1924. *Present* : Bertram C.J. and Jayewardene A.J.

FERNANDO *v.* FERNANDO.

116—D. C. Negombo, 16,734.

Paulian action—Fraudulent intent—Resulting prejudice—Insufficiency of assets—Claim for unliquidated damages—Creditor to whom the action is competent—Civil Procedure Code, s. 18.

A Paulian action does not lie unless the plaintiff can show not only a fraudulent intention (*consilium*), but also actual prejudice (*eventus*) demonstrated by a legal process (*i.e.*) 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 the assets on which it has already been levied are insufficient to satisfy the debt.

Per JAYEWARDENE A.J.—A person who has a claim for unliquidated damages only cannot be regarded as a creditor to whom a Paulian action is available.

The joinder of a party under section 18 of the Civil Procedure Code is discretionary with the Court.

APPEAL from the an order of the District Judge of Negombo refusing to add one Manuel Joseph Silva as a party to the action. The plaintiff sued the defendant for a declaration that he

[1] *(1920) 45 Bom. 1071 (1074.)*

was entitled to a fishing boat in the possession of the defendant and for damages for wrongful detention of the same. The boat in question belonged to the party sought to be added, who transferred it by deed No. 61 of May 4, 1924, to the plaintiff. The defendant filed answer admitting that the boat belonged to Manuel Joseph Silva, but alleged that the transfer in favour of the plaintiff was a fraudulent one. He further alleged that he had entered into an agreement with Manuel Joseph Silva for the hire of the boat, that Manuel Joseph had committed a breach of the agreement, and that he had thereby sustained damages to recover which he had instituted an action against him. He claimed in reconvention that deed No. 61 be set aside on the ground of its being a fraudulent alienation, and that the boat be held bound and executable for the realization of his claim set up in his action against Manuel Joseph.

Amerasekere (with him *de Zoysa*), for appellant.

Croos Da Brera, for respondent.

September 19, 1924. BERTRAM C.J.—

The facts of this case are set out in the judgment of my brother Jayewardene, which I have had the advantage of reading, and I need not further refer to them except to point out that the defendant is involved in his present difficulties through his arbitrary act in seizing and detaining the boat with which this action is concerned, instead of taking steps to sequester it by process of law.

We are concerned with this aspect of the matter. What we have to determine is the question of law, whether the defendant was entitled to the remedy which he invokes. This involves two further questions:—

(1) Is he a person qualified to bring a Paulian action?

(2) At the date of his application, had the time arrived when he could bring it?

The Paulian action as it existed, both in Roman and Roman-Dutch law, was a very different proceeding from that which we now describe by this name in our own Courts. I quote this description of it from *Planiol's Traite de Droit Civil, paragraph 297*:—

> "This action in Roman procedure exhibited a remarkable character which it has lost. It was a collective suit instituted in the name of the general body of creditors by a sort of administrator or syndic, the *curator bonorum vendendorum*. And its result necessarily accrued to the profit of the general body. The action was put into force after the general sale of the goods of the debtor, when the sum so obtained was insufficient to discharge all the creditors."

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The plaintiff might be either the *curator* or a person otherwise appointed to represent the *curator*. *De his curatori bonorum vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo.—Dig. XLII., 8.* In Roman law an interdict was also allowed on the same lines. And it appears to be suggested that this interdict was open to individual creditors. See *Girard Manuel Elementaire de Droit Romaine, 7th ed., p. 448, notes 2 and 3.* Voet only knows the Paulian action as above described. *See Voet XLII., 8.* See also *Grotius, bk. II. Ch. V., section 4,* and *Schorer's Notes, p. 409 (Maasdorp's edition); Vander Keessel's Theses, CXCIX.; Kotze's Van Leeuwen, vol. I., p. 195.* The action only lay after the creditors had been put into possession of the property, and after the property had been sold and found insufficient to discharge the debts. *Si ex bonis, in quæ creditores missi, quibusque curator datus, satisfieri nequeat omnibus creditoribus.—Voet XLII., 8, 1.* Two conditions were essential to the remedy: (1) A fraudulent design "*consilium*;" (2) a result corresponding thereto "*eventus.*" *Exigimus et consilium et eventum.—Dig. XLII., B. 15.* Again, *ita demum revocatur quod fraudandorum creditorum causa factum est, si eventum fraus habuit scilicet si hi creditores quorum fraudandorum causa fecit, bona ipsius vendiderunt.—Dig XLII., 8, 10.* That is to say, it only lay when the sale of the property had disclosed an insufficiency of assets. See for a full explanation of this aspect of the law the judgment of Mr. Berwick in *Silva v. Mack.*[1]

Our own practice has undoubtedly greatly departed from this model. We might, indeed, have some hesitation in recognizing this departure if it were not so thoroughly established. It is very interesting to note that an exactly similar development has taken place in French law, where the Paulian action is preserved in force by Article 1167 of the Civil Code. Until that Code French law was exactly on the same footing as Roman-Dutch law, that is to say, it was the Roman law as modified by local custom. And before the Code it had been settled that the action lay at the suit of an individual creditor, and that what he recovered went, not to the general body of creditors, but to the satisfaction of his own debt. See for an interesting account of this process, and for the principles governing the Paulian action, *Planiol, op. cit. paragraphs 296-334.* It may be noted, too, that Vander Keessel, in his *Theses 199,* remarks that alienations in fraud of creditors had been carefully provided against by various particular laws in various Dutch States. It is possible that some modification of the old Roman-Dutch principles had already taken place at the time of the Dutch occupation of the Maritime Provinces. The development of our own law in this direction was, no doubt, greatly influenced by English law based on the Statute of Elizabeth (*27 Eliz., cap. 4*) under which such a remedy could be invoked by an individual creditor.

[1] *(1875) 1. N. L. R. 135.*

Nevertheless, I take it to be clear that even under this development, the same two fundamental conditions are essential, namely, " *consilium* " and " *eventus*, " that is to say, there must have been a 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. See generally the judgment of Mr. Berwick above referred to.

Whether a person, who has only an unliquidated claim for damages, is a creditor within the meaning of this principle of law is a question which, I confess, is not very easy to determine. Such a person may be described as a creditor *ex delicto*. Pothier, in his *Commentary on the Pandects*, expresses the opinion that a person to whom something is due *ex delicto* may be considered a " creditor. " *Sed et si ex delicto debeatur; mihi videtur posse creditoris loco accipi.—Tit. XVI., de Verborum significatione, paragraph LXIII.* There were two views of what constituted a " creditor " among the Roman jurists. One was that a creditor was a person who had relied upon the good faith of another, *alienam fidem secutus. Nam cuicumque rei adsentiamur alienam fidem secuti, mox recepturi quid ex hoc contractu credere dicimur.—1, 1, ff. de Rbe. cred.* This is the view adopted by Van Leeuwen's *Censura Forensis, IV., 3, 1.* The other view was that anyone to whom anything was due for any cause was a creditor. *Creditorum appellatione, non hi tantum accipiuntur qui pecuniam crediderunt, sed omnes quibus ex qualibet causa debetur. —Gaius, lib. 1 Ed. provinc.* See also another passage, *creditores accipiendos esse constat, eos quibus debetur ex quacumque actione vel persecutione.*

It may be noted that this is consistent with the view that a claim under an action is not a debt until it is reduced to judgment. Planiol insists that the Paulian action applies to all creditors without distinction; both those " who have acquired a right by a voluntary act on their part, such as a contract, " and those who have become creditors " without having wished it. "

One feels reluctant to adopt a view which would seem to imply that, if a person committed a gross fraud or wrong against another and then disposed of his property with a view to avoiding the result of any consequent action, the person defrauded would not be a creditor for the purpose of a Paulian action. There is, however, a solution of this difficulty, namely, that such a person may be considered to have formed a design to defraud future creditors, and prejudice caused by such a fraudulent design is declared to be within scope of this remedy. This view is expounded by Mr. Berwick in the judgment above referred to.

While I do not wish to dissent from the view taken by my brother Jayewardene, I prefer to base my own decision on the principle that the action does not lie unless the plaintiff can show not only a fraudulent intention, " *consilium*, " but also actual prejudice,

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"*eventus*," demonstrated by a legal process, that is to say, 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.

For this reason I must dismiss the appeal, with costs.

JAYEWARDENE A.J.—

This is an appeal from an order of the District Judge of Negombo refusing to add one Manuel Joseph Silva as a party to this action. The plaintiff sued the defendant for a declaration that he was entitled to a fishing boat in the possession of the defendant and for damages for the wrongful detention of the same. The boat in question belonged to Manuel Joseph Silva, the party sought to be added, who transferred it by deed No. 61 of May 4, 1924, to the plaintiff. The defendant filed answer admitting that the boat belonged to Manuel Joseph Silva, but alleged that the transfer in favour of the plaintiff was a fraudulent one. He further alleged that he had entered into an agreement with Manuel Joseph for the hire of this boat for a period of about three months commencing from January 20, 1924, for the purpose of carrying on fishing operations off the North-Western coast. Manuel Joseph was to act as the tindal of the boat during this period. The defendant and Manuel Joseph set out on this fishing expedition, but when they reached a place called Talaimannar, the tindal obstructed the defendant and prevented him from continuing his fishing operations. Thereupon, the parties had to return to Negombo. The defendant says that Manuel Joseph has committed a breach of his agreement, and that he has thereby sustained damage to the extent of Rs. 1,025. On March 21 last he instituted an action against Manuel Joseph to recover a sum of Rs. 1,000 as damages. He claims to be entitled to keep the boat as security for the payment of the damages claimed by him. He further alleges that Manuel Joseph and the plaintiff, who is his nephew, made several attempts to obtain possession of the boat, which were unsuccessful, and ultimately the plaintiff procured the execution of deed No. 61 in his favour without consideration, and solely for the purpose of preventing him from recovering his just claim and defrauding him. He claims in reconvention that deed No. 61 transferring the boat be set aside on the ground of its being a fraudulent alienation, and that the boat he held bound and executable for the realization of his claim, set up in his action against Manuel Joseph, No. 16,626, D. C. Negombo. He also asks that Manuel Joseph be added as a party to the action.

It is necessary that Manuel Joseph should be added as a party to the action if the claim in reconvention is to be tried. The joinder of a party under section 18 of the Civil Procedure Code is

discretionary with the Court. It seems to me that the claim in reconvention is *primâ facie* unsustainable at present. The action to set aside a transaction as being fraudulent, that is, the Paulian action, is given to creditors, to whose prejudice things have been fraudulently alienated. *Voet XLII., 8, 3.* The defendant is not, in my opinion, in the position of a creditor of Manual Joseph at the present time. There is no debt due to him, and his claim is one for unliquidated damages only. A person who has such a claim against another cannot be regarded as a creditor. A creditor connotes the existence of a debt and a debtor. It cannot be said that the claim for damages is a debt, or that the person against whom the claim is made is a debtor. It is only when the claim is found by the Court to be due and is embodied in a decree that the relation of creditor and debtor would arise in such a case. The meaning of the term " creditor " was discussed in *ex parte Wilmot In re Thomson*,[1] and it was held that the term " creditor " in its ordinary and proper acceptation of the term did not include a person having a claim for unliquidated damages, and that such a person would not become a creditor until after the right to recover, and the amount to which he is entitled, are determined by action. Till that process is gone through, the term " creditor " cannot be used with reference to a person claiming unliquidated damages. The term creditor seems to have the same meaning in the civil law. Forcellini in his *Lexicon totius Latinatis* defines " creditor " as " one that lends or trusts another "—" *qui aliquid alteri credidit quod proinde sibi debetur.* "—*Dig. L. 16, 10, 11, 12.* " *Creditorum appellatione non hi tantum accipiunter qui pecuniam crediderunt sed omnes quibes ex qualibet causa sicut ex empto, ex locato, vel ex alio contractu,* " and would not, I think, include persons having claims for unliquidated damages arising out of breach of contract or *ex delicto.*

The defendant's claim is not a debt that can be proved in insolvency proceedings or in an administration suit. In my opinion, therefore, the defendant is not a creditor at present, and cannot ask for the cancellation of the transfer in favour of the plaintiff on the grounds of its being a fraudulent alienation. It may be that if he obtains a decree in his favour in his action against Manuel Joseph before the trial of the present action, he would be entitled to maintain his claim in reconvention. When that happens he can ask the Court to add Manuel Joseph as a party to the action. But, for the present, it would be useless to add him. This is the only question arising in the appeal, and I think that the District Judge was right in refusing the defendant's application. The appeal must be dismissed, with costs.

Appeal dismissed.

[1] *(1867) L. R. 2 Ch. 795.*