1891

*Jan. 23,26.

*Nov. 16.

G. F. STEPHENS (PLAINTIFF) .....APPELLANT;

AND

COLIN McARTHUR AND JAMES WORTHINGTON (DEFENDANTS) } RESPONDENTS

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Construction of statute—Transfer of personal property—Preference by —Pressure—Intent—49 V. c. 45 s. 2 (Man.)

By the Manitoba Act 49 V. c. 45 s. 2, "Every gift, conveyance, etc., of goods, chattels or effects * * * made by a person at a time when he is in insolvent circumstances * * * with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void."

Held, Patterson J. dissenting, that the word "preference" in this act imports a voluntary preference and does not apply to a case where the transfer has been induced by the pressure of the creditor.

Held, further, that a mere demand by the creditor without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference.

The words "or which has such effect" in the act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. *Molsons Bank* v. *Halter* (18 Can. S.C.R. 88) approved and followed.

Held, per Patterson J., that any transfer by an insolvent debtor which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the statute whether or not it is the voluntary act of the debtor or given as the result of pressure.

PRESENT:—Sir W. J. Ritchie C. J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

1891

STEPHENS v. MCARTHUR.

APPEAL from a decision of the Court of Queen's Bench (Man.) (1), affirming the judgment at the trial of an interpleader issue in favour of the defendants.

The plaintiff Stephens, who carried on business as a wholesale dealer in paints and oils in the city of Winnipeg under the firm name of G. F. Stephens & Co., held a chattel mortgage on the stock in trade of Madell & Robinson, a retail firm of painters and paper hangers in the same city, and the goods so mortgaged had been seized under execution issued on a judgment of the defendants against the said firm. The interpleader issue was to try the right to the possession of these goods.

The mortgage to the plaintiff was given on 8th December, 1888, under the following circumstances: He had had considerable dealings with Madell & Robinson and at this date he found that their account was getting too large to carry without security. A few days before 8th December he went to see Madell & Robinson about getting security, and on their stating that if they could get time to pay their debts until the spring trade opened they would be able to satisfy all their creditors, the plaintiff agreed to give them time and make further advances if they would give a chattel mortgage, which they agreed to do. At the trial there was conflicting evidence as to whether or not the plaintiff threatened at that time to sue if security was not given, but it was shown that he had been dunning them occasionally before that, and that he told them at the time the mortgage was given, or shortly after, that he would have issued a writ if the security had been refused.

On the 17th December the firm of Madell & Robinson was dissolved, Madell retiring and transferring his interest in the business to Mrs. Robinson, who carried

(1) 6 Man. L. R. 496.

1891

STEPHENS v. McARTHUR.

it on until 5th February, 1889, when she made an assignment for the general benefit of her creditors. Prior to this assignment the respondents had obtained judgment against Madell & Robinson, and an execution was placed in the sheriff's hands on 26th January, 1889. The goods in the store of the judgment debtors having been seized under the execution this interpleader issue was ordered between Stephens as plaintiff, claiming under his chattel mortgage, and the respondents as execution creditors.

On this state of facts it is objected on behalf of the respondents, the execution creditors, that the chattel mortgage is void under "The Act respecting Assignments for the benefit of Creditors," (1), as creating a fraudulent preference. That section provides as follows :—

"2. Every gift, conveyance, assignment or transfer, delivery over, or payment of goods, chattels or effects, or of bills, bonds, notes, securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall as against them be utterly void."

The trial judge held that the chattel mortgage was not given by the debtors with intent to defeat, delay or prejudice their creditors, or to create a preference; he held, however, that it had the effect of creating a preference, and was, therefore, void under the act.

(1) 49 Vic. c. 45 s. 2 (Man.)

1891

STEPHENS v. MCARTHUR.

This decision was affirmed by the Court of Queen's Bench. The plaintiff appealed to this court.

Moss Q.C. and *Wade* for the appellant.

The Manitoba statute clearly is an act relating to bankruptcy or insolvency and is void. *Clarkson* v. *Ontario Bank* (1); *Reg.* v. *Chandler* (2).

By sec. 7 of the act only the assignee can sue. If he refuses, or if there is no assignment, a creditor may sue by leave of the court.

The appellant is within the saving clause. The evidence shows that he intended to make advances to Robinson and he gave him time to pay his debt which is equivalent to an advance. *Rae* v. *McDonald* (3).

This court has decided in *Molsons Bank* v. *Halter* (4) that the intent to delay or give a preference must still be shown in spite of the words "or which has such effect" in the statute. That being so there was clearly no such intent in this case. The matter of preference is very fully discussed in *Slater* v. *Oliver* (5). See also *Ex parte Ellis* (6), *Ex parte Sheen* (7).

Morris Q.C. and *Elliott* for the respondents referred to *Murtha* v. *McKenna* (8).

SIR W. J. RITCHIE C.J.—I entirely concur in the judgment of my brother Strong in this case, and for the reasons which he has advanced I would allow the appeal.

STRONG J.—The question raised by this appeal is one involving the validity as against creditors of a chattel mortgage given to the appellant by a firm of Madell & Robinson who were debtors of both the appel-

(1) 15 Ont. App. R. 166.
(2) 1 Han. (N.B.) 556.
(3) 13 O. R. 366.
(4) 18 Can. S.C.R. 88.
(5) 7 O. R. 158.
(6) 2 Ch. D. 797.
(7) 1 Ch. D. 560.
(8) 14 Gr. 59.

1891

STEPHENS v. MCARTHUR.

Strong J.

lant and respondents, and it is worthy of remark at the outset that the result of the judgment appealed against is not to avoid this mortgage in favour of the general body of creditors, but merely to substitute the respondents, who are execution creditors, as creditors having priority, so far as regards the property comprised in the mortgage, over the appellant. The debtors having made an assignment for the benefit of creditors generally the assignee, Mr. Wade, who was originally made a party to the interpleader proceedings, submitted to be barred, and this interpleader issue was then directed to be tried between the appellant claiming under his chattel mortgage as plaintiff, and the respondents, the execution creditors, as defendants. On the trial of this issue before Mr. Justice Bain (without a jury) the learned judge found for the respondents, and upon an appeal being taken to the full Court of Queen's Bench the judgment of Mr. Justice Bain was sustained.

The specific ground upon which the security is impeached is that it was a preference, or had the effect of a preference, within the meaning of the Manitoba act 49 Vic. ch. 45 sec. 2. This enactment is as follows:

> Every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, securities or of shares, dividends, premiums or bonds in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances or unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void.

One of the appellant's contentions is that this clause is void as being legislation on the subject of insolvency and therefore beyond the powers of a provincial legislature. I am of opinion, however, that the appeal may be decided on other grounds, apart altogether from the question of the constitutional validity of the statute,

and that we are therefore relieved from considering and pronouncing upon this latter point.

That the appellant was a perfectly honest creditor, whose debt had arisen in every respect in good faith, was in no way disputed.

Whether there was or not notice to the appellant of the insolvency of the debtors is a point which, in the view I take of the meaning and construction of the statute, is not material to the decision of the present appeal.

It is clear, however, that notice has not been established. The trial judge found, and the court in banc sustained the finding, that the appellant had not notice of the insolvency of the execution debtors at the time he took his security. In appeal Mr. Justice Killam expressly says that there was evidence to support this finding and that there is no weight of evidence against it. In this court we may therefore well treat this question of fact as concluded by the concurrent findings of the two courts below.

The substantial ground upon which I am prepared to rest my judgment is the construction of the language of the statute in relation to the meaning of the words "preference" and "effect of preference."

That by the second section of the statute before set forth it was intended in any way to attribute to the word "preference" a wider scope than previous decisions had given it, or to alter or interfere with the signification which had in accordance with its etymological meaning been affixed to the expression when used in bankruptcy and insolvency statutes by courts of the highest authority, in no way appears either from the section itself or from any context to be found in other parts of the statute. It is for the respondents to establish that the word is to receive some secondary meaning, differ-

1891

STEPHENS v. MCARTHUR.

Strong J.

ing from that which has always been placed upon it, before they can ask us to refuse to follow the authorities which, from the time of Lord Mansfield down to the decision of the case of *Butcher* v. *Stead* (1), have held that the word imports a voluntary preference and that an act of the debtor which is induced by the pressure of the creditor is in no sense to be deemed a preference.

In *Butcher* v. *Stead* (1) Lord Cairns thus decisively expresses the view that the word " preference " *per se* imports a voluntary preference, and that when there is pressure on the part of a creditor seeking payment or security for a debt honestly due there can be no fraudulent preference. The passage I refer to is that to be found at p. 846 of the report, where the Lord Chancellor says :—

> The act appears to have left the question of preference as it stood under the old law, and indeed the use of the word " preference " implying an act of free will would of itself make it necessary to consider whether pressure had or had not been used, and this appears to have been the opinion of the Lords Justices in the case of *Ex parte Topham* (2).

Can then anything in the way of statutory enactment be pointed to, displacing this positive and authoritative declaration of the law delivered by the Lord Chancellor of England so recently as the year 1875 ? Nothing to which we have been referred shows that there has been any change, and if the result would be, as in the present case, to bring about a mere interversion of the priorities of two rival creditors it is perhaps not to be regretted that no change has been made. It is not, however, to be supposed that this case of *Butcher* v. *Stead* (1) stands alone as an authority upon the effect of pressure as rebutting a presumption of fraudulent preference. In the recent case of *Long* v. *Hancock* (3)

(1) L. R. 7 H. L. 839. (2) 8 Ch. App. 614.
(3) 12 Can.S.C.R. 539.

Mr. Justice Gwynne in this court laid down the same doctrine, and the cases cited in the appellant's factum, of *Kennedy* v. *Freeman* (1), *Slater* v. *Oliver* (2), and *re Boyd* (3), are all to the same effect.

As I have said the doctrine had its origin as far back as the time of Lord Mansfield (see *Harman* v. *Fishar* (4) and *Thompson* v. *Freeman*) (5) and the books are full of cases down to recent times all recognizing the doctrine and treating it as one necessarily arising from the primary and natural import of the word "preference" as meaning a voluntary act on the part of the debtor and therefore as a term which is not applicable to an act brought about by the active influence of the creditor. Two decisions of the Privy Council, both referred to in the appellant's factum, are so precisely in point that they seem to me conclusive. In the first *The Bank of Australasia* v. *Harris* (6) the words of a statute in the nature of an insolvency act which avoided acts "having the effect of preferring" were identical with those in the present statute and it was held that this referred to fraudulent preferences only. The Jamaica case of *Nunes* v. *Carter* (7) is to the same effect. Both these cases recognize that the word "preference," or "preferring" referred to a voluntary and therefore fraudulent preference. In the notes to *Harman* v. *Fishar* 4), in Tudor's L. Cases on Mercantile Law (8), a long list of authorities which it would be useless to quote more particularly is to be found.

Then as to what acts are sufficient to constitute pressure the decided cases are equally explicit. The cases on this head are also all collected in the book last referred to (9) and from them it appears that a mere

(1) 15 Ont. App. R. 230.
(2) 7 O. R. 158.
(3) 15 L. R. (Ir.) 521.
(4) Cowp. 117.
(5) 1 T. R. 155.
(6) 15 Moore P. C. C. 116.
(7) L. R. 1 P. C. 342.
(8) See p. 818 ed. 1884.
(9) Tudor's L. C. on Mercantile Law, p. 818.

1891

STEPHENS v. MCARTHUR.

Strong J.

demand by the creditor without even a threat of, much less a resort to, legal proceedings is sufficient pressure to rebut the presumption of a preference. We need not, however, dwell longer on this part of the case, inasmuch as both Mr. Justice Bain at the trial and the court on appeal were of opinion that if pressure was in law sufficient to rebut any inference of fraudulent preference it was, in point of fact, sufficiently established. Mr. Justice Killam delivering judgment in appeal says:

> I understand the learned judge intended to find that there was such pressure as to rebut any presumption of an intent to prefer. The evidence fully warrants such a finding. This effect of pressure has been so frequently accepted in this court as not to require to be now discussed.

Then, and this perhaps is the main argument relied on by the respondents, it is said that even if there was no intent to prefer yet the security given had "the effect of a preference" within the meaning of those words as used in the statute. In the case of *Molsons Bank* v. *Halter* (1) I have already stated my own opinion as to the meaning which ought to be placed on this expression. I there said that I interpreted them as applying to a case in which that had been done indirectly which if it had been done directly would have been a preference within the statute. To this opinion I still adhere, and if I am correct in this, which is the literal construction, it is conclusive in the present case.

It has, however, been forcibly argued on this appeal, both in the appellant's factum and by his counsel at the bar, that if it is once demonstrated that the word preference means *ex vi termini* a voluntary preference then the class of contracts, deeds, instruments or acts which are to be avoided as having the effect of a pre-

(1) 18 Can. S. C. R. 88.

ference must also be restricted to such as are spontaneous acts or deeds of the debtor. This argument appears to me irresistible, and even were it unsupported by authority I should deem it conclusive of the case. But in the case of *The Bank of Australasia* v. *Harris* (1), before the Privy Council, the very same point arose; the difference between the words of the statute, the construction of which was in question there, and the present statute are immaterial. It will be remembered that the words of the statute in that case (which I have already quoted) were "having the effect of preferring," here they are "or which has such effect," the relative word "such" referring to the giving any one or more of his creditors a "preference" over his other creditors. No reasonable or even sensible distinction can be made between the language of the two statutes, and it therefore follows that we have in this case of *The Bank of Australasia* v. *Harris* (1), a direct authority on this point of construction which we cannot refuse to follow without repudiating the authority of our own supreme court of appeal. And this same construction we have again substantially repeated in the case of *Nunes* v. *Carter* (2).

Therefore it appears that both upon authority and principle the construction of the statute contended for by the appellant is that which ought to be adopted.

Had it been the intention of the legislature to make such an alteration of the law as to avoid all transactions which might result in giving precedence to active and diligent creditors who should by pressing their claims obtain priority over others, it can hardly be supposed, in view of the well-established state of the then existing law to the contrary, that such a change would not have been enunciated in clear and explicit terms.

(1) 15 Moo. P C. C. 116. (2) L. R. 1 P. C. 342.

1891

STEPHENS v. MCARTHUR.

Strong J.

As I have already pointed out it is found by both the courts below that the appellant had no notice of the insolvency of the debtor; but even if it had been otherwise I should have considered that inasmuch as the law as it had been settled in England did not make securities obtained by a creditor in priority to others a fraudulent preference, provided it was the result of pressure, even although the creditor had notice of the debtor's insolvency, and as this state of the law had not been altered by the statute, notice was immaterial.

As I have arrived at this conclusion it is unnecessary to notice two other points made by the appellant, one impeaching the *locus standi* of the respondents to attack the mortgage, a right which it is contended is given exclusively to the assignee, the other that there was a further advance by the appellant at the time of taking his security. Both of these objections seem to be of weight, but I express no opinion as regards either of them.

The appeal should, in my opinion, be allowed and judgment entered on the interpleader issue for the appellant with costs in this court and also in the court below.

FOURNIER and TASCHEREAU JJ.—Concurred in the judgment of Mr. Justice Strong for allowing the appeal.

GWYNNE J.—I cannot pronounce the judgment of the learned judge who tried the case upon the question of fact as to the perfect honesty of the transaction assailed and the *bona fides* of the parties to it to be clearly errroneous, and if I cannot, the established rule of the court is that I should not. In other respects also I entirely concur in the judgment of my brother Strong, to which I merely desire to add that in my judgment

1891

STEPHENS v. MCARTHUR.

Gwynne J.

the case is concluded by the judgment of this court in *Molsons Bank* v. *Halter* (1).

PATTERSON J.—(After reviewing the evidence at some length his Lordship proceeded as follows): The result of all the evidence seems to me very plain.

The debtors being unable to pay their debts, but having hopes that if they could keep their creditors from interfering with their business they might be able to provide in the long run for paying them, transfer to one creditor all their assets, some by way of mortgage; some, viz., the book debts, by absolute assignment; and some, viz., the horse, both ways, the absolute sale being before the mortgage; having an understanding, vague enough and not amounting to an agreement, that he would assist them to keep their business going. He would not have engaged as far as he did, as he tells us, if they had not given him the security—in other words made him better off than the other creditors. The most effective assistance looked for was evidently the keeping off the other creditors, or as Robinson phrased it when speaking of the book debts, "to keep other people from jumping on to them, and to give me the same chance that I wanted in the first place,"—which is pretty much to the same effect as a statement of the plaintiff which I have already read when he said: "Giving me a chattel mortgage would secure me and prevent any other creditors coming and seizing every thing, and give them time also to pay them all off. The understanding was that I was to take the security and give them all the time necessary to pay off the other creditors."

The respondents obtained judgment against Madell and Robinson on or before the 26th of January, 1889, and on that day seized the goods under a *fi. fa.* and they

(1) 18 Can. S.C.R. 88.

1891

STEPHENS v. McARTHUR.

Patterson J.

were, as already mentioned, sold under the interpleader order.

The mortgage is attacked under the following provision of the statute of Manitoba, 49 Vic. ch. 45 sec. 2:

2. Every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall as against them be utterly void.

It has been held to be invalid by the unanimous judgment of the Court of Queen's Bench in that province as having the effect of giving a preference to the appellant over the other creditors of Madell and Robinson.

There were two objections taken to the mortgage under the act respecting chattel mortgages, both of which were, I think properly, overruled in the court below. One was to the description of the goods; but the description satisfies the statute, as already decided in this court. The other was based upon the circumstance that the mortgage was given in part to secure the amount of current promissory notes, the contention being that the consideration ought, so far as that amount is concerned, to have been differently stated; and, consequent upon that, that there ought to have been a different affidavit of *bona fides*. But the security was not taken against the liability of the mortgagee as indorser of the notes. The amount of those notes was a debt directly due to the mortgagee as much as the amount of the overdue notes or of that part of the amount which had never been covered by a note. A promise to pay a debt at a future day does not alter the nature of the debt.

1891

STEPHENS v. MCARTHUR.

Patterson J.

We have therefore to consider only the statute of 49 Vic. ch. 45, and the questions under it are: Was the mortgage made with intent to give the mortgagee a preference over other creditors, or had it such effect?

In the first place what is a preference?

In investigating the meaning and force of that word as used in this Manitoba statute it is said that we are not at liberty to look beyond the construction applied by this court to the same word in a statute of the province of Ontario in the recent case of *Molsons Bank* v. *Halter* (1). If that position is correct we must understand the preference dealt with by the statute as being the voluntary and spontaneous act of the debtor uninfluenced by pressure, even to the extent of a request, on the part of the creditor. As expressed in that case by one of my learned brothers:

> To constitute a preference it [*i. e.* the transfer of property] must have been given by the insolvent of his own mere motion, and as a favour or bounty proceeding voluntarily from himself.

With great respect for the opinions of my learned brothers who formed the majority of the court at the hearing of *Molsons Bank* v. *Halter* (1), I venture to think a reconsideration of the question desirable, nor do I perceive any sufficient reason for treating the judgment in that case, even if the views alluded to had been those of the whole court, as making it our duty to apply the same construction to this Manitoba statute. The two statutes are, no doubt, very much alike, but in *Molsons Bank* v. *Halter* (1) there were several questions that do not arise in the case before us. One of them turned on the relation of the mortgagor in the impeached mortgage towards his mortgagee. It was held, upon the facts of the case, that those persons were not debtor and creditor, and it was further held that the statute avoided preferential transfers

(1) 18 Can. S.C.R. 88.

1891

STEPHENS v. MCARTHUR.

Patterson J.

only when made by a debtor to his creditor. That decision took the case altogether out of the statute and made the discussion of the word "preference" unnecessary for the disposal of the appeal.

But I take it to be indisputable that, as a matter of principle, the reasons given by the court for its judgment in any case may properly be reconsidered and, if found to be erroneous, corrected when a similar question arises in another case. Whether that can be done by an ultimate court of appeal, such as the House of Lords, may perhaps not be free from question. We have the opinion of Lord Campbell expressed in *Bright* v. *Hutton* (1), and in *Beamish* v. *Beamish* (2), in one direction, and that of Lord St. Leonards in *Wilson* v. *Wilson* (3), taking the opposite view, while in the last named case Lord Brougham spoke of the question as *questio vexata*. The reasons on which the opinion of Lord Campbell is founded apply only to the court of last resort, and the power of every other judicial tribunal to correct an error (if it has fallen into one) in subsequently applying the law to other cases is recognised in express terms, particularly by Lord St. Leonards. I had occasion to consider the doctrine in *re Hall* (4), where I referred to the cases I have now cited with other authorities. Instances illustrating the point are often met with. One of them is afforded by the case *Ex parte Griffith* (5), in which the Court of Appeal departed from the rule of decision which had obtained in a series of cases beginning with *Ex parte Tempest* (6). I shall have to notice those cases more fully by and by, as I proceed with the consideration of the question: What is a preference within the meaning of the Manitoba statute?

(1) 3 H. L. Cas. 341.
(2) 9 H. L. Cas. 274.
(3) 5 H. L. Cas. 49.
(4) 8 Ont. App. R. 135.
(5) 23 Ch. D. 69.
(6) 6 Ch. App. 70.

To one reading the statute the word does not seem hard to understand, yet it is urged that under the apparent simplicity of the expression there lurks a hidden qualification. A man whose mind is unwarped by legal subtleties, and who reads the statute in order to learn and be governed by its provisions, will instinctively act on the golden rule of construction and give to the language its ordinary grammatical meaning. The word "preference" will not be to him an unfamiliar term in the vocabulary of business life. Preference shares in railway and other companies, and preferred creditors in insolvency or winding-up proceedings, he will probably know as subjects of legislation, if not in a more practical way. The clause of the Manitoba statute now before us is a reproduction, with some recent variations, of one enacted in the province of Canada over thirty years ago (1) and adopted in Manitoba where it was more than once reenacted. It contained the word preference in the same sense as in the present clause (2), and had also a proviso excepting from its operations assignments made by debtors "for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of such debtor their just debts." "Preference and priority" mean in these instances pretty much the same thing. One man gets paid in priority to another, or the other may get nothing at all. That is the sense in which the word is employed in this statute, and it is the ordinary force of the word as used in our legislation, as for example in the Ontario assessment laws which make the taxes a special lien on land, "having preference over any claim," &c. (3).

(1) 22 Vic. c. 96 s. 19; C. S. U. C. c. 26 s. 18; R. S. O. 1877 c. 118 s. 2.

(2) 38 Vic. c. 5 s. 59 (Man.); C. S. M. c. 37 s. 96; 48 Vic. c. 17 s. 123 (Man.)

(3) R. S. O. 1887, c. 193, s. 137.

1891

STEPHENS v. McARTHUR.

Patterson J.

But we are told that in this Manitoba statute it does not mean that. It is argued that to give one creditor an advantage over the others, in respect of the assets of his debtor, is not within the meaning of the statute to give him a preference unless it is done by the voluntary and spontaneous act of the debtor. This is a different thing from the "intent," which under this law has usually been construed as the same word is construed in the statute 13 Eliz. ch. 5, and which, from the date of *Wood* v *Dixie* (1) through nearly all of the last half century, has given rise to so many contests. The contention is that the word "preference" by its own proper force involves, and in this statute expresses, the idea of spontaneity on the part of the debtor who gives the preference. I entirely dissent from this suggestion. I regard it as unwarranted by anything necessarily conveyed by the word itself; as palpably opposed to the purpose of the statute; and as unsupported by the correct understanding of any English authority.

The term "fraudulent preference" as used in connection with the administration of English bankruptcy law, was not found in any statute. It was a term adopted by the courts to designate an act by which one creditor obtained an advantage over the others when two things concurred: first, that the act was voluntary on the part of the debtor; and secondly, that it was done in contemplation of bankruptcy. The word "preference" in this compound term was used in the sense which I attribute to it in the Manitoba statute, and it was held to be *fraudulent* when the two things I have mentioned concurred. Then came the Bankruptcy Act, 1869, and afterwards the Bankruptcy Act, 1883. Each of those acts contained a

(1) 7 Q. B. 892.

clause, which was section 92 of the former and section 48 of the latter act, that—

> Every conveyance, &c., by any person unable to pay his debts as they become due from his own money in favour of any creditor..... with a view of giving such creditor a preference over the other creditors, shall, if the person making.....the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making.....the same, be deemed fraudulent and void as against the trustee in bankruptcy.

This enactment encountered the inertia that is induced in the judicial mind by long following a particular line of thought. It was at first held that it left the law unaltered, and that the preference forbidden by it was merely the old fraudulent preference of the judicial decisions which, as I have said, was never defined by statute, and which included as one of its ingredients the voluntary and spontaneous action of the debtor. It was so laid down in *Ex parte Tempest* (1), in 1870. James L.J., speaking in that case of the old law, said :

> The principle is that in order to constitute a fraudulent preference the act must be the *spontaneous* act of the debtor, not originating in a demand or some other step of the creditor.

And again :

> The motive of giving a security is always to make the second creditor safe and better off than other creditors. The question is : What is the motive of that motive ?

And further on :

> It is said, however, that the Bankruptcy Act, 1869, sec. 92, alters the law and makes an application by the creditor immaterial. It appears to me that, to make that section apply, the transaction must be one which would have been an act of fraudulent preference under the old law.

In *Ex parte Topham* (2), in 1873, the Court of Appeal considered that the Chief Judge had given a perfectly accurate description of the state of the law when he said that—

(1) 6 Ch. App. 70. (2) 8 Ch. App. 614.

1891

STEPHENS v. MCARTHUR.

Unless it can be made clearly apparent, and to the satisfaction of the court which has to decide, that *the debtor's sole motive* was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even though it be obviously in favour of a creditor.

Patterson J.

In the case of *Butcher* v. *Stead* (1) which was before the House of Lords in 1875, the question decided was that a provision of section 92 saving the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration, extended to protect a person who received payment as a creditor, Lord Selborne disapproving of the construction thus put upon the statute, and expressing a fear that the decision opened a wide door to frauds upon the bankrupt law. The decision does not bear upon the present discussion, but Lord Cairns in the course of his judgment used language which may seem to do so. He said :

> The act appears to have left the question of pressure as it stood under the old law, and indeed the word "preference," implying an act of free will, would of itself make it necessary to consider whether pressure had or had not been used, and this appears to have been the opinion of the Lords Justices in the case of *Ex parte Topham* (2).

It may be presumptuous to question the dictum of so eminent a jurist as Lord Cairns, even as to the meaning of an English word, but I humbly submit that the word "preference" does not, *ex vi termini*, imply an act of free will, and that if the free will or voluntary act of the debtor is to be understood as an ingredient of the preference dealt with by these statutes that understanding must be derived elsewhere than from the word "preference" itself. The word "prefer" is no doubt appropriate to denote an act of the mind, or the state of one's affections or choice, and possibly that may be the sense in which it is most frequently used in every-day conversation ; but that is only one application of its meaning which is, literally, to bear or carry before, or to give the object of the

(1) L.R. 7 H.L. 839. (2) 8 Ch. App. 614.

preference a place before some other. We may safely appeal to the authorised version of the scriptures as a standard of accuracy as well as of elegance in the use of our language. We there find the word sometimes expressive of choice (1), as when Timothy is charged to do certain things "without preferring one before another, doing nothing by partiality." But it is more usual to find the word denoting only relative position, as in the Baptist's announcement "After me cometh a man who is preferred before me" (2), and when it is said that "This Daniel was preferred before the presidents and princes" (3). In other versions the same meaning is conveyed by a different word. In Beza's latin translation of the passage from St. John, we have "*antepono*,"—*Pone me venit vir qui antepositus est mihi.* In the vulgate we find "*ante*" with "*facio*."—*Qui post me venturus est ante me factus est.* The revised version has it "After me cometh a man which *is become* before me." In the passage from Daniel the vulgate uses the verb "*supero*."—*Igitur Daniel superabat omnes principes et satrapas.* And in the revised version it is "This Daniel *was distinguished* above the presidents and satraps."

In this sense, it seems plain to my understanding, the word prefer is used in these statutes; and in every place where it occurs in the judgments cited it conveys the idea of giving one creditor a position more advanced than the others, or precedence, in relation to the payment of his debt. In short, as before remarked, the words "preference" and "priority" are almost if not altogether interchangeable.

When the English courts read into the new clause of the Bankruptcy Acts the old doctrines touching fraudulent preference they pursued a course of reason-

(1) 1 Tim. V. 21.
(2) John I. 15,30.
(3) Dan. VI. 3.

1891

STEPHENS v. MCARTHUR.

Patterson J.

ing inapplicable to our statutes and to our conditions. We are not dealing with a bankrupt law; but if we were we should still remember that the English bankruptcy system under which, independently of statute law, the old doctrines and formulæ had been established was not part of our jurisprudence. We may say of their rule of interpretation as applied to our statute, adopting language used by Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1), that it would "run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature." But the construction given to the clause of the Bankruptcy Acts of 1869 and 1883 in *Ex parte Tempest* (2) and other cases was, after a while, challenged, and, as far as it dealt with the force of the word "preference," was abandoned.

The judicial inertia was at length overcome.

Ex parte Griffith (3) was decided in the Court of Appeal in February, 1883, by judges all of whom had gone on the bench after the act of 1869 had come into force. They were Jessel M.R. and Lindley and Bowen L.JJ. The principles settled by their decision are thus concisely stated in the head note of the report:—

> In determining whether a transaction amounts to a fraudulent preference the court ought now to have regard simply to the statutory definition contained in section 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.

It was thus no longer held to be essential to the invalidity of a transaction that it was the spontaneous act of the debtor, or that his sole motive must be the intent to prefer the particular creditor.

It will be useful to quote one or two observations made by the judges in delivering their opinions. It

(1) 12 App. Cas. 575, 582. (2) 6 Ch. App. 70.
(3) 23 Ch. D. 69.

1891

STEPHENS v. MCARTHUR.

Patterson J.

would be instructive to read the whole of what was said by the Master of the Rolls, but I shall confine myself to one passage:—

I think it far better that we should in all these cases look to the intention of the clause in the act, and not entangle ourselves in an enquiry as to the precise views and intentions of the parties, in order to see what was the motive of the transaction and what the law was before the statute.

Lindley L.J. said:—

What we have to consider is the true construction of section 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the legislature has laid down is equivalent to the standard of the old law.

Some remarks of Bowen L.J. are particularly worthy of note:—

I should like to pause, he said, in the current of judicial decisions for the last fifteen years on the subject of fraudulent preference, and to take note, so to say, of the position in which the court finds itself in relation to this subject. Everybody knows that originally there was no 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 bankrupt law, though there was no statutory enactment on 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 that 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 enquiries as to what were the deductions that 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 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 discuss-

1891

STEPHENS v. MCARTHUR.

Patterson J.

ing motives of motives, enquire whether the transaction was entered into with a view to give one creditor a preference over the other.

I referred to this case of *Ex parte Griffith* (1) in a case of *Brayley* v. *Ellis* (2), in which I took part in the Ontario Court of Appeal in 1884, and cited also *Ex parte Hill re Bird* (3) which was decided shortly after the Griffith case, and I then expressed the opinion, which I still hold, that with those decisions before us we were at liberty to give effect to the plain language of a similar statute to the one before us without fear of coming into conflict with rules or supposed rules of decision in the English courts. Some of my colleagues in the Court of Appeal did not take quite the same view as I did of the effect of *Ex parte Griffith* (1), which had been decided after the argument of the case of *Brayley* v. *Ellis* (2); but I find the decision, together with that in *Ex parte Hill* (3), spoken of in the third edition of the Messrs. Williams Treatise on Bankruptcy (4), published in 1884, as having considerably shaken the rules laid down in former cases as applicable to fraudulent preferences. The authors also remark that for some time prior even to the decision in *Ex parte Griffith* (1) there had been a tendency to depart from the old notion that a *bonâ fide* demand negatived preference, and to disregard pressure and demands unless the position of the debtor was such that the demand or pressure might really influence him, citing two or three cases on the point.

The sensible and practical rule laid down in *Ex parte Griffith* (1) for administering the clause of the Bankruptcy Act I understand to have ever since been recognised as the proper rule. In *Ex parte Taylor* (5), in 1886, an attempt was made to carry it too far. It was argued that if a creditor was in fact preferred the

(1) 23 Ch. D. 69.
(2) 9 Ont. App. R. 565, 590.
(3) 23 Ch. D. 695.
(4) P. 236.
(5) 18 Q. B. D. 295.

motives of the debtor in giving him the preference were not to be enquired into; but that, as it was pointed out by the Court of Appeal, would be to strike out of the section the words referring to the intent. Lord Esher M.R. in the course of his observations remarked that:

It has been said that the court must be satisfied that the preferring of the creditor was the predominant view of the debtor—that if he acted from mixed motives the court must find out which was the predominant view in his mind. That no doubt is so, though I should have been content to say that the payment must have been made with a view of preferring the creditor. What is meant by "with a view?" It is the same thing as with an "intent." * * * It is impossible to lay down any exhaustive rule; the court must judge from the particular facts of each case whether the debtor did make the payment with a view or intent of preferring the creditor."

Lindley L.J. said:

Regard must be had to the "view" with which the payment was made. * * * It is impossible to infer the debtor's view from the mere fact that the creditor was preferred.

And Lopes L.J.:

The mere fact of making a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor the payment is a fraudulent preference. If the substantial motive is reformation for a wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference.

The rule seems to be settled that in order to save a preferential payment or transfer under section 48 of the Bankruptcy Act of 1883 something more must be done than merely to show that the transaction was not the spontaneous act of the debtor. A creditor cannot come, as Jessel M.R. described the creditors as coming in *Ex parte Griffith* (1), and as it seems to me the creditor came in this case, saying: "Can't you give me a preference," and asking the debtor to assign property to him to secure his debt. What more has to be shown must depend on the circumstances of the

(1) 23 Ch. D. 69.

1891

STEPHENS v. MCARTHUR.

Patterson J.

case. In *Ex parte Taylor* (1) the payment was held to have been made without any view of preferring the creditors, but with the sole intent of averting a threatened exposure of the debtor. But a motive of that sort will not be found by inference or suggestion. For example, it will not do to show that you have done something for which you are liable to prosecution unless you go further and prove that you were threatened with proceedings. That was decided in 1889, in *Ex parte Boyd* (2). A son had received £1,000 on behalf of a company of which his father was promoter and principal shareholder and had not accounted for the money. He transferred shares in the company to his father who paid off the £1,000. It was held by a divisional court that there being no evidence of any criminal proceedings having been contemplated against the debtor in respect of his alleged defalcations, and the father being aware of the debtor's insolvent condition, the transaction was rightly set aside.

The English courts have thus receded from the notion that the term "fraudulent preference" as defined by the bankruptcy decisions is the equivalent of the word "preference" in section 48, used as it is used there without the qualifying adjective; but I repeat that we are not dealing with a bankrupt law, and that the English bankruptcy system never was the law of Ontario or Manitoba. There is nothing in the Manitoba statute to require or justify the qualification which we are asked to apply to the word "preference," as in the case of the *Bank of Australasia* v. *Harris* (3), where the word was held to be qualified by the effect of other parts of the statute in which it occurred. Our duty is to interpret our statute by giving to the language in which the legislative will is expressed its natural force. "Preference" so understood means an advantage given

(1) 18 Q.B.D. 295. (2) 6 Morrell's Bky. Cases 209.
(3) 15 Moore P. C. 97.

to or obtained by one creditor over others. It is not uncommon to find these words "preference" and "advantage" used one for the other. Thus James L.J. in *Ex parte Tempest* (1) speaks of one creditor getting an advantage over the others or being better off than the others; and in a very recent case, *In re Skegg* (2), Lord Justice Bowen paraphrases "undue preference" by "undue advantage."

The plaintiff Stephens obtained by his mortgage an advantage over the other creditors. He was made better off than any of them, for he got everything and left nothing for the rest. The mortgage had the effect of giving him a preference and, therefore, by the plain words of the statute, it is void as against the other creditors.

I am further of opinion that the mortgage was made with intent to give the mortgagee a preference, although as it had "such effect" the statute dispenses with the necessity for enquiring into the intent.

Let us realise what the transaction was as shown by the account given by the plaintiff and by T. B. Robinson, and with the additional light afforded by the dealing with the book debts.

The plaintiff Stephens, the largest creditor, had given orders not to renew any more of the paper of the firm, so that if other creditors seemed inclined to push matters he might save himself. No one should get a preference over him. Then he tells the debtors that something must be done. Three courses are talked of, viz.: the plaintiff may sue for his claim, a large part of which was, however, not ripe for suit; or the debtors may make an assignment for all their creditors alike; or they may give the plaintiff a preference by mortgaging all their assets to him.

The three courses are practically only two, because

(1) 6 Ch. App. 70. (2) 25 Q. B. D. 505, 510.

1891

STEPHENS v. MCARTHUR.

Patterson J.

under this Manitoba statute a debtor who is sued can, by making an assignment, place all his creditors on an equal footing. The choice offered was, therefore, to assign for the equal benefit of all, or to give a preference to the plaintiff over all the others. When Mr. Robinson says that on an assignment the creditors would not have realised over ten or fifteen cents in the dollar he differs widely from the plaintiff who paid 55 cents, and was prepared to bid 75, at the sheriff's sale. He doubtless bases his estimate on the idea of the stock being brought at once to the hammer, but that is not a necessary consequence of an assignment. See *Slater* v. *Badenach* (1) in this court. If an assignment had been made the creditors might be trusted to look after their own interests. The choice was made, and it was to make the mortgage, or in other words, to give the preference to the plaintiff. It would be childish to argue, and I do not think it has been argued, that a man who conveys everything that he has to one creditor does not do so with intent that that creditor shall be better off than the rest. We must not confound intent with wish or desire, and there is less danger of our doing so than when the doctrine of spontaneity obtained.

But while the object and design of giving the security was that the one creditor should be secured and that the others should run all the risks, was there not some other motive that predominated and to which the making of the mortgage ought to be ascribed?

It is the same question put by Lord Justice James in *Ex parte Tempest* (2), in 1870, and dealt with in the vigorous judgment of Lord Justice Bowen in *Ex parte Griffith* (3), in 1883—the question of the motive of a motive.

A person who conveys all his property to one of his creditors leaving nothing within the reach of the

(1) 10 Can. S. C. R. 296. (2) 6 Ch. App. 70.
(3) 23 Ch. D. 69.

others will be apt to find it more difficult to assign a plausible motive for his act, if he desires it to appear to have been done with an intent other than the intent to give the preference which he has given, than if one piece of property were transferred or charged leaving other property free, or a payment made which took only a part of his means.

This question of motives necessarily envolves an enquiry into the action of certain influences on somebody's mind. Whose mind have we to discuss in this case? The debtors and mortgagors were Madell and Eliza Robinson; but Eliza had no mind of her own in connection with the business—her own deposition proves that—and Madell, the partner who was the tradesman and attended to the out-door work, was leaving the concern and taking $100 with him. T. B. Robinson who is spoken of as carrying on the business in the name of his wife, under whose power of attorney he acted, tells us that, as the sole member of the new firm of T. B. Robinson & Co., the wife carried on the business in his name. It seems that he is the only person whose motives we can discuss. He may have been sanguine enough to believe that, with time to work out the problem, the fortunes of the business could be retrieved, the creditors all paid, and something left. That hope must have been seen to have been unfounded when the affairs were analysed in connection with the trial; but assuming it to have existed when he decided on giving the mortgage in place of making an assignment its influence must have been due to the prospect of something remaining after paying the debts, rather than to solicitude for the creditors. The assignment would have suited the creditors better. But Robinson's plans required that the creditors should be kept off, and the mortgage was the only way to do that. It left the book debts

1891

STEPHENS v. McARTHUR.

Patterson J.

exposed, and they were accordingly assigned to the plaintiff under the circumstances already detailed, the explanations given being, as we have seen, not entirely free from confusion and discrepancy. It was necessary also that some help should be given to keep any life in the business. Stephens agreed it may be said, though there was no definite agreement, to help them, but how? He would sell them such goods as they required, and as he had, provided they paid him promptly on the usual terms of thirty days' credit. He advanced $200 or thereabouts, and he took an absolute assignment of $400 or $500 worth of good accounts. The precise relation between that assignment and the advances of money is involved in some confusion, but it is impossible to read what the plaintiff and Robinson say about the book debts without plainly perceiving that the main object—we may even say the avowed object—was to keep those accounts out of the reach of the other creditors. That design governed the whole transaction for it was one scheme throughout. It is not difficult to gather it from what is said about the mortgage, though not so plainly put as when the accounts are spoken of. We should, in my opinion, fail to give its due effect to the statute if we should affirm the good faith of this transaction and hold the motive to keep the creditors at bay while the debtors made the speculative, and not very hopeful, attempt to bring up their lee way sufficient to sustain this pledge and conveyance of the whole of their property to the one creditor. Were there, after all, two motives, a dominant and a secondary one? It seems to me that we describe the same motive whether we say it was to prefer the one to the others, or to postpone all the others to the one.

It was urged on behalf of the respondents in

1891

STEPHENS v. McARTHUR.

Patterson J.

connection with a branch of the case which I have not yet touched, viz.: the legislative authority of the province to pass the act in question, that if the act was *ultra vires* the rights of the parties would have to be tested under a provision of an act passed in 1885 (1), which declared that every conveyance, &c., made by an insolvent person, or one unable to pay his debts in full, with intent to defeat or delay his creditors or any of them, or to give any one of them a preference over the others, should be void as against creditors, saving, as already noticed, assignments for the benefit of all the creditors. This follows the law of Upper Canada and Ontario which last appeared in the Revised Statutes of 1877 (2), but with a difference. As far as they dealt with preferential transfers the statutes were alike, and what I have said about the intent to prefer in this case, apart from the effect, applies under the act of 1885 as well as under that of 1886. But the difference between the Manitoba act of 1885 and the Ontario or Upper Canada law was in the other particular of defeating or delaying creditors. The Upper Canada and Ontario law was held to be in this respect like the statute of 13 Eliz. ch. 5, and not to avoid a conveyance to a creditor even though it defeated or delayed other creditors and was made with intent so to do. The Manitoba reproductions of the statute (3) seem designed to avoid that construction by introducing the words "or any of them"—making the intent to defeat or delay any of the creditors as fatal as the intent to defeat or delay all of them. These words "or any of them" do not appear in the act of 1886 in connection with the defeating or delaying or prejudicing the creditors, wherefore under that act we have to discuss only the question of the

(1) 48 V. c. 17, s. 123.
(2) R. S. O. 1877, c. 118, s. 2.
(3) 38 V. c. 5, s. 59; C.S.M. c. 37, s. 96; 48 V. c. 17, s. 123.

1891

STEPHENS v. MCARTHUR.

Patterson J.

preference. But if the validity of the mortgage had to be tested under the act of 1885 I should without hesitation hold it to have been made with intent to delay the creditors other than the mortgagee, as well as with intent to give a preference.

Regarding the authority of the provincial legislature to pass the act in question I have merely to say that I retain the views I expressed respecting the cognate act of the Ontario Legislature in *Edgar* v. *Central Bank* (1).

In my opinion the appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellant: *F. C. Wade.*

Solicitor for respondents: *G. A. Elliott.*

(1) 15 Ont. App. R. 202.