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*Mar. 14, 17.

*Dec. 10.

THE MOLSON BANK (PLAINTIFFS).....APPELLANTS ;

AND

EDWARD HALTER AND MOSES E. WISMER (DEFENDANTS).....} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—R.S.O. (1887) *c.* 124 *s.* 2—*Assignment for benefit of creditors—Preference—Intent—Pressure—Criminal liability.*

R. S. O. (1887) c. 124 s. 2 makes void any conveyance of property by a person in insolvent circumstances made " 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."

Held, affirming the judgment of the Court of Appeal, Fournier and Patterson JJ. dissenting, that the words " or which has such effect " in this section apply only to the case of " giving any one or more of (his creditors) a preference over his other creditors or over any one or more of them."

Held further, that the preference provided against in the statute is a voluntary preference and a conveyance obtained by pressure from the grantee would not be within its terms.

W. having become insolvent, and wishing to secure to an estate of which he was an executor monies which he had used for his own purposes, gave his co-executors a mortgage on his property for the purpose, and proceedings were taken by a creditor to set aside this mortgage under the above section.

Held, Fournier and Patterson JJ. dissenting, that the mortgage was not void under the statute.

Held per Strong, Taschereau and Gwynne JJ. that there was no preference under the statute as the persons for whose benefit the security was given were not creditors of the grantor, but they stood in the relation of trustee and *cestui que trust.*

Held also, per Strong and Taschereau JJ., that the grantor being criminally responsible for misappropriating the money of the estate of which he was executor the fear of penal consequences was sufficient pressure on him to take from the mortgage the character of a voluntary preference.

PRESENT.—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of MacMahon J. at the trial in favor of the defendants.

The defendants were co-executors and trustees under a will of what was known as the Jantz estate. The defendant Wismer was the active trustee and he received certain monies of the estate which he applied to his own purposes. He had been a farmer but bought the interest of a partner in a milling business and gave a statement of his means to the plaintiff bank in order that his firm might obtain a line of credit to carry on the business. In a little more than a year the firm became insolvent and Wismer gave to his co-trustee a second mortgage on certain property to secure the estate money which he had appropriated. No assignment for the general benefit of creditors was made by the firm or by Wismer and the bank having obtained a judgment against Wismer took proceedings to have the said mortgage set aside as being a fraudulent preference under the statute R.S.O. (1877) ch. 124 sec. 2. The trial judge refused to set it aside and gave judgment for the defendants which the Court of Appeal affirmed. The decision of the latter court was based on the ground that the parties did not stand in the relation of the debtor and creditor and there could, therefore, be no preference and that an intent to defeat or delay creditors must still be shown to avoid a preference under the statute which was not done. The plaintiffs appealed to the Supreme Court of Canada.

Bowlby Q. C. for the appellants. R. S. O. ch. 124, sec. 2, makes void every transfer of property which has the effect of defeating or delaying creditors.

The relation of debtor and creditor undoubtedly existed between the Jantz estate and Wismer. *Ex parte*

(1) 16 Ont. App. R. 323.

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Taylor. In re Goldsmid (1), followed in *Ex parte Ball. In re Hutchinson* (2); *In re Mills. Ex parte The Official Receiver* (3).

The mortgage is clearly void under the statute. *McDonald* v. *McCall* (4); *Davis* v. *Wickson* (5); *Warnock* v. *Kloepfer* (6) affirmed by the Supreme Court on appeal; *Rider* v. *Kidder* (7).

Aytoun-Finlay and *Duvernet* for the respondents. The judgment of the plaintiffs is against Wismer personally, and cannot be enforced against him as executor. *Allen* v. *McTavish* (8); *Lucas* v. *Crookshank* (9).

The statute only applies to voluntary assignments, *McLean* v. *Garland* (10); *Long* v. *Hancock* (11); and there was clearly pressure on Wismer to give this mortgage.

STRONG J.—The question presented for decision by this appeal is whether a mortgage of lands made by one of several executors to his co-executors as security for money belonging to his testator's estate, wrongfully appropriated by him, is void by reason of the mortgagor's insolvency when he executed the mortgage.

The solution of this question depends, in the first place, upon the construction to be placed upon section 2 of the Revised Statutes of Ontario, 1887, ch. 124, which is as follows :—

Every * * * conveyance * * * of * * * any * * * 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 null and void.

(1) 18 Q.B.D. 295.
(2) Weekly Notes, 1887, p. 21.
(3) 58 L.T.N.S. 235.
(4) 12 Ont. App. R. 593.
(5) 1 O.R. 369.
(6) 15 Ont. App. R. 324.
(7) 10 Ves. 360.
(8) 8 Ont. App. R. 440.
(9) 25 Can. L. J. 124.
(10) 13 Can. S.C.R. 366.
(11) 12 Can. S.C.R. 539.

The appellants have contended before this court, as they also contended before the Court of Appeal, that in construing this enactment the words "or which has such effect," are not to be confined to the immediately antecedent case, that avoiding preferences, but are also to be applied to the first case comprised in the section, that of conveyances made to defeat, delay or prejudice creditors, and that, consequently, as the effect of the mortgage here has been, in fact, to defeat and prejudice the appellants as judgment creditors of Wismer, the mortgagor, it is, irrespective altogether of the intent with which it was given, void as against the appellants. The Court of Appeal, by a majority of three to one, Mr. Justice Osler being the dissentient judge, decided against this contention. The Chief Justice of Ontario and Mr. Justice Burton both held, in the learned judgments delivered by them, that the words "or which has such effect," are to be confined to the case of preferences, and Mr. Justice MacLennan concurred in the judgment of the Chief Justice; Mr. Justice Osler, on the other hand, based his dissenting judgment on the construction which attributes the words in question to both the cases dealt with by the section and therefore held that, without regard to the intent with which it was made, the mortgage by Wismer to his co-executors to secure the moneys of the testator's estate which he had appropriated to his own use was void. If intent to defeat creditors is required to be proved to bring a case within the first part of the section it is manifest that the appellants must fail so far as regards the contention now under consideration.

In the first place I entirely agree with the majority of the Court of Appeal in attributing the words "or which has such effect" to the case of preferences exclusively. Many unimpeachable authorities have established that in interpreting statutes th rule

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of grammatical construction is to govern unless the context, indicating that a different intent actuated the legislature, requires a departure from that rule, or unless some absurdity, injustice or great inconvenience would be the result of adherence to it. So well established is this rule that it has been called by very great judges the "golden rule," and we find it approved and applied to numerous cases, some of them decided in the House of Lords. One of the instances of the application of this principle is that which occurs in the construction of relative words and a subordinate rule, formulated in a well known legal maxim, has been adopted as a canon of construction in such cases. This maxim, *ad proximum antecedens fiat relatio nisi impediatur sententia*, is, therefore, that which is primarily to be applied in the present case, and we are not entitled to disregard it or to depart from it unless its effect will be to bring the clause of the statute we are dealing with within some of the exceptions to the general principle of literal, grammatical construction. Then can it be said that the interpretation of this section adopted by the Court of Appeal in accordance with the maxim just referred to, by confining the words "or has such effect," or rather the relative word "such" in that sentence, to that part of the section concerning preferences which immediately precedes, introduces any of those consequences which are said to indicate that the rule is inapplicable? I am of opinion that it cannot be so said. It is impossible to say that such a meaning is at variance with any context, or that it involves either absurdity or injustice, or that it is repugnant to anything to be found either in this specific clause or in other parts of the statute. I have heard and can conceive nothing which would lead to these results and, therefore, I am of opinion that we must refer the words "such effect" to the next antecedent,

"a preference over his other creditors," a construction which is in accord, not only with the literal and grammatical meaning, but which is also consistent with reason, good sense and legal convenience, and which does not conflict with any contrary intent of the legislature disclosed by the context. If, on the other hand, we were to apply these referential words to the first part of the section, and hold that a conveyance tending to prejudice creditors, though made with the most honest and praiseworthy intentions, was void, and that, too, even as regards *bonâ fide* purchasers, such as a creditor innocently taking a conveyance in satisfaction of his debt, or parties claiming under an ante-nuptial settlement made and accepted in good faith and without notice of any fraudulent intent, we should, I think, be attributing to the statute an operation which would not merely be novel and startling but which would be positively unjust.

Therefore, I am of opinion that the validity of the impeached mortgage must depend exclusively on the answer to be made to the inquiry whether or not the mortgage is proved to have been made with intent to give a preference to particular creditors over the appellants or over the general body of creditors, or whether it has had such effect, which is the case secondly provided for by the enactment in question. No question of statutory construction arises here; the section construed in the manner already indicated is, in my opinion, perfectly plain and unambiguous. The question we have to determine is, in the abstract, whether a conveyance or mortgage by a defaulting trustee to his co-trustees, made when the defaulter is in a state of insolvency with the object and intent of making good to the trust estate monies which he has abstracted from the trust fund and appropriated to his own use, is to be considered a preference of one creditor to

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another or as having the effect of such a preference within this second section. Again concurring with the learned judges who formed the majority in the Court of Appeal I am of opinion that the answer to this must be in the negative for the reason that the persons for whose benefit the security was given were not creditors within the meaning of this section of the statute but have rights higher than those of creditors. The English cases are conclusive on the point. *Ex parte Stubbins re Wilkinson* (1) and *ex parte Taylor re Goldsmid* (2), and *ex parte Kelly* (3), all decide that the doctrine of fraudulent preference has no application to such a state of facts as we find disclosed by the evidence in the present case. As the Master of the Rolls observed in the case of *ex parte Taylor* (2), the relationship between the defaulting party and those who get the benefit of the conveyance or mortgage in such cases is not that of debtor and creditor at all but that of trustee and *cestui qui trust*, and consequently the enactments in the bankruptcy statutes against preferences do not include the case in question. The reasoning of these cases is so satisfactory, and the disastrous consequences of a contrary construction so obvious, that I need not say more on this head. The English authorities already quoted are precisely in point, and no reason has been, or can be, suggested why they should not be acted upon here.

There is, however, still another reason why, even in the absence of these English cases, I should, on a different ground, have come to the same conclusion. As Lord Cairns, in the case of *Butcher* v. *Stead* (4), has laid it down the word "preference" imports a voluntary preference, that is to say, a spontaneous act of the debtor. There was nothing new in this explanation

(1) 17 Ch. D. 58.
(2) 18 Q.B.D. 295.
(3) 11 Ch. D. 311.
(4) L.R. 7 H.L. 839.

of the term; it was a very old principle of the law of bankruptcy, though it was stated by Lord Cairns more clearly and decisively, and in a more absolute form, than it had ever before been formulated in. Then could it be said that the giving a security by Wismer for this money which he had abstracted from the assets of his testator and fraudulently applied to his own use was a mere voluntary act on his part? Surely not in view of the state of our criminal law, which renders such a defaulting trustee liable to prosecution, and on conviction to personal punishment. It is held that a mere demand is sufficient pressure by a creditor to take away from a conveyance, transfer or mortgage the character of an unjust preference, and if the pressure of the creditor is thus sufficient to show that such a transaction is not a voluntary preference, how much more effectual for that purpose should be the pressure caused by the consciousness of the trustee, that if he fails to make good his abstractions from the fund he will subject himself to penal consequences. In such a case it could never be said that the act of restoration, if impeached as a preference, was voluntary or spontaneous, or made otherwise than under the weight of the heaviest pressure to which the defaulter could be subjected. As I have said, pressure by the creditor in the case of a common debt divests a transfer of any fraudulent color, and in the case of the trustee, such as we have here, the law itself, by recognizing the restitution of a trust fund as a higher duty enforced by a higher statutory sanction than the payment of an ordinary debt, exerts the pressure which takes away from the transaction the character of a voluntary preference.

Upon this last ground alone I should be prepared to hold that the mortgage impugned by this section

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was neither an illegal preference nor a security having the effect of such a preference.

Although in the view which I take it is not material that I should be able to assign any particular meaning to the words "or has such effect," I may add that I should find no difficulty in doing so. It appears to me that they have a perfectly plain and obvious meaning. They are, in my opinion, redundant words inserted by the draftsman, *ex abundanti cautelâ*, to show that not merely direct preferences, such as would result where an impeached mortgage or conveyance was made directly by the debtor to the creditors, they being the only and immediate parties to the transaction, were intended to be prohibited, but that preferences which might be the consequences of indirect and circuitous forms which might be given to transfers of property made through persons interposed between the debtor and creditor were also intended to be included.

So used they were probably unnecessary and superfluous, but their use for such a purpose was quite in conformity with the style generally adopted in drafting legislative acts.

The appeal must be dismissed with costs.

FOURNIER J. was of opinion that the appeal should be allowed.

TASCHEREAU J. concurred with STRONG J.

GWYNNE J.—The determination of this case turns upon the true construction to be put upon sec. 2 of the Ontario Statute, 48 Vic. ch. 26—which is now consolidated with other acts in ch. 124 of the Revised Statutes of Ontario. The frequent revision of the statutes and the mode adopted for effecting these revisions are, in my opinion, calculated to conceal, and to

distract the attention from the consideration of the object which the legislature had in view in originally enacting the provision of the law for the time being under consideration. This 2nd section of 48 Vic. ch. 26 was passed by way of substitution for the 2nd section of ch. 118 R.S.O., 1877, and the effect was to make this section, so substituted, to be thenceforth read as the 2nd section of said ch. 118, the title of which act is: "An act respecting the fraudulent preference of creditors by persons in insolvent circumstances." We have thus, as it appears to me, a clear enunciation by the legislature of their intention in enacting this 2nd section of 48 Vic. ch. 26 to be to provide against persons in insolvent circumstances transferring any property for the purpose of defrauding their creditors, or giving to any of their creditors a fraudulent preference over any other creditor. The section enacts that—

> Every gift, conveyance, assignment, or transfer, delivery over, or payment of any goods, chattels or effects, or of any shares, dividends, premiums or bonus in any bank company or corporation, or of any other property, real or personal, made by any 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.

What the draftsman of this section intended by the words at its close, "or which has such effect," I do not think was very clear to his own mind. To my mind, I must say that they do not appear to have the effect of changing the nature of the inquiry which would have been necessary, or of extending the operation of the section beyond what it would have effected if these words had been omitted. Prior to the passing of 48 Vic. ch. 26, if a deed had been assailed under ch. 118 of the Revised Statutes of Ontario upon the ground of its being fraudulent as against the creditors of the grantor

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as having been executed by him with intent to defeat, delay or prejudice them in obtaining satisfaction of their debts out of the property conveyed by the deed to the extent of the value of such property, the inquiry into that subject necessarily opened the question of the consideration upon and for which the deed had been executed; and if it appeared that the deed was purely voluntary upon the part of the grantor, without any good and valuable consideration having been given by or on behalf of the grantee or other person on whose behalf and for whose benefit the deed was executed, the natural and necessary effect of such a deed was to defeat, delay and prejudice the creditors of the grantor, and so the fraud charged was established, namely, that the deed was executed by the grantor with the intent that it should have that effect which was the natural and necessary effect of its being executed; but if it should, on the contrary, appear that the deed was executed for a good, valuable, legal consideration, proceeding from the grantee or person in whose favor or for whose benefit the deed was executed, such good consideration operating to support the deed and to pass the title in the property conveyed to such person, the necessary result was that no fraud against the grantor's creditors had been committed, and the deed could not be held to have had the effect of depriving the creditors of any property which they had any right to reach to obtain thereout satisfaction of their debts in whole or in part. Thus we see that the question as to the intent with which the deed was executed was subsidiary to, and involved in, the question as to what was the consideration upon and for which the deed was executed. If the consideration given was good and valuable, and given *bonâ fide*, the deed could not be said to have the effect of defeating or delaying the grantor's creditors nor could the grantor be said to have executed the deed with the

intent that it should have an effect which, in point of law, it could not, under the circumstances, be said to have; in short the question as to the sufficiency or insufficiency of the deed to pass the title thereby purported to be conveyed, and the question as to what was the effect of the deed, and what the intent with which it had been executed, were all involved in the one question, namely: Was the consideration upon and for which the deed was executed a good valid and *bonâ fide* consideration for the purpose of vesting the title of the property according to the terms of the deed, or, on the contrary, was the deed a purely voluntary deed executed without any consideration *bonâ fide* given and proceeding from the person in whose behalf or for whose benefit it was executed? Now, if a deed should be assailed since the passing of 48 Vic. ch. 26 as fraudulent against the creditors of the grantor upon the allegation that it defeated or delayed or prejudiced them in the recovery of their debts, the evidence, I apprehend, must be of precisely the same nature as had been necessary before the passing of the act, and the consideration upon and for which the deed was executed is still, equally as before, the crucial test to determine whether the deed was sufficient to pass the title *bonâ fide* to the grantee of the deed, or whether, on the contrary, it was a purely voluntary deed, and so having the effect as charged of defeating, delaying and prejudicing the grantor's creditors in the recovery of their debts. Assuming, then, the words, "or which has such effect" to be coupled with the words, "with intent to defeat, delay or prejudice his creditors" as well as with the words with which they are immediately connected, namely, "or to give to any one or more of them a preference over his other creditors, or over any one or more of them," it does not appear to me that thereby any material difference is made in the

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law, either as to the nature of the deed, which is open to the imputation of being one which, operating so as to defeat, delay, or prejudice the grantor's creditors, is fraudulent as against them, or as to the nature of the evidence as to the consideration which is sufficient to sustain the deed, and to relieve it from such imputation of fraud. The whole question is still as before involved in an inquiry into the precise character and sufficiency of the consideration upon and for which the deed was in truth executed. The suggestion that the effect of the words, "or which has such effect," coupled with the words, "with intent to defeat, delay, or prejudice his creditors," is to make them operate in two distinct events, namely: First, to avoid a deed executed with intent to defeat, delay or prejudice the grantor's creditors, whether the deed should or should not have, or in other words, although it should not have, such effect; and second, to avoid the deed which had the effect of defeating, delaying or prejudicing the grantor's creditors, although he executed the deed *bonâ fide* for good and valuable consideration without any such intent, cannot, in my opinion, be entertained for a moment. It is impossible to attribute to the legislature so motiveless and senseless an intention as that a deed should be avoided as prejudicial and fraudulent as against creditors, as defeating or delaying or prejudicing them in the recovery of their debts, which had not any such effect, upon the ground that the grantor is assumed to have vainly intended that the deed should have an effect which *ex premissis* it had not. Every deed executed by an insolvent purely voluntarily and without consideration is regarded in law as well as in fact as having the effect of defeating, delaying and prejudicing the creditors of the insolvent grantor; the only deed, therefore, executed by an insolvent not having

such effect must be a deed executed *bonâ fide* for good and valuable consideration; and neither justice nor common sense, in my opinion, justifies the contention that the legislature, by the language used, contemplated declaring void as fraudulent, as against the grantor's creditors, a deed executed by him, *bonâ fide*, for good and valuable consideration proceeding from the person to whom, or in whose favor, and for whose benefit the deed was executed. Such a great change in the law which such a construction of the language used, so pregnant itself with fraud, would effect cannot, in my opinion, be attributed to the language used by the legislature.

While I am of opinion that the words under consideration have no such effect I concur with the learned Chief Justice of the Court of Appeal for Ontario, in the opinion that the words "or which has such effect," are to be construed only in connection with the sentence immediately preceding —thus: "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." If the intention had been to apply these words in connection also with the words, "with intent to defeat, delay or prejudice his creditors," the natural expression would have been, "or which has any of such effects," for there had been several effects involved in the two sentences, namely, the effect of defeating, the effect of delaying, the effect of prejudicing the grantor's creditors generally, and the very different effect, namely, the effect of preferring one or more of his creditors over others; but construing the words in connection with the immediately preceding words—"or to give to any one or more of his creditors a preference over his other creditors, or over one or more of them," there is not the slightest indication that the legislature

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intended, in 48 Vic. ch. 26, to use the terms, "preference," and "to give a preference," in any other sense than the well understood legal sense of those terms as the same had been in use before the passing of the act. Indeed, on the contrary, the enacting of the 2nd sec. of 48 Vic. ch. 26, in substitution for the 2nd sec. of ch. 118 R. S. O., 1877, the title of which act is as above stated, indicates very plainly, I think, that the legislature used the terms in their well understood legal sense, namely, the fraudulent preference given by an insolvent to one or more of his creditors over others. It is, therefore, as material since the passing of 48 Vic. ch. 26 as it was before to inquire what species of conveyance was assailable as giving a preference to one of the creditors of an insolvent over others. A preference of one creditor over others consisted, and, in my opinion, still consists, in the voluntary disposition by an insolvent of some portion of his property so as to confer greater benefit upon one or more of his creditors than upon others, when unable to pay all in full. To constitute a preference it must have been given by the insolvent of his own mere motion, and as a favor or bounty proceeding voluntarily from himself.

If, for example, a person in insolvent circumstances should execute a deed conveying a portion of his property to one of his creditors in order to get the remainder of his property released from the operation of an execution in the sheriff's hands as against his property generally, or if in a suit in chancery by one of his creditors to compel specific performance of a contract relating to a portion of his property the insolvent should be decreed specifically to perform such contract by conveying to such creditor the particular property in question, in neither of those cases could a creditor of the insolvent assail successfully the convey-

ance as constituting a preference of one creditor over his other creditors, either before or since the passing of 48 Vic. ch. 26, for the reason that such deeds must be regarded as having been executed by compulsion of law and for good consideration, and not for the purpose of effecting a voluntary disposition of any part of the grantor's property as a benefit conferred upon one of his creditors over the others.

So likewise, as it appears to me, if an insolvent should transfer property to one of his creditors for the purpose of specifically performing a contract which the creditor could enforce by process of law, although no suit had been instituted for that purpose, such transfer would not constitute a giving a preference by the insolvent to such creditor within the meaning of the statute; an act, specific performance of which could have been enforced by law, could not, I apprehend, have been considered to be, before the passing of 48 Vic. ch. 26, what the law regarded as a preference given to one of an insolvent's creditors over the others; and as the 48 Vic. ch. 26, makes no difference as to the character of the act which constitutes a preference, but uses that term in its well known legal sense, a disposition of property by an insolvent which did not, before the act, constitute a preference of one creditor over others cannot be adjudged to be a preference within the meaning of 48 Vic. ch. 26.

Upon the whole, therefore, I can see no reason why the English decisions upon a similar question to that arising here are not as applicable to the determination of the present case as to like cases arising in England; and upon the authority of *Ex parte Kelly. In re Smith* (1), *Ex parte Stubbins. In re Wilkinson*(2), and *Ex parte Taylor. In re Goldsmid* (3), and upon principle, I am of opinion that

(1) 11 Ch. D. 306. (2) 17 Ch. D. 58.
(3) 18 Q. B. D. 295.

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a conveyance, such as the one in question, executed by one of two trustees to his co-trustee to reinstate a fund of their *cestui que trust* which had been misappropriated by the former trustee in breach of his trust is not a conveyance which can be avoided under the Ontario statutes relating to assignments and preferences by insolvent persons, either upon the contention that it operates as fraudulent to the insolvent's trustees creditors generally, or as a preference to one of his creditors.

To such a transaction the Ontario statute has, in my opinion, no application, and the appeal, therefore, should be dismissed with costs.

PATTERSON J.—The essential facts in this appeal are few and are not now in dispute.

Halter and Wismer were executors of Jantz. Wismer received moneys belonging to the estate and applied them to his own use; then, becoming insolvent, he executed a mortgage to Halter and himself, as executors of Jantz, to secure the amount of the misappropriated moneys.

This action is brought to set aside that mortgage as void against the creditors of Wismer.

The mortgage is not void under the statute 13 Eliz. ch. 5. *Holbird* v. *Anderson* (1); *Alton* v. *Harrison* (2); *Boldero* v. *London and Westminster Discount Co.* (3). I lately discussed these and other cases in *Whitman* v. *Union Bank of Halifax* (4).

Is it void under the Ontario Act, R.S.O. (1887) ch. 124, which is entitled "An Act respecting Assignments and Preferences by Insolvent Persons"?

I shall refer again farther on to the title of the act.

The second section declares that the assignment of any property, real or personal, made by a person at a

(1) 5 T. R. 235.
(2) 4 Ch. App. 622.
(3) 5 Ex. D. 47.
(4) 16 Can. S. C. R. 410.

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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.

This differs in two or three respects from the statute of 13 Eliz. Its scope is more limited because it applies only to insolvent persons, and its effect with regard to those persons is more extensive because it includes preferences of particular creditors among its prohibitions, and makes its operation depend not on intention alone but also on the effect of the transaction.

I do not read the enactment as requiring the concurrence of the two things, the intent and the effect. A transfer made by an insolvent person with intent to defeat or delay creditors, or to give a preference to one or more creditors over the others, is made void as against creditors although no creditor shall be actually defeated or delayed, and no preference actually obtained, by means of it.

In that case the intent must be established in the same way as under the statute of Elizabeth, and the apparent object of the transaction may be explained by proof of pressure or some motive which rebuts the forbidden intent. But if the result is the defeating or delaying or giving a preference, if the transaction has such effect, then the statute dispenses with inquiry as to the intent. It might not be incorrect to say that the effect being produced the intent is conclusively presumed if, as under the statute of Elizabeth, the intent were essential to the avoidance of the transfer. With our minds trained under that statute it may be hard to dissociate the two ideas, but the language of the Ontario act, "or which has such effect," is very

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plain, and to my mind makes the effect of the transaction decisive without respect to the intent. The motive of the legislature was avowed in the preamble of the statute by which the clause was cast in its present form, 48 Vic. ch. 26. Questions were constantly arising respecting the intent of transactions impeached under the law as it stood in R.S.O. (1877) ch. 118. An attempt had been made by 47 Vic. ch. 10, sec. 3 to couple with the intent to give a preference among creditors the effect or the tendency of a transfer to create a preference, but the amendment was not happily expressed and failed in its purpose. Then the legislature, in the following session, enacted the clause as we now find it, reciting that "whereas great difficulty is experienced in determining cases arising under the present law relating to transfers of property by persons in insolvent circumstances, or on the eve of insolvency, and it is desirable to remedy the same."

Along with this recital may be noticed the fact that the term "fraudulent" which had been used in the title of ch. 118 of the R.S.O. (1877) and in the previous statute which was there represented and which is replaced by section 2 of the act of 48 Vic., which term, applied as it was in that title to preferences led, in my apprehension, to much of the difficulty referred to in this recital, is dropped in the act of 48 Vic. and in R. S.O. (1887) ch. 124.

The effort to remove the recited difficulty will turn out to be unsuccessful if we refuse to give their plain and direct force to the terms in which the legislative will is expressed. There is no reason or warrant for our so refusing.

These views I understand to be the same as those of Mr. Justice Osler who dissented in the court below, and I do not understand any of the learned judges of that court to find fault with them as a matter of prin-

ciple. But when we come to the practical interpretation of the clause three of the learned judges, one of whom further holds that the intent as well as the effect must appear, read the words " or which has such effect " as applying only to preferential transfers, and not to those that may defeat, delay or prejudice creditors without giving a preference to one creditor over another.

This reading of the clause is, to my apprehension, far away from the plain grammatical reading of the language as well as widely apart from what I take to be the expressed object of the legislature in framing it. The language is " 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." That is the description of the intent, an intent to do any one of the things enumerated ; a transfer made with that intent, that is to say an intent to do any one of those things, " or which has such effect," that is the effect of doing any one of those things, shall be void against creditors.

If these qualifying words " or which has such effect" are not to apply equally to all the objects of the intent on equal footing it must be by reason of some overruling policy or principle that will justify a distinct violence to language which is not itself ambiguous or indefinite.

The preamble of the statute does not suggest any idea of discrimination. To defeat or delay creditors or to give a preference stood on precisely the same footing in the law under which difficulties were experienced which it was desired to remedy. A new term was introduced in the act 48 Vic. ch. 26, viz., to prejudice creditors, and the four things, defeat, delay, prejudice, prefer, now stand each in precisely the same grammatical relation to the enacting words as the others.

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The legislature has adopted the policy of resting the validity of a transfer by an insolvent person on the effect without inquiry into the intent. It is argued that that is only when a preference is accorded. Why should that be so? Assuming the policy to be sound policy, and it is not our province to question it, why should a transfer which merely disturbs the equality among the creditors be dealt with more strictly than one that defeats all the creditors? If the fact of giving a preference is to be fatal to one, the other ought not to be treated with greater tenderness.

It was held by all the learned judges of appeal that the mortgage had not the effect of giving a preference to one or more creditors over the others within the meaning of the statute because the mortgagees were not creditors of Wismer, or, in the guarded language of Mr. Justice Osler, were not creditors in the strict sense of the word. I shall show why I differ from that conclusion, but if it was not a transfer to creditors it was one that had the effect of defeating, delaying or prejudicing the creditors and is, therefore, as against the creditors, utterly null and void. I agree in that particular with Mr. Justice Osler.

That ground would be sufficient for the allowance of this appeal, but the other question is an important one on the construction of the statute and must be considered.

It is not and cannot be denied that when Wismer applied the trust money to his own use he became liable in a civil action at the suit of somebody. The form of action is of no consequence. It might be what in former times was an action at law, as money had and received, if the money was appropriated to an individual *cestui que trust*, or it might have been by suit in equity if nothing had been done to alter the relation of trustee and *cestui que trust*. See many cases collect-

ed in Bullen and Leake's treatise on pleading (1). He became a debtor to some one. It would be so even if the money had been feloniously stolen. See *Chowne* v. *Baylis* (2), where one question put and answered in the affirmative by Sir J. Romilly, M.R., was this: If one man takes the property of another does such taking constitute in the eye of the law a debt from the thief to the person robbed? The liability is not less a debt by reason of its being incurred by a breach of trust, whether an express or an implied trust. See *Emma Silver Mining Co.* v. *Grant* (3), where a specific sum was found due from the defendant, who was financial agent and promoter of the company, to the company for the secret profit made on a transaction. One head-note is

> Held, also, that the debt so due from G. was incurred by "fraud" and also "breach of trust" within section 49 of the Bankruptcy Act, 1869, and that accordingly G. was not released from such debt by his discharge; and he was thereupon ordered personally to pay such debt to the company, or so much thereof as should not be received by the company under the liquidation.

See also to the same effect *Cooper* v. *Pritchard* (4) where a bankrupt was refused his discharge from a debt incurred by the fraud of his partner who misappropriated money intrusted to the firm for investment. Brett, M. R., there referred to the well known rule, which I venture to think has been somewhat overlooked in the present case, that in construing an act of parliament one has no right to introduce words into the enactment unless it is obvious that it cannot be made sensible without them. See also *Evans* v. *Bear* (5) where an order having been made against two executors jointly to pay into court money misappropriated by one of them an attachment was issued against the innocent executor as well as the other, the point

(1) P. 47 of the 3rd edition.
(2) 8 Jur. N.S. 1028; 31 L.J. Ch. 757; 31 Beav. 351.
(3) 17 Ch. D. 122.
(4) 18 Q.B.D. 351.
(5) 10 Ch. App. 76.

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decided being that he came within the third exception to the fourth section of the act for abolition of imprisonment for debt, the Debtors' Act, 1869, which excludes from the operation of the section "default by a trustee or a person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control." *Cobham* v. *Dalton* (1) was a case where a trustee, who had been ordered to pay into court trust money which he had mixed with his own, was adjudicated a bankrupt. It was held that although the debt was one from which an order of discharge would not release him still, as it was a debt provable under the bankruptcy, he was, pending the bankruptcy proceedings, protected from attachment for disobedience to the order by section 12 of the Bankruptcy Act, 1869, which enacted that

> Where a debtor shall be adjudicated a bankrupt no creditor to whom the bankrupt is indebted shall have any remedy against the person or property of the bankrupt in respect of such debt, except in manner directed by this act.

In *Ex parte Kelly & Co. In re Smith, Fleming & Co.*,(2) Kelly & Co., at Glasgow, remitted money to Smiths, Fleming & Co., at London, to pay in retiring certain bills. They intended to appropriate the money to that purpose and never applied it to their own use, though a part was paid by mistake into their own bank in place of the Bank of England, and about the time of their bankruptcy endeavored to correct the mistake. That was held not to be a payment made voluntarily and by way of preferring a particular creditor. James, L. J., thus states the law:

> No doubt if a trustee commits a breach of trust by stealing or otherwise misappropriating the trust moneys he becomes a debtor to his *cestui que trust* in respect of the money which he has thus improperly taken, and if he becomes a debtor in that way he remains only a

(1) 10 Ch. App. 655. (2) 11 Ch. D. 306.

debtor, and the *cestui que trust* only a creditor, unless he can ear-mark the money which the trustee has misappropriated,

and so on.

It is indisputable that Wismer was a debtor and that the person or persons to whom he owed the money, whether the executors or beneficiaries, whether known and ascertained individually or called by the comprehensive name of the estate, were his creditors. They could clearly have proved for the debt as creditors under an assignment for the general benefit of creditors under the Ontario act. If the money was appropriated to them, as Wismer proposed to do when he told Halter that he was ruined and would like to save the money of the estate that he had used if he could, and as he tried to do by executing the mortgage, it undoubtedly gave a preference to those creditors over the others, and so the transfer came literally within the terms of the statute.

But it has been held that it is not within the statute because the transfer was not made to a creditor. I am not prepared to concede that the executors were not creditors of Wismer. It was the duty of Halter to protect the interest of the *cestuis que trustent* by active measures against his co-executor, and he would be the proper person to prove the debt under the statute.

A trustee is called upon, if a breach of trust be threatened, to prevent it by obtaining an injunction, and if a breach of trust has been already committed, to bring an action for the restoration of the trust fund to its proper condition, or at least to take such other active measures as, with a due regard to all the circumstances of the case, may be considered most prudential.

Lewin on Trusts (1), citing *Brice* v. *Stokes* (2), *In re Chertsey Market* (3), *Franco* v. *Franco* (4), *Walker* v. *Symonds* (5) and other cases, and see *Styles* v. *Guy* (6),

(1) 8 ed. p. 274.
(2) 11 Ves. 319.
(3) 6 Price 279.
(4) 3 Ves. 75.
(5) 3 Swans. 81.
(6) 1 Mac. & G. 422.

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per Lord Cottenham ; *Williams* v. *Nixon* (1), per Lord Langdale ; *Booth* v. *Booth* (2), *Lincoln* v. *Wright* (3), which related to executors.

But there is not a word in the statute on which to found the doctrine that the transfer must be to a creditor. What is forbidden is a transfer which gives a preference to one creditor over the others, no matter who the transferee may be. It is the effect of the transaction, not the shape it is put in, that is dealt with.

I respectfully submit that the decision is an instance of introducing words into a statute which, without them, is perfectly plain. The words are imported from the English Bankruptcy Acts, either section 92 of the act of 1869, or section 48 of the act of 1883, which are similar in their words and read thus :

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

Here we have forbidden a transfer made *in favor of any creditor* or person in trust for any creditor, with a view to give *such* creditor a preference. That is to say, it must be made to the creditor himself who is preferred, or to some one in trust for him. We have no such provision. The section of the Bankruptcy Acts has been construed very literally, and perhaps with unnecessary strictness, in the courts as appears from dicta in cases relied on in the court below. The cases really were decisions that the transactions in question were not with a view to prefer creditors because the motive was to restore trust funds or to escape prosecu-

(7) 2 Beav. 475. (8) 1 Beav. 125.
(9) 4 Beav. 427.

tion for misappropriating them, but the other point was alluded to.

Thus in *Ex parte Stubbins. In re Wilkinson* (1) it was held that if a debtor on the eve of bankruptcy voluntarily makes good trust moneys which he has misapplied the payment cannot be set aside under the Bankruptcy Act as a fraudulent preference. James L. J. concluded his judgment by stating the doctrine that if a debtor on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has taken from his master, or from anybody else, and does restore the money, it seems impossible to hold that such a payment can be treated as a voluntary preference of a creditor. The defaulting trustee had induced his co-trustee to buy part of his goods in order that he might replace trust moneys which he had misappropriated. That was held not to be a fraudulent transfer to the purchaser. He paid the money to the credit of the two trustees in the banking account of the trust estate, and as to that the Lord Justice said

> I am of opinion that it is impossible to bring such a transaction within the doctrine of voluntary preference of a creditor. In order to do that there must be a payment or a transfer of goods to a creditor or to somebody in trust for a creditor. Here the creditor was the trust estate, if it could be called a creditor.

Then followed the general statement of law already quoted. This dictum is relied on as some authority for the construction of the Ontario Act. It is obviously an example of the strict reading of the words which have no equivalent in the Ontario Act, while the decision of the case is on the question of intent which the latter statute excludes.

Another case relied on is *Ex parte Taylor. In re Goldsmid* (2). It follows *Ex parte Stubbins* (1) on both points,

(1) 17 Ch. D. 58.

(2) 18 Q. B. D. 295.

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as will sufficiently appear from a short passage from the judgment of Lord Esher, M. R.

With regard to the other ground, the execution of the deed of the 23rd of March, the bankrupt had been guilty of a gross, and perhaps a fraudulent, breach of trust, and an application was made to him by Taylor, his co-trustee, to replace the trust money which had been lost. I do not say that threats were made use of, but great pressure was put on him. The relation of debtor and creditor did not exist between the parties. The relation was only that of trustee, honest trustee and defaulting trustee. No action of debt could have been maintained for the sum which was paid, and such a case is not within s. 48 at all. But even if Taylor could be regarded as a creditor of the bankrupt I think the other view comes in ; the bankrupt had committed a gross breach of trust, and it could not be said that he executed the deed with a view of preferring Taylor to whom it could bring no personal benefit. The deed must have been executed with the view of making good the breach of trust. Consequently, there was no fraudulent preference and no act of bankruptcy.

Two other cases were referred to in the court below, *Re Mills. Ex parte the Official Receiver* (1), and *Ex parte Ball. Re Hutchinson* (2), which is found only in the weekly notes. They add nothing to the others.

Ex parte Kelly (3), which I have noticed, was not mentioned in the judgments. It was there held, two years before the case of Stubbins, that the provisions of section 92 of the Bankruptcy Act, 1869, apply only to transactions between a debtor and persons who are, in the strict sense of the words, his creditors.

I may add all these cases to the list I have given as examples of the recognition of a debt created by a breach of trust as being a debt as fully as when created in any other way.

We have to interpret our own statute which differs in the important particulars which I have pointed out from the clause in the English acts, and which, in its present form passed in 1885, long after the Bank-

(1) 58 L. T. 235 and 871. (2) W. N. (1887) 21.
(3) 11 Ch. D. 306.

ruptcy Act, 1869, and after nearly all the decisions cited under that act and the act of 1883, continues to avoid the form of words on which those decisions turn. It aims at the equal distribution of the assets of insolvent persons among their creditors without preference or priority except in defined cases of privilege which do not come in question under the second section.

I am clearly of opinion that Wismer was a debtor in respect of the money in question ; that the ground on which this appeal should be decided is not that the effect of the mortgage of Halter was to defeat or delay or prejudice creditors, as it would be if not given in respect of a debt, but that it had the effect of providing for this debt in preference to his other debts.

If it were essential to the operation of the statute, as it is held to be under the strict reading of the English Bankruptcy Acts, that the transfer should be to a creditor I am prepared to hold that Halter was a creditor, having as executor a legal right—joint if not several—to the money, being entitled by a civil action to compel its restitution to him or to him and his co-executor, and if necessary to prove as creditor for the debt in any proceedings for the administration of the estate of Wismer, whether under the statute in question or otherwise.

I am of opinion that the appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors for Appellants: *Bowlby & Clement.*

Solicitors for Respondent: *W. Nesbitt & C. R. Hanning.*