1884
*Nov. 19.
1885
*May. 12.

THOMAS CULTER JONES, AMBROSE SNOW, AND THOMAS B. FLINT (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH R. KINNEY, ASSIGNEE UNDER THE INSOLVENT ACT OF 1875 AND AMENDING ACTS, OF THE ESTATE AND EFFECTS OF THOMAS B. FLINT, AN INSOLVENT (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Insolvent Act of 1875 *and amending Acts—Mortgage of Insolvent's Property—Transfer within thirty days in contemplation of Insolvency—Fraudulent preference under section* 133—*Merchants Shipping Act.*

F., a ship-owner in Yarmouth, N. S., employed as his agents in Liverpool J. & Co., the defendant J. being a member of their firm, and as agents in New York he employed the firm of S. & B., of which the defendant S. was a member. In the course of his dealings with these agents he became indebted to both firms for acceptances by them of his drafts, made when he was in want of money, towards the payment of which they received the freights of his vessel and remittances in money. On one occasion he said that he would give to the Liverpool firm a mortgage on the "Tsernogora" or the "Magnolia" when they should require it, and in a subsequent conversation with a member of the firm he agreed to give such mortgage on certain conditions which were not carried out. He also promised the firm in New York to give them security in case anything happened, and mentioned as such security a mortgage on the "Tsernogora." According to F.'s own statement he had sufficient property to pay his liabilities when these conversations took place. A few weeks after these conversations took place, F. executed a mortgage of $\frac{20}{64}$ shares of the "Tsernogora" in favor of the defendants J. and S. and had the same recorded, and within thirty days thereafter a writ of

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*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Taschereau JJ.

attachment in insolvency was issued against him. The plaintiff, who was appointed assignee of F.'s estate by his creditors, filed a bill to have the mortgage set aside, claiming that it was void under section 133 of the "Insolvent Act of 1875." The defendant J. did not answer the plaintiff's bill, and the other defendants denied that the mortgage was made in contemplation of insolvency, and also claimed that as it was made under the provisions of the "Merchants' Shipping Act" (Imperial), it was not affected by the "Insolvent Act of 1875." The judge in equity, before whom the cause was heard, made a decree in favor of the plaintiff and ordered the mortgage to be set aside, and the Supreme Court of Nova Scotia dismissed an appeal from that judgment. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the court below, Henry J. dissenting, that the promise to give security "in case anything should happen" could only mean "in case the party should go into insolvency," and that the transfer was void under section 133 of the "Insolvent Act of 1875."

Held, also, that the provisions of the "Merchants' Shipping Act" did not prevent the property in the ship passing to the assignee under the Insolvent Act.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment of the judge in equity.

The facts of the case are fully reported in the judgments delivered by the court, and in the report of the case in the court below.

Pelton Q.C., and *Gormully* for the appellants, contended that the plaintiffs could not set aside the mortgage from Flint to Snow and Jones: 1st, because the mortgage was not executed in contemplation of insolvency or in violation of the Insolvent Act, but in good faith for sufficient consideration, without knowledge of insolvency and in pursuance of a previous agreement, and fresh advances, and extended accommodation and payments were made and given on the faith of such agreement by the defendant Snow, and the firm of which he was a partner, to the defendant Flint, and on this branch of the case relied on the following cases:

(1) 5 Russ. & Geld. 244.

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Campbell v. *Barrie* (1); *Allan* v. *Clarkson* (2); *Ex parte Winder in re Winstanley* (3); *Ex parte Wilkinson in re Berry* (4); *Bittlestone* v. *Cooke* (5); and *Bills* v. *Smith* (6); and Williams on Bankruptcy (7); and *McWhirter* v. *Thorne* (8). And because under "The Merchant Shipping Act of 1854" (Imperial), and the Colonial Laws Validity Act (Imperial), and under the Statutes of Canada, the right and title of the defendant Snow under the mortgage could not be defeated or affected in any way by the provisions of the Insolvent Act and amendments; citing McLachlan on Shipping (9); Merchant Shipping Act, 1854 (10); Statutes of Canada, 1873 (11); *Bell* v. *Bank of London* (12); *Kitchen* v. *Irvine* (13); *Cahoon et al* v. *Morrow* (14).

Bingay Q.C. and *Graham* Q.C. for respondent.

1. There is no repugnancy between the Merchants' Shipping Act, 1854, and the Insolvent Act, 1875. There may be an incidental interference in the operation of the latter as there is in Canada in respect to legislation of the Dominion and the provinces, but there is no conflict between the two Acts. See *Citizens' Insurance Co.* v. *Parsons* (15) B. N. Act, secs. 91, 56. All Dominion legislation and all the provisions of the Civil Code respecting ships would be repugnant if the Insolvent Act is. The Dominion Parliament has full power under the B. N. A. Act to legislate in respect to insolvency and shipping. The Merchant Shipping Act provides for title to shipping. The Insolvent Act says a trader in insolvent circumstances cannot make

(1) 31 U. C. Q. B. 279.
(2) 17 Gr. 570.
(3) 1 Ch. D. 290.
(4) 22 Ch. D. 788.
(5) 6 E. & B. 296.
(6) 6 B. & S. 314.
(7) P. 269.
(8) 19 U. C. C. P. 302.
(9) (Ed. 1862), pp. 39, 42, 44.
(10) Section 72.
(11) Ch. 128 Sec. 43.
(12) 3 H. & N. 730.
(13) 28 L. J. Q. B. 46; 5 Jur. N. S. 118.
(14) 1 Old. 148.
(15) 4 Can. S. C. R. 215.

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a transfer. *Bell* v. *Bank of London* (1); *Lindon* v. *Sharpe* (2).

2. The onus is on defendant to show that the alleged previous agreement which is used to support this transfer was made *bonâ fide*, and when the insolvent was in such circumstances that he could lawfully make such a transfer. *Wilkinson re Barry* (3).

There must be other evidence than that of the parties to the agreement. *Morton* v. *Nihan* (4).

The agreement was to postpone the security until Flint was on the verge of insolvency, and cannot support the transfer. Kerr on Fraud (5); *Ex parte Burton* (6); *Ex parte Kilner* (7).

The section of the English Bankruptcy Act is different, and the agreement cannot be imported into our statute, except on the theory that it was an agreement such as in equity would be specifically performed. Even in such case, if a secret agreement can be used to support a transfer, the sections respecting fraudulent preferences are useless.

Sir J. W. RITCHIE C. J.—The facts and pleadings, as stated in the judgment of the judge in equity, are as follows:—

This is a bill at the instance of a creditor assignee under the insolvent Debtors' Act to set aside a bill of sale by way of mortgage by Thomas B. Flint, one of the defendants, to Thomas C. Jones and Ambrose Snow, also defendants. The bill sets out that a mortgage on $\frac{22}{64}$ shares owned by him in the ship "Tsernogora" was executed by the defendant Flint in favor of the defendants Jones and Snow on the 15th April, 1879, in pursuance of an alleged previous agreement made with them severally to give them security *pro ratâ* on the ship for advance made by them severally to him in his business. That Flint was then largely indebted and in insolvent circumstances, and that on the 13th day of May, 1879, and within thirty

(1) 3 H. & N. 730.
(2) 6 M. & G. 895.
(3) 22 Ch. D. 788.
(4) 5 Ont. App. R. 20.
(5) 2nd Ed. 223.
(6) 13 Ch. D. 102.
(7) 13 Ch. D. 245.

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days from the making of the mortgage, he was placed in insolvency and the plaintiff appointed assignee. That the defendant Flint's shares in the "Tsernogora" formed the principal part of his assets, and that the mortgage had been made fraudulently and in contemplation of insolvency. The bill prayed that it be set aside and the registry cancelled, &c.

Thomas C. Jones, defendant, one of the mortgagees, did not appear. Flint and Snow the other mortgagees appeared and answered separately, Flint denying that he was in insolvent circumstances, and that the mortgage was made in contemplation thereof, and both of them setting up a previous verbal agreement that Flint would give to Snow and his partners, the firm of Snow & Burgess, security for further advances to be made by them to him, which advances to a large amount had been made by them to him in reliance upon such agreement or promise, and that such agreement was made with Flint without any knowledge on their part of his being in insolvent circumstances.

It appeared by the evidence that Flint, who was a barrister by profession residing at Yarmouth, in the Province of Nova Scotia, was and had been for some years previously, a ship-owner. He owned shares in several ships which he employed in general carrying trade. His agents in Liverpool, England, were T. C. Jones & Co., and in New York Snow & Burgess. At the time of his failure he owned property, valued at schedule rates, as follows:—

Real estate	$ 9,350
Mortgage on real estate	800
Personal chattels	1,300
Shares in "Tsernogora"	12,500
Shares in four other vessels	10,450
Debts and balances due him	3,500
Total	$37,800

LIABILITIES.

Direct	$ 36,000
Indirect	40,000
	$ 76,000

The assignee proved that these properties were scheduled at higher rates than they would bring, the bulk of his real estate was mortgaged for its full value and about the same time as the mortgage on the "Tsernogora" Flint's share in two other vessels were mortgaged and other securities given by Flint to creditors some of whose claims had not matured. All of the parties in whose favor Flint had endorsed to the amount of $40,000 in all were really in insolvent cir-

cumstances, and to his knowledge were then badly strapped (to use his own expression) for money. Their temporary solvency depended on the stability of parties abroad and especially upon Charles Gumm & Co., of Liverpool, England, and their failure which was evidently not entirely unanticipated by Flint and the news of which was received by him before the execution or registry of the mortgage to Jones and Snow, threw the whole of them including Flint into a state of hopeless insolvency.

It is needless to discuss the evidence to show that Flint knew or at least feared that he was about to become insolvent and whatever promises he made to the mortgagees to give them security it appears to me to be so clear on his own evidence that he was induced to give the security at that time by the fear of insolvency at a very early period that it would be a work of supererogation to insert in this judgment the elaborate analysis of the evidence on that point of the case which I have prepared. What I have to say on another ground of defence will incidentally throw some further light upon it.

The defendant's second defence set out in the Bill was that admitting the mortgage to have been made in contemplation of insolvency the statute did not apply because it was made to fulfil an agreement which had been previously made between the parties which agreement was not made in contemplation of insolvency and that the court would uphold the conveyance made in pursuance of that agreement as if it had been made at the time and under the circumstances attaching to the agreement.

He informs us in his evidence that he had a conversation with Alfred Snow, one of the firm of Snow & Burgess, at their office in New York, about 1st November, 1878, more than six months before the mortgage was executed. That for some time previous to that date he had been in the habit of drawing on Snow & Burgess when he wanted money and at the same time sending them as collateral security joint and several notes from himself and the parties in Yarmouth for whom he was in the habit of endorsing, viz., Rogers & Co., Horton, Kelly & Lewis. The amounts of these drafts were paid as they became due by freights of Flint's vessels and by remittances from him to them. Mr. Snow at that conversation told him that they objected to the note as collateral security for the drafts and asked for other security and Flint promised that he would "give them security in case anything should happen." He mentioned among other things the "Tsernogora," "they said they would leave it to me to protect them, they had security at the time in collateral notes, I did not increase my indebtedness to them, they were not consulted with reference to the mortgage before my giving it, ther

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did not demand the mortgage previously to its being given, the giving of the mortgage was voluntary on my part." In his cross-examination he says that "they consented to continue the business with the understanding that they were to be kept secured." But he subsequently modifies this by the statement "that he agreed to give them collateral notes whenever I drew on them and told them I would give them a mortgage on the 'Tsernogora' in addition to the notes should they want additional security." This they never did, they received the collateral notes with every draft without demanding additional security or even mentioning the matter after that conversation.

He states that he had this conversation and promise in his mind when he put Snow's name in the mortgage. His original intention was to give each of the parties—Jones & Co. and Snow & Burgess—a separate mortgage each on ten shares of the ship, and he had a week previously made drafts of these mortgages, but finally, obviously on receipt of news of Gumm & Co.'s failure, he hurried the two into one brief mortgage and hastened to the office of the registrar to get the mortgage entered as soon as possible.

While I am by no means prepared to say it is necessary that a previous arrangement to give a security must be such a technical binding contract that specific performance could be enforced in equity, or damages for a breach recovered at law, after a careful consideration of the evidence, I find it extremely difficult to say, that in this case there was any *bonâ fide* agreement binding or not binding, to give the mortgage; but assuming there was, I think the evidence abundantly shows that the mortgage was to be given as the mortgagor says only, "in case anything should happen," which I can only take to mean "insolvency," and that when actually given, it was given in contemplation of insolvency, and therefore a violation of sec. 133 of the Insolvent Act of 1875, which enacts:

If any sale, deposit, pledge or transfer be made of any property real or personal by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any property, real or personal, movable or immovable, goods, effects, or valuable security, be given by way of payment by such person, to any creditor whereby such creditor obtains or will obtain an unjust preference

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over the creditors, such sale, deposit, pledge, transfer or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before a demand of an assignment, or for the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment, or by the issue of such writ of attachment, it shall be presumed to have been so made in contemplation of insolvency.

In view of the object and policy of this Insolvent Act being to secure a general and equal distribution of an insolvent estate among all the creditors of the insolvent, and with that view to prevent preferential dealing with creditors with a view to insolvency, can it be said that this promise to give security in case anything should happen, was not by its very terms to be carried out only in the event of insolvency, or with a view to insolvency? And, as clearly established by the evidence, it was, in furtherance of this intention, only given when ruinous insolvency had overtaken the mortgagor.

The authorities, in my opinion, clearly establish that any promise that a creditor shall have priority in the event of bankruptcy is contrary to the policy of the bankruptcy laws and void.

In *ex parte Burton in re Tunstall* (1) the marginal note is as follows:—

Shortly before a trader filed a liquidation petition he executed a bill of sale of substantially the whole of his property, to secure the repayment of an advance which had been made to him two months previously. At the time when the advance was made the borrower agreed to give a bill of sale to secure it; but the agreement was that the bill of sale was not to be signed until the tender "lost confidence" in the borrower. *Held* (reversing the decision of Bacon C.J.), that this amounted to an agreement to postpone the giving of the bill of sale until the grantor should be on the verge of bankruptcy; and that, consequently, on the principle of *ex parte Fisher* it could not support the deed.

(1) 13 Ch. D. p. 102.

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James L.J.:

There we held that it is a fraud on the bankrupt law for a man to undertake to give his creditors a bill of sale when required, that is to say, when the circumstances of the debtor shall be such as to require the creditor to demand it. That decision established an exception upon an exception. That which is void is an assignment of all a man's property for a past consideration. But a court of equity regards that which has been agreed to be done as done, and therefore it has said that, if it was really part of the understanding when the money was advanced that a bill of sale should be given, then that agreement would be the same thing as if the bill of sale had been actually given at the time. The bill of sale would be sustained by the previous agreement. But *ex parte Fisher* established this exception upon that exception to the rule, viz., that if the bargain be not an out-and-out one, but only an agreement to give the bill of sale when required, then it is only a device to enable the debtor to acquire false credit, and the creditor is not entitled to avail himself of it in the event of the debtor's bankruptcy. It is a fraud on the bankrupt law. To my mind that is exactly the present case. The bill of sale was not to be signed till the borrower had "lost the confidence" of the lender.

Thesiger L. J.:

The only question is whether, at the time when the advance was made, there was such an agreement to give the bill of sale as this court can give effect to. The debtor's evidence is that the bill of sale was not to be signed till Whitehead had "lost confidence" in him. If that evidence is not displaced it brings the case within the principle of *ex parte* Fisher, which is not to be frittered away by nice distinctions, and the evidence of Whitehead admits something of the same kind, for he says that the bill of sale was not actually signed till he had lost confidence in the debtor.

Ex parte Kilner in re Barker, Baggalay L.J. (1):

The principle applicable to cases of this description is enunciated by Lord Justice Mellish, in giving the judgment of the court in *ex parte Fisher* (2), in these terms: "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in

(1) 13 Ch. D. p. 248. (2) 7 Ch. App. 644.

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order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors." He dealt with the particular circumstances of that case, and said that there was evidence "from which we infer that it was understood between the bankrupt and Mr. Wells, from the commencement of the advances, that a bill of sale was to be given, if required, by Mr. Wells, though, for the purpose of protecting Mr. Ash's credit in the meantime, the giving of the bill of sale was purposely postponed until he was unable to go on, and was in a state of insolvency." Now I think it is clear from the way in which the principle is enunciated by Lord Justice Mellish, that it must be for the court in each case that comes before it to take into consideration all the surrounding circumstances, and to see whether, having regard to these circumstances, there is evidence of an intention to commit an actual fraud against the general body of creditors.

Thesiger L.J.:

She relies upon a prior agreement which she says supports the bill of sale on the principle laid down in *Mercer* v. *Peterson* (1) and cases of that class. Those principles are undoubtedly binding upon this court, but I cannot shut my eyes to the fact that their application in any particular case ought to be most carefully guarded, because it cannot be disputed that they do, unless they are applied with very great caution and under the most careful limitations, open the door to very considerable frauds. It appears to me, therefore, right that the court should require from any person setting up a bill of sale, executed under such circumstances as those which exist in the present case, very clear evidence that the agreement which is set for the purpose of rendering the bill of sale valid was a *bonâ fide* agreement, or, in other words, using the expression of Lord Justice Mellish in *ex parte Fisher* (2), that it was not an agreement that the bill of sale was to be delayed until such time as the trader should be in a state of insolvency, in order to prevent the destruction of his credit which would result from the registration. I think that the decision in *ex parte* Fisher supplied a most wholesome corrective to the dangers which, as it seems to me, may arise from the principles laid down in *Mercer* v. *Peterson* (3), and that we ought to apply the doctrines laid down by Lord Justice Mellish to their full extent, and to require, in this and similar cases, a very clear explanation of the reason why the

(1) L. R. 2 Ex. 304; Ibid. 3 Ex. 104.

(2) L. R. 7 Ch. 644.

(3) L. R. 2 Ex. 304; Ibid. 3 Ex. 101.

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giving of the bill of sale was delayed. Here no explanation whatever is given of the delay, and I should infer from the evidence that the intention of the parties at the time when the agreement of November, 1877, was made, that no bill of sale should be required until the debtor should be in a state of insolvency, in other words, the execution of the bill of sale was postponed for the purpose of protecting his credit.

I am clearly of opinion that the Dominion Parliament in legislating on the subject of bankruptcy and insolvency, had full power and authority to declare that an insolvent trader in Canada should not make a transfer of his property, including his ships registered in Canada in contemplation of insolvency, and that sec. 133 applies to this mortgage so made.

STRONG J.—Unless the mortgage which is impeached by the bill in this case can be referred to some prior agreement, it is clear that it must be held to be void as a voluntary preference within the terms of section 133 of the Insolvency Act 1875, for it was given within thirty days next before the issuing of the writ of attachment, and moreover, the mortgagor, Flint, is proved to have been insolvent at the time and the evidence shows that it was given voluntarily, that is without any pressure on the part of the mortgagees. The real question is, therefore: Was there a prior agreement come to in good faith, sufficient to make the security unimpeachable on behalf of the creditors? Flint in his evidence thus states the prior agreement to which he attributes the giving of this mortgage, he says: —"When I was in New York in the fall of 1878, I had a conversation with Snow and Burgess about drawing on them, and told them I would see my account protected in case anything happened, and mentioned amongst the securities the "Tsernogora." The learned judge in equity before whom this cause was originally heard, construed this reference to the

case of anything happening to mean in case there was any danger of loss to the creditors arising from the insolvency or probable insolvency of the debtor. In this, he was, I think, entirely right. Can we then consistently with authority hold that such an agreement as this, to give security in case of insolvency or apprehended insolvency, leaving it to the debtor himself to determine when the occasion has arisen, takes from the transaction of the mortgage the character of a voluntary preference which standing alone must be attributed to it. I am clearly of opinion that it does not The cases of *ex parte Fisher* (1), *re Tunstall* (2), and *ex parte Kilner* (3), are all in point to show that such an agreement is in itself invalid, as being a fraud on the Insolvency Act, and therefore one which can give no support to a security otherwise void as a voluntary preference. In the cases cited the security was *primâ facie* void under the Bankruptcy Acts as comprising all the debtor's property, and it was in each case sought to support it by proof of a prior agreement to give security "when required" or "if required," which was held insufficient, the court saying that it was a fraud on the Bankruptcy Act to agree with a trader that he should give security if he got into difficulties, but meanwhile should enjoy the benefit and credit of appearing to be the absolute and unencumbered owner of the property. The agreement in the present case seems still more objectionable for it leaves the giving of the security to the voluntary act of the debtor, who is himself to determine when it is to be given, and who, therefore, has it in his power, if he thinks fit so to do, to withold it altogether. There is no reason why the principle of the cases cited should not apply to the case of an agreement to give security on specific property as well

(1) 7 Ch. App. 636. (2) 13 Ch. D. 102.
(3) 13 Ch. D. 245.

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as on all the insolvent's property when the security is given under such circumstances that standing by itself it would be a fraudulent preference. The security being *primâ facie* void as a voluntary preference under the 133rd section of the Act the onus was on the mortgagees, if they could, to displace presumption by evidence. All they have shown for that purpose is a previous arrangement to give security which was in itself a fraud on creditors and on the Insolvency Act.

I see nothing in the point that ships registered under the Merchants' Shipping Act do not pass to the assignee. The Insolvency Act was clearly constitutional and has been so held by the Privy Council. No proper Insolvency Act could have been passed unless it made provision for the disposition of all the insolvent's property. Property in British registered ships must, therefore, like other property, be held to vest in the assignee. If, for the purpose of perfecting the assignee's title, it is requisite that some assignment of the vessel should appear on the registry the judge has power to compel the insolvent to execute such an instrument.

The appeal should be dismissed with costs.

FOURNIER J.—For the same reason I am in favor of dismissing the appeal. The court of Nova Scotia was unanimous in holding that the mortgage was given in contemplation of insolvency. The contention, that the moment a mortgage or bill of sale of a ship is registered, no matter by what fraudulent means it is obtained, the title is absolute and unimpeachable, is untenable. You can find nothing to support this view in the Merchants' Shipping Act. The provision in the statute is simply to afford a ready means of disposing of this kind of property, giving a power of sale to the mortgagee so that he may dispose of it in the most summary

manner. That is the only object of the law in giving that form of title and making it absolute, but it does not prevent the title being attacked by all regular modes. I do not consider that this kind of property is exempt from being attacked for fraud. For these reasons, viz: the contemplation of insolvency and that the title is not so absolute so as to prevent it being attacked for fraud, which are the reasons given by both the Equity judge and the majority of the Supreme Court judges, I am in favor of dismissing the appeal.

HENRY J.—I regret that I cannot come to the same conclusion on either of the two points which have been mentioned by the Chief Justice and my brother Fournier.

We are certainly governed by the decisions which the learned Chief Justice has referred to, and the law which he has laid down, but I maintain that the circumstances are different from those in the cases to which he has referred. It is under the 133rd section that the party respondent seeks to set aside this mortgage, and I may here state that the Insolvent Debtors' Act being in curtailment of common law rights of the parties must be strictly construed. The 133rd section says (1):

Now, that is the assumption that is made, and that is all that the Act says—that if it is done at any time and it is proved that it is an unjust preference that is given to a creditor and that it is done by the person in contemplation of insolvency, then it is void.

In the first place, we must see whether it was done in this case in contemplation of insolvency. We are to take the evidence of Flint, and if we come to the conclusion that his evidence is totally unreliable, we

(1) See p. 714.

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can come to the conclusion that it was done in contemplation of insolvency; but if his statement is true that it was not done in contemplation of insolvency, because he swears most positively that when that was done (and several cases have been decided in this court that favor the same position that he occupied) that it was not so done in contemplation of insolvency, that he expected to tide through, and that he expected by making this arrangement with Snow and Jones and Co., that he would be in such a position that he would be able to carry through his business, then the provision of that section has not been violated. That is his sworn testimony; it is not contradicted, nor do I see any reason to disbelieve it, and, therefore, I think that in this respect the allegation that the act complained of is against the provision of the statute has not been sustained by the evidence.

In the next place the presumption arising from the fact that the mortgage was given within thirty days, is capable of being rebutted, and I think the evidence here rebuts it to this extent, that if the parties under the agreement obtain advances from other parties on an undertaking to secure them, this clause has no effect whatever and the implication in respect of the thirty days is in fact completely negatived. Section 131 says:

A contract or conveyance for consideration respecting real or personal estate, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant of such inability, whether such person be his creditor or not, and before such inability has become public and notorious, but within thirty days next before a demand of an assignment or the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, is voidable, and may be set aside by any court of competent jurisdiction upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the court may order.

Not one tittle of evidence is given to show that the

parties to whom the mortgage was given were aware of the inability on the part of Flint to meet his engagements. On the contrary the whole of the members of the firm swear most positively that they had no idea of it. What should the court do under such circumstances? They might make an order, under the terms of this clause of the Act, that the party should give up the security, but that he should be reimbursed for any advances that he had made in consideration of that security. I therefore think, under this clause of the Act, the plaintiff is not entitled to succeed, and he has not sought redress under that section of the Act, but under the 133rd section, which, I think, has a totally different object in view. Then we must also look to the 132nd section, which enacts:

All contracts or conveyances made and acts done by a debtor, respecting either real or personal estate, with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done and intended, with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing or delaying the creditors of their remedies, or of injuring them, or any of them, are prohibited and are null and void.

Under that section of the Act there is no evidence to show that the parties who obtained the mortgage had any fraudulent intention, or in fact, had any information that this party was making an assignment when in embarrassed circumstances. As to that part of the case then I think it is necessary to look at some of the evidence that has been given. I will not read it over. I have noted the different pages at which it is to be found, and have come to the conclusion that a careful reading of the evidence, and a comparison of the evidence of Flint, of Snow and others, will not establish the position that Flint was to give the security only when the other parties required it or became doubtful of him,

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or when in a state of insolvency; the evidence does not sustain any one or other of these positions; the advances were made solely on the condition that he was to secure them. Six months before this assignment was made, in the month of October, 1877, Allbright, a partner of Jones, who was one of the parties to this mortgage, objected to accepting further drafts, and told Flint that they did not wish to continue the business, that it was an unsatisfactory way of doing business, but they continued to do it on the promise of Flint that he would have them secured. In October, 1878, that is six months before this assignment was made, another conversation took place between Flint and Alfred S. Snow, and there again the evidence is that Snow said to Flint, when agreeing to continue the acceptance of his drafts, we trust to you to keep us secured; we will not go on at present, but under your promise to keep us secured we will accept these drafts of yours, and they went on and accepted drafts to something like the amount of $18,000, on the promise that he would keep them secured, and the very name of this vessel that was assigned afterwards was mentioned as one of the means of security. They swore most positively that if it had not been for that engagement they would have changed the business and refused to accept the drafts, but in consequence of that promise, not that he would give them a bill of sale on the vessel or a mortgage when they ceased to have faith in him or went into insolvency, but that he was to keep them secured. They go further and say that they expected it had been done before it was done. I therefore think that this is not a case in point. It is not a case the same as those referred to in the cases read by the learned Chief Justice. I take a different view of the evidence altogether from that taken by my learned brethren. The evidence is very particular and all the parties swore that they had no idea that Flint was

insolvent or in embarrassed circumstances. Reading the whole of the evidence carefully, it appears just to amount to this, "we will continue to advance to you and you will make us secure," and he promised to do so. If he failed to do that in proper time it was no fault of Snow or of Jones & Co.

There is another very important point connected with this which has not been very much touched upon by the learned Chief Justice. With all due deference I must differ from the construction of the Merchants' Shipping Act given by my two learned brethern. I have come to the conclusion, that if the transfer were given by an insolvent, the Insolvent Act of course touches the property, and if it were not for the provision of the Merchants' Shipping Act they might go behind the mortgage, and ascertain whether it was given contrary to the Insolvent Act or not, but I maintain that enquiry is prohibited by the Imperial statute. We are told, and it is admitted, that in England an insolvent court could not go behind a mortgage; but we are told in so many words, that in Canada, in contravention of the Imperial Act, that can be done which could not be done in England. We know that the Merchants' Shipping Act applies to all British possessions, and when it is provided that an Insolvent Act shall not effect mortgages, surely if an English Insolvent Act cannot, a Colonial Insolvent Act cannot override the provisions of the Imperial Shipping Act. Were it not for the Insolvent Act there would be no question in this case. And this, be it borne in mind, is not a question of fraud, there is no allegation of it, it is an unjust preference, and unjust because the statute makes it so. It is not fraudulent, but if it were proved to be fraudulent there might still be a difficulty under the Merchants' Shipping Act. Now what is the Merchants' Shipping Act, and what does it provide? The 43r

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section says:

> Subject to any rights and powers appearing by the register book to be vested in another party, the registered owner of any ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned, &c.

Such ship or share. That is in the case of the transfer of a ship. Section 66 says:

> A registered ship, or any share therein may be made a security for a loan or other valuable consideration, and the instrument creating such security hereinafter termed a mortgage, shall be in the form marked "1" in the schedule hereto or as near thereto as circumstances permit; and on the production of such instrument, the registrar of the port at which the ship is registered shall record the same in the register books.

Now when we know that the Act is universal throughout all British territories, how can we say that that is to be contravened by a colonial law?

I said before that if it was a fraudulent transaction that was set up here, the case might possibly be different; but it is not so; it is a mere provision of the Insolvent Act passed by the Dominion of Canada, and that, it is said, overrides the provision of the English Act. But we are told that the provision in question only applies to England. How do we find that it only applies to England? It applies as generally as any other provision of it; it goes everywhere that that Act has operation, as part of it. How can it be said then that the Dominion Parliament is authorized to override an Imperial statute? The reason that Parliament had for passing that Act in England, we may surmise, but it is not necessary that we should; but I may mention that ships go all over the world, and a man owning a ship registered in England makes a mortgage on it and has his certificate from his port of entry that there are no incumbrances on that ship; he wants advances, and he is told "yes, I will give you advances, but you must keep me secure." Amongst other articles by which he might be secured is a certain ship and her name is

mentioned, and the party advances him two thousand pounds in a foreign port, but he says, "oh you did that in contemplation of insolvency," because four or five months afterwards he became insolvent. Now, the statute was intended to prevent anything of that kind taking place, and it was intended that a party should go to the registry and take conveyances from that registry. It is all provided for in the Act, and it seems to me perfectly plain and palpable that the intention of the British Parliament was that the registry or transfer of a ship or bill of sale was not to be affected by anything outside between parties, and unless fraud itself should vitiate the contract. Under these circumstances, for the reasons given in the judgment of Justice Wetherbee of Halifax, in which I concur, I am of opinion on that point that the appeal should be allowed. But there is another section of ch. 63 of the Imperial Act of 28 and 29 Vic., sec. 2, which reads as follows:—

> Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colonies, to which such law may relate, shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Here is the provision of the Act.

It must be repugnant or else it cannot override it, and here is a provision in the Imperial statute which says that any such colonial law shall have no effect whatever.

One answer was given to this in the argument at Halifax, and that was in reference to a provision in the Act that the Merchants' Shipping Act might be amended by a Colonial Act specially approved of by the Queen in Council, and it was argued on the part of the respondent that inasmuch as this Insolvent Act of Canada was passed and received the Queen's assent by the Governor General, that that satisfies that clause in the Act, but I maintain that it cannot affect it. The

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statute itself makes particular provision how it is to be done, that is by an Order of the Queen in Council; but that has not been done. The assent of the Governor General to a bill passed by the Dominion Parliament is very different from an Order of the Queen in Council; giving the royal consent to it is not sufficient for what is required by that clause of the Act.

Under the whole of the circumstances I think the appeal should be allowed.

TASCHEREAU J.—I agree with the learned Chief Justice that this appeal should be dismissed on the ground that the mortgage in question was clearly given in contemplation of insolvency. On the second point raised in the case, as to the effect of the provisions of the Merchants' Shipping Act, I have strong doubts. There seems to me to be a great deal of force in the reasons just given by my brother Henry on that part of the case, and if the judgment in the case were to depend on the conclusion I arrive at, I would certainly have taken more time to consider that important question.

Appeal dismissed with costs.

Solicitor for appellants: *Sandford H. Pelton.*

Solicitor for respondent: *James Went Bingay.*