SILVA *v.* MACK.

1875.
February 9.

D. C., Colombo, 61,400.

(Roche Victoria's case.)

Fraudulent deed—Want of consideration—Insolvency of grantor—Creditors, antecedent and subsequent to date of deed—English law and Roman-Dutch law—Ordinance No. 7 of 1853, s. 58.

A bond given without consideration by a person in a state of insolvency is void, as a fraud upon all persons who were creditors at its date and prejudiced by it.

A deed cannot be set aside as fraudulent by a creditor who becomes such after the date of the alienation, unless it be proved to have been made with an intention to defeat future creditors.

THE following judgment of the learned District Judge (Mr. Berwick), delivered on June 22, 1874, fully sets out the facts of the case.

"This is an action against the administrator of the estate of the late Roche Victoria by an alleged creditor on a bond by the intestate dated 25th January, 1867, for Rs. 7,150 and interest. The libel sues for this sum and interest from the date of the bond, total Rs. 11,938, and prays that 64 shares of the ship *Geraldina Alexandrina Roche*, specially mortgaged therefor, may be declared executable for the claim. The plea of the administrator is that the bond was voluntary and without consideration, and fraudulently made to defeat creditors. It does not specify any particular

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creditor as prejudiced or intended to be defrauded. The replication is a traverse and demurrer. A question having arisen whether an administrator could maintain such a plea, setting up as a defence the fraud of the party he himself represents, certain creditors of the deceased were allowed to intervene against the plaintiff, and in their libel of intervention have repeated the plea of the administrator. These creditors are Cargill & Co., Armitage Brothers, and E. Labroy, executrix of the estate of the late Mr. Lorenz.

"As to the want of consideration and indebtedness generally. The bond is dated January, 1867. The consideration set up is an anterior and old loan said to have been made in March, 1861, of £250; another loan in September, 1866, of £220; compound interest on these loans from 1861 till the date of the bond, at 15 per cent., £245, making a total of £715.

"It is admitted that no security of any kind was given for these loans till 1867; that there was no document of any kind to vouch them; no witness of the payments; no evidence whatever of them beyond the unsupported statement of the plaintiff, who is the deceased's son-in-law and a party interested among the heirs in defrauding legitimate creditors; and that no interest was ever paid on the stale alleged debts for which it was said the bond was given. It is proved that the existence of this bond was suppressed from the administrator and from the legitimate creditors for a long period after the deceased's death, under circumstances which naturally gave both special occasion and abundant opportunity for bringing it forward; that the claim was not inserted in a list of Roche Victoria's liabilities prepared by his son, a youth who was acting throughout under the constant advice and assistance of the plaintiff himself; and that the existence of the bond was concealed from the deceased's legal adviser, Mr. Loos, who says 'he (Roche Victoria) never did anything without taking my 'advice,' and whose client the plaintiff himself in fact was. See the evidence of Messrs. Nicholls, Loos, and Mack.

"Roche Victoria has died insolvent, and we have now to examine how far back in point of date his embarrassments extended.

"There is ample evidence that, as far back as the date of the bond, he was largely indebted, and in difficulties. On the very day before it was signed we find him writing to Mr. Lorenz (G 1): 'No one knows but the Almighty God who created me. I was 'obliged to beg my friends to assist me on this occasion.' Document E shows that in 1863 he owed Nany Tamby £435, and then borrowed a further sum of £1,700, agreeing to repay it in monthly instalments, and it would appear from the deed of assignment of this debt (marked D) that this debt was still subsisting in 1872.

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Mr. Dawson's award (Q) shows that in 1870 he was indebted to Nany Tamby in £1,472, balance due on promissory notes unsettled since 1865. The letters by him to Mr. Lorenz in 1868 are not too far removed in point of date from that of the impeached bond (and these were not objected to on any other ground) to be relevant as to the state of his affairs when it was granted. In the absence of any evidence of sudden and independent pecuniary reverses having occurred in the interval, to which, and not to old indebtedness, the impecuniosity there referred to might reasonably be ascribed, the whole tenor of those of 18th March and 30th September, 1868 (G 4 and 5), admits of no explanation consistent with solvency. In the latter he writes: 'I must confess the 'truth in this matter that if you are [had] not interfered in 'this matter in time, I would have [been] smashed, and would have '[been] exposed to the public long ago .... Not only I, Sir, 'but every mother's child will say even now or up to date that 'the poor Roche is living on Mr. Lorenz's bread,' ..... and much more language to the same effect, such as only an insolvent entreating a creditor's indulgence would use. In the same letter he alludes to the imminent seizure in execution of one of his ships on a judgment obtained by the bank. It is true that the reception in evidence of other letters by him to Mr. Lorenz was objected to as inadmissible when tendered on behalf of the intervenients to show Roche's insolvent circumstances at the date of the bond, and that I sustained the objection; but on further reflection I am not quite satisfied that my decision, made on the spur of the trial, and necessarily with little leisure for considering the point, was correct, and I have no hesitation in quoting from the letters marked G, because they were only objected to on the one ground of remoteness of date (which I think is an untenable objection), and not on the ground on which the others were rejected. But there is sufficient evidence even without the documentary proof. Mr. Loos, who was his trusted and confidential legal adviser, consulted by him on and cognizant of all his affairs, swears as follows: 'I was his professional adviser in 1867. From '1867 down to the time of his death he was in rather embarrassed 'circumstances. His circumstances were bad in 1866 and for 'some years before 1867,' and then he goes on to give details.

"The result is such an exceedingly strong *primâ facie* case as to call for rebutting evidence, and failing this I must find as facts that the bond was without consideration, and executed in a state of insolvency. Equally by Dutch and English law these findings make it a fraud upon and void as against all persons who were creditors at its date and prejudiced by it.

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"But of the several intervenients Cargill & Co. were certainly not creditors at the date of the bond, and neither were Armitage Brothers (at least there is no proof that they were); and it is a question whether there is admissible evidence that Mr. Lorenz was. Is such a bond void as against subsequent creditors?

"The English cases turn on the construction of *13 Eliz., cap. 5*, and the most important recent cases to the point are *Jenkyn v. Vaughan, 3 Drew, 419; Spirett v. Willows, 34 L. J., ch. 365;* and *Freeman v. Pope, 39 L. J., ch. 148 and 689.* In the first Vice-Chancellor Kindersley held that a subsequent creditor may file a bill if any debt due at the date of the voluntary settlement remains due at the date of the bill. In *Spirett v. Willows*, a distinction was taken between an impeachment by an antecedent creditor and by a subsequent one, it being there held by Westbury, Lord Chancellor, (1) that when any debt contracted anteriorly to a voluntary settlement is impeded thereby, and still exists unsatisfied, such a creditor may impeach the settlement, however solvent the debtor may have been at its date; but (2) when subsequent creditors impeach it, they must show either insolvency (or deep indebtedness) or express intent to defraud creditors. Lastly, *Freeman v. Pope, 39 L. J., ch. 148 and 689*, seems to have dissolved this distinction, and has decided in effect that when any debt contracted before the settlement still exists unsatisfied, either the antecedent creditor or a subsequent creditor may impeach the settlement, however solvent the debtor may have been at its date, or however remote it may have been from his intention to delay or defraud creditors. Vice-Chancellor James. dealing in that case with the claim of a subsequent creditor, and an antecedent debt still existing, when stating the results of the previous cases, says: 'It is immaterial whether the debtor had any intention 'whatever of defeating his creditors,' ..... and again, 'however 'honest the settlement was, and however solvent the settler was, 'at the time.' These principles are however to a large extent opposed to the Civil law and to other systems of enlightened jurisprudence, as well as to former English cases. See *2 Bell's Com. on Scotch Law, 182–186; 2 Kent's Com. on American Law, part V., 38; Story's Equity Jurisprudence, sections 349, 361, 362, &c.; Chitty's Coll. of Statutes, tit. Fraudulent Conveyances;* and on Civil law see *Voet ad Pand., XLII. 8, 14.* Further, Vice-Chancellor James came very reluctantly to his decision in *Freeman v. Pope;* and *Spirett v. Willows* on which that case hangs) has been acutely criticised *(May's Voluntary and Fraudulent Alienations, p. 43)*, and has been brought forward

and overruled in America *(ib. 46)*; and the effect of it is considerably modified by the grounds given for affirming *Freeman v. Pope* in appeal *(L. R. 5, ch. 538–541)*.

"It is unnecessary in the present case to decide what the right of creditors would be in the case of both innocent intent and perfect solvency at the date of the fraudulent settlement, because here I find as a fact that there was insolvency at that time; but it is not so clear that there was an intention to defraud the present or any then future creditors by it. I am therefore called upon to determine whether, by the law of this country, when there has been insolvency at the date of the settlement (or produced thereby), a creditor to whom the debtor subsequently became indebted, but whom there was no intention to defraud thereby, may impeach it; and whether the existence of some antecedent unsatisfied debt is necessary to enable him to do so.

"The subject is one on which there is much conflict of laws. The law of Scotland differs from that of England, and the laws of the United States of America differ among themselves. Mr. Justice Story, rather however expressing his opinion, as a legal philosopher, of what the law ought to be, says: 'Where the con-'veyance is intentionally made to defraud creditors' (antecedent creditors, I presume he means) 'it seems perfectly reasonable that 'it should be held void as to all subsequent as well as to all prior 'creditors on account of ill faith.' (*Equity Jurisprudence, section 361.*) According to English law, the element of fraudulent intent seems now to be altogether eliminated by *Freeman v. Pope*, and a subsequent debtor, as already stated, may impeach a voluntary settlement if (as settled in *Jenkyn v. Vaughan*) there be still existing at the time of impeachment any debt contracted antecedent to the settlement. I think this condition of an antecedent and still existing debt is sufficiently proved in this case in respect to the sum entered in the list of registered claims as due to Nicholls & Co., who are the last of a series of assignees of a debt contracted by Roche Victoria to Nany Tamby. But, is this also the Roman-Dutch law? Or, failing facilities for answering the question in this form, is it the Civil law? For I cannot acquiesce in the argument that section 58 of the Insolvency Ordinance, introducing English law in certain cases, applies to the present one. The word 'insolvent' must be there construed to be a person who has been adjudicated insolvent under the Ordinance.

"It appears to me that the Civil law requires a concurrence of prejudice and fraudulent intention immediately directed against the person who seeks to impeach the deed; that is to say, there must be both those circumstances, and they must also meet in the

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same person; Voet indeed says: *Competit haec actio creditoribus in quorum prejudicium res fraudulenter alienatae sunt* (*Ad Pand, XLII. 8, 3*). The passage, however, which he cites from the *Digest* in support of this statement (*XLII. 8, 1 pr.*) uses the expression 'fraud,' and not 'prejudice,' and is immediately followed there by the explanation *quo edicto consuluit creditoribus revocanda ea quæcunque in fraudem eorum alienata sunt* (*Digest, XLII. 8, 1, s. 1*). In *XLII. 8, 10, s. 1*, we find a distinction taken where the claim of the antecedent creditor has been settled, but other creditors remain. *Ita demum revocatur, quod fraudandorum creditorum causa factum est, si eventum fraus habuit scilicet si hi creditores, quorum fraudandorum causa fecit, bona ipsius vendiderunt. Ceterum si illos dimisit quorum fraudandorum causa fecit et alios sortitus est, si quidem simpliciter dimissis prioribus, quos fraudare voluit, alios postea sortitus est, cessat revocatio; si autem horum pecunia, quos fraudare noluit, priores dimisit, quos fraudare voluit, Marcellus dicit, revocationi locum fore. Secundum hanc distinctionem, et ab Imperatore Severo et Antonino rescriptum est, eoque jure utimur*; that is to say, 'subsequent 'creditors who were not intended to be defrauded by the 'fraudulent act cannot impeach it, unless the creditor who was 'intended to be defrauded has been paid off with their money.' (This is analogous to the Scotch law, *2 Bell's Com. 184; Erskine's Inst. 4, 1, 29, 30*, and manifestly falls far short of the English law as settled in *Jenkyns v. Vaughan.*)

"Accordingly Voet, when he is enumerating the various features which the actions *Pauleana* and *Recissoria* have in common (there being much resemblance between them, but the latter restricted to alienations after the judicial execution against an insolvent's estate called the *missio in possessionem*), says at paragraph 14, that one of the features they have in common is fraud on the part of the debtor, but that in this fraud two things must concur, to wit, the intention or design of defrauding, knowing that he was insolvent, and that he was nevertheless diminishing his estate, and a result corresponding to that intention, whereby his creditors are unable to recover their rights; and he adds: 'and 'finally [it is necessary] that the fraudulent intention and the 'result concur in the person of the same creditor, unless he whom 'the debtor originally intended to defraud has been settled with 'out of the money of the creditor defrauded in fact.' He closes the paragraph by deducing the consequence that no action is competent unless the debtor was insolvent at the time of the fraudulent gift or sale, or unless the alienation itself would have the effect of making him so.

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"A case very much in point is thus put in the *Digest* (*XLII. 8, 15*):—'If one who is a debtor to Titius, and is aware of his 'own insolvency, gives his slaves their freedom by his testament, 'and then, after having paid off Titius, becomes indebted to 'Sempronius and dies, leaving his testament unrevoked, the 'manumission of his slaves remains valid, although his estate be 'insolvent.' So far this shows that a voluntary settlement made by a person who is at its date in a state of insolvency is good against subsequent creditors, if no antecedent creditor's debt remains unsatisfied (compare *Freeman v. Pope*), but what if the debt remained due to Titius at the time that the debt to Sempronius was incurred, or if both remained due at his death? That Titius could set aside the voluntary settlement there is no doubt (*Instit. lib. 1, tit. 6, section 3*), but could Sempronius, who was not a creditor at its date, do so as in the English law? The reasoning given in the *Digest* (*XLII. 8, 15*) for the decision there mentioned equally applies to and answers this question; and in the negative *quia libertates ut rescindantur, utrumque in eorundem persona exigimus et consilium et eventum: et si quidem creditor cujus fraudandi consilium initum erat, non fraudatur; et adversus eum, qui fraudatur consilium initum non est; libertates itaque ratae sunt, i.e.*, 'because 'in order that the manumission should be set aside we require both '[fraudulent] intention and a result corresponding therewith; 'and inasmuch as the creditor, who was the object of the 'fraudulent intention, is not defrauded, as regards him who is 'defrauded, the fraudulent design is wanting.' In the case I have put it is true that Titius is defrauded, but in respect to the plaintiff Sempronius, who alone impeaches the deed, a fraudulent design is wanting. This passage, together with the text which follows it in the *Digest*, is one of the authorities which *Voet* cites for his definite proposition that the fraudulent design and the issue thereof must concur in the same creditor, except when the antecedent creditor has been paid with the money of the subsequent one.

"I shall certainly desire to give what the Germans call an expansive interpretation to the law against frauds on creditors, as has indubitably been largely done both in England on the Statutes of Elizabeth, and in Scotland on the corresponding Statute 1621, B. 18. But to do that is one thing, and to decide in express contradiction to law is another; and I feel constrained to hold on the authority of *Voet* (*XLII. 8, 14*), that in order to a voluntary settlement or fictitious objection (which is the matter here) being impeached, it must be shown that there was an intention to defraud the very creditor who has been actually prejudiced by

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it: and I can find no authority for holding that any creditor who is not in that category can come into Court to impeach it.

"This opinion, however, does not necessarily infer that in no case is a person who only became a creditor after its date outside of that category. For the fraudulent intention may have been to defeat future as well as antecedent creditors.

"Whatever contrarities exist among different systems of jurisprudence as to the rights of subsequent creditors when there was no actual intention to defraud any one, or an intention to defraud any one, or an intention to defraud antecedent creditors only, I think there is no room to doubt that, where there has been an actual intention to defraud future creditors as well, any one of them who is prejudiced may set aside the deed.

"I have therefore further to find whether this intention existed in this case. I believe that it did. It almost happens in this country that gratuitous alienations and mortgages for sham debts are made by persons in insolvent circumstances, for the purpose of the alienee or mortgagee being a secret trustee to preserve property for the debtor's fraudulent benefit after he has gone through the insolvency court, and to put his estate out of the power of subsequent as well as prior creditors, while he goes on trading recklessly and on a false display of capital. I am bound in fairness to the deceased to say that there is no evidence before me that he traded recklessly after creating this fictitious debt, which indeed was registered in usual course. But at the same time we know that the mortgage of the vessel would have been futile without registration, and we know how notorious it is to every one that, except where special inquiries become necessary in transactions regarding the very land or subjects mortgaged, how little wiser the public are as to encumbrances or alienations of property which remains in the possession, and apparently the property, of the ostensible owner. I place little account therefore on the mere fact of registration in dealing with a question of intent to put property beyond the reach of future creditors, and I think it is a legitimate presumption that, where an insolvent carries on trade and incurs considerable debts after creating a sham debt by way of a secret trust, which would have the effect of prejudicing future as well as prior creditors, his intention was in accordance with the result. In this I only apply the legal maxim that a man must be presumed to have intended the natural consequence of his own acts, a maxim which is ten-fold stronger where that act is fraudulent. At the same time I must add that an intention to defraud future creditors by this mortgage has not appeared to me free of fair ground for doubt, and it is therefore

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that I have felt it necessary to consider the law which must be applied in case of its absence. If this case should be appealed, and this intention be ultimately negatived in appeal, then, on the view I have arrived at on the law, I think the plaintiff will be entitled to judgment against both the defendant and the intervenients.

"On my finding, however, and on the foregoing view of the law, it is necessary to decide whether Roche Victoria was indebted to Mr. Lorenz (represented by the intervenient La Brooy) at the time the deed was executed or not. It is sufficient to set aside the deed that I have found as a fact that it was to the best of my judgment intended to defraud some future creditor, and two of the intervenients are in that category. I need scarcely observe that a fictitious debt, putting oneself under an obligation for what he did not owe (which is the case here), stands in all respects on the same footing as a voluntary settlement. The *Digest* has *Sive se obligavit fraudandorum creditorum causa* (*XLII. 8, 3*). The bond and mortgage will be declared fraudulent as against the intervenients. I cannot dismiss the plaintiff's claim against the defendant, because he represents not creditors but heirs, and as against them the plaintiff's claim is good, and must be upheld; for the transaction is good as between the parties to it and their heirs, though bad as against all creditors. The defendant as administrator will therefore pay the plaintiff's cost, but the plaintiff will pay the intervenients' costs.

"As the law applicable to a case of this kind has been very fully discussed in this suit, and that adopted (mainly on the authority of the Civil law as interpreted by *Voet* in *XLII. 8, 14* of his *Commentaries on the Pandects*) is in conflict with English law, though I feel fully fortified by the examplars of the Scotch law and the law of Louisiana, the jurisprudence of which kingdom and state are both founded, like our own, on the basis of the Civil law, it will be useful to put in a concise proposition what I have now held to be the law of Ceylon. In a note to *Kent's Commentaries, vol. 2, p. 442*, will be found the following passages :—'In Louisiana 'a deed cannot be set aside as fraudulent by a creditor who 'becomes such after the date of the alienation, unless it be proved 'to have been made with an intention to defeat future creditors.' This I consider exactly to express the law of this country, if we add the words 'or unless it be proved that a person who was 'a creditor at its date has been paid with the money of the sub-'sequent creditor who seeks to set it aside.' And with this addition it exactly and tersely summarizes what I have decided on the points raised in this suit."

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The mortgage bond in favour of the plaintiff having been set aside as fraudulent, he appealed.

Fitzroy Kelly (with him *Samuel Grenier*) appeared for him.

Ferdinands (with him *Layard*) for defendant respondent.

Cur. adv. vult.

The case was argued in appeal on 2nd February, 1875.

9th February, 1875. The judgment of the Supreme Court was delivered by Sir RICHARD MORGAN, Acting Chief Justice, as follows :—

The Supreme Court concurs with the learned District Judge in holding that the bond upon which the plaintiff sues was given by the deceased without consideration, and with intent to defraud his creditors.

Affirmed.