1968 *Present :* **Samerawickrame, J., and Tennekoon, J.**

D. W. ATUKORALE and another, Appellants *and* D. C. ATUKORALE, Respondent

S. C. 124/64—D. C. Gampaha, 6935/L

Contract—Negotiorum gestio—*Creditor and debtor—Payment of debt by a third party without debtor's permission—Right of the third party to recover the sum from the debtor—Scope—Unjust enrichment.*

Paulian action—Fraudulent alienation of immovable property directed against a future creditor—Effect—Claim for unliquidated sum of money—Right of claimant to seek Paulian remedy in reconvention after obtaining decree—Computation of period of prescription—" Cause of action "—Prescription Ordinance, s. 10—Death of transferor-defendant pending action—Whether substitution of his heirs is necessary—Civil Procedure Code, s. 398.

(i) Where a person pays off a debt of another, he has an action on *negotia gesta*. Although, in this kind of action, the gestor is normally required to show that he acted with the intent of serving the interests of the debtor, the scope of the action is extended on equitable grounds to a gestor who intervened in bad faith and with intention of furthering his own interests, but in such a case his claim against the debtor is limited to the extent to which the debtor has been enriched.

Subsequent to the execution of a mortgage of two lands Delgahawatta and Kitulgahawatta, the 2nd defendant, who was the mortgagor, gifted the land Kitulgahawatta to the 1st defendant. The gift contained a covenant that the land was free from all encumbrances. Thereafter the 1st defendant, without any mandate from the 2nd defendant, paid the mortgagee the sum of Rs. 6,000 which was due to the mortgagee from the 2nd defendant and sued the 2nd defendant for the recovery of that sum. There was no doubt that when Delgahawatta, which was worth about Rs. 25,000, became free of the mortgage, the 2nd defendant was enriched to an amount more than Rs. 6,000.

Held, that, on payment of the mortgage debt, the 1st defendant had a claim to be indemnified by the 2nd defendant to the extent to which the latter had been enriched by the action of the 1st defendant. The claim, however, was to an unliquidated sum of money.

(ii) Where a cause of action has accrued to A to claim an unliquidated sum of money from B, and A has notified to B about such claim, a subsequent alienation of immovable property by B, with the intention of rendering himself

insolvent as against the time when the decree in favour of A would come into being, can be impeached by A in a Paulian action when, on obtaining a decree in his favour, he seizes the property in question in execution of the decree.

Mukthar v. Ismail (64 N. L. R. 2. 3) distinguished.

(iii) Where a Paulian action (or claim in reconvention) is based on a fraudulent alienation directed against *future* creditors, the right of action of a person who claims to belong to the class of persons against whom that fraudulent alienation is directed arises only when he becomes a creditor. In the case of such an action, a cause of action arises and time begins to run under the Prescription Ordinance only on the date when the plaintiff becomes a creditor.

(iv) A Paulian action is an action which is directed against the person to whom property was fraudulently alienated by the debtor of the plaintiff. Although, in such action, the debtor is made a party, failure to make substitution in place of the debtor, if the debtor dies pending the action, does not have the effect of rendering void the continuation of the action against the transferee and the judgment and the decree entered in the action, unless the heirs of the debtor had participated in the fraud or were enriched thereby.

APPEAL from a judgment of the District Court, Gampaha.

On 26th January 1950, the 2nd defendant mortgaged two lands Delgahawatte and Kitulgahawatta to a Provident Association. On 26th July 1953 he gifted Kitulgahawatta to the 1st defendant who, thereafter, sold that land and with the proceeds of the sale paid off the sum of Rs. 6,000 due to the mortgagee from the 2nd defendant. When the mortgage bond was thus discharged and the lands Delgahawatta and Kitulgahawatta were both free of the mortgage, the 1st defendant wrote to the 2nd defendant on 23rd March 1955 demanding payment of a sum of Rs. 6,000. After the 2nd defendant denied liability by letter dated 19th April 1955, the 1st defendant sued him in D. C. Gampaha 5103/M for the recovery of the sum of Rs. 6,000 and obtained decree in his favour on 19th July 1957. When he seized the land Delgahawatta in execution of the decree, the 1st and 2nd plaintiffs claimed the land on deeds P1 of 6th April 1955, P2 of 27th May 1955 and P4 of 10th May 1956. Their claims were dismissed. Thereupon, on 6th May 1968, the plaintiffs filed the present action praying that they be declared entitled to the land Delgahawatta. The 1st defendant pleaded that the deeds P1, P2 and P4 in favour of the plaintiff were executed by the 2nd defendant in fraud of creditors and asked that they be declared void so far as it was necessary for execution of the decree in his favour. The 2nd defendant, who was added as a party, died pending the action and no substitution was effected in his place.

The District Judge gave judgment in favour of the 1st defendant. In the present appeal by the plaintiff, it was contended on their behalf—

"(*a*) that the 1st defendant was not a creditor and had no debt owing to him from the 2nd defendant until the entering of the decree on 19th July 1955 in D. C. Gampaha 5103/M and therefore the alienation on deeds P1, P2 and P4, which were executed prior to that date, could not be said to have been made in fraud of a creditor.

(*b*) that in any event, the 1st defendant's claim to have the said deeds declared void was barred by prescription.

(*c*) that the 2nd defendant having died and no substitution having been made in his place, the action was thereafter not properly constituted and was bad and the judgment and the decree entered therein were void."

H. W. Jayewardene, Q.C. with *E. S. Amerasinghe* and *S. S. Basnayake*, for plaintiffs-appellants.

C. Ranganathan Q.C., with *W. D. Gunasekera*, for 1st defendant-respondent.

Cur. adv. vult.

July 7, 1968. SAMERAWICKRAME, J.—

This is an appeal from the judgment and decree of the District Court of Gampaha declaring the property described in the schedule to the plaint liable to be sold in execution to satisfy the claim of the 1st defendant and setting aside certain deeds executed by the 2nd defendant in favour of the plaintiffs, so far as it is necessary to do so for the recovery of the amount due to the 1st defendant.

The matter arose in the following way. Don Thegis Atukorale, who was the 2nd defendant in the action, owned two lands called Delgahawatta and Kitulgahawatta. On mortgage bond No. 3991 of January 26, 1950 (1D6) he mortgaged the said two lands to the Public Service Mutual Provident Association, as security for the repayment of a sum of Rs. 11,000/- and interest thereon. Thereafter, by deed of gift No. 760 of July 26, 1953, he gifted the land Kitulgahawatta to his son, the 1st defendant. In December 1954, the 1st defendant sold the land Kitulgahawatta and out of the proceeds of sale, he paid off the amount due to the Public Service Mutual Provident Association and settled the amount due on the bond 3991 (1D6). By reason of the said payment, the mortgage bond was discharged and the lands Dolgahawatta and Kitulgahawatta were both free of mortgage created by the said bond. The 1st defendant, thereafter, by letter dated March 23, 1955, made demand of the 2nd defendant for a sum of Rs. 6,000/-, said to be the appropriate amount due in respect of the discharge of the mortgage of Delgahawatta. By letter dated April 19, 1955, a reply was made to the letter of demand, denying liability to pay the amount claimed. The 1st defendant thereupon filed action in D. C. Gampaha 5103/M against the 2nd defendant for the recovery of the sum of Rs. 6,000/-. Answer was filed in that case but the defendant did not appear and decree nisi was entered on April 1, 1957 and was made absolute on July 19, 1957. The 1st defendant applied for execution of the decree and seized the land Delgahawatta. The 1st and 2nd plaintiffs,

thereupon, claimed the said land on deeds P1 of April 6, 1955, P2 of May 27, 1955 and P4 of May 10, 1956. Their claims were dismissed. Thereafter, on May 6, 1958, the plaintiffs filed the present action praying that they be declared entitled to the said land Delgahawatta and that that land be released from seizure. The 1st defendant filed answer pleading that the deeds in favour of the plaintiff had been executed in fraud of creditors and asked that they be declared void so far as it is necessary for execution of the decree in his favour. He had the transferor on the said deeds, namely, the 2nd defendant, added as a party. The 2nd defendant died during the course of the proceedings and no substitution was effected in his place.

The District Judge gave judgment in favour of the 1st defendant and the plaintiffs have filed this appeal against the said judgment. On behalf of the plaintiff-appellants, Mr. H. W. Jayewardene, Q.C. raised three matters :—

(*a*) that 1st defendant was not a creditor and had no debt owing to him until the entering of the decree absolute in D. C. Gampaha 5103/M of July 19, 1957 and therefore the alienation on deeds P1, P2 and P4, which were executed prior to that date, could not be said to have been made in fraud of a creditor.

(*b*) that in any event, the 1st defendant's claim to have the said deeds declared void is barred by prescription.

(*c*) that the 2nd defendant having died and no substitution having been made in his place, the action was thereafter not properly constituted and was bad and the judgment and the decree entered therein are void.

In support of the first matter that he raised, Mr. Jayewardene contended that the only debtor under the mortgage bond in favour of the Public Service Mutual Provident Association was the 2nd defendant and the transfer by him to the 1st defendant of one of the lands which was subject to the mortgage did not make the latter a co-debtor of the 2nd defendant. Accordingly, the payment of the mortgage debt by the 1st defendant did not give him a claim to contribution from the 2nd defendant as from a co-debtor. He further submitted that on payment of the debt of the 2nd defendant, the 1st defendant did not become entitled to any claim against the 2nd defendant in the absence of a cession of action by the creditor or a novation. Accordingly, there was no debt or liability at all on the part of the 2nd defendant to the 1st defendant. He further submitted that in any event, if there was any liability, it was liability in respect of an unliquidated amount and that, therefore, the 1st defendant did not become a creditor, nor was there any debt due to him, until decree was entered in his favour. The alienations upon P1, P2 and P4 which were made before the date of the decree and, therefore, before the 1st defendant became creditor, would not be alienations made in fraud of a creditor.

Mr. Ranganathan, appearing for the 1st defendant-respondent, contended that on payment by the 1st defendant of the mortgage debt, there arose a liability on the part of the 2nd defendant and that the latter had made the alienation in favour of the plaintiffs fraudulently to avoid having to make payment on the decree that would be entered against him and that, in the circumstances, the Paulian remedy was available. He did not seek to support the finding of the District Judge that the 1st defendant-respondent was entitled to contribution. He submitted that he was entitled to show, on the facts proved at the trial, that there was in law a liability on the part of the 2nd defendant to indemnify the 1st defendant to the extent to which he had been enriched. In view of the terms of issue No. 10, I think that Mr. Ranganathan's last submission is right.

The deed of gift, 1D1, executed by the 2nd defendant in favour of the 1st defendant, contained a covenant that the land gifted was free from all encumbrances. It was, therefore, the understanding and arrangement between the parties that the 2nd defendant should be responsible for the settlement of the mortgage debt. Further, as a question of fact, the learned Judge, on a consideration of the evidence, including that relating to the values of the properties gifted by the 2nd defendant to his different children, rejected the suggestion that the gift in favour of the 1st defendant was made upon the undertaking that he would pay off the mortgage debt. When the 1st defendant paid and discharged the mortgage debt, he made payment of a debt that was due and owing by the 2nd defendant to the Public Service Mutual Provident Association. The 2nd defendant was also enriched by the discharge of the mortgage because thereby his land Delgahawatta was freed of the mortgage. In the plaint in the present action, the plaintiffs value the subject matter of the action at Rs. 7,000/-. The learned Judge considered that a reasonable assessment of the value of Delgahawatta is Rs. 25,000/-. There can be no doubt that by Delgahawatta being freed of the mortgage, the 2nd defendant was enriched to an amount more than Rs. 6,000/-, which was claimed by the 1st defendant. The enrichment is so obvious that it is hardly necessary to cite authority, but in a case where a person had paid a sum of money and obtained the release of a land from seizure and sale for non-payment of estate duty, Manicavasagar, J., while holding that he could not claim compensation for improvements because payment of a mortgage was not an improvement and the person was not a *bona-fide* possessor, nevertheless, held that he was entitled to be paid back the money he claimed on the principle that no one should be enriched at the expense of another—*vide* 67 N. L. R. at 527.

Where a person pays off a debt of another, he has an action on *negotia gesta*. Digest May 3, 1943 is as follows :—

> "Whereas you paid money on behalf of a man who gave you no *mandatum* to do so, you have a good action on *negotia gesta*, as the result of the payment was that the debtor was released from his creditor :—unless indeed the debtor had some interest in the payment not being made."

The position appears to be that if a person pays off a debt of a third party with the knowledge and consent or acquiescence of that party, he acts upon a mandate from him and is thereby entitled to recover the money paid as upon a contract. If he does so without such knowledge, or consent, the debtor acts by way of a *negotiorum gestio*. The learned District Judge has made a finding that the 1st defendant acted with the consent of the 2nd defendant, but that finding is not based on satisfactory grounds and I prefer to decide the matter apart from that finding. Moreover, the evidentiary material, from which the learned Judge inferred consent, does not, in view of other relevant material, establish a mandate nor did the 1st defendant rely on any mandate.

A difficulty in the way of the 1st defendant claiming to have acted by way of *negotiorum gestio* and maintaining the action called *actio negotiorum contraria* is that in the normal case, a gestor is required to show that he acted with the intent of serving the interests of the debtor. The 1st defendant appears to have paid off the mortgage debt because his own land Kitulgahawatta was subject to the mortgage. It would appear that he acted in his own interests. The scope of the action, however, was extended on equitable grounds to a gestor who intervened in bad faith and with the intention of furthering his own interests, but in such a case, his claim was limited to the extent to which the debtor had been enriched. Digest 3-5-6-3 states, "We may add that if a man has managed my affair with no thought of me, but for the sake of gain to himself, then as we are told by Labeo, he managed his own affair rather than mine (and, no doubt, a man who intervenes with a predatory object aims at his own profit, and not at my advantage) : but none the less, indeed all the more, will such a one too be liable to the action on *negotia gesta*. Should he himself have gone to any expense in connexion with my affairs, he will have a right of action against me, not to the extent to which he is out of pocket, seeing that he meddled in my business without authority, but to the extent to which I am enriched " (Monro's translation).

Voet 3-5-9 permitted the action in accordance with the principle stated in the above passage from the Digest. Voet (Gane's Translation, Vol. 1, p. 563) is :—" But it ought not to be passed over that he who interfered in another's affairs with a view to his own advantage does not recover in the action to a greater extent than in so far as he whose affairs that are has been enriched by his so doing ".

There is also a passage from Rubin " Unauthorised Administration (*Negotiorum Gestio*) in South Africa (1958) p. 42 cited at 82 South African Law Journal, p. 469 which is in point :—

> " The high-water mark in the process of extending the scope of the *actio contraria* on equitable grounds is reached by the granting of the action (though only to the extent of the dominus's enrichment) to a gestor who intervened in bad faith and with the intention of furthering his own interests."

I am, therefore, of the view that on payment of the mortgage debt, the 1st defendant had a claim to be indemnified by the 2nd defendant to the extent to which the latter had been enriched by the action of the 1st defendant. The claim, however, was to an unliquidated sum of money.

The next mattor for consideration is whether a claim for an unliquidated sum of money is a debt and a person ontitled to such a claim is a creditor for the purposo of a Paulian action. The term " debt " is in my view, not applicable to a claim for an unliquidated sum of money. It has been defined to be " a sum payable in respect of a liquidated money demand recoverable by action "—*vide* Stroud's Judicial Dictionary (3rd Ed., p. 733). Again, in decisions of this Court, it has been held that a person who has a claim for an unliquidated sum of money cannot maintain a Paulian action until his claim has been reduced to a decree. In *Fernando v. Fernando* [1], the Paulian remedy was denied to a person, who at the time of the action, had only an unliquidated claim for damages, upon which he had filed action, but had not obtained a decree. In the case of *Fernando v. Fernando* [2], Keuneman, J. carefully examined the grounds given by the two Judges, who decided the earlier case, and stated, " At least one point can be regarded as settled in that case, namely, that where the claim is for unliquidated damages, the person who has such a claim cannot maintain a Paulian action, until his claim has been reduced into the form of a decree ". In *Punchi Appuhamy v. Hewapedige Sedera* [3], the action was held to lie because plaintiff had obtained a decree on his claim on unliquidated damages at the time he instituted the Paulian action.

The 1st defendant, therefore, became a creditor entitled to institute a Paulian action only on the entering of the decree in D. C. Gampaha 5103/M filed by him against the 2nd defendant. Decree in that action was entered on July 19, 1957.

Subject to an exception, a person may maintain a Paulian action only in respect of an alienation made by the debtor after he became a creditor and after a debt was owed to him. The grounds for this requirement and the exception are stated by Planiol—Elementaire Traite de Droit Civil, Vol. II, Pt. 1, para 316, at page 186 (Louisiana State Law Institute Translation). " In the normal state of affairs, the creditor who attacks the act of his debtor should prove that his credit arose prior to the act attacked. In fact, if he has not dealt with the debtor until afterwards, what can he complain of ? He could not have counted on property which had already left the hands of his debtor ; he has dealt with a man already impoverished and has taken him as such ". Later, in the same paragraph, he says, " Those who become creditors after the fraudulent act have therefore no right to attack it. They have such a right, however, if the fraud was directed against them. Examples of this are seen in practice : certain debtors commit fraud against their future creditors in arranging in advance the manner of withdrawing the pledge

[1] *(1924) 26 N. L. R. 292.* [2] *(1940) 42 N. L. R. 12.*

[3] *(1947) 48 N. L. R. 130.*

in which creditors will count in dealing with them ". In the report of case of *Silva v. Mack* [1] there appears the judgment of Berwick D.J. in which he considers the position exhaustively. Two passages from his judgment may be referred to. At page 135 he states, " 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 same person ". After considering the rules of the different systems of law, he states at page 138, " 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 ". Bertram C.J. in a dictum in 26 N. L. R. 295 expressly adopted the view of Mr. Berwick. He said " 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 fradudulent design is declared to be within scope of this remedy. This view is expounded by Mr. Berwick in the judgment above referred to ". The case of *Fernando v. Fernando* [2], is in point. In holding that the Paulian action lay at the instance of a person who had obtained a decree for damages, in respect of his alienation that had been made fraudulently after the cause of action *ex delicto* had arisen, Keuneman, J. said, " In this case, it has been established that the alienation was made by the second defendant fraudulently and with the express intention of hindering and defeating the claim of the first defendant. It is clear that prior to the date of alienation, a cause of action *ex delicto* had accrued to the first defendant, and that the first defendant had notified to the second defendant, his intention of bringing an action for damages. I hold that the second defendant knew that, in consequence of the alienation, the first defendant would not be able to realise his decree, in other words, that he acted so that when the decree came into being, there would be no assets or insufficient assets to levy execution on. In fact the second defendant was deliberately rendering himself insolvent as against the time that the decree would come into being. In the result, the claim of the first defendant has been defeated ".

[1] *(1875) 1 N. L. R. 131.*

[2] *(1940) 42 N. L.R. p 12.*

The learned District Judge has held that the deeds P1, P2 and P4 have been executed for no consideration ; that alienations were made fraudulently by the transferor for the purpose of placing his assets beyond the reach of his creditor and that they left him with no property from which the claim of the 1st defendant could be satisfied. On the findings of the learned District Judge, the 2nd defendant had of set intent or design made the alienations with the object of defeating the right of the 1st defendant on any decree which he might obtain upon the unliquidated claim that had arisen in his favour and which had been notified by the 1st defendant by the letter of demand dated 23rd March, 1955. On these facts, having regard to the authorities cited above, the 1st defendant was entitled, on obtaining decree, to maintain a Paulian action to impeach those alienations. I, therefore, hold that a right to the Paulian remedy had arisen in favour of the 1st defendant to have the deeds P1, P2 and P4 set aside.

I should refer to the decision of the Divisional Bench in *Mukthar v. Ismail*[1]. In that case, it was held that a claim for unliquidated damages is not a debt and a person entitled to such a claim is not a creditor for the purpose of a Paulian action until he has obtained a decree. It was further held that the plaintiff in that case, who had obtained a decree for damages, was not entitled to maintain a Paulian action to set aside the alienations made prior to his obtaining the decree. Basnayake, C.J. who delivered the judgment in that case, referred to the first part of the passage from Planiol which I have set out above, but did not refer to or consider the second part of that passage (also set out above) which deals with the exceptions in the case of alienations directed against future creditors. It appears to me that he did not refer to or consider it because, on the facts of that case, the question of the exception did not arise. The property that was alienated did not belong to the debtor at the time the claim for unliquidated damages arose and, therefore, it was not property which the creditor could have counted upon at the time of the transaction which resulted in damages. Apart from that fact, it also appeared that the property had been both purchased and sold after the action for damages had been instituted and before decree was entered. I am, accordingly, of the view, that the decision in the Divisional Bench case dealt with a set of facts which were both peculiar and far different to that in the present case and that that decision is, therefore, not of assistance in deciding this matter.

Mr. Jayewardene also contended that the 1st defendant's claim to relief was barred by prescription. He submitted that the fraudulent alienations constituted the 1st defendant's cause of action and that as the claim in reconvention in which he sought the Paulian remedy was

[1] *(1962) 64 N. L. R. 293.*

made more than three years after the alienation, the said claim was barred by prescription. The relevant Section is Section 10 of the Prescription Ordinance. Section 10 provides "No action shall be maintainable in respect of any cause of action not hereinbefore expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued ".

The term " cause of action " has more than one meaning. What is perhaps the primary meaning is to be found in a definition made in *Cooke (Cook) v. Gill* [1]. Brett J. said, " cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse ". The term has also a narrower meaning of ' the act on the part of the defendant which gives the plaintiff his cause of complaint ', vide *Jackson v. Spittal* [2]. By statutory definition this narrower meaning is given to " cause of action " when it appears in the Civil Procedure Code. The term as it appears in the Prescription Ordinance has not been defined. In the vast majority of cases, it is the act on the part of the defendant which gives rise to a right of action in the plaintiff and in such cases the cause of action would arise, and time would begin to run under the Prescription Ordinance, on the doing of the said act by the defendant. But there are cases where right of action does not arise immediately upon the doing of the act by the defendant, but only on the happening of some subsequent event and in such cases, a cause of action would arise and time would begin to run under the Prescription Ordinance, only at the happening of such subsequent event. The most common example is a tort where the right of action does not arise on an act being done by the defendant, bacause damage is an essential element of the liability, vide *Nelson v. Municipal Council, Colombo* [3]. In such cases, cause of action would arise and time would begin to run under the Prescription Ordinance, not necessarily on the doing of the act by the defendant, but on damage being suffered if this takes place later. In the case of the tort of malicious prosecution, the act done by the defendant is the institution of criminal proceedings maliciously and without reasonable or probable cause, but a person is not entitled to institute an action for malicious prosecution, until there has been a termination of the criminal proceedings in his favour. Accordingly, cause of action would arise and time would begin to run under the Prescription Ordinance in respect of an action for malicious prosecution only on the termination of the criminal proceedings. In the case of a Paulian action brought on a fraudulent alienation directed against future creditors, the right of action of a person who claims to belong to the class of persons against whom

[1] *(1873) Law Reports C. P. 107, at page 116.* [2] *Law Reports 5 C. P. 542.*
[3] *(1909) 13 N. L. R. 43.*

that fraudulent alienation is directed only arises when he becomes a creditor. I think, therefore, that in the case of such an action, a cause of action arises and time begins to run under the Prescription Ordinance only on the date the plaintiff becomes a creditor. This is such an action and I hold accordingly that prescription began to run only when the 1st defendant became a creditor and that was on the entering of the decree in D. C. Gampaha 5103/M. This took place on 19th July, 1957, and the claim in reconvention in the present action seeking the Paulian remedy was filed on 25th July, 1958. Accordingly, that claim is not barred by prescription.

The last matter urged on behalf of the appellants was that by reason of the failure to make substitution in place of the 2nd defendant who died pending the action, the continuation of the action was bad and the judgment and the decree entered therein were void. A Paulian action is one that is directed against the transferee because the object of the action is to have his property declared liable to be sold for the purpose of satisfying a debt due to the creditor. Planiol—Elementaire Traite de Droit Civil, Vol. 11, p. 189, para 320 (Louisiana State Law Institute Translation) states, "A Paulian action is always exercised against a third party, that is, against the person who has benefited from the fraudulent act". In a very early case, in which it was held that an alienation could be set aside on the ground of fraud only in proceedings where a transferor was a party, Layard C.J. gave the reason why it was necessary that he should be a party. In *Dissanayake v. Baban* [1] he states "I think before any person can be held to have committed fraud on his creditors that he is entitled to be heard in defence of himself". It has also been laid down that a Paulian action does not lie against the heirs of the debtor unless they have participated in the fraud or have been enriched thereby—vide Voet 42-8-5. It has not been suggested that any of the children of the 2nd defendant participated in the fraud. The children who were benefited by it are parties being the 1st and 2nd plaintiffs. The statement in Voet would seem to indicate that if a debtor dies before the institution of a Paulian action and his heirs have neither participated in the fraud nor benefited thereby, the action may be instituted against the transferee alone. The Civil Procedure Code contemplates the substitution of a legal representative of the deceased Defendant where there are more defendants than one only in the case where the right to sue does not survive against the surviving defendant alone—vide Section 398. It appears to me that in a Paulian action, on the death of the transferor-defendant, the right to sue survives against the other defendant alone. I am, therefore, inclined to take the view that the failure to make substitution in place of the 2nd defendant who died pending the action had not the effect of rendering the action bad. The matter may be tested in another way.

[1] *(1903) 1 Matara Cases 211 at p. 216.*

The legal representative, who can be substituted in place of the deceased defendant, is either his executor or administrator or his heirs who have alienated the inheritance. The character of the persons who may be substituted shows that the substitution is made so that they may defend the action in the interests of the estate of the decased. The decree that could be entered on 1st defendant's claim in reconvention in this action would not adversely affect the estate of the deceased, for it would only declare the property of the plaintiffs liable to be sold in execution for the satisfaction of the 1st defendant's decree. In point of fact, it is more advantageous to the estate of the deceased defendant that the claim in reconvention should succeed rather than that it should fail, for if the claim in reconvention is successful, the writ of the 1st defendant will be satisfied out of the property of the plaintiffs-appellants, but if the claim in reconvention is unsuccessful, it is possible that the 1st defendant may reissue writ and seek to levy execution out of the assets belonging to the estate of the deceased defendant even if they are not capable of fully satisfying his claim. I, accordingly, hold that the failure to make substitution in place of the deceased 2nd defendant did not make the continuation of the action bad and did not render the judgment and the decree void.

I am, therefore, of the view that the order made by the learned District Judge is correct, and I accordingly dismiss the appeal with costs.

TENNEKOON, J.—I agree.

Appeal dismissed.