respondent's contention on this point.

In the result, the two sums of £700 and £968 11s. 11d. ought for this purpose to be included in the debts of Robertson on 8th July, and they, independent of Phillipson's costs, establish his insolvency on that date.

It then becomes necessary to consider whether the trustee has proved that the securities were not executed "for a reasonable and sufficient consideration given at the time of making or giving the same." The consideration was £937 7s. 6d., actually given at the time—because the agreement "and advance of the 7th July" and the consequent signing of the documents on the 8th were all one transaction and may justly be regarded as contemporaneous—and £954 18s. previous overdraft, and an indefinite arrangement to make current advances which without any breach of contract could be and has terminated shortly afterwards. What is meant by "reasonable and sufficient consideration?" Can it be said as was argued by Mr. *Feez* that it merely means "reasonable and sufficient" as between a creditor and a debtor, who hopes and expects thereby to re-establish his solvency, and that "sufficient" means of sufficient value to the debtor, or, so to speak, worth the

(1) 2 Camp., 166, at p. 168.

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sacrifice, in the circumstances in which he is placed? I do not feel able to accept that definition. The object of the section must be borne in mind. As already indicated, it was not enacted for the debtor's protection, for he, like every other man of sound mind and full age, may be left to make his own bargains, nor to enable him to run risks with property already insufficient to meet his liabilities. It was designed for the protection of the general body of his creditors once he is in fact insolvent. It was recognized by the legislature that such a man ought not to alter the condition of his assets so far as either to appreciably lessen them in value or to render them more difficult to satisfy his creditors' claims. Reading the words "reasonable and sufficient" with this object in view, I think they mean what an honest and prudent man in the position of an insolvent debtor, anxious to retrieve his position if possible, and yet careful not to lessen his present means of discharging his obligations in any way, would think a reasonable and sufficient consideration. In other words "sufficient" means of substantially equal value, and "reasonable" means substantially as available for realization. The form of his property may be changed, but he may not materially diminish its capacity to satisfy his creditors' just demands.

The section was intended to absolutely prevent one creditor obtaining more than his just and proportionate share of an insolvent debtor's property, whether by design or accident; the result of the transaction, instead of the contemplation, intention or purpose of the debtor being the test. If, then, the result of the transaction be substituted for the debtor's contemplation of bankrutcy, the case of *Linton* v. *Bartlett* (1) is much in point. There a bankrupt had given a preference to a creditor, and the question was whether it was an act of bankruptcy. The Court said:—"The deed and the transaction *may have been very fair as between the parties*; but in all these cases the object to be attended to is, *quo animo* the transaction is done. Now the single question is, whether a man shall be allowed to commit *a fraud upon the whole system of the laws concerning bankrupts*, by giving a preference to one creditor in prejudice to the rest? Clearly he shall not."

(1) 1 Cowp., 120.

Having regard therefore to the result of the transaction, it is not enough to say that the bargain was very fair as between the parties. The Act, in such circumstances as here exist, stamps it as a fraud.

That is sufficient without more to avoid the securities, and it is not actually necessary to deal with the further questions of law raised by the respondent.

As to one of them, however, that of good faith under sec. 109, it is desirable to state my views.

The burden of proving good faith by the section itself is expressly placed upon the person supporting the validity of the transaction. I have come to the conclusion that the evidence does not support the finding of the learned Judge that the securities were take in good faith. I do not refer to good faith as a matter of morality but as within the meaning of sec. 109. *James* L.J. in *In re Tate* (1), after quoting from *Butcher* v. *Stead* (2), said of a person who had received money from a bankrupt:—"The person receiving the money must show that he took it in good faith, and that he did not know that the person paying the money was doing anything injurious to his other creditors."

In this case the bank knew as much of Robertson's affairs as he did, and therefore knew that he was sued by Phillipson upon a claim which, if substantiated, would leave Robertson unable to meet his liabilities. The bank, in effect, threw all the risk upon the other creditors, securing to itself a preference in case of Robertson's insolvency. In these circumstances the words of Lord *Hobhouse* in delivering the judgment of the Privy Council in *National Bank of Australasia* v. *Morris* (3) apply with great force:—"Their Lordships conceive that if the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent." The Act there referred to was 25 Vict. No. 8 of New South Wales, and sec. 2 of that Act provided that certain payments before sequestration to a creditor should be protected, if *inter alia* the creditor did not know at

(1) 35 L.T., 531, at p. 532. (2) L.R., 7 H.L., 839.
(3) (1892) A.C., 287, at p. 290.

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the time of payment that the debtor was insolvent or would by the payment be rendered insolvent. Taking this view of the facts and the law, I have no doubt the securities are invalidated by force of sec. 109 as well as sec. 108.

The ground upon which the bills of sale were attacked under the *Bills of Sales Act* is one which relates to the construction of the particular documents rather than of the Act itself, and therefore I do not find it necessary in this case to enter upon its consideration.

In my opinion the appeal must be dismissed.

HIGGINS J. This is a case in which the learned Judge below has reluctantly found himself compelled, according to a certain view of the Queensland *Insolvency Act* of 1874, to treat an honest transaction as fraudulent. He does not doubt "in the smallest degree, the *bona fides* of the bank manager in requiring immediate security." It is true that Phillipson's action for either damages or rescission of a contract was pending against the debtor; but His Honor is satisfied that the bank manager "had not the slightest notion that the defendant in that action would not be successful, . . . The defendant told him (and truly) that he was advised by his counsel, after the evidence on commission had been taken, that he had a good case. The action was one in which fraud was alleged against the defendant. Well, he had known the defendant in the action for a considerable time, and apparently had every respect and esteem for him as a man of high character, and not likely to be a man who would be guilty of fraud." The learned Judge expressly finds also:—"I do not think that Robertson had the slightest idea, in giving the security, of preferring the bank"; and so promising was the defendant's bank account that the bank was willing and anxious to keep him as a customer, and not let his account go elsewhere. It was a healthy account of a going business. The question is, does the law of Queensland compel the Court to say, notwithstanding such findings, that Robertson fraudulently preferred the bank.

The trustee in the insolvency mainly relies on sec. 108 of the *Insolvency Act* of 1874. To succeed under that section, he has to show (a) that Robertson was, at the time of giving the

securities, "unable to pay his debts as they became due out of his own moneys"; and (b) that the securities were not given "for a reasonable and sufficient consideration given at the time." The Judge has found, as to (a), that Robertson had on 8th July, the date of the securities, credit which would have enabled him to pay his debts if and when they should be demanded; and that he had, apart from other assets, good book debts—book debts such that he could have got the money from his debtors if he had asked for it—exceeding the amount of his then existing engagements. "But still," His Honour says, "it appears to me that the Act requires, and I am bound to hold, that he must have moneys of his own, in his actual possession or at call, to pay his debts as they become due"; and adds, "technically, it appears to me that he was insolvent, . . . and I have reluctantly come to the conclusion that I must answer the first question in the affirmative—that Mr. Robertson, when he gave the securities, was not able to pay his debts as they became due from his own moneys and was insolvent." If this view, that only moneys in his actual possession or at call are to be considered in applying the words of sec. 108, "unable to pay his debts as they become due out of his own moneys," is correct, it will follow that a Rothschild or a Rockefeller will often be liable to be treated as coming within the words, even if his debts are a few thousands, and his assets and resources many millions. On question (b) also the learned Judge finds against the bank, following in this, not his own view as to the reasonableness and sufficiency of the consideration as a matter of business, but what he conceives to have been treated as the effect of sec. 108.

The debtor, a colliery proprietor, had £954 18s. overdraft at his bank on 7th July. This was the day for paying the June wages to the employés at the colliery, £937; and the bank manager consented to advance the wages on getting security, covering both debts, over assets valued, on a mercantile basis (not a banker's basis), at £4,800. It is said that the £937 was not a "reasonable and sufficient consideration given at the time." These words are treated, in the argument for the trustee, as if they meant that the amount of the consideration given at the time must be equal, or nearly equal, to the amount secured. The

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learned Judge cannot see—nor can I—why, if these words mean equality in amount, it should not be complete equality. The security, on this theory, ought to be given for the amount of the present advance only. But, in *In re Donaldson* (1), the Court held that a present advance of three-fifths of the amount secured was "sufficient"; and here, it did not exceed one half. His Honor, in deference to this decision, would have gone so far as to treat the consideration as sufficient if five-eighths of the amount secured consisted of a present advance; but as it was only four-eighths, it is to be treated as insufficient. I concur with the learned Judge in his view that it is impossible to understand on what principle we are to determine the inquiry, what proportion the advance should bear to the charge so as to be valid, and to give business men confidence that their transactions will not be regarded as fraudulent. But I do not think that sec. 108 of the Act involves any such inquiry.

As for the meaning of the phrase "unable to pay his debts as they become due from his own moneys," it has to be remembered that it is taken from the British *Bankruptcy Act* of 1869; that the Bankruptcy Acts used to apply to traders only, and that this very Act applied in great part to traders only; and that the phrase was meant to be used by commercial men in regulating their dealings. The critical words are "as they become due"; so that, on the one hand, a debtor in making a payment or giving a security to a creditor, has to take into account, not only his debts immediately payable, but his debts which will become payable; and on the other hand, he is not obliged to keep money always in hand to meet debts not immediately due. It is sufficient if he see to it that he will be in a position to get enough moneys of his own to pay each debt as and when it becomes due. For instance, if he get money by sale or by mortgage of his assets, they are "his own moneys." But he does not satisfy this phrase by showing merely that his father, or his aunt, would pay for him. Again, no mercantile man would be treated as unable to pay his "debts," for the mere reason that he had not resources wherewith to pay the full uncalled liability on shares that he holds in prosperous companies, or the contingent liability under

(1) 1 Q.L.J., 105.

a guarantee given by him for the due administration of an estate by a wealthy and reputable administrator against whom there is no shadow of a charge. These are not "debts"; they are contingent liabilities. A call is not a "debt" until it is made. The test used to be, was a man in a condition to pay his debts, in ordinary course, as persons carrying on a trade usually do: *De Tastet* v. *Le Tavernier* (1). The expression used in a long line of cases, and incorporated in the *Bankruptcy Act* 1849 was "unable to meet his engagements"; but this expression was changed, in the *Bankruptcy Act* of 1869 to "unable to pay his debts as they become due out of his own moneys"—I presume in the belief that the word "engagements" was too vague. This very Queensland Act, copying the British Act, makes, in section 140, a marked distinction between "debts" and "liabilities." "Liabilities" are provable as well as "debts," if capable of estimation. The section is headed "proof of *debts*"; but this is only a brief expression to cover all that is more accurately defined in the section itself. It is a rude sign-post for the guidance of travellers through the Act. It is urged upon us that whatever is provable in the insolvency is a "debt" within the meaning of the expression "unable to pay his debts"; but that is impossible. A liability as surety under an administration bond, and an uncalled liability on shares, may, if capable of estimation, be proved in insolvency; but this is by virtue of the express provisions allowing the proof of mere liabilities. They are not "debts" in fact; and there is no provision in the Act that they are to be deemed to be debts. These provisions of the Bankruptcy Acts are meant for the guidance of commercial men in their conduct. A man can regulate his conduct so far as regards things known and certain, such as debts; but not even the cautious merchant of Venice could regulate his conduct so as to avoid disaster when all possible contingences turn out adversely. I see no reason for refusing to the word "debts" the ordinary mercantile meaning, and the ordinary legal meaning, if it be understood that debts payable in the future as well as debts now payable, such as promissory notes not yet payable, are included. It is not neces-

(1) 1 Keen, 161.

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sary that they should be actually payable so as to be capable of supporting a petition for insolvency. This is the meaning given to "debts due" in the converse case, of debts due to the insolvent at insolvency, for the purposes of the order and disposition clause (*Queensland Act*, sec. 87). As *Mellish* L.J. said in *Ex parte Kemp*; *In re Fastnedge* (1):—"Until a sum certain has become due, and *is to be paid in all events*, there is, in my opinion, no debt due. The clause does not relate to demands which may be proved against the estate of a bankrupt, but to debts due to him." My opinion, therefore, is that a debtor is not "unable to pay his debts as they become due out of his own moneys," merely because he has contingent or other liabilities that *may possibly* become debts, and would then be too much for him; or because he does not always keep money in his box, or at call in a bank, sufficient to meet all his present and future debts, much less his contingent liabilities. That this is the true meaning of the words "from his own moneys" is apparent from the language of the Court of Appeal in *In re Washington Diamond Mining Co.* (2); where the moneys that a company could get in by making calls were treated as its own moneys for the purpose of these words. There is, therefore, no foundation for the view that the debtor "must have moneys of his own in his actual possession or at call, to pay his debts as they become due"; or for the view that contingent liabilities are to be regarded as debts.

Now, to apply this view of the phrase to the facts of the case. On 8th July, the day that he executed the securities, Robertson owed the bank £954 in addition to the present advance of £937. Taking the view of the facts which is most favourable to the trustee, Robertson owed £1,085 to other creditors; but of this sum £243 was only payable out of coal to be supplied, and £399 was payable on 21st July. He owed even less than £1,085, according to the Judge's finding; for his Honor treats these two debts as being only £239 and £311 respectively, and the other debts as amounting to £403 12s. (see Ex. 2); but the difference is not very material. Taking the figures which are the most favourable to the trustee, Robertson's actual debts, present and future, were £2,733, including the £1,891 owing to the bank;

(1) L.R. 9 Ch., 383, at p. 390. (2) (1893) 3 Ch., 95, at pp. 101, 109.

and there was no one asking for payment. He was also defendant in an action brought by Phillipson, the purchaser of the ship *Kingswear*, for fraudulent representation, and for consequent rescission of the contract of purchase, or damages; but this was not a "debt," according to the view expressed above; and neither the bank manager nor Robertson had any idea that the action would be successful. So the learned Judge has found; and his finding is not, and cannot be, impugned. An order for rescission (with the incidental order to repay the £700 purchase money already paid) is by no means an order as of course on proof of fraud, and it may be fenced in with unforeseen conditions and terms; and who could foretell the damages which would be awarded by the jury for deceit? There were costs payable to Robertson's own solicitors at the time that he filed his schedule, 12th August; but the trial extended over several days at the end of July and the beginning of August, and there is no evidence to show how much, if any, of these costs, were due on 8th July. On the other side Robertson's assets, as estimated at the time, were £7,410. This amount would have been even greater, but for the fact of the pending action as to the *Kingswear*. The full purchase money was £2,500; £700 were already paid, and the value of the balance was treated as £1,000 net instead of £1,800, because the purchaser disputed his liability to pay it. The assets included £1,251 absolutely good book debts—as the banker says "his debtors were so good for their liabilities that I think he could have got the money from them if he had asked them for it." These book debts alone would have been ample to satisfy all debts due or becoming due to Robertson's other creditors; and in addition, there were about £550 other book debts as to which, and their then present value, there is no evidence, one way or the other (transcript, p. 13). This is conclusive that Robertson was able to pay his creditors in full, if my view of the meaning of the phrase is right, and if the contingent liability in respect of the *Kingswear* is not to be treated as a debt. By the judgment in the action, dated 10th August, it was ordered that the contract of sale "be rescinded," that Robertson repay the £700 already paid, that Phillipson on such payment put the *Kingswear* in the same condition as at the date of the contract and de-

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liver her to Robertson; and that Robertson pay £968 11s. 11d. "by way of damages." I do not understand this judgment awarding both rescission and damages; but there has been no appeal, and Robertson filed his schedule within two days. Looking now at the figures as they stood on 8th July, the assets and the liabilities are as follows:—

As estimated by the parties { Assets £7,410. / Debts (present and future) £2,833.

Adding the *Kingswear* liability as ultimately ascertained—treating it as a debt; and omitting costs. { Assets £7,410. / Liabilities £4,501.

Still adding the *Kingswear* liability, but treating the ship as worth nothing to Robertson. { Assets £6,410. / Liabilities £4,501.

Even on the last basis there was a surplus of £1,909. I say nothing about the July wages; from the 8th July only about one week's wages had accrued due; and if we are to take into account wages to be earned in the future, we ought to take into account the handsome earnings of the business and the fruit of those wages. There is no evidence that £842, the other debts, could not have been paid by means of this surplus; and, therefore, I am of opinion that the appellants have not discharged their burden of proof, as they have not shown that Robertson was on 8th July unable to pay his debts, even assuming that the *Kingswear* liability is to be treated as a debt on that date, and that the *Kingswear* itself was of no value. It is alleged that Robertson was unable to raise money to pay his wages and debts after the judgment on 10th August. But his financial position after the adverse verdict is no fair test of his financial position on 8th July; yet even after the judgment the bank manager was ready to advance the month's wages and more—about £1,600—on the security of the book debts, if Robertson would give it. But, of course, the *Kingswear* was worth something. She had been sold, as seaworthy, for £2,500. She stood at that value in the books of the bank. I shall assume (though I doubt it very much) that the finding of the jury, (recited in the judgment), of unseaworthiness is to be treated as evidence of the fact of unseaworthiness against the bank; yet even after the action she is

valued in the sworn schedule as worth £1,500, and that is the only evidence on the subject. On 8th July, the initial date, the Court had not given Phillipson any security on the *Kingswear*; and the jury had not found that she was unseaworthy. It is, therefore, obviously unfair to treat the *Kingswear*, or the purchase money payable therefor, on that date, as being worthless for financing purposes. In this part of the case I am assuming, against my own view, that the possible liability in respect of the *Kingswear* is to be treated as a debt as on 8th July; but, of course, if my view is right, the appellants' failure to satisfy the burden of proof is still more obvious.

I ought, perhaps, to allude to the argument that, because the class of creditors who may be treated as preferred includes those who are to become, or may become, creditors in the future, by virtue of contracts already existing: *In re Paine*; *Ex parte Read* (1); *In re Blackpool Motor Car Co. Ltd.*; *Hamilton* v. *Blackpool Motor Car Co. Ltd.* (2), so the class of debts in the phrase "unable to pay his debts" must include all liabilities of all kinds that may become debts in the future. No one, I think, has urged that these cases are not good law. It seems, for instance, that a man may "prefer" his surety by giving him a security by way of indemnity against any possible loss. But why should these cases bind us in the interpretation of the other phrase? There is really no analogy between the cases. To "prefer" a creditor means to put him in a position that he will be better off than other creditors in the administration in insolvency. It involves a mental state as to the future; and in preferring a creditor the mind is necessarily fixed on the state of things at the time of insolvency, and on the debts or liabilities that may be proved at that time. But in the phrase "unable to pay his debts as they become due out of his own moneys" there is no mental state involved; and the question is one of external facts as they exist at the time of the security being given. The phrase "unable to pay his debts as they become due" is not to be explained by the rule of thumb method of finding what liabilities are provable on an insolvency. The true correlative of *debts due by the insolvent* is *debts due to the insol-*

(1) (1897) 1 Q.B., 122. (2) (1901) 1 Ch., 77.

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vent, and the meaning of this is given by *Mellish* L.J., in the passage which I have quoted above.

The next question is, what is the meaning of "a reasonable and sufficient consideration given at the time?" What is "a reasonable and sufficient consideration" for giving a security over an existing debt and a present advance? The phrase is read by the respondent trustee as if it were "a consideration in money equal in amount to the amount secured." But there is nothing whatever about equality, or even equivalence, in the section. At the time when this sec. 108 was first enacted—in the *Insolvency Act* of 1864, sec. 74—there were frequent cases in England and elsewhere in which the want of a reasonable and sufficient consideration, given at the time of the security by the creditor secured, was held to be evidence, but not conclusive evidence, of an intention to defraud the other creditors. For it was a common occurrence to give satisfaction or security to a favoured creditor, and to conceal the real motive by taking from him at the time some colourable fresh payment, and then to say that the consideration for the transaction was this fresh payment. There were endless struggles as to what was the real motive. It seems to me that the Queensland legislature merely meant that what had hitherto been mere evidence should hereafter be conclusive demonstration of a fraudulent intent to prefer, in the case of a man unable to pay his debts. But there is no reason why the same tests should not be applied in finding whether there was or was not such a consideration. In *Allen* v. *Bonnett* (1) the old debt was £450; the fresh advance was only £300; and yet a security for the whole sum of £750 was upheld. In *Ex parte Fisher*; *In re Ash*, the cases are reviewed, and *Mellish* L.J. said (2): —"We do not, however, think that we can lay down as a matter of law that the smallness of the amount of the advance necessarily makes the bill of sale an act of bankruptcy; but we think that it affords strong evidence that the principal object of the parties in the whole transaction was, not to enable the bankrupt to continue his trade, but to secure to Mr. *Wells* the repayment of his past advances." This was said in an extreme case in which the security covered the whole of the debtor's property. The idea

(1) L.R. 5 Ch., 577.

(2) L.R. 7 Ch., 636, at p. 644.

that the present advance must be equal, or even nearly equal, to the amount secured, was never suggested in these cases. The words used in the Act are not "equal in amount," but "reasonable and sufficient." A secured creditor cannot get more than his debt, whatever the value of the property mortgaged may be. He merely gets a priority of payment so far as regards certain assets; and if he be paid from these assets, the other assets are available for the other creditors. The amount available for other creditors is not diminished if by means of the advance obtained the debtor could maintain or retrieve his position, even if he is actually unable to pay his debts at the time. This case was argued as if the bank got, for its £937, assets of the value of £4,800, or, at the best, got assets of the value of £1,891 (the amount secured); but this is a mistake. This is not the case of an absolute assignment. In the case of an absolute assignment a comparison of the property assigned with the amount of the debt discharged is often very material. If a man on 7th July has to pay £937 for wages, or else shut up his business in ruin, is it not worth his while to give priority as to part—even the greater part—of his property to the extent of covering an existing debt of £954 and the present advance of £937? Is there not here a "reasonable and sufficient consideration?" Another part of the consideration is to be found in the contract of the bank (recited in the bill of sale) to make advances to Robertson by way of loan; but the amount was undefined. The word "sufficient" has for many years been familiar in cases and text writers in connection with "consideration." It does not refer to the amount, but to the nature of "consideration." Any damage to the person to whom the promise is made, as well as any advantage to the person by whom the promise is made, is "sufficient" consideration to support a contract. A widow promises to pay her late husband's creditor if he will prove the debt to be owing. He proves it; and the trouble that he takes in doing so is "sufficient" consideration to support the contract: See *Williamson* v. *Clements* (1). There is no necessity to show anything like equality. In this section there is added the word "reasonable." Probably this means such consideration as a man could reasonably

(1) 1 Taunt., 523.

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expect, under the circumstances, to obtain by way of bargain, where each party is straining for his own benefit. At the time the words were first put into the Queensland Act of 1864, the test was, is it a transaction by way of genuine bargain, not a favour to the creditor: *Shelford Bankruptcy Acts* 1862, p. 323; *Alderson* v. *Temple* (1). In this case the bank had long been promised security, but the giving of it had been postponed from various causes, and nothing was more natural than for the bank to say: "Either the whole debt secured, or no advance of £937." But whatever is the precise force of this word "reasonably," it certainly does not mean "equal in amount to the debt secured." There is no evidence whatever tending to show that the consideration was unreasonable; and the learned Judge evidently thought the transaction was the most natural, honest, business-like one in the world. But he felt compelled by decisions to find that no reasonable or sufficient consideration was given at the time. I am of opinion that sec. 108, in prescribing that these two conditions—inability to pay debts &c., and the want of a reasonable and sufficient consideration given at the time—shall be *conclusive* evidence of fraud —while other sections of the Act gave an opportunity to impeach the transaction on the ground that there was an actual fraud (sec. 107) or that the transaction was fraudulent in *effect* (sec. 109)—meant to prescribe substantially that if a man, in financial difficulties, choose to (practically) make a gift to, instead of a bargain at arm's length with, the creditor, the Court need make no further inquiry as to motive or effect, but treat the transaction as a fraud.

An attempt has been made by Mr. *Graham*, who has certainly been unsparing of pains in working at the case, to show that even if sec. 108 does not invalidate the transaction, the securities are invalid under sec. 109; and for this purpose he seeks now to show that the bank has not proved that the security was taken in good faith. There is no express finding on this subject in the judgment; and I do not find in the Judge's notes of the argument, which are full, any reference to sec. 109, although there is reference to secs. 107 and 108. It is not fair, therefore, to comment on the absence of an express finding of good faith under sec. 109.

(1) 4 Burr., 2235.

Indeed, if this section 109 was not pressed before the Judge, this Court ought not to be asked to give a finding of fact under that section now. Reliance is principally placed on the remarks of *Cairns* L.J. in *Tomkins* v. *Saffery* (1), but in that case the creditors alleged to have been preferred were obviously put upon inquiry by facts which were fully within their knowledge. They knew, as Lord *Cairns* said, "that there was a person with whom the bankrupt had had pecuniary dealings to a considerable amount, which dealings might take the form either of debt or of bounty not amounting to debt." The bankrupt was "the person who of all others upon a matter of this kind would be their most untrustworthy informant." But Robertson is found to be a man of tested probity and honour, and his opinion as to the result of the action was backed up by all his legal advisers. I do not quite see of whom the bank manager could effectively have made further inquiries. But perhaps the simplest answer to the contention is that, if my interpretation of the phrase "unable to pay debts &c." is right, neither Robertson nor the bank manager had any need to concern themselves, for the purposes of the section, with possible liabilities which were not debts. This is one of several answers which seem to me to be sufficient as regards the new charge under sec. 109. As for the technical point taken before the Court—not in the notice of motion—that the bill of sale does not truly state all its conditions, I do not agree with it at all. But, in view of the turn which the case has taken, I do not feel called upon to take up further time and space in elaborating my reasons on a point of no general importance. I have felt it incumbent on me to state at some length the reasons why I venture to dissent on the main point—the meaning and application of sec. 108—from my learned colleagues.

Appeal dismissed, with costs.

Solicitors, for appellants, *Flower & Hart.*

Solicitors, for respondent, *Althow & McGregor.*

N. G. P.

(1) 3 App. Cas., 213, at p. 227.