1933 *Present:* **Dalton A.C.J. and Drieberg J.**

STRONG *v.* MARIKAR.

209—D. C. (Inty.) Puttalam, 4,441.

Caveat—Creditor files caveat to prevent alienation of property by debtor in fraud of creditors—Object of caveat—Registerable interest in land—Registration of Documents Ordinance, No. 23 of 1927, ss. 30, 32, and 33.

Section 32 of the Registration of Documents Ordinance does not entitle a creditor, who has not obtained judgment against his debtor, to enter a caveat to prevent the alienation of property by his debtor in fraud of creditors.

The object of the section is to give the caveator notice of a deed in order that he might have it rectified or cancelled under sub-section (5) if he can show that it is void or voidable or fraudulent as against him or that it is in derogation of his lawful rights.

It does not alter the substantive law regarding the grounds on which he can have the deed cancelled.

Held further, the caveator is not bound to show that he has a registerable interest in the land, the registration of deeds affecting which he seeks to prevent.

IN this action the appellant sued the respondent for the recovery of a sum of Rs. 10,662.91 and, before the decision of the action, registered under section 32 of the Registration of Documents Ordinance, No. 23 of 1927, a caveat affecting five lands of the respondent. He filed an affidavit alleging that the respondent was about to mortgage them and that if he did so, the appellant would be deprived of the means of recovering the amount due to him. The respondent moved under section 33 of the Ordinance that the registration of the caveat be cancelled. The learned District Judge held that the filing of the caveat was wrongful and allowed the application.

H. V. Perera, for appellant.—Under section 25 of Ordinance No. 14 of 1891, only a party to an instrument or deed can lodge a caveat (*Annamaly Chetty v. Thornhill*[1]), but under section 32 (1) of Ordinance No. 23 of 1927, any person is entitled to enter one. The change in the wording is significant. Section 32 (1) has been deliberately made wider in terms, as the party aggrieved has been given a remedy by section 33 and a claim for damages by section 34. As the law now stands any person can lodge a caveat, but if he does so unlawfully or improperly he will be liable in damages.

N. Nadarajah, for respondent.—The position taken up by the appellant is not correct. It was not intended to widen the provisions of Ordinance No. 14 of 1891. In the statement of objects and reasons by the Hon. the Attorney-General in the *Government Gazette* of April 8, 1927, it is clearly stated that the amendment of section 25 of Ordinance No. 14 of 1891 was necessary in view of the fact that the section was being abused by simple money creditors. The submission made for the appellant is that the mischief sought to be averted has been rendered lawful.

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[1] *29 N. L. R. 241.*

The class of persons who can come under section 32 is no larger than under the clause 25 of Ordinance No. 25 of 1891, but a close examination of sub-section (5) of section 32 shows what persons are entitled to lodge caveats. The appellant does not come within the class of persons. He is only at the best a simple creditor without a decree of Court for his claim. His claim is being disputed. As such he cannot say that the deed is fraudulent as against him or in derogation of his lawful rights. Under the Roman-Dutch law a simple creditor without discussing the available property of his debtor cannot say that he has been defrauded. This can only be done after a decree. (*4 N. L. R. 81.*) It is submitted that a simple money creditor cannot enter a caveat, and the law is the same now as under section 25 of Ordinance No. 14 of 1891 as far as simple creditors are concerned.

H. V. Perera, in reply.—The case of *Fernando v. Fernando*[1] only lays down that a person claiming damages cannot bring a Paulian action without a decree. That does not apply to a creditor who claims a debt which is due. He can institute a Paulian action, and as such he can rightly say that his rights are being interfered with when a debtor transfers his property; he can therefore lodge a caveat.

July 13, 1933. DALTON A.C.J.—

I agree that this appeal must be dismissed. I have had the opportunity of reading the judgment of my brother Drieberg, and I concur in the conclusion to which he has come. I should like to add, however, that the idea of a creditor being allowed to enter a caveat to stop his debtor dealing with his immovable property, until his ordinary contract debt is paid, is not strange to me, or in fact unknown in Roman-Dutch law. During the course of the argument before us, the remarks of A. St. V. Jayewardene J. in *Fernando v. Fernando*[1] were brought to our notice, and they do give room for the suggestion that in Ceylon a creditor whose claim is certain and ascertained, although he has not obtained a judgment, is in a more favourable position, so far as a Paulian action is concerned, than one who has a claim for unliquidated damages only. The origin in the Netherlands of the practice of advertisement in the case of sales of land is referred to by Wessels J. in *Houtpoort Syndicate v. Jacobs*[2]. In British Guiana even at the present day, simple contract creditors are empowered to enter a caveat against the transfer or mortgage of any immovable property belonging to the debtor. This right of opposition has been the subject of many local decisions there, but does not extend to any claim for uncertain or unascertained damages. The Vendue Regulations for Demerara and Essequebo, as enacted by the Assembly of Ten on October 6, 1784, are referred to by Burge, *Colonial Laws, 1st ed., p. 582.* By subsequent regulation the requirements in respect of sales by the vendue master were extended to all alienations of immovable property, and they are now governed there by Rules of Court under the provisions of the local Deeds Registry Ordinance, 1919. There the conditions under which a creditor can enter an opposition or caveat before a conveyance or mortgage is executed are set out. They

[1] *26 N. L. R. 292.* [2] *South Africa. (1904) T. S. 105.*

in fact play an important part in the system of conveyancing which survives in its present form to a great extent from Dutch days. With regard to Ceylon, however, although the provisions of our Registration of Documents Ordinance (No. 23 of 1927) made considerable changes in respect of the law applicable to instruments affecting land, and the use of the words " in derogation of his lawful rights " in section 32 (5) raises considerable difficulties, Mr. Perera has not satisfied me that the Ordinance has made any change in the law of the land, as it stood before the Ordinance was passed, in respect of the enlargement of the right of creditors in Ceylon to obtain the rectification or cancellation of deeds alleged to have been executed to their prejudice.

The appeal must therefore be dismissed with costs.

DRIEBERG J.—

The appellant sued the respondent for the recovery of a sum of Rs. 10,662.91 and, before the decision of the action, registered on August 3, 1932, under section 32 of the Registration of Documents Ordinance, No. 23 of 1927, a caveat affecting five lands of the respondent. The appellant says these lands are in the present state of the market worth Rs. 100,000 and that the respondent's liabilities, including the debt to the appellant, amount to Rs. 91,653.29, of which Rs. 57,000 is secured by mortgage. He alleged that the respondent was preparing further to encumber his property and that if he executed the deeds and registered them, he would be completely deprived of any means of recovering the amount due to him; that it was absolutely necessary that he should prevent the registration of any documents by the respondent in order that in the event of execution he would be able to impugn the same as being in fraud of his claim. He gave this explanation in an affidavit filed by him when the respondent moved to have the registration of the caveat cancelled. The respondent does not challenge this statement of his liabilities, but he says that the lands affected by the caveat are worth Rs. 100,000. On October 15 the respondent moved under section 33 of the Ordinance that the registration of the caveat be cancelled. The learned District Judge held that the filing of the caveat was wrongful and not necessary, that the appellant had no right to do so, and he ordered that it be cancelled. The appeal is from this order.

The judgment proceeded on the ground that though the provision for the registration of caveats under section 32 of Ordinance No. 23 of 1927 was in certain respects different from that under section 25 of Ordinance No. 14 of 1891, the caveator had still to show that he had a registerable interest in the land, the registration of deeds affecting which he sought to prevent. It is clear that the appellant would not have been entitled to register a caveat under the Ordinance of 1891, but it is contended it is otherwise under the present Ordinance.

Under Ordinance No. 14 of 1891, section 25, it was competent for any party to lodge with the Registrar a caveat to prevent the registration of any deed or other instrument affecting a particular land which might thereafter be tendered for registration within a fixed period not exceeding six months. If a deed was tendered for registration within that period the caveator had thirty days within which to bring his action in which

case the registration was suspended until the decision of the action. It is clear that under this provision the only persons to whom this relief would be necessary were those who would be affected by the registration of a deed and who would lose in competition with it. In *191 D. C. Negombo, 16,048*,[1] Bertram C.J. held that by the word "party" was meant "party to some deed or instrument", and that the object of the section was to allow a person who claimed a registerable interest in the land under some document to prevent another registration being made to his prejudice. It was pointed out there and also in *Croos v. Ramanathan Chetty*[2] that this provision was not intended to supplement the process which the law allowed of sequestration before judgment, provided by section 653 of the Civil Procedure Code.

Ordinance No. 23 of 1927, which repealed section 25 of Ordinance No. 14 of 1891, does not use the word "party" but enacts that "any person" may register a caveat. It provides what the caveator has to prove when he impeaches a deed submitted for registration while the caveat is in force, and what order the Court may make regarding it. It also makes provision, which Ordinance No. 14 of 1891 did not, for the party affected by the caveat, though he has submitted no deed for registration, to apply that the registration of the caveat be cancelled. It brings within its scope cases to which the old provision does not apply; this follows from the use of the words "any person" instead of the word "party", and it provides for the relief of persons who may be prejudiced, not by the registration of a deed and the consequent loss of their claims to priority as in the case of the old provision, but by the execution of a deed and the acquisition of rights under it. It will be seen that whereas under Ordinance No. 14 of 1891, registration was suspended until the caveator established his claim, under section 32 of Ordinance No. 23 of 1927 the object of the caveat is to give the caveator notice of a deed in order that he might have it rectified or cancelled under section 32 (5) if he can show that it is void or voidable or fraudulent against him or that it is in derogation of his lawful rights.

Those cases for which provision was made in section 25 of Ordinance No. 14 of 1891, namely, where merely suspension of registration is needed for the protection of those having a registerable interest in a land, are excluded from section 32 of Ordinance No. 23 of 1927 for the reason that no caveat is needed for their protection. Provision is made for such cases by the new system of priority notices under section 30. Where a person, called for the purposes of that section a "transferee", has acquired or proposes to acquire from another person, called the "transferor", any interest in land, he can register a priority notice of his intention to register the instrument in his favour. Where the instrument is not yet executed the consent of the transferee is needed for the registration of the priority notice; if executed, his consent is not necessary. The notice remains in force for a period of six weeks, which can be extended by consent. If the deed to the transferee by the transferor is registered while the priority notice is in force, it is deemed to have been registered on the day

[1] *(1925) 29 N. L. R. 241, (191 D. C. Negombo. 16048).*

[2] *(1924) 5 C. L. Recorder 164.*

on which the priority notice was registered. There was no provision of this kind in the Ordinance of 1891.

The learned District Judge was wrong in holding that a caveator under section 32 should have a registerable interest in the land. This section does not state who may register a caveat but this can be gathered from the provisions of sub-section (5) regarding the proof to be given by a caveator who impeaches a deed tendered for registration and the order which the Court can make regarding it. The caveator must prove that the deed was at the time of registration void or voidable by him or fraudulent against him or in derogation of his lawful rights, and if he succeeds in proving this the Court may order the deed to be rectified or cancelled and may order the necessary correction in the register. I would here draw attention to the words " that the instrument presented for registration is or was at the time of registration void or voidable . . . . . ". Whether by this is meant the time of registration of the caveat or the time of the registration of the impeached deed is not clear. It is not however necessary to consider this, but what is clear is that there is no provision as in the Ordinance of 1891, that the registration should be suspended, and from the provision that on a decision adverse to the impeached deed the necessary correction should be made in the register it would appear that a deed presented after the registration of the caveat would be registered. Its presence on the register implies that it has been registered, for registration is effected by entering a deed on the register. The appellant in this case to be entitled to register a caveat should be able to prove that deeds tendered thereafter by the respondent for registration would be, as regards himself, void or voidable or fraudulent or in derogation of his lawful rights. The respondent, on the appellant's statement, is not presently insolvent; any transfer would not affect him, but only such as would have the effect of rendering the respondent insolvent to the prejudice of the appellant, and here again a distinction would have to be drawn between voluntary conveyances and those for valuable consideration, for in the case of the latter a fraudulent intention on the part of the alienee as well would have to be proved. This would mean that the Court would have to examine each deed tendered and allow or cancel it according to whether or not the appellant would be prejudiced by it. Section 32 merely provides a procedure which enables a person to have notice of a deed which he has the right to have cancelled. It does not alter the substantive law regarding the grounds on which he can have the deed cancelled. In this case the appellant seeks to procure the cancellation of deeds which would be, as regards himself, fraudulent alienations to defeat his rights as a creditor. I will briefly state what the rights of a creditor in his position are.

If he can satisfy the Court that the debtor was fraudulently alienating his property he could, subject to the other conditions of section 653 of the Civil Procedure Code, at once institute an action for the recovery of the amount due to him and get an order for the sequestration of so much of his debtor's property as is necessary to satisfy his claim until he obtains judgment and executes it. The same remedy is open to him in the course of his action.

Where the debtor has committed an act of insolvency the creditor can have him adjudicated insolvent in which case conveyances without valuable consideration, with certain exceptions, made while he was insolvent would be void against his creditors; Insolvent Estates Ordinance, section 51. Conveyances, though for valuable consideration, made between the commission of an act of insolvency and the filing of the petition, are also under certain circumstances void against creditors; section 57. Where an alienation has been made in fraud of creditors this is an act of insolvency which will support an adjudication.

A creditor who has obtained a judgment is amply protected by the new Ordinance, for, in addition to the provision for registration of seizure, which would render private alienations thereafter void as against rights enforceable under the seizure under the Civil Procedure Code, he can now under section 31 register a priority notice as soon as writ of execution is issued and so protect himself in the interval between that and the seizure and its registration.

Was it then intended by section 32 to afford to a creditor who has not obtained a judgment a means of obtaining what can otherwise only be obtained in a Paulian action? A Paulian action cannot be brought except by a person who holds a judgment " for the cause of action does not arise until the rest of the property of the debtor, not included in the impeached deed has been exhausted by execution ", Bonser C.J. in *Podisingho Appuhamy v. Loku Singho*[1]. He referred to *Voet 42.8.13* where it is said of the Paulian action that it " should be instituted within a year from the time the right of action first arises, the year to be reckoned not from the time of effecting the alienation in fraud of creditors but of the sale of the whole estate: as it is then that the right of action first arises: for, before that, it cannot be ascertained whether the creditors cannot be satisfied out of the rest of the property which has remained in the patrimony of the insolvent and thus whether or not creditors have been defrauded by the alienation ". (*De Vos' translation.*)

The case of *Fernando v. Fernando*[2] was cited by Mr. Perera. There the plaintiff sued the defendant to recover a boat in the possession of the defendant and for damages. The plaintiff had bought the boat from Manuel Joseph de Silva. The defendant pleaded that he had an agreement with de Silva for the hire of the boat and there was an action pending in which he sued de Silva for damages for breach of the agreement, and he claimed the right to retain possession of the boat as security for his claim. He alleged that the transfer by de Silva to the plaintiff was a fraudulent alienation; he asked that it be declared void as against his claim and for that purpose he moved that de Silva be made a party to the action. The appeal was from a refusal to make de Silva a party. The questions before the Court, as stated by Bertram C.J., were whether the defendant was a person qualified to bring a Paulian action and whether at the time of his application the time had arrived when he could bring it. Mr. Perera referred us to the judgment of Jayewardene J. where he considered the objection to the defendant's application on the ground of his claim being for unliquidated damages; he thought that in that particular case a judgment was needed for the reason that the

[1] *(1900) 4 N. L. R. 81.*

[2] *(1924) 26 N. L. R. 292.*

claim was one for unliquidated damages and that until a definite debt was adjudged to be due by a Court there could be no relationship of creditor and debtor. His judgment suggests that in the case of an ascertained and definite claim a creditor who had not got a judgment could maintain the action. Bertram C.J., however, took the view that in any case a claim under an action is not a debt until it is reduced to judgment and that "two fundamental conditions are essential, namely, *concilium* and *eventus*, that is to say, there must be the design to defraud the creditor putting the remedy in suit, and the process of law must have disclosed the fact that that creditor was in fact defrauded by the insufficiency of the debtor's assets" (on page 295) and that "the action is only competent to a judgment creditor who can show that by reason of the alienation complained of the judgment-debtor has no assets on which execution can be levied, or that assets on which it has already been levied are insufficient to satisfy the debt." (on page 296). In *Baronchi Appu v. Siyadoris Appu* [1] it was stated by Pereira J. that it is not only a judgment creditor who can bring the action. The case is not fully reported and it is not clear what the form of the action was and the alienating debtor was not a party to it. The action was dismissed with leave to institute a fresh action.

It is difficult to see how the decree of a Paulian action can be obtained in a proceeding under section 32 (5) of the Ordinance; what would happen if the person affected by the caveat denies that he is indebted to the caveator? Is the caveat to continue in force until the caveator establishes the fact that he is a creditor? Further, if, as in this case, the caveator shows the risk to himself of an alienation by the debtor by a statement of the debtor's other liabilities and of his available assets, if the Court to enter on an inquiry regarding the value of the assets if the parties are not agreed on the point, and if the debtor denies the liabilities to others alleged by the caveator, is the Court to investigate and determine the extent of such indebtedness? If so, the Court will have to undertake a complete examination of the financial affairs of the person concerned.

The relief allowed to a successful caveator under section 32 (5) does not suggest that it is one intended for an alienation in fraud of creditors. The deed has to be "rectified or cancelled". There can be no question of rectifying such a deed, nor should such a deed be cancelled; cancellation would revest title in the transferor. A decree in a Paulian action declares the transfer void as against a creditor or creditors only, it does not revest the transferor with title, (*Punchi Banda, v. Perera*) [2]; if the claims of the creditors are thereafter satisfied by other means, the title of the transferee would remain entirley unaffected by the decree. If it was intended for such cases I would expect section 32 (5) to provide for an order declaring the deed void as against the caveator. There are many cases where a resort to a caveat is allowable and necessary, but in my opinion it was not intended nor is it necessary in such a case as this.

The order cancelling it under the provisions of section 33 (2) is right and the appeal is dismissed, with costs.

Appeal dismissed.

[1] *(1914) 4 C. A. C. 65.*

[2] *(1928) 30 N. L. R. 355.*