APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Batty.

1900. August 27.

BHAGWANT APPAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* KEDARI KASHINATH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Fraudulent conveyance—Sale by debtor in order to defeat an execution—Intent to defeat or delay creditors—Transfer of Property Act (IV of 1882), *Sec.* 53—13 *Eliz., Cap.* 5, *and* 27 *Eliz., Cap.* 4.

Bhagwant filed a suit against Ganpati, the manager of a Hindu undivided family, to recover a sum of money due to him, and on the same day obtained an order for attachment before judgment of certain property belonging to the defendant and his family. Before the attachment was actually effected, the property in question and other property was sold to Kedari (defendant No. 1). The deed of conveyance was executed on the day the suit was filed, and the order for attachment was made and notice of the order for attachment was given both to the vendor and the purchaser before the deed was registered, but before the attachment was actually effected.

Subsequently the plaintiff obtained a money decree in his suit and then filed this suit against the vendor and purchaser, praying for a declaration that the conveyance was fraudulent and void, and that the property was liable to attachment in execution of his decree.

The lower Courts dismissed the suit, holding that the sale to the vendee was valid although made with the object of defeating the anticipated attachment of the plaintiff. On appeal to the High Court,

Held, (confirming the decree) that clause 2 of section 53 of the Transfer of Property Act (IV of 1882) did not apply, as it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration.

Held, also, that although the object of the transfer was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditors so as to render clause 1 of section 53 applicable. Such intent would probably be inferred if there was such an inadequacy of consideration as to bring the case within clause 1 of section 53.

Clause 3 of the section only comes into operation when the facts justify the application of clause 1 or clause 2.

SECOND appeal from the decision of E. M. Pratt, District Judge of Sholápur-Bijápur, confirming the decree of Ráo Sáheb N. B. Brahme, Second Class Subordinate Judge at Bársi.

* Second Appeal, No. 688 of 1899.

One Martand and his sons Ganpati and Shivalinga were members of a joint Hindu family possessed of certain ancestral property.

Ganpati was the manager of the family and, as such, he had borrowed money for family purposes from the plaintiff Bhagwant Appaji.

On the 11th November, 1896, plaintiff filed a suit against Ganpati, as manager of the family, to recover the debt due to him, and on the same day he obtained an order for attachment before judgment of the property in dispute; but before the attachment was actually effected, Martand sold this property along with other property to Kedari Kashinath (defendant No. 1), transferring to him the interests of the whole family in the said property.

On the same day the sale-deed was tendered for registration; but the plaintiff gave intimation of the Court's order for attachment before judgment, both to the vendor and purchaser, in the Sub-Registrar's office.

The property was attached, whereupon the purchaser Kedari applied for and obtained an order for its removal.

The plaintiff obtained a money decree against Ganpati in the above mentioned suit, and subsequently filed the present suit praying for a declaration that the sale of the property by Martand to Kedari was fraudulent and colourable, intended to defeat the execution of his decree and, therefore, void, and that the property conveyed by the sale-deed was liable to attachment and sale in execution of his decree against Ganpati.

The Court of first instance held that, though the object of the sale was to defeat an anticipated execution, the sale was effected for a valuable consideration, and was valid, and that the property was not liable to attachment and sale in execution of plaintiff's decree.

This decision was upheld in appeal by the District Court.

The plaintiff preferred a second appeal to the High Court.

S. A. S. Setlur (with *B. N. Bajekar*), for appellant (plaintiff).

P. M. Mehta (with *M. B. Chaubal*), for respondents.

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BATTY, J.:—In this case the plaintiff sued to obtain a declaration that certain property was liable to attachment in execution of a money decree obtained by him against defendant No. 3 (Martand) and No. 4 (Shivlinga), and to have cancelled as fraudulent and colourable a document purporting to convey that property to defendant No. 1.

The document was admittedly executed on the day the order for attachment was made and registered, after notice had been given at the Registrar's office both to the transferor and the transferee that the order for attachment had been made, but before the attachment had been actually effected. The attachment of which the plaintiff gave notice was admittedly an attachment before judgment, and the suit in which it was granted was instituted on the same day as that on which that attachment was ordered and on which the document in question was executed. The property was released from attachment on the application of the transferee.

Both the lower Courts found that execution and registration of the document in question were duly proved, and that the transaction had not been shown to be without consideration; that, therefore, although the object of the sale was admittedly to defeat the anticipated execution, the property was not liable to attachment in execution of the decree.

The plaintiff in this appeal alleges not only that the document in question was void and colourable, but also that the defendant No. 1 was not a *boná-fide* purchaser for value, and that as notice of the impending attachment had been given before the registration of that document, the sale was a fraud on the plaintiff and voidable at his option under section 53 of the Transfer of Property Act, 1882, as made with the object of defeating execution. It is further contended that the burden of proving consideration for that document should have been placed on the defendant; that there was no money paid; that the entry in the books of the defendant refer to cash as paid, and that although prior debts are alleged as consideration, there was no adjustment of those debts before the execution of the document; that the object of the sale being to defeat execution of the plaintiff's decree,

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the onus of proving that the transaction was entered into in good faith should have been placed on the defendant No. 1, the transferee, as held in the case of *Narayana Pattar* v. *Viraraghavan Pattar*(1), and that under the ruling in *Natha* v. *Dhunbaiji*(2), where all the cases were fully considered, it is necessary that a finding should be obtained on the question whether the transaction was *bonâ fide*. In the case of *Ishan Chunder Das* v. *Bishu Sirdar*(3) the facts, it was contended, were different; for there no notice had been given of the intention of the transferor to defeat the execution of a decree as in the present instance, there was only knowledge of an impending execution, and the lower Courts had not found that there was such an intention. And if there is doubt as to the finding of the lower Courts on the facts, a remand should, it is urged, be directed in order to obtain a distinct decision on the point.

For the respondent, on the other hand, it is contended that the onus was throughout on the plaintiff, and the lower Courts having clearly found that there was nothing to show want of consideration for the transfer, the fact that it was entered into with knowledge or notice of intended process, or even with intent to defeat such process, was immaterial. The cases of *Rajan Harji* v. *Ardeshir Hormusji*(4) and *Joshua* v. *Alliance Bank of Simla*(5) were cited in support of these propositions, and it was urged further that the issue now raised was a new one which could not be entertained for the first time on second appeal.

There can be no room for doubt that an erroneous finding of fact, however gross or inexcusable the error may seem to be, could afford no ground for entertaining this appeal unless it be shown either that there was error in procedure or that there was no evidence before the lower Court proper for its consideration in support of that finding, though, on the other hand, inferences drawn from the facts found might be called in question in second appeal—*Lachmeswar Singh* v. *Manowar Hossein*(6), *Ramgopal* v

(1) (1899) 23 Mad., 184, at p. 189.
(2) (1898) 23 Bom., 1.
(3) (1897) 24 Cal., 825.
(4) (1879) 4 Bom., 70.
(5) (1894) 22 Cal., 185.
(6) (1891) L. R., 19 I. A., 48; S. C., 19 Cal., 253.

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Shamskhaton[1], which follows the ruling in *Durga Chowdhrani* v. *Jewahir Singh*[2] and *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani*[3] and *Pertab Chunder Ghose* v. *Mohendranath Purkait*[4]. In this case, therefore, unless the lower Courts have misplaced the onus, or were bound on the facts as found to conclude that the transfer in question was voidable under section 53 of the Transfer of Property Act, 1882, at the option of the plaintiff, this Court cannot now interfere.

The appellant's pleader has not been able to cite any authorities in support of the contention that the onus of proving payment of consideration was upon the defendant. The plaintiff as suing to establish his right to attach the property as that of his judgment-debtor must prove that right—*Shekh Adam* v. *Jamnadas*[5]. More especially as the order passed on the application for the removal of the attachment was against him—*Govind Atmaram* v. *Santai*[12]; *Tillakchand Hindumal* v. *Jitamal Sudaram*[7]; *Rajan Harji* v. *Ardeshir Hormusji*[8]; see also *Hale* v. *Metropolitan Saloon Omnibus Company*[9]. The ruling in the case of *Narayana Pattar* v. *Viraraghavan Pattar*[10], relied upon for the appellant, does not touch the question as to the burden of proving absence of consideration, but merely lays down that where a document secures debts not due, the effect is, quoad such fictitious debts, to defeat or delay creditors, and that it would lie upon the parties who wish to take advantage of such a document to show that there was no such intention and that the document does nothing further than create a preference in favour of certain creditors over the rest. In other words, the ruling does not relieve a judgment-creditor impugning such a document from the burden of proving that it was without consideration, but only shifts the onus as to good faith when it has been shown that part of the ostensible consideration is illusory.

(1) (1892) L. R., 19 I. A., 228; S. C., 20 Cal., 93.
(2) (1890) L. R. 17 I. A. 122; S. C., 18 Cal., 23.
(3) (1887) L. R., 14 I. A., 101; S. C., 14 Cal., 740.
(4) (1889) L. R., 16 I. A., 233; S. C., 17 Cal., 291.
(5) (1891) 17 Bom., 94 at p. 99.
(6) (1887) 12 Bom., 270.
(7) (1873) 10 B. H. C. R., 206.
(8) (1879) 4 Bom., 70.
(9) (1859) 28 L. J., Ch. 777.
(10) (1899) 23 Mad., 184 at p. 189.

Practically this proposition is merely a statement of what is contained in the second paragraph of section 53 of the Transfer of Property Act, 1882. It is of course open to a party to sustain the onus cast upon him, by the facts which he may elicit by cross-examination of the other party's witnesses—*Moti Kahanji* v. *Dipchand Virchand*(1). But it does not appear in this case that the plaintiff in the Court of first instance questioned the existence of the debts which were alleged to have formed the consideration for the document which he impugned. The form of the issues implied that the onus was upon him: he apparently accepted it without demur, and even had it been misplaced, it is doubtful whether the irregularity could be regarded as having prejudiced him on the merits—*Dinkar Ballal* v. *Hari Shridhar*(2) which follows *Moti Kahanji* v. *Dipchand Virchand*(1) and *Makund* v. *Bahori Lal*(3). It seems, then, that the decision of the lower Courts, that want of consideration was not proved, is not open to challenge now on second appeal.

It remains to consider whether on the further finding of fact arrived at by the lower Appellate Court, namely, that the object of the sale was to defeat an anticipated execution, that sale was voidable at the option of the plaintiff, the attaching creditor, under the provisions of section 53 of the Transfer of Property Act, 1882. There does not appear to be absolute unanimity of judicial decision on the questions whether the section under discussion alters the pre-existing law governing such cases. Whitley Stokes in his note on the section(4) says that it replaces the statutes of Elizabeth (13 Eliz., cap. 5, and 27 Eliz., cap. 4) repealed by the Act. In *Ishan Chunder Das* v. *Bishu Sirdar*(5), however, it was said that though the Statute 13 Eliz., cap. 5, forms in part the groundwork of section 53, "its language is different, and the Indian law goes much further than the English statute." It has been urged that the decision in *Natha* v. *Dhunbaiji*(6) also deals with the section as having added somewhat to the law established by earlier authorities. But that case was one concerning settlements, the consideration for which was held to be grossly inadequate if not

(1) (1868) 5 B. H. C. R., 81, A. C. J.
(2) (1889) 14 Bom., 206, at p. 210.
(3) (1881) 3 All., 824.
(4) Anglo-Indian Codes, Vol. I, p. 767.
(5) (1897) 24 Cal., 825 at p. 828.
(6) (1898) 23 Bom., 1.

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wholly illusory. So that the decision would appear to be in harmony with the precedents established under the statutes repealed by the Indian Act. In the case of *Joshua* v. *Alliance Bank of Simla*(1) it was distinctly held that section 53 does not alter in any respect the law such as it existed in this country at the time the Act was passed, and that if any such change in the law were intended, the terms of section 53 are curiously inapt for expressing any such intention. That judgment, no doubt, dealt specially with a case falling under 27 Eliz., cap. 4, but the language quoted clearly indicates that in the opinion of the Court no change *whatever* was intended by the Legislature.

Now although the question whether the statutes 13 Eliz., cap. 5, and 27 Eliz., cap. 4, extended to India, seems to have remained more or less *in dubio*, in *H. H. Azim Unnissa Begum* v. *Dale*(2), Stat. 13 Eliz., cap. 5, was regarded as so extending,—and as between British subjects other than Hindus or Mahomedans, 27 Eliz., cap. 4, was also so considered on implications from *Freeman* v. *Fairlie*(3) and *Mayor of Lyons* v. *East India Co.*(4), and its applicability seems to have been taken for granted in *Judah* v. *Mirza Abdool Kurreem*(5). In *Joshua* v. *Alliance Bank of Simla*(6) it was considered that these two statutes were no doubt in force in this country at any rate on the Original Side of the Court, *i. e.*, in the Presidency towns. West, J., in *Rangilbhai Kalyandas* v. *Vinayak Vishnu*(7), however, undoubtingly asserts that 'the English Statute 13 Eliz., cap. 5, has not, as such, any operation in the mofussil in India, but adds that it embodies principles of general application on account of their essential equity.' The Privy Council in the case cited by him, *Abdul Hye* v. *Mir Mohammed Mozaffar Hossein*(8), more guardedly observe that "whether or not the statute (13 Eliz., cap. 5) (which may not extend to, or operate in, the mofussil in India) is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given

(1) (1894) 22 Cal., 185 at p. 202.
(2) (1868) 6 Mad. H. C. R., 455 at p. 471.
(3) (1828) 1 M. I. A., 305. *Vide* foot-note.
(4) (1836) 1 M. I. A., 175.
(5) (1874) 22 Cal. W. R., 60 C. R.
(6) (1894) 22 Cal., 185 at p. 206.
(7) (1887) 11 Bom., 666 at p. 675.
(8) (1883) L. R., 11 I. A., 10; S. C. 10 Cal., 616 at p. 624.

effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience." It must, therefore, be taken that the statutes in question, and the authorities based thereon, may be accepted as unmistakeable guides to the law in India on the subject prior to the enactment of the Transfer of Property Act, 1882. And inasmuch according to accepted canons of construction(1) the presumption "is that the Legislature does not intend to make any alteration in the law, beyond what it explicitly declares, either in express terms or by unmistakeable implication," it remains to consider whether there is any thing in the wording of section 53 which is irreconcileable with the principles embodied in the statutes of Elizabeth, as interpreted by authoritative judicial decision.

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Shephard and Brown in their commentary on the section remark "that the section merely reproduces certain of the propositions contained in these statutes" and add (somewhat superciliously) that "no attempt is made except in the second clause to represent the result of three centuries of decisions on the statutes." On a review of the leading authorities, however, the words of the section, when carefully studied, appear to have embodied all the main principles recognised as established by the result of the long current of accepted decisions under the statutes in question.

It seems hardly necessary to note that in certain respects section 53 does not even purport to go so far as the statutes of Elizabeth. For while 13 Eliz., cap. 5, applies to transfers both of realty and personalty, section 53 of the Indian Act applies only to *immoveable* property. With the provisions in the section corresponding with those of 27 Eliz., cap. 4, which relates to realty only, we are not in this case concerned. For that statute was for the protection of purchasers only, which term, though it includes of course mortgagees, could not include a mere holder of a money decree who is not a purchaser within the meaning of the statute—*Beavan* v. *Earl of Oxford*(2) and *Benham* v. *Keane*(3). No

(1) Maxwell on Interpretation of Statutes, C. iii, Sec. 1, p. 96, 2nd Ed.

(2) (1856) 6 DeG. M. and G., 507 at p. 532.

(3) (1861) 31 L. J. Ch., 129 at p. 132.

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charge on specific property having been acquired by the decree-holder, he could no more avail himself of 27 Eliz., cap. 4., than he could of the doctrine of *lis pendens*. Nor have the Bankruptcy-laws and cases decided thereunder any application in the present instance. Section 53 makes no reference to the principles governing such cases, and it will be necessary to refer to them only for the purpose of indicating the lines of demarcation distinguishing them from cases the circumst nces of which give no occasion for the consideration of quest ns of mere preference to the prejudice of creditors generally.

It will be convenient first to nsider what are the nett results of the decisions and then to discuss the question how far the section is in harmony with those results. Among the earliest of the reported Indian cases on this branch of law, are those of *V. Sankarappa* v. *Kamayya*(1) and *Tillakchand Hindumal* v. *Jitamal Sudaram*(2) which cites the first quoted case. Both of these cases follow the English law and rule that 'where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution'—*V. Sankarappa* v. *Kamayya*(3)—'but that if the transaction be only a colourable transaction, not intended to confer upon the vendee or mortgagee any beneficial interest in the property, but simply to substitute such vendee or mortgagee as a *nominal* owner in lieu of the real owner (the judgment-debtor) with the object of screening the property from execution, the vendee or mortgagee is a mere trustee, and the judgment-creditor is entitled to attach the property'—*Tillakchand Hindumal* v. *Jitamal Sudaram*(4). In both of these cases, consideration was passed and they, therefore, correspond with cases contemplated in the first para. of section 53 as controlled by the third para. of that section.

In *Tillakchand* v. *Jitamal*(5) the consideration consisted of time-barred debts, still unsatisfied, which, as was pointed out, would under clause (3) of section 25 of the Indian Contract

(1) (1866) 3 M. H. C. R., 231.
(2) (1873) 10 Bom. H. C. R., 206.
(3) (1866) 3 M. H. C. R., 235.
(4) (1873) 10 B. H. C. R., 210.
(5) (18) 10 B. H. C. R., 215.

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Act, 1872, suffice to support a contract. The judgments in these cases cite *Wood* v. *Dixie*[1], *Darvill* v. *Terry*[2] and *Hale* v. *The Metropolitan Saloon Omnibus Co.*[3]. In *Wood* v. *Dixie* Lord Denman, C. J., observed: "We were clearly safe in going so far as to say that a *mere* intent to defeat a particular creditor does not constitute a fraud," and the result of the decision as given in the head-note is that a sale of property for good consideration is not either at common law or under Statute 13 Eliz., cap. 5, fraudulent and void merely because it is made with the intention to defeat the expected execution of a judgment-creditor. In *Darvill* v. *Terry* a bill of sale by way of mortgage had been given of household goods as security for a debt of £130 then due, and further advance of £160 then to be made, but not paid till two days later, and there was evidence that before the mortgage the transferee "was aware that an execution might be expected against the transferor's goods." The goods remained in possession of the transferor and were so when seized under a writ of *fi: fa.* The Judge *left to the jury* the question whether the transaction was *bonâ fide* or a mere sham, and inasmuch as the mortgage even if made with the intention of defeating an execution creditor was not necessarily void, the direction was held sufficient.

In *Hale* v. *The Metropolitan Omnibus Co.*, a tradesman expecting the execution of a writ effected a sale of the whole of his furniture and stock in trade, but it was held it was not a sufficient ground for vitiating a sale that it was made to defeat an expected execution,—the onus, said Kindersley, V. C., being on the company (the execution-creditor). In that case "the purchaser and the judgment-debtor were strangers previously" and it was said "suspicion though a ground for most minute and searching investigation is no ground for decision." A still stronger case is *Alton* v. *Harrison*[4]. There a trader, a debtor in expectation of a writ, executed a deed of mortgage vesting substantially *all* his property in trustees for the benefit of five of his creditors, though it provided that he was to remain in possession for six months, but not so as to let in any execution

(1) (1845) 7 Q. B. (Ad. & Ellis), 892.
(2) (1861) 30 L. J. Exch., 355.
(3) (1859) 28 L. J. Ch., 777.
(4) (1869) L. R., 4 Ch., 622.

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or sequestration. The deed was held not void, as it was honestly for the purpose of giving security to the five creditors, and was not a contrivance resorted to for his own personal benefit. The document, though stipulating for his continued possession, was regarded as a mortgage not to become absolute for six months. The Court observed that it makes no difference in regard to the statute of Elizabeth, whether the debtor deals with the whole or only part of his property (though this would be most material under the Bankruptcy laws—*Ex parte Saffery*; *Ex parte Winder, In re King*; *Ex parte Gibson, Smith* v. *Pilgrim*; *Ex parte Tempest*—*vide infra* p. 223). And it was added that "if the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth." This was followed in *Ex parte Games*[1], where a bill of sale of *all* the existing *and after-acquired* property by a mortgage to secure an existing debt and future advances was held not void under 13 Eliz., cap. 5. It was observed that the transaction, however, might have been impeached as an act of bankruptcy, but that no creditor availed himself of it. This last decision is followed in the case of *Ramasamia Pillai* v. *Adinarayana Pillai*[2], which is a decision under section 53 of the Transfer of Property Act, 1882, indicating that the section is in accord with English decisions under 13 Elizabeth. In the case of *Golden* v. *Gillam*: *in re Johnson*[3] a deed of gift by the debtor of all her property in trust for her daughters in consideration of their covenant to pay her debts incurred up to date, was found an honestly intended family arrangement not executed with the object of defeating creditors, and valid under Statute 13 Eliz., cap. 5. It was said (p. 395) "the purpose of the parties was honest and fair and (p. 393) "the effect on a deed of this sort of its being for good consideration is very great" as it "shows at once that there *may be purposes in the transaction other than the defeating or delaying* of creditors and it was for valuable consideration" (p. 397). This case has been followed in *Gopal* v. *Bank of Madras*[4] as answering the question whether a document was void by reason of its having been executed by the transferor in contemplation of his approaching failure

(1) (1879) 12 Ch. D., 314.
(2) (1897) 20 Mad., 465.
(3) (1881) 20 Ch. Div., 389.
(4) (1892) 16 Mad., 397.

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and insolvency, by the proposition that "the mere fraudulent intent of the vendor cannot avoid the deed if the purchasers were free from that fraud." The case of *Gopal* v. *Bank of Madras* last cited also followed the decision in *Motilal* v. *Utam*,(1) where the transferor executed on the eve of bankruptcy a sale-deed *of all* the property of the firm for an antecedent debt and fresh advance, and the sale-deed was assailed as void by the holder of a decree against the transferor. *Golden* v. *Gillam* was followed as there were no circumstance showing that the transferee in entering into the transaction was a party to any scheme by the debtor to delay the creditors, although having regard to the circumstance of its having been entered into on the eve of the failure of the firm, it might be regarded as a transaction by which the transferor obtained an unfair preference over the general body of creditors. The case of *Rám Burun Singh* v. *Jankee Sahoo*(2), which is followed in *Ishan Chunder Das* v. *Bishu Sirdar* (3), shows that, if the transferee "gave full *boná fide* consideration for his conveyance, then he obtained a good title from the owner notwithstanding that he knew the fact that a judgment-creditor was seeking to get process of execution against the property." Vide *Ram Burun Singh* v. *Jankee Sahoo*(4). And in *Ishan Chunder Das* v. *Bishu Sirdar* the knowledge of an impending execution was held insufficient to vitiate the transfer. These last cited rulings show that the transferee may succeed even though he knows that the effect of his transaction will be to defeat a particular creditor or even the general body of creditors. But the decided cases seem to go even further than that, and show that though a creditor may consciously and even intentionally obtain a preference over other creditors, by a transfer from a judgment-debtor, the transaction cannot on that ground alone be impeached by any one creditor, if it is for good consideration and retains no benefit for the debtor. The reason for this is not far to seek. For while on the one hand there is no particular reason why a creditor, who by superior activity, has obtained satisfaction or security, should disgorge in favour of a less vigilant creditor, who may possibly have recourse to other

(1) (1888) 13 Bom., 434.
(2) (1874) 22 Cal. W R., 473.
(3) (1897) 24 Cal., 825.
(4) (1874) 22 W. R., 474.

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assets or the general liability of the debtor, neither on the other hand, even supposing all assets to have been swallowed up in the transfer impugned, is there any reason why the unsatisfied creditor should obtain the exclusive benefit of recovering from the alienated property when there may be others equally entitled.

It has, therefore, repeatedly been held that a mere preference over one particular creditor is not a ground for vitiating a transfer, but that such a transaction can only be impeached by the whole body of creditors or by an assignee who represents them. Thus in *Ex parte Cooper*[1] it was laid down that when the result of recovering property alleged to have been delivered by fraudulent preference, would not be for the benefit of the creditors at large, but of an individual creditor, neither the trustee nor the individual creditor in his name can take proceedings. And Mellish, L.J., observed: "The doctrine of fraudulent preference is for the purposes of distribution among the creditors generally, not for the benefit of a single creditor." And *In re Marsden*[2] shows that when there was no act of bankruptcy, the debtor's allowing judgment to go against him by default in a *bonâ fide* suit for a real debt, in that case due to his own father-in-law, no other creditor being in a position to take bankruptcy proceedings, there was no fraudulent preference, the corollary being apparently that unless and until a transaction comes within the purview of the Bankruptcy laws, preference to a *bonâ fide* creditor does not suffice to vitiate it.

On the other hand, in *Dadapa* v. *Vishnudas* [3], where the question arose as to whether a debtor was entitled to be declared an insolvent under section 351, clause (*c*) of the Code of Civil Procedure, the mortgage for past debts alone of nearly the whole of his property to one of his creditors, aware of his embarrassment, during the pendency of a suit by another creditor, was held to be fraudulent, and to give no title to the particular creditor as against the assignees *who represent the creditors generally*—*Dadapa* v. *Vishnudas* [4]. In *Burjorji Dorabji Patel* v. *Dhunbai* [5] it

(1) (1875) L. R., 10 Ch., 510.
(2) (1883) 25 Ch. D., 311.
(3) (1887) 12 Bom., 424.
(4) (1887) 12 Bom., at p. 426.
(5) (1891) 16 Bom., 1.

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seems to have been held that the settlement giving a preference could not be set aside as fraudulent and void as against creditors in that suit, because it was not filed on behalf and substantially for the benefit of *all* the creditors—*Burjorji Dorabji Patel* v. *Dhunbai* (1), or by the trustee in bankruptcy or insolvency who represents and acts on behalf of all the creditors. So, as already observed, it was on the same ground that the Court refused to regard as void a sale, otherwise unimpeachable, in the case of *Motilal Ravichand* v. *Utam Jagjivandas*(2), holding that though, as executed on the eve of bankruptcy, it might be regarded as one by which the plaintiff obtained an undue preference, and as such impeached in a suit framed for the purpose by a person representing the body of creditors, it could not be so impeached in a "suit the object of which was to determine whether an *individual* creditor was entitled to attach and sell the property in execution of his own judgment-debt." Indeed, in the case *Curtis* v. *Price*(3) the settlement, which the marginal note shows was voluntary(4), was declared void only as against creditors, "but," Lord Erskine observed, "only to the extent, in which it may be *necessary* to deal with the estate for their satisfaction, it is as if it had never been made. To every other purpose it is good. Satisfy the creditors; and the settlement stands. The Court frequently is obliged to sell the whole estate; though the whole proceeds are not necessarily applicable." A single creditor without any charge upon the specific property alienated, has no better right than the *bonâ fide* alienee to insist on its application to the satisfaction of his claims; it may be in excess of what is necessary, there may be other assets and others having claims on them: and unless the proceedings are of such a nature that the whole estate and all the assets and liabilities can be ascertained and so dealt with as to secure a settlement of all claims by rateable and equal distribution, there is no reason why one particular portion of property should be taken from a creditor who has paid for it, merely in order to render it available for another individual who has no charge on that specific property at all. This seems to have been indicated in the passage already quoted

(1) (1891) 16 Bom., at p. 19.
(2) (1888) 13 Bom., 434.
(3) (1806) 12 Vesey Jun., 89.
(4) *Vide* p. 103.

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from *Wood* v. *Dixie* in which Lord Denman said that "a mere intent to defeat a particular creditor does not constitute a fraud," and that case is quoted in *Suba Bibi* v. *Balgobind Das*(1), where it is accordingly stated that "a genuine sale made for good and valid consideration to one creditor, *even if effected to delay and defeat another*, apart, of course, from cases in which either insolvency or bankruptcy is involved, is not void."

This second group of cases, therefore, leaves no room for doubt that a transaction entered into for good consideration has never, either under the statutes of Elizabeth or under section 53 of the Transfer of Property Act, 1882, been held void or voidable merely on the ground that it would, or even that it must, have the effect of defeating a particular creditor, notwithstanding that the transferee might know that it would have that effect. The obvious and known effect of the advantage to be gained and even the intention to profit by it are insufficient to prove an intention to defraud. An intention to gain an advantage for one's self may incidentally involve loss to another. But it is not identical with an intention to cause such loss. More must be proved. The intention must be not only to get beforehand as against one individual claim, but so to affect the general assets of the debtor as to leave them inadequate for his liabilities as a whole, which otherwise may be satisfied from the remaining property. The defeat of creditors must be the "*dominant* motive"—*Rangilbhai Kalyandas* v. *Vinayak Vishnu*(2), and this is so even under the Bankruptcy laws (32 & 33 Vict., cap. 71, sec. 92). In *Ex parte Hill*; *In re Bird*(3) which quotes Bacon, C.J., in *Ex parte Blackburn*(4) to the effect that it must be made clearly "apparent that the debtor's *sole motive* was to prefer the creditor paid to the other creditors," Bowen, L.J., held that at least "the real, effectual, substantial view" must be that of giving a preference—*Ex parte Hill*; *In re Bird* (5). The preference must be the essential object, not merely an incidental or even an inevitable result. So in *Thompson* v. *Webster*(6) a settlement of real estate by a son in embarrassed circumstances and subsequently insolvent, having

(1) (1886) 8 All., 178 at p. 180.
(2) (1887) 11 Bom., 666 at p. 679.
(3) (1883) 23 Ch. Div., 695.
(4) (1871) L. R., 12 Eq. 358 at p. 364.
(5) (1883) 23 Ch. Div., at p. 701.
(6) (1859) 28 L. J., Ch., 700.

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been made on his obtaining a loan from his mother who had advanced money to him before, was not void under 13 Eliz., cap. 5, proof being wanting as to *intent* to delay, hinder or defraud creditors. And in *Holmes* v. *Penney*[1] a settlement by a debtor of his life-interests upon trust to his own brother, to pay certain small debts and apply the income towards the maintenance of the debtor and family, as the trustees should think proper, there being perfect *bonâ fides* on their part, was held to have sufficient consideration to support it against other creditors not named therein, and to contain no such trust for the benefit of the debtor as would render any part of the stock so settled liable to the demands of his creditors. In *Middleton* v. *Pollock*[2] an insolvent debtor, who died without being adjudicated a bankrupt, left a memorandum, dated a fortnight before his death, declaring himself a trustee of lease-holds mortgaged to him and of a bill endorsed to secure the repayment of sums placed in his hands for investment, and as he retained no benefit for himself, the Bankruptcy laws not applying, the gift was held *bonâ fide* under 13 Eliz., cap. 5. In the case of a voluntary settlement with intent to defraud or defeat prior, or as in the case of *Spirett* v. *Willows*[3] as explained in *Freeman* v. *Pope*[4] express proof of intent to defraud even subsequent creditors, the fact that sufficient money was retained at the time to pay debts then owing, would not take the case out of 13 Eliz., cap 5. But *Freeman* v. *Pope* shows that "an actual and express intent is necessary to be proved in such cases as *Holmes* v. *Penney*, where instruments sought to be set aside were founded on valuable consideration." [5] It is only "where the settlement is voluntary, the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the *voluntary* settlement, sufficient available assets are not left for the payment of the settlor's debts, *then* the law infers intent, and it would be the duty of a Judge, in leaving the case to the jury, to tell the jury that they must presume the intent." In voluntary settlements then the intent may be presumed from the effect; in transfers for consideration it must be proved and

(1) (1857) 26 L. J., Ch., 179.

(2) (1876) 2 Ch. D., 104.

(3) (1865) 34 L. J., Ch., 365.

(4) (1870) L. R., 5 Ch., 538.

(5) *Vide* Sir M. Giffard's judgment in *Freeman* v. *Pope*, p. 544.

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must appear to have been the dominant motive. Such appears to be the result of his third group of cases above cited.

But neither the decided cases nor the provisions of section 53 of the Transfer of Property Act, 1882, though they treat consideration as raising a presumption against such intent to defraud, defeat or delay, ignore the possibility of the *co-existence* of such intention with the actual payment of consideration by the transferee. The following group of cases indicate the nature of the evidence and circumstances necessary to establish such an intention when consideration has moved from the alienee.

The leading authority is of course that known as *Twyne's case*[1]. There the debtor Pierce was actually indebted to Twyne in £400, and pending the writ in an action by another creditor for £200 made in secret a general deed of gift of all his goods and chattels to Twyne in satisfaction of his debt, but continued in possession of the goods and some of them he sold, shore the sheep and marked them with his own mark. The "marks and signs of fraud" were (1) the gift is general without exception of his apparel or anything of necessity: *quod dolosus versatur in generalibus.* (2) The donor remained in possession and used them as his own and by *reason* thereof he traded and trafficked with others and deceived them. (3) It was made in secret: *et dona clandestina sunt semper suspiciosa.* (4) It was made pending the writ. (5) There was a *trust* between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud. (6) The deed contains that the gift was made honestly, truly and *bonâ fide, et clausulæ inconsuet semper inducunt suspicionem.* It is rather the cumulative effect of all these indications of fraud than each single one of them taken alone that would now be regarded as conclusive. For, as to the first, we now have *Golden* v. *Gilam*; *Alton* v. *Harrison*; and *Ex parte Games.* As to the second, *Alton* v. *Harrison.* The fourth is not by itself sufficient (*vide* first group of cases cited above) and the sixth is manifestly ground of suspicion only. The modern cases attach the most weight to the third and fifth of this

(1) Smith's Lea. Ca., Vol. I, p. 1, (6th Ed.); Coke, p. 80.

famous list of the marks and signs of fraud, that is to say, to the secrecy of the transaction and the retention of a benefit for the grantor, the deed being "a mere cloak". Thus in the case of *Cracknall* v. *Janson*(1), where for money advanced in 1864 a mortgage was executed in 1871, without pressure for repayment and without previous agreement, and the mortgage-deed was in favour of the debtor's own step-daughter(2) and was not communicated to her till 1874, but given over by the debtor to his wife to keep, it was held void under 27 Eliz., cap. 4, as against a subsequent mortgage of 1871, notwithstanding the existence of consideration. So in *Clarke* v. *Palmer*,(3) where Palmer mortgaged the estate to Sir J. Milbanke in 1862, but was allowed to retain possession of the title-deeds and thereafter in 1863 and 1868 mortgaged to two successive mortgagees, the second of whom assumed the first to be the only incumbrancer, as Milbanke allowed Palmer to deal with the estate as if unencumbered, he was postponed. This case was not dealt with as one falling under either statute of Elizabeth; but the judgment discusses *Perry-Herrick* v. *Attwood*,(4) which was held within 27 Eliz., cap. 4, the Lord Chancellor remarking, "If the intention of the parties to the transaction was that the Misses Attwood should have the security, but that notwithstanding Attwood showed the title deeds that he might be enabled thereby to deal with the estate in favour of third parties, I am strongly disposed to think that the security comes within the statute: it certainly comes within the principle." At any rate a subsequent incumbrancer acting after due inquiry is to be protected against loss in such circumstances—*Clarke* v. *Palmer*(5). *Bulmer* v. *Hunter*(6) is another instance of the intention, notwithstanding consideration, rendering a transaction void. In that instance there was an antenuptial settlement of all the debtor's property eleven days, followed by marriage six days, before notice of the creditor's action; it left the debtor utterly insolvent and wholly without assets and there was "no doubt that the wife must have known all about the transaction before the marriage, and her solicitor must

(1) (1879) 11 Ch. D., 1.
(2) *Vide* p. 22.
(3) (1882) 21 Ch. D., 124.
(4) (1857) 2 DeG. and J., 21.
(5) (1882) 21 Ch. D., 124.
(6) (1869) L. R., 8 Eq., 46.

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also have had notice of all the facts" (1). This was held void as against creditors under the then Bankruptcy law (section 70 of 24 and 25 Vict., cap. 134). But as it practically enabled the debtor to retain the whole benefit(2) and as "throughout the proceedings there was but one object, which was to commit fraud, it affords an illustration that privity to the fraud, even by a purchaser for value (marriage being good consideration), constitutes an essential distinction which is wanting in such a case as *Campion* v. *Cotton*(3), where it was held "clear that the fact of his (the settlor's) being indebted at the time and of her (the wife) knowing, would not affect the validity of the settlement." It may be noted as supporting this corollary, that in the case of *Ware* v. *Gardner*(4) a post-nuptial settlement (therefore without consideration of marriage), by a trader solvent at the time, assigning *all* his effects future and present upon trust to pay the income to his wife for her separate use was held void under 13 Eliz., cap. 5, though he did not become bankrupt till five years later and had meanwhile satisfied such mortgages as at date of the settlement existed on the property comprised therein. He had continued trading, and the Court observed: "The question is whether by this deed he could have had any other intent than to delay and hinder his creditors, and I am clearly of opinion that he did execute it with that intent, and that this post-nuptial settlement is within the very words of the statute of 13 Eliz., cap. 5." On the other hand, in *Price* v. *Jenkins*(5) a settlement by a widower on remarriage, assigning *leasehold* properties upon trust for himself for life and after his death for his son, was held not to be within the statute of 13 Eliz., cap. 5, "for the assignment of leasehold property to which liability is attached is, in itself, a conveyance for valuable consideration." James, L.J., observed of the responsibility of the trustees for payment of rent, "It might be such a responsibility that a lessee might be actually willing to pay money to get rid of it. If there is *any* valuable consideration for a settlement, the quantum is of no consequence under the statute of Elizabeth."

(1) Pp. 50, 51.

(2) *Vide* p. 51.

(3) (1810) 17 Ves. Jun., 263 at p. 272.

(4) (1869) L. R., 7 Eq. 317 at p. 321.

(5) (1877) 5 Ch. D., 619.

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These cases show that where there is no consideration the intent may be presumed, but that the intent to defraud, defeat, delay or hinder must be the sole conceivable or dominant motive, and that if there be consideration, this intent cannot be presumed but must be proved, and must be shown to have been one to which the purchaser for value was a party for the purpose of enabling the debtor to retain a benefit, and that this being proved, the fact that consideration has passed will not avail to save the transaction from any creditor impeaching it as an attempt to defraud, defeat, delay or hinder him.

Instances to the like effect are to be found among cases decided in India. *Rangilbhai Kalyandas* v. *Vinayak Vishnu*(1) is a particularly suitable illustration, as West, J., began his judgment in the case by observing that had the Transfer of Property Act IV of 1882 been introduced into the Presidency of Bombay, the Court would have been spared the necessity of seeking elsewhere for the principles by which to decide the case. Section 53 of that Act, he added, "contains a note which would be directly applicable, and which presents in a compendious form the *result* which we have to reach through a somewhat laborious examination of the authorities" *vide* p. 671. Now in that case the widow of a man who had died in insolvent circumstances, conveyed to his separated brothers the whole of his property. There was consideration which as in *Tillakchand* v. *Jitamal*(2) consisted mainly of time-barred debts due by her deceased husband to the vendees. It was not, therefore, mere want of consideration that vitiated the sale. There was also a contemporaneous agreement by the vendees to settle the claims of the chief creditors of the deceased. But this undertaking had not been communicated to the creditors and was, therefore, susceptible of suppression at will. The vendor, however, did not part with possession, though she executed a note to pay a nominal rent to the vendees. The vendees as near relations had *full* knowledge of the facts (*cf. Bulwer* v. *Hunter, supra*). There was secrecy, as in *Twyne's* case. There was retention of benefit for the transferor, as in *Clarke* v. *Palmer*, *Cracknall* v. *Janson*, *Perry-Herrick* v. *Attwood* (*cf. Alton* v. *Harrison* and *Ex parte Games*). The consideration

(1) (1887) 11 Bom., 666. (2) (1873) 10 Bom., H. C. R., 206.

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was, as in *Cracknall* v. *Janson*, a stale, unenforceable, unpressed debt (contrast *Thompson* v. *Webster*). These circumstances indicate that the "dominant motive," the *causa causans*, without which it is inconceivable that the transaction would have been entered into, was simply to defeat and delay creditors which enabled the debtor to retain the whole benefit using the transfer as a *mere* cloak. A further point it is true was taken in the judgment that the alienating widow was a *quasi*-trustee for her husband's estate and was bound to apply it in equal and impartial discharge of obligations enforceable against it. But it seems to have been, not on that ground, but on the ground that the transaction, if entered into by her husband, would have been set aside, that it was held unsustainable as effected by the widow, though no doubt the argument *a fortiori* was employed. A money decree creditor cannot follow the estate of a deceased person into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir at law—*Bazayet Hossein* v. *Dooli Chund*(1). But it would seem from *Greender Chunder Ghose* v. *Mackintosh* (2) that this would not apply if it can be proved that the purchaser knew not only that there were debts of the deceased left unsatisfied and that the assets were insufficient and the heir or devisee to whom he paid the purchase-money intended to apply it otherwise than in payment of such debts. This seems to have been accepted in *Kasumunnissa Bibee* v. *Nilratna Bose*(3). However this may be with regard to the complicity of the purchaser in misapplication of the consideration money, when there is an obligation to apply the assets of a deceased person in discharge of his debts, the main ground of decision in *Rangilbhai* v. *Vinayak*, that complicity in a transaction intended as a mere cloak to enable the debtor to retain as against creditors the benefits which he proposes to transfer, renders that transaction colourable and as such voidable, even though ostensible consideration for the transaction exists, but that there the intentional complicity is not presumed but must be proved. *Rangilbhai* v. *Vinayak* was followed in *Nana Mansaram* v. *Rautmal Tarachand*(4) where

(1) (1878) 4 Cal., 402. The same case is much more fully and correctly reported and noted on at L. R., 5 I. A., 213.

(2) (1879) 4 Cal., 897 at p. 906.

(3) (1881) 8 Cal. 79 at p. 86.

(4) (1896) 22 Bom., 255.

again the ostensible consideration consisted of time-barred and unenforceable debts and where as in *Twyne's* case the property was brought without valuing it and even without inspecting it—and the entire property without reservation purported to pass, possession remaining with the vendor, and even the ostensible consideration was held to be grossly inadequate.

This fourth group of cases then demonstrates the indicia of fraud which must be established against the purchaser for value, before his purchase can be set aside as made with intent to defeat or delay the creditors of the transferor. It is unnecessary to consider here the class of cases which relate specially to the Bankruptcy laws and which, as regards transfers not purely voluntary if made by an insolvent within three months of bankruptcy, insist on pressure in case of an antecedent debt—*Smith* v. *Pilgrim*[1], *Ex-parte Saffery*[2] and *In re Gibson*[3] even in the case of a partial assignment, unless there be further advances—*Ex parte Winder*[4] and *In re King*[5]. But it may be noteworthy that the alienation of the assets in their entirety, and the spontaneous alienation for debts which have long remained unpressed, are, even apart from the Bankruptcy law, among the recognised indicia of an intent to delay creditors. For it is improbable the debtor would really wish to part with, or the purchaser would really wish to take every thing, and that where claims long dormant are suddenly revived in view of an execution, the dominant, if not the sole conceivable motive, is to make the ostensible consideration an excuse for the out-and-out withdrawal of the assets. Such circumstances, however, are not by themselves conclusive when the Bankruptcy law is not applicable (*vide Alton* v. *Harrison* and *Tillakchand* v. *Jiamal, supra*), but are only among the signs and marks of fraud, the cumulative effect of which leaves no alternative to the conclusion that the common intent of the parties was to defraud.

It now remains to consider whether the principles deduced from the foregoing cases are in unison with the provisions of

(1) (1876) 2 Ch. D., 127.
(2) (1876) 4 Ch. D., 555.
(3) (1878) 8 Ch. D., 230.
(4) (1875) 1 Ch. D., 290.
(5) (1876) 2 Ch. D., 256.

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section 53 of the Transfer of Property Act, 1882. The first paragraph of that section deals with transfers intended

(*a*) to defraud prior or subsequent transferees for consideration, co-owners and other persons having an interest, and,

(*b*) to defeat or delay the creditors of the transferor.

The first mentioned intent (*a*) comes within the purview of 27 Eliz., cap. 4, as directed against purchasers or others having already a specific interest, and need not, therefore, be discussed in connection with the present case where the transfer is impugned by a mere creditor unsecured.

The portion which relates to the intent to defeat or delay creditors is, however, like the rest of that paragraph, governed by the third and saving provision that nothing in the section shall impair the rights of any transferee in good faith and for consideration. It is also to be noted that where good faith or consideration is wanting and the intent is established, the remedy is given to the person defeated or delayed. The second paragraph provides that the intent to defeat or delay may be presumed from the *effect* if there is no consideration or only a *grossly* inadequate consideration. The result, then, appears to be as follows:—

(*a*) As good faith and consideration render the section wholly inapplicable, a bare intent to defeat or delay is not within the first paragraph of the section at all. This corresponds with the first group of cases cited above.

(*b*) The intent, in order to render a transfer voidable at the option of a single creditor, must be an intent to defeat or delay not only the creditor claiming that option, but the *creditors* of the transferor, *i. e.*, it must so impair the estate as to render it incapable for remaining assets to satisfy its general liabilities: otherwise the creditor can have recourse to other assets. It is not until this general inability of the estate is established, that any person complaining that he has been defeated or delayed can claim the option given by the section. If the untransferred assets suffice to meet all claims, a single creditor cannot prevent the transferor from dealing as he pleases with the surplus. It is open of course to the single creditor to show that though there may be a residue sufficient to satisfy his own claim, there are other rival creditors who could not all be satisfied and who may come into conflict with him. To do this, it would seem as a matter of procedure, (with which of course the section does not profess to deal), that all other creditors should have an opportunity of being joined, and indeed, if the available assets are insufficient to meet the claim even of a single creditor, there is nothing in the section which is in opposition to the doctrine that the single creditor should adopt a procedure which would give him the exclusive benefit derivable from the avoidance of the transfer. The section only provides that the transfer shall be voidable so as to render the property transferred once more part of the transferor's estate and as such liable to all claims thereon. There seems, therefore, nothing in the second group of cases cited above which is out of harmony with this part of the provisions of section 53.

(*c*) The second paragraph of the section shows that the intent may be presumed from the effect, when the consideration is either wanting altogether or is grossly inadequate. This implies that no such presumption arises from the bare effect of the transfer in any other case. This seems to be in complete accord with the Indian authorities, though it may not be so easily reconcileable with the dictum in the English case of *Price* v. *Jenkins*—that the *quantum* is of no consequence. In this connection, however, it is to be borne in mind that under the third paragraph of section 53—if there be any consideration at all, and also good faith in the purchaser, he would be unaffected even by the second paragraph, so that even inadequacy of consideration coupled with the effect of the transfer to defeat or delay creditors, would not throw the *onus* on the purchaser of showing that it was not *his* intention to contribute to that effect, provided that no want of good faith on his part appeared in the case.

(*d*) It is clear from the second paragraph, as read with the third paragraph of the section, that the presumption of intent cannot arise from the mere effect of the transfer, even though the consideration may be inconsiderable, unless the third paragraph is rendered inoperative by want of good faith in the transferee. That is to say, that the words (in the second paragraph)

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"may-be presumed" must be read as subject to the third paragraph, which prevents such presumption arising if there be any consideration at all, and no bad faith to which the purchaser is a party. The transaction may defeat or delay; the transferor may intend that it should; the transferee may know that it will; the consideration may be inadequate, and yet unless the purchaser himself has been wanting in good faith, the presumption referred to in the second paragraph does not arise. In *Joshua* v. *Alliance Bank of Simla*[1], Sale, J., whose judgment in the appeal was confirmed, intimated his opinion that the words "may be presumed to have been made with such intent as aforesaid," should be construed in accordance with the cases decided under 27 Eliz., cap. 4. If cases under 13 Eliz., cap. 5, be equally in point, it would follow that as shown in the third group of cases cited above, the purchaser must have had, as his dominant motive, the desire to co-operate with the transferor in screening the property from creditors and enabling him to use it as a mere cloak for the retention of a benefit. But other considerations may manifestly have been operative with the purchaser, even though he may have been willing to make an exceptionally good bargain for himself and thus have given inadequate consideration. He may be honestly actuated by the keenest regard to his own interest, but he is debarred from acting in the interests of the debtor. That this is the natural meaning of the section appears to follow from the use of the phrase "with intent to defeat or delay," which has manifestly a very different meaning from the phrase "knowing that he will be likely to cause defeat or delay." The word "intent," by its etymology, seems to have metaphorical allusion to archery, and implies "aim" and thus connotes not a casual or merely possible result—foreseen perhaps as a not improbable incident, but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken.

(*e*) *In cases to which the provisions* of the last paragraph of section 53 does not apply, *i. e.*, in cases where there is either no

[1] (1894) 22 Cal., 185, at p. 202.

good faith or no consideratien or where there is no good faith and the consideration is grossly inadequate, there is nothing to prevent the presumption of an intent to defeat or delay creditors arising from a transfer which has the effect of defeating or delaying creditors. This shows (i) that consideration may co-exist with intent to defeat or delay, and this is manifestly in accord with the fourth group of cases cited above; and (ii) that where *neither* consideration nor good faith exists, there can be nothing to rebut that presumption if the effect of the transfer be to defeat or delay *any* creditor, a result which is clearly indicated in the cases (such as *Tillakchand* v. *Jitamal*) treating of purely colourable transactions where the whole transfer is a mere pretence and a sham, and nothing has really passed or was intended to pass on either side.

Thus it appears that every principle of *substantive* law laid down in the cases accepted prior to the Act, is, as regards immoveable property at least, deducible from section 53 of that Act; nor is there anything to show that even in matters of procedure any new departure is inevitable. The view that the Legislature intended no alteration thus seems to be one that may safely be adopted on the authority of *Joshua* v. *Alliance Bank of Simla.* As that position was precisely challenged by the appellants in this case, it has seemed necessary to discuss the point at length in this case, although, as pointed out by the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi*[1], "the object of codifying a particular branch of law is that on any point specifically dealt with, the law should thenceforth be ascertained by interpreting the language used in that enactment, instead of, as before, searching in the authorities to discover what may be the law as laid down in prior decisions, and the language of such an enactment must receive its natural meaning, without any assumption as to its having probably been the intention to leave unaltered the law as it existed before" (see also *Bank of England* v. *Vagliano*[2] there quoted).

However, in the present instance, as already observed, judicial doubt (I. L. R., 24 Cal., 828) has been expressed as to the extent to which the provisions contained in section 53 are capable of being

(1) (1896) 23 Cal., 563. (2) (1891) Ap. Ca. 107.

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construed as embodying certain well-established principles, and it has, therefore, seemed advisable to consider how far that view is consistent with the facts. The value of certain of the cases cited, in determining the indiçia of fraud, is, moreover, not diminished by the existence of an enactment so tersely worded as section 53 of the Act, and it may safely be accepted that absence or gross inadequacy of consideration, the indifference of the purchaser as to the enforcement of any claims he may have had, or to inspection and valuation before purchase, and to the continuance of the transferee in possession or control after purchase, secrecy in making the arrangement, and the attempt to include in it all available assets, must always be considered in determining the existence of good faith. The question of *bonâ fides* is one of fact and as shown in *Darvill* v. *Terry* (*supra*) would in England be left to the jury. It is, therefore, one on which this Court cannot pronounce in second appeal; nor can an objection involving questions of disputed facts as incidental to a point of law be taken in second appeal—*Gavdappa* v. *Girmallappa* (1). The plaintiff, if he wished to challenge the good faith of the transaction notwithstanding consideration passed, should have raised the point at an earler stage. He cannot do so now. The lower Courts have found against him on the issue which he did raise as to consideration, and there is nothing in the undisputed facts to afford the basis for an inference that the dominant motive of the transferee was to serve the interests of the debtor rather than his own. The facts as they stand show that the plaintiff brought his suit and obtained his order for attachment before judgment on the same day that the transfer was arranged and completed.

The circumstances indicated that it was a race between two competing creditors who should get satisfaction first. And the winner, provided he is not guilty of foul play, is not to be disqualified merely because he runs to win. There was haste no doubt, but that is natural in such a contest. On these grounds I would reject the appeal and confirm the decree with costs.

FULTON, J.:—I concur in the very learned and exhaustive judgment of my colleague and would confirm the decree with costs.

(1) (1894) 19 Bom., 331.

On the facts found by the District Judge, which were apparently the only facts put forward by the defendants, it is impossible for us to say that the provisions of section 53 of the Transfer of Property Act apply. It was not proved that the disputed transfer was made gratuitously or for a grossly inadequate consideration: the second clause of the section is, therefore, inapplicable. It was found that the object of the transfer was to defeat an anticipated execution, but my learned colleague has given good reasons for holding that this is not equivalent to a finding that the intent was to defeat or delay "the creditors of the transferor." There may or may not have been other creditors and there may or may not have been other property available to meet their claims. From the mere intent to defeat one anticipated execution it does not necessarily follow that there was an intent to defeat or delay "the creditors," though such intent would probably be inferred if it were also found that there was an inadequacy of consideration sufficient to bring the case under clause 2 of the section. In these circumstances it seems impossible for us to say, on the findings of the District Judge, that clause 1 is applicable.

No question, then, arises under clause 3, which only comes into operation when the facts are sufficient to justify the application of clause 1 or 2.

It is unnecessary, therefore, to express any opinion whether, if the plaintiff were compelled to rely on clause 3, he would not be obliged to prove affirmatively the fact both of good faith and of consideration, or whether we could lay down as a matter of law that the recital of the receipt of consideration in the sale deed was sufficient to throw on the defendants the burden of proving want of consideration.

Decree confirmed.