30-11-70

G.P.-S.43575—1969-70—2,000

J 219 166/70

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Provincial Division)
(Appèl Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

ABRAHAM JOSEPH CORNELISSEN N.O. *Appellant,*

versus

UNIVERSAL CARAVAN SALES (PTY) LTD.) *Respondent*

Appellant's Attorney
Prokureur vir Appellant Nau e & Naude

Respondent's Attorney
Prokureur vir Respondent Rosendorff & Venter

Appellant's Advocate
Advokaat vir Appellant [illegible]

Respondent's Advocate
Advokaat vir Respondent [illegible]

Set down for hearing on
Op die rol geplaas vir verhoor op 5-3-1971

3, 4, 6, 7, 9

[illegible]

C. P. A.)

[illegible]

Posted 30-3-71 per Holmes JA:— majority judgment of Kotzé A.J.A.— appeal upheld with costs and the order of the Court *a quo* is altered to read:-

"Exception dismissed with costs. The maximum fee prescribed in rule of Court 69 is declared inapplicable."

REGISTRAR.
30.3.1971

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ABRAHAM JOSEPH CORNELISSEN N.O. Appellant

and

UNIVERSAL CARAVAN SALES (PROPRIETARY) LIMITED Respondent

CORAM: HOLMES, JANSEN, JJ.A., DIEMONT, MILLER et KOTZÉ, A.JJ.A.

HEARD: 5.3.1971. DELIVERED: 30.3.1971.

JUDGMENT

KOTZÉ, A.J.A. : -

In the Orange Free State Provincial Division Hofmeyr, J., upheld an exception to an alternative plea. This is an appeal against that decision. The appellant will be referred to as the defendant and the respondent will be referred to as the plaintiff.

The plaintiff instituted action against the defendant in his capacity as the duly appointed liquidator of Voorspoed Motors (Eiendoms) Beperk, hereinafter referred to as "the company", for an order for the return of certain

caravans/.....

caravans and ancillary equipment, hereinafter referred to as "the goods".

The alternative plea to which exception is taken assumes the correctness of certain facts pleaded by the plaintiff. It follows that these facts must likewise be accepted for present purposes. Summarised they are: -

1. On the 25th June, 1969 the plaintiff sold the goods to the company on credit it being agreed that payment would be made in equal instalments by means of three cheques handed over and dated 18th July, 2nd August and 18th August, 1969.
2. The goods were delivered to the company and are in the possession of the defendant.
3. In concluding the sale and agreeing to deliver the goods on credit the plaintiff relied on the truth of the material representation made to it, with the intention that it should be acted upon, to the effect that the plaintiff would be paid the purchase price, and that the cheques would be met.
4. But for the aforesaid representation the plaintiff would not have agreed to and would not have delivered the goods to the company.
5. The aforesaid representation was untrue to the knowledge of the company in that at the time it was made the company was financially embarrassed and was unable to pay its debts and was in insolvent circumstances and had no belief that it would be able to pay the purchase price or was recklessly indifferent as to whether it would be able to pay the purchase price or not.
6. The company was placed under a provisional winding-up order on the 12th July, 1969 and under a final winding-up

order/....

order on the 28th July, 1969, i.e. after the delivery of the goods to the company.

The claim for the return of the goods is based upon a repudiation of the sale by the plaintiff upon discovery of the fraudulent representation by the company.

The alternative plea against which exception is taken avers that, notwithstanding the fraud, ownership in the goods passed to the company on delivery and that by reason of the winding-up of the company on the ground of inability to pay its debts the plaintiff is restricted to a concurrent claim in the winding-up.

The exception upheld by the Court below is that the plea discloses no defence on the ground that in the circumstances pleaded an order for the return of the goods is justified.

The Judge a quo virtually equated the conduct of the company in the present case with theft, and considered it unlikely that the legislature could ever have intended to aid and abet an illegality of this nature. Accordingly he concluded that no provision of the Insolvency

Act or of the Companies Act deprives the plaintiff of the cause of action that he would have had but for the winding-up viz. to repudiate the sale and demand return of the goods.

This approach overlooks the juridical distinction between the case of theft where manifestly the deprived owner never intends to transfer ownership and a case like the present where positively the transferor intends to do so even though the intention is induced by fraud. See Preller and Others v. Jordaan, 1956 (1) S.A. 483 (A) at 495 - 6.

Counsel were agreed that the present appeal falls to be decided on the basis that the plaintiff and the company intended a transfer of ownership as a result of delivery and that in fact ownership of the goods did pass to the company. The issue accordingly, which arises for decision is whether the supervening winding-up of the company terminates the plaintiff's right of recovery pursuant to the repudiation of the sale.

Mr. Wentzel, who appeared for the plaintiff, contended that deception achieved by the instant species of fraud perpetrated in contemplation of insolvency warrants the recognition of a rule that property obtained as a result thereof

should, notwithstanding insolvency, be capable of vindication at the instance of the seller. He relied on the rule of Roman-Dutch law stated as follows by Van Leeuwen 4.17.3 (Kotzé translation): -

> "With respect to the ownership, the thing sold becomes the property of the purchaser only when the stipulated price is paid, even although complete delivery has already been made, so that the vendor, so long as the price has not been paid, retains his property and may legally claim back the things he has sold unless the said things were sold on credit, and the vendor has accepted the word, faith, promise, or credit of the purchaser. Without having in this case after delivery any further right of reclaim or *rei vindicatio*, even although the purchaser subsequently becomes bankrupt without having paid the promised purchase price; saving however where it can clearly be shewn that such purchaser had already contemplated this, and simply intended to deceive the vendor in his good faith, for then we must hold that the thing sold, whether the sale be on credit or for ready money, remained the property of the vendor, notwithstanding the delivery and giving of credit; for in such a case the thing is not considered to have been delivered but rather to have been obtained by fraud."

The rule as stated by Van Leeuwen, so it was argued, is as consistent with present day statutory provisions of insolvency as it was with the insolvency practice

of/.....

of the Roman-Dutch law. The exceptional right afforded to a seller in the face of the purchaser's imminent insolvency should be recognised at the present time as it was then. Reference was made to Wainwright and Co. v. Trustee Assigned Estate Mahomed, (1908) 29 N.L.R. 290 and 619, a dictum in Preston and Dixon v. Trustee of Biden, 1 H.C.G. 248 at 313, McKillop v. Zuckerman, 22 S.C. 448, Gous v. de Kock, 5 S.C. 405 and Gounder v. Saunders and Others, 1935 N.P.D. 219, as further authority in support of the above contention.

The validity of the argument advanced on behalf of the plaintiff depends upon the effect of the statutory provisions in regard to the winding-up of companies upon the Roman-Dutch law/insolvency or bankruptcy procedure. By virtue of sub-section (1) (a) of section 20 of the Insolvency Act No. 24 of 1936 as amended - applied mutatis mutandis to the winding-up of a company unable to pay its debts by section 182 of the Companies Act No. 46 of 1926 as amended - a company becomes divested of its estate on winding-up. Its estate, which then vests in the liquidator, includes all its property as at that

date/.....

date (sub-section (2) (a)). The assets comprising this all-embracing estate are applied to the costs of winding-up and the claims of creditors as nearly as possible as they would be applied under the law relating to insolvent estates (section 177 of the Companies Act). Sections 95 - 103 of the Insolvency Act as thus applied to the winding-up of companies establish an exhaustive order of preference in respect of the application of all the assets. A winding-up order -

> "crystallises the .... position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order" -

per Innes, J., in Walker v. Syfret N.O., 1911 A.D. 141 at 166.

The legislative enactment that the estate comprises all the property at the date of insolvency, the freezing of all assets and the application of the assets to the claims of all creditors on the pro rata order of preference ultimately envisaged in section 103 reveals an intention to

govern/.....

govern the entire terrain in regard to the distribution of the estate of the insolvent. It seems to follow that no room exists for a finding that the Roman-Dutch rule enunciated by <u>Van Leeuwen</u> continues to exist side by side with the statutory provisions in regard to the payment of claims.

The first <u>Wainwright case</u> at p. 290 was decided on exception on facts similar to those pleaded in the instant case. Bale, C.J., stated at p. 293 that "the plaintiff might be entitled, upon proof of the facts alleged .... to succeed". The case is not authority for the proposition that in the circumstances pleaded ownership remains with the seller. The report of the trial at p. 619 is equally indecisive inasmuch as on the facts it was not established that the subject matter of the sale was in the possession of the insolvent's trustee.

<u>Preston's case</u>, as appears from p. 312 of the judgment, concerned a cash sale and is not a helpful authority.

<u>McKillop v. Zuckerman</u> was decided on the basis that the articles in question were obtained from the

seller/.....

seller in circumstances amounting to theft by false pretences. In the words of Hopley, J., they were "practically stolen, and I cannot hold that plaintiff passed dominium in the property, to a thief".

Counsel conceded that Gous v. de Kock and Gounder v. Saunders and Others were cases of limited application. They are not in pari materia to the problem here in issue.

Counsel on both sides, in response to a request so to do, have submitted further written argument on the correctness and applicability of a view expressed by MacKeurtan in "The Law of Sale of Goods in South Africa" (third edition), page 268, that section 36 of the Insolvency Act No. 24 of 1936 -

> "lays down that save in cash sales, no seller is entitled to recover any goods delivered to the insolvent by reason only that he has failed to pay the price. This leaves unimpaired the seller's right to recover on the ground of implied fraud."

The learned author states in a foot-note that he regards the above as the "rational interpretation".

Section 36 of the Insolvency Act provides:-

> "36(1) If a person, before the sequestration of his estate, by virtue of a contract of purchase and sale

which/.....

which provided for the payment of the purchase price upon delivery of the property in question to the purchaser, received any movable property without paying the purchase price in full, the seller may, after the sequestration of the purchaser's estate, reclaim that property if within ten days after delivery thereof he has given notice in writing to the purchaser or to the trustee of the purchaser's insolvent estate or to the Master, that he reclaims the property: Provided that if the trustee disputes the seller's right to reclaim the property, the seller shall not be entitled to reclaim it, unless he institutes, within fourteen days after having received notice that the trustee so disputes his right, legal proceedings to enforce his right.

(2) For the purposes of sub-section (1) a contract of purchase and sale shall be deemed to provide for the payment of the purchase price upon delivery of the property in question to the purchaser, unless the seller has agreed that the purchase price or any part thereof shall not be claimable before or at the time of such delivery.

(3) The trustee of the purchaser's insolvent estate shall not be obliged to restore any property reclaimed by the seller in terms of sub-section (1) unless the seller refunds to him every part of the purchase price which he has already received.

(4) Except as in this section provided, a seller shall not be entitled to recover any property which he sold and delivered to a purchaser whose estate was sequestrated after the sale, only by reason of the fact that the purchaser failed to pay the purchase price.

(5) The owner of the movable property which was in the possession or custody of a person at the time of the sequestration of that person's estate, shall not be entitled to recover that property if it has, in good faith, been sold as part of the said person's

insolvent/...

insolvent estate, unless the owner has, by notice in writing, given, before the sale, to the curator bonis if one has been appointed or to the trustee of the insolvent estate, or if there is no such curator bonis or trustee, to the Master, demanded a return of the property.

(6) If any such property has been sold as part of the insolvent estate, the former owner of that property may recover from the trustee, before the confirmation of any trustee's account in the estate in terms of section one hundred and twelve, the net proceeds of the sale of that property (unless he has recovered the property itself from the purchaser), and thereupon he shall lose any right which he may have had to recover the property itself in terms of sub-section (5)."

The reason for MacKeurtan's statement that section 36 leaves the seller's right to recover on the ground of fraud unimpaired derives from his interpretation of sub-section (4) and the use of the word "only" in sub-section (4). The first three sub-sections of section 36 clearly are confined to cash sales (cf. the words "the payment of the purchase price upon delivery of the property") of movable property. Sub-sections (5) and (6) are in terms wide enough to extend to transactions other than sale. The reference to "possession or custody" in sub-section (5) is sufficiently extensive to embrace stolen articles, articles let or lent to the insolvent, articles pledged with the insolvent

and/.....

and so forth. A possible view of sub-section (4) is that it should be confined to cash sales and that it should be seen as a summarised re-statement of the preceding three sub-sections. I am doubtful whether it should be so confined and would prefer to consider its import on the instant case by supposing that the phraseology is wide enough to cover the case of a seller on credit. Proceeding on this supposition sub-section (4) may be paraphrased as follows: -

> "Except as provided in sub-sections (1), (2) and (3) no seller whatsoever shall be entitled to recover any property sold and delivered to an insolvent before the sequestration of his estate on the single ground that the insolvent has failed to pay the purchase price."

The sub-section as above paraphrased contains a recognition of the possibility that, apart from the circumstances set out in sub-sections (1), (2) and (3), a ground or grounds may exist which together with non-payment of the purchase price might entitle a seller to recover the merx. It is neither necessary nor desirable to speculate whether such recognition derives from ex abundanti cautela considerations or from considerations actually envisaged by the Legislature but not clearly expressed for reasons best known to itself. It is

sufficient/

sufficient to hold for the purposes of the appeal, as I think it should be held, that ownership in the goods having passed to the company, notwithstanding the deception practised by it, does not constitute a ground upon which the plaintiff may recover the goods. The reasons for this conclusion are the following: -

1. The obscure and uncertain phraseology of sub-section (4) constitutes unconvincing ground upon which to base a construction having the effect of placing a limitation upon the unambiguous and limitless language of section 20 of the Insolvency Act which divests the insolvent of all his property. To hold, in the absence of clear language requiring such a construction, that sub-section (4) of section 36 qualifies the provisions of section 20 may strike at the very foundation of our insolvency legislation. For -

> "the vesting of the assets in, and the sale by, the trustee is the very pivot of the whole statute" - per

Innes, C.J., in Collison's Ltd. v. Castle Wine and Brandy Co. and Others, 1907 T.S. 587 at 592.

2. Section 129(1)(b) of the Insolvency Act which provides that, subject to certain reservations, the rehabilitation of an insolvent shall have the effect of discharging all his pre-sequestration debts which did not arise out of any fraud on his part, suggests strongly that the Legislature did not overlook the case of a seller who succumbs to the fraud of a purchaser who stands on the brink of insolvency. Whilst the legislation does not extend the remedy of revindication to such a seller, it does provide a remedy more extensive than that available to other concurrent creditors. In addition to his right to claim pro rata against the assets with other concurrent creditors, the defrauded seller's right to exact the balance of the purchase price after rehabilitation - a capacity which most insolvent persons presumably strive to attain - is preserved. It follows what whilst section 129(1)(b) does not confer a preference on the defrauded seller it compensates him by placing him in a category between a preferred and a concurrent creditor.

3. Section 36 of the present Insolvency Act was preceded by section 35 of Act No. 32 of 1916. Except for certain changes

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in wording and arrangement of sub-sections there is little difference in substance between the two sections. Act No. 32 of 1916 repealed the pre-Union insolvency legislation. The precursors of section 35 of Act No. 32 of 1916 were in the Cape of Good Hope, the Orange River Colony, Natal and the South African Republic section 105 of Ordinance No. 6 of 1843, section 105 of Chapter CIV of the Law Book, section 126 of Law 47 of 1887 and section 42 of Law 13 of 1895 respectively. There is substantial similarity in the wording of the three first-mentioned provisions. I quote the Natal provision by way of example: -

> "No person, from whom any insolvent shall have purchased any property, movable or immovable, personal or real, and who shall have delivered, or caused or permitted such property to be delivered, to such insolvent, shall be entitled either to claim such property being in the sequestrated estate, or to claim to be preferred, in any way, for the price or value thereof, by reason alone that such property was sold by such person, to such insolvent, without any period having been stipulated, until the expiration of which period the price should not be payable, or upon any actual agreement, or tacit understanding, that such price should be paid, or payable forthwith: <u>Provided, that nothing herein contained shall be deemed or taken to alter or affect any previous law in force in this Colony, in regard to the right of a vendor to rescind any sale, and reclaim his property, on account of fraud and circumvention practised upon him by the purchaser</u>, except only in so far as the

matter/.....

matters aforesaid, hereby declared to be of themselves not sufficient to entitle any such vendor to claim again property sold and delivered, shall have been deemed to amount to, or to be conclusive evidence of, such fraud and circumvention; and provided also, that nothing herein contained shall apply to any case in which any such vendor shall, within ten days of the delivery of any property sold as aforesaid, reclaim, by notice, in writing, the possession of the said property, and proceed thereafter, without any unnecessary delay, to enforce the re-delivery of the said property by means of legal process."

(My italics)

Section 42 of Law 13 of 1895 of the South African Republic reads: -

"Hij, die aan eenen insolvent eenig goed, hetzij roerend of onroerend, personeel of reëel, heeft verkocht en geleverd of doen leveren, kan, wanneer de verkoop heeft plaats gehad, zonder dat een termijn was bepaald vóór welks expiratie de prijs niet betaalbaar zou zijn, of met een werkelijke afspraak of stilzwijgende overeenkomst dat de prijs dadelijk zou worden betaald of betaalbaar zijn, zoodanig goed uit den gesequestreerden boedel terugeischen, wanneer hij dien eisch binnen 21 dagen na aflevering van het goed schriftelijk kenbaar maakt.

Na dien tijd zal hij zoodanige reclame slechts kunnen instellen op grond van bedrog door den kooper tegen hem gepleegd.

Hij, die aan den insolvent eenig goed als bovenbedoeld op crediet heeft verkocht en geleverd zal niet gerechtigd zijn dien koop te vernietigen, of de koopsom te vorderen van den curator of anderen wettigen beheerder des boedels. De goederen aldus verkocht en geleverd zullen bij dezen blijven berusten ten profijte van den boedel."

(My italics)

The/.....

The portions italicised find no counterpart in the statute currently in force and strongly indicate an intentional sweeping away of the provisions which preserve or (in the case of the lastmentioned measure) enact a right in favour of the vendor to reclaim on the ground of fraud. The elimination of earlier provisions which reenact the common law rule is indicative of a clear legislative intention to reverse and repeal the provisions in question.

4. Section 20 of the Act significantly is not expressed to be subject to sub-section (4) of section 36. If the intention of the Legislature had been to impair the totality of the divested estate as provided for in section 20 one would expect a limitation in direct language. The circumstance that section 20 is not expressed to be subject to the other sub-sections of section 36 is insignificant as those sub-sections deal with cases where the movable property contemplated is in the possession of the insolvent but not subject to his ownership.

The decisive consideration in this appeal, in my view, is that by admission of both sides ownership passed

before winding-up - a consideration which _prima facie_ seems to exclude _Van Leeuwen's_ rule so heavily relied on by _Mr. Wentzel_. That rule in express terms is based on the consideration that where the vendor has been deceived the _merx_ remains the property of the seller - not that it reverts to the seller on insolvency. It therefore seems to follow that ownership having passed from the plaintiff its claim for the purchase price is unsecured and non-preferent and falls to be satisfied out of the free residue of the estate in the manner laid down by sections 96 to 103 of the Insolvency Act. Since the company is a juristic and not a natural person the benefit of section 129(1)(b) of the Insolvency Act will not be available to the plaintiff.

I have had the opportunity of reading the judgment of Miller, A.J.A. If sub-section (4) of section 36 deals with both cash and credit sales I agree, for the reasons stated in that judgment, that it contemplates only cases in which ownership had not passed to the insolvent.

In my view the appeal should be upheld with costs and the order of the Court a quo should be altered to read: - "Exception dismissed with costs. The maximum fee prescribed in rule of Court 69 is declared inapplicable."

KOTZE, A.J.A.

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

ABRAHAM JOSEPH CORNELISSEN N.O. .... APPELLANT

AND

UNIVERSAL CARAVAN SALES (PROPRIETARY) LTD. ... RESPONDENT

Coram : Holmes, Jansen, JJ.A., Diemont, Miller et Kotzé, A.JJ.A.

Heard: 5 March 1971. Delivered: 30 March 1971.

JUDGMENT.

Miller, A.J.A. :

The appeal falls to be considered on the footing (i) that the fraud upon which the respondent relied in its declaration, was that the company (now in liquidation), at a time when it knew that it was unable to pay its debts or was indifferent whether or not it could pay them, "represented to the plaintiff that the purchase price would be duly paid", thereby inducing the plaintiff to sell and deliver the goods to it on credit, (see the details set out in the judgment of Kotzé, A.J.A.) and, (ii) that on delivery of the goods to the

company .... /2

company, ownership therein passed from the respondent to the company. It was expressly stated to be common cause, on appeal, and it must therefore be accepted for purposes of this appeal, that at the time when the company was placed in liquidation, it was the owner of the goods in question.

In terms of section 20 of the Insolvency Act, (which is, mutatis mutandis, applicable in the case of liquidation of a company), the goods therefore formed part of the company's estate and as such vested, upon liquidation, in the appellant in his capacity as liquidator of the company. I agree with Kotzé, A.J.A., that having regard to the terms of section 20, read with later provisions in the Insolvency Act relating to the distribution of the proceeds of the assets, the whole estate, which would include the goods in question, would fall to be dealt with by the liquidator strictly in accordance with the scheme of distribution described in the Act. The respondent, then, would be a concurrent creditor in respect of the unpaid purchase price. Cancellation by the respondent of the

agreement.../

agreement of sale would not of itself divest the company or the estate of ownership or confer any special preference or security on the respondent, unless there were other provisions in the Act which brought about that result. Failing such other provisions, the Act requires the proceeds of the whole of the estate, after payment of certain costs and charges, to be distributed in accordance with the prescribed order of preference for the benefit of creditors, amongst whom the respondent would be counted.

The real problem in this case is whether section 36 (4) of the Act enables the respondent, in the circumstances outlined in the judgment of Kotzé, A.J.A., successfully to claim the return of the goods, ownership of which he had transferred to the company prior to its liquidation, pursuant to a sale on credit, the purchase price remaining unpaid at the date of liquidation.

I agree with Holmes, J.A., that the word

"only" in sub-section (4) cannot be treated <u>pro non scripto</u> or be assumed to have been incorporated in the sub-section <u>per incuriam</u>, and that it must therefore play its part in the interpretation of the sub-section and in assessing the impact, if any, of section 36 (4) on the apparently comprehensive inclusion, by section 20, of all the property of the insolvent in the estate which is to vest in the trustee (or liquidator). Of the six sub-sections of section 36, five clearly deal with property of which the insolvent was not the owner at the time of insolvency. Sub-sections (1) to (3) deal with sales "not on credit" and make provision for the reclaiming of property which, pursuant to the sale, had been delivered by the seller prior to insolvency but had not been paid for by the purchaser. Clearly, delivery in a sale not for credit does not ordinarily pass ownership until the purchase price has been paid. Sub-sections (5) and (6) deal in express terms with property which at the time of insolvency was owned by another but was in the possession or custody of the

insolvent..../

insolvent. Sub-section (4) does not in terms refer to sales for cash or sales on credit. Having regard to the three sub-sections which precede it, the indications are that it refers only to cash sales and serves as a concluding summation of the circumstances in which a seller may "reclaim" or "recover" the sold property. (It seems to me that the words "reclaim" and "recover" are used inter-changeably - see the Afrikaans "terugeis" in sub-section (1) and "terug te vorder" in sub-section (4).) I cannot accept that sub-section (4) is confined to sales on credit; neither the wording of the sub-section itself nor the context of section 36 as a whole, justifies such an inference or assumption. I am, however, prepared to assume in favour of the respondent, because of the general reference to sales in sub-section (4), that it may be interpreted to embrace any sale of goods, whether for cash or on credit. The question is whether sub-section (4), even on that assumption, is to be construed as manifesting an intention by the Legislature that even where property has passed in ownership to the insolvent prior to his insolvency, the seller may nevertheless "recover" such property after sequestration, provided that he does

not claim "only by reason of the fact that the purchaser failed to pay the purchase price". It may be observed that it would appear to be improbable that had the Legislature intended to make provision for such a notable qualification of section 20 which vests all the property of the insolvent in the trustee, it would have chosen to do so by the oblique method employed in sub-section (4). But this, of course, is no answer to the contention that that is what sub-section (4) achieves, for it is not unknown that important provisions are sometimes found in a part of a Statute where they may least have been expected to be found.

In the context in which it is used in section

36 (4), "only" is synonymous with "solely", "exclusively", "merely". What section 36 (4) says, in effect, is that a seller whose sole or exclusive ground or reason for claiming to "recover" property which he had "sold and delivered" to the insolvent prior to insolvency, is that the purchase price has not been paid, cannot succeed unless the claim is made "as in this section provided", i.e., unless the claim is made in terms of sub-sections (1) to (3). I accept that the provision that a seller may not recover property if he relies "only" (or exclusively) on a particularly specified fact, predicates that he may possibly be entitled to recover if he relies on a different fact or on the specified fact together with other facts. But this does not manifest an intention by the Legislature that the seller may claim to recover property, the ownership of which had prior to insolvency passed to the insolvent, if his cause of action is something other than mere failure by the purchaser to pay the price. It is

to......./

to be noted that the property referred to in section 36 (4) is property which the seller "sold and delivered" to a purchaser. The words "sold and delivered" do not necessarily connote that ownership in the goods has passed to the purchaser, for it is trite law that mere physical delivery of property, unaccompanied by an intention to transfer ownership, does not give the recipient dominium. It is not difficult to visualize circumstances in which a seller, even in a sale on credit, may physically deliver the res to a purchaser without intending that ownership should then be transferred; for example, quite apart from sales not on credit, and apart also from hire-purchase transactions, property may be sold on condition that although it is to be delivered to the purchaser forthwith, ownership is not to pass pending the fulfilment of a condition or the happening of an event. In such a case, notwithstanding the sale and delivery of the res, the purchaser would possess the property but not yet own it and if, insolvency intervening before payment of the price and before

fulfilment ... /8

fulfilment of the condition, the seller were to seek to recover the property, he would do so not "only by reason of the fact that the purchaser failed to pay the purchase price" but also by reason of the fact that he, the seller, was still the owner of the property, the price of which had not been paid.

It seems to me, especially when the context and the subject matter of section 36 as a whole are borne in mind, that the Legislature, in enacting sub-section (4), contemplated only cases in which ownership of the goods sold and delivered had not passed to the purchaser. Sub-section (4) would then form a consistent pattern with the remaining sub-sections of section 36, all of which visualize circumstances in which the insolvent was not the owner of the property. It may be said that if that was the purpose of the Legislature, it was unnecessary to have enacted sub-section (4) at all, for a vindicatory action would be available to the true owner of the property

without....../

without the aid of a special statutory provision. But the same might be said of sub-sections (1) to (3). The answer is, I think, that in section 36 the Legislature was not concerned to create or confer rights, but ~~merely~~ to place limitations upon the right of the owner to recover his property which at the time of the insolvency was in the possession of the insolvent pursuant to an agreement of sale. Hence the procedural provisions in sub-section (1), which show that the seller (the owner) could recover his property only in the manner laid down. And so too, in sub-section (4), the dominant purpose is to limit the right of recovery, (".....a seller shall not be entitled to recover.....") but the possibility is recognized that he may have grounds for recovery not based exclusively on non-payment of the price. If he has such grounds, the sub-section recognizes his right to recover, but always pre-supposing that the property belongs not to the insolvent but to the seller. On this view of the purpose and effect of section 36, it has no impact on section 20 ~~and~~ or

on the order of distribution defined in sections 96 to 103; nor does it create any special secubity or confer on the creditor any right of preference not provided for in those sections.

A contrary interpretation of section 36 (4) would drastically qualify the clear and comprehensive terms of section 20, which, as is pointed out by Kotzé, A.J.A., in his judgment, is the corner-stone of the scheme of the Insolvency Act. That scheme is that all property of the insolvent is included in the estate; "the hand of the law is laid upon his estate"; the trustee must utilize the property as the law directs him to do. If, in the circumstances of a case such as this, the seller is entitled to recover property which was admittedly owned by the insolvent at the time of sequestration, it is not difficult to visualize substantial denudation of an insolvent's estate by creditors who claimed the return of property which they had been induced by his representation of a fraudulent nature to sell to the insolvent on credit. As I have pointed out, the fraud relied upon in this case is that the purchaser with fraudulent intent represented to the seller that he was able to pay his debts and that the

purchase price would be duly paid. Although it would appear that an express representation to that effect was relied upon, the position would not be substantially different where not an express but implied representation was relied upon; where, in short, by his very offer to buy the goods, the purchaser might be held to have represented, by implication, that he was able to and would duly pay the price. The terms of section 135 (3) of the Insolvency Act might also provide a fruitful source for claims to return of property of the insolvent. That section renders an insolvent guilty of a criminal offence, punishable by imprisonment for a period not exceeding two years, if prior to sequestration he contracted a debt or debts exceeding stipulated amounts, without any reasonable expectation of being able to discharge such debt or debts. If section 36 (4) is construed in the manner contended for by the appellant, it would be reasonably possible that a merchant who had supplied ~~an insolvent~~ a trader who subsequently became insolvent, with virtually the whole of such trader's stock, on credit, would be entitled to the return thereof

on......./

~~debts and that the purchaser~~ on the ground that the trader, having ordered the stock at a time when he had no reasonable expectation of being able to pay for it, falsely represented, by his conduct or otherwise, that he could and would pay for it, and that, therefore, the merchant relied for return of the stock not "only" on the purchaser's failure to pay the price, but also on a fraudulent misrepresentation made by the purchaser.

I do not find it necessary to deal in this judgment with the early insolvency legislation in the several provinces or with the common law, which have been sufficiently dealt with by Kotzé, A.J.A., who points out that in enacting section 36 (4) the Legislature, while using the word "only", appears deliberately to have omitted the provisos which might be said to have protected a seller against fraud of the type now under consideration. (It could also be argued that the proviso dealing with fraud was restricted to fraud in cash sales, where admittedly ownership had not passed). His conclusions in that regard tend to support the view which I have expressed

herein .... /12

herein that the Legislature did not intend to enable a creditor such as the appellant is, to recover property of which the insolvent became and was at the time of sequestration the owner, on the ground that he relied not only on the insolvent's failure to pay the price, but also on the fact that the insolvent had falsely represented that he could and would pay the price.

For these reasons, I agree that the appeal must be allowed, with costs, and with the order proposed by Kotzé, A.J.A.

Miller, A.J.A.

Jansen, J.A. concurs.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ABRAHAM JOSEPH CORNELISSEN N.O. .... Appellant

AND

UNIVERSAL CARAVAN SALES (PROPRIETARY)

LIMITED .... Respondent

Coram: HOLMES, JANSEN, JJ.A., DIEMONT, MILLER et

KOTZé, A.JJ.A.

HEARD: 5 March 1971. Delivered: 30 March 1971.

J U D G M E N T

HOLMES, J.A.:

I respectfully beg leave to differ from the

CONCLUSION of the majority.

A buyer fraudulently induces a seller to sell to him on credit goods costing more than R2000 and to deliver the goods, by falsely representing that the price will duly be paid, intending that this misrepresentation will be acted upon; whereas the

2/... buyer

buyer well knows that he is unable to pay his debts and is in insolvent circumstances. Shortly after delivery of the goods the buyer's estate is sequestrated. The seller, on discovering the fraudulent misrepresentation, repudiates the sale. Can the defrauded unpaid seller recover the goods from the trustee of the buyer's insolvent estate, or is he restricted to the cold comfort of a dividend from a concurrent claim in the insolvency?

There can be no doubt whatever how every businessman who sells goods would answer the question. But does the Law walk so insensibly apart from mercantile concepts of justice that it answers the question differently? This depends upon an objective consideration of the terms of the Insolvency Act and any relevant common law which it does not displace.

As to the latter, it has been well recognised for a century that the Insolvency Acts in this country have not ousted the relevant common law unless the latter in inconsistent with the statute; see the Privy Council case of

3/... <u>Thurborn</u>

<u>Thurborn & Another v. Steward & Another</u>, decided in 1871, and reported in L.R. 3., P.C. 478, in relation to the 1843 Cape Insolvency Ordinance. See also <u>Scharff's Trustee v. Scharff</u>, 1915 T.P.D. 403 at 476, in which it was said, in relation to the Transvaal Insolvency Law 13 of 1895, "There are numerous authorities that the provisions of the Roman and Roman-Dutch Law as to the revocation of acts done in fraud of creditors have not been superseded by the Insolvency Law". See, too, <u>Fenhalls v. Ebrahim</u>, 1956 (4) S.A. 723 (N), in which it was held that the common law <u>Actio Pauliana</u>, for the setting aside of an alienation in fraud of creditors, is not excluded by the Insolvency Act, 24 of 1936.

In any branch of the law, and whether common or statutory, fraud is regarded as an odorous concept. The Romans described it as "any craft, deceit or contrivance employed with a view to circumvent, deceive, or ensnare another"; see Digest, 4.3.1.2., referred to by De Villiers, C.J., in <u>Tait v. Wicht & Others</u>, 7 S.C. 158 at 165. The law has

4/... consistently

consistently set its face against it. Thus a fraudulently induced sale is voidable at common law, with the remedy of rescission and damages and a personal action against the buyer for recovery of the property. In certain cases fraud vitiates consensus and renders the sale void, leaving the seller with the remedy of vindicating the property as owner. Criminal law exposes an alleged defrauder to prosecution and even renders him liable to arrest without warrant; see section 23 (b) of Act 56 of 1955.

The common law relating to insolvency also reflects an abhorrence of fraud. In the case of a fraudulently induced sale on credit, the seller is entitled to withhold delivery where the purchaser becomes insolvent between the date of sale and the date fixed for payment. That was the opinion of the French writers Pothier, Domat and Troplong, and it was approved by this Court in Ullman Bros. v. Kroonstad Produce Co., 1923 A.D. 449 at 458. Troplong bases the remedy on deception and justice. He says, as quoted by Mackeurtan on Sale, third edition, page 260 -

> "Justice demands that, when the appearances of solvency which gave

> rise to the trust of the seller is shown to have been deceptive at the time of sale, the Courts should come to the help of the party of whose good faith advantage has been taken".

After delivery, according to the common law, a defrauded unpaid seller on credit could recover the goods on the buyer's insolvency, if the buyer was contemplating bankruptcy at the time of the sale and deceived the seller. That is the very situation in the instant case. Van der Keessel, a distinguished Dutch jurist and professor of law at the University of Leyden from 1770 to 1815, puts it in a nutshell in his Select Theses, 204 (Lorenz translation) -

> "A person who, knowing himself to be insolvent, has fraudulently purchased anything from another, and has shortly after made cession to the Court, though credit may have been given him for the price, is bound to restore the thing to the seller claiming it."

6/... This

This is also the view of Van Leeuwen, 4.17.3, (Kotzé translation). He concludes by saying that "In such a case the thing is not considered to have been delivered but rather to have been obtained by fraud". In the instant case this finds an echo in the seller's protest, contained in a letter from their attorneys attached to the further particulars to the declaration, namely, "The goods were obtained from our client by fraud".

I pause here to observe that it would be doing less than justice to the robustness and flexibility of the Roman Dutch Law to suppose that the foregoing relief is granted solely by reference to legalistic theorising as to whether delivery was based on <u>justa causa</u> and whether <u>dominium</u> passed. What the common law rule does, sensibly and effectively, on the buyer's insolvency, is to come to the aid of an unpaid seller induced by the fraud of a near-bankrupt buyer to sell goods to him on credit and deliver them. That relief is at least applicable on the accepted view that delivery plus intention passes ownership, leaving a defrauded seller with the remedy of rescission and a personal right of action against the buyer for the recovery of the goods. The question in the

7/... instant

instant case is whether that right persists against the liquidator.

I am unable to assent to the proposition that the decisive consideration in the appeal is the concession by counsel that ownership passed on delivery and before the winding-up. What must first be decided by this Court is whether the Legislature in section 36 (4) of the Insolvency Act allows an unpaid seller a right of recovery of goods obtained on credit by the fraud of a buyer on the brink of insolvency. That is what the common law does. If there is such a right under section 36 (4) it does not necessarily have to exist by way of a vindication: it can, at the least, exist as a personal right for the return of the goods. The decisive consideration in the appeal is therefore the interpretation of section 36 (4). This nettle must be firmly grasped. In particular the word "only" must be interpreted and its meaning stated. Until this is done, the plaintiff's claim cannot be rejected. This task cannot be avoided. In ascertaining and stating the meaning of "only" you can take other sections (e.g. 96 et seq) into account, as well as unexcluded common law. But until you have stated such meaning, you are in no position to reject the plaintiff's claim solely by reference to the pattern of the other sections.

By way of approach, there can be no doubt but that the general pattern of the Act is to divest the insolvent of his property for the benefit of his creditors. The procedure is elaborately enunciated. Against that general background, the question is whether section 36 (4) lets in a common law exception based on the insolvent's fraud. That brings me directly to a consideration of the section. It reads as follows -

> "36 (1) If a person, before the sequestration of his estate, by virtue of a contract of purchase and sale which provided for the payment of the purchase price upon delivery of the property in question to the purchaser, received any movable property without paying the purchase price in full, the seller may, after the sequestration of the purchaser's estate, reclaim that property if within ten days after delivery thereof he has given notice in writing to the purchaser or to the trustee of the purchaser's insolvent estate or to the Master, that he reclaims the property: Provided that if the trustee disputes the seller's right to reclaim the property, the seller shall not be entitled to reclaim it, unless he institutes, within fourteen days after having received notice that the trustee so disputes his right, legal proceedings to enforce his right.
>
> (2) For the purposes of sub-section (1) a contract of purchase and sale shall be deemed to provide for the payment of the purchase price upon delivery of the property in question to the purchaser, unless the seller has agreed that the purchase price or any part thereof shall not be claimable before or at the time of such delivery.

(3) The trustee of the purchaser's insolvent estate shall not be obliged to restore any property reclaimed by the seller in terms of sub-section (1) unless the seller refunds to him every part of the purchase price which he has already received.

(4) Except as in this section provided, a seller shall not be entitled to recover any property which he sold and delivered to a purchaser whose estate was sequestrated after the sale, only by reason of the fact that the purchaser failed to pay the purchase price.

(5) The owner of the movable property which was in the possession or custody of a person at the time of the sequestration of that person's estate, shall not be entitled to recover that property if it has, in good faith, been sold as part of the said person's insolvent estate, unless the owner has, by notice in writing, given, before the sale, to the curator bonis if one has been appointed or to the trustee of the insolvent estate, or if there is no such curator bonis or trustee, to the Master, demanded a return of the property.

(6) If any such property has been sold as part of the insolvent estate, the former owner of that property may recover from the trustee, before the confirmation of any trustee's account in the estate in terms of section one hundred and twelve, the net proceeds of the sale of that property (unless he has recovered the property itself from the purchaser), and thereupon he shall lose any right which he may have had to recover the property itself in terms of sub-section (5)."

10/... The

The first three of the foregoing sub-sections deal with the situation after the buyer's insolvency where a seller has sold for cash and the buyer has received the goods without having paid the price. The sub-sections prescribe the procedure for the reclamation of the goods by the seller and their restoration by the trustee. The right to reclaim (as distinct from the procedure) accords with the common law rule that, in sales for cash, ownership does not pass on delivery unless the price has been paid. Those three sub-sections do not apply to the instant case, in which the sale was on credit.

I turn to an analysis of sub-section (4), and make the following comments.

(a) The word "only" clearly postulates the existence a right of recovery based not merely on the fact that the purchaser failed to pay the price. Hence the word "only" broadens the ambit of the sub-section: it does not restrict it.

(b) The sub-section is confined to sales for credit. I say this for the following

reasons. (i) The first three sub-sections unmistakeably deal with sales for cash. (ii) Whenever the word "the seller" appear therein (no fewer than six times) this can only relate to the seller for cash. (iii) By abrupt contrast, sub-section (4) does not purport to deal with sales for cash. (iv) It pointedly uses the expression "a seller". (v) If this sub-section was intended to continue to deal with the concept of cash sales dealt with in the previous three sub-sections, it would have persisted with the expression "the seller". (vi) The inevitable inference is that sub-section (4) is not concerned with sales for cash.

(c) The right of recovery allowed in sub-section (4) is not expressed to be confined to cases in which <u>dominium</u> in the thing sold did not pass to the buyer before insolvency. Nor is there any warrant for construing it as if it did. The preceding three sub-sections deal with that situation because, in sales for cash, ownership does not pass on delivery if the price is unpaid,

and vindication is the appropriate remedy. And we know, from (b), <u>supra</u>, that sub-section (4) is not concerned with sales for cash. We also know that in sales for credit, ownership does ordinarily pass. Furthermore, where <u>dominium</u> is still in the seller, sub-sections (1) to (3) speak of his right to "reclaim". In sub-section (4), by contrast, the right is to "recover". The point is not so much that there is a wide difference in meaning; it is that sub-section (4), which does not deal with the same subject-matter as (1) to (3), pointedly introduces a differently described right. It is true that sub-sections (5) and (6) also use the verb "recover"; but they are not expressly dealing with sales; and sub-section (6) deals with proceeds, so that "recover" is there the appropriate verb. A further reason for not confining the right of recovery in sub-section (4) to cases where the <u>dominium</u> has not passed to the buyer, is that no time limit is fixed, as it is in sub-sections (1) to (3). In the light of these factors, the correct

13/... interpretation,

interpretation, in my view, is that the right of recovery allowed in sub-section (4) covers a _jus in personam_.

(d) I do not read sub-section (4) as providing a right of recovery in hire purchase sales where the seller is still the owner. That situation is dealt with by section 84 of the Act. And in cases not falling specifically thereunder, sub-sections (5) and (6) of section 36 would be available. Sub-section (4), on the other hand, applies to credit sales where ownership has passed to the buyer.

(e) Once it is seen that sub-section (4) is confined to sales on credit, there is in my view no room for interpreting the sub-section as meaning that a seller, whose only reason for seeking to recover is the fact that he has not been paid, cannot succeed unless the claim is made "as in this section provided" i.e. under sub-sections (1) to (3). The reason is that the latter provide a procedure peculiar to sales for cash. You cannot recover property in a credit sale by reference to sub-sections dealing with sales for cash. The two are as different as chalk from cheese: in the first, ownership did not pass, in the second it did.

In the result, the meaning and purpose of sub-section (4) seems to me plain. It is as stated in Mackeurtan on Sale, third edition, page 268, (and in all previous editions) namely, "The section quoted lays down that, save in cash sales, no seller is entitled to recover any goods delivered to the insolvent by reason only that he has failed to pay the price".

The use of the word "only" in my view clearly recognises the right of the unpaid seller on credit to recover the goods upon some other additional ground. And the ground which immediately comes to mind is the common law ground of fraud. FRAUD is not the normal risk of commerce. The Legislature must have been aware of the long recognised principle that the Insolvency Act does not displace the common law unless the matter is clearly inconsistent with the statute.

This was also the view put forward "as the rational interpretation" by Mackeurtan in his work on Sale, first published in 1921, at page 253, note 65, in relation to the corresponding section 35 (2) in Act 32 of 1916. (As a matter of interest, the author's preface to that edition expresses his devotion to "our own splendid system of jurisprudence ... the

Roman Dutch System, of which we are now almost the sole inheritors") The learned author repeated "the rational interpretation" aforesaid in his second edition, published in 1935, at page 279 note 65. For the relevant passage in the third edition see page 268 and note 65. It is hardly necessary to add that opinions expressed by that learned author have often been accepted by the courts of this country over the last half century.

I would add that a Court must lean strongly against holding that the word "only" was inserted in the statute *per incuriam*. "A statute should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." - *per* Cockburn, C.J., in *The Queen v. Bishop of Oxford*, 4 Q.B.D., at 261, cited with approval by Kotze, J.A., in *A.G., Transvaal v. Additional Magistrate, Johannesburg*, 1924 A.D. 421 at 436.

Upon the interpretation of section 36 (4) just mentioned, it follows that those provisions in the Insolvency Act, which provide that upon sequestration the insolvent is

15/... divested

divested of all his property which then becomes distributable among various categories of creditors, are pro tanto qualified. The fact that those other sections do not expressly state the qualification, cannot avoid the clear conclusion just mentioned.

I have only to add that ordinarily a buyer on credit impliedly represents that he accepts liability for the price. Whether he can and will pay is the normal risk of commerce. But he does not ordinarily "impliedly" represent or warrant that he can and will pay on due date. The bogey that future trustees will be inundated with recovery claims on that basis seems to me remote. But when he expressly and fraudulently represents that his post-dated cheque will be met on due presentation, knowing that it will not be, because he is unable to pay his debts and is in insolvent circumstances - that is a horse of a different colour.

On the conclusion that the meaning of sub-section (4) is plain, it is not relevant to embark upon an analysis of the legislation in the four Provinces prior to 1910. See

Ex Parte Minister of Justice; In re Rex v. Masow, 1940 A.D. 75, in which Centlivres, J.A., in construing a certain statutory provision, said at page 90, "In my view it is not permissible in construing that section to refer to the law that was in existence prior to the enactment of that section unless the section is so ambiguous that it is necessary to refer to such law in order to ascertain the intention of the Legislature." See also Ex Parte Minister of Justice: In re Rex v. Demingo, 1951 (1) (A.D.) 36 at 44 A.

I would add that no assistance can be derived from the fact the marginal note to section 36 of Act 24 of 1936 reads: "Goods not paid for which debtor purchased not on credit". See Steyn, Uitleg van Wette, Derde uitgawe, bls. 140/1. In Durban Corporation v. Ext. Whittaker, 1919 A.D. 195, at 201, De Villiers, A.J.A., said, in regard to marginal notes, "Under our system of legislation they are not considered or passed by the Legislature, and the maxim rubrica non est lex must therefore be said still to obtain with us as regards marginal notes". Furthermore, the marginal note to section

36 obviously does not apply to the contents of sub-sections (5) and (6). For the reasons which I have already mentioned, the note cannot apply to sub-section (4) either. It is only descriptive of the first three sub-sections.

If, however, the language of section 36 (4) of the Insolvency Act is regarded as uncertain, regard must be had to certain interpretive aids -

(1) "It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law"; see R. v. Morris, 1 C.C.R., 95, approved by Solomon, J., in Johannesburg Municipality v. Cohen's Trustees, 1909 T.S. 811 at 823. And, with specific reference to the Insolvency Act, in Fairly v. Raubenheimer, 1935 A.D. 135, Beyers, J.A., said at page 146 -

> "Ons insolvensie wet maak geen inbreuk op die Gemenereg nie insover die Gemenereg bestaanbaar is met die voorsiening van die insolvensie wet. As dus die statuut oor iets swyg of twyfelagtig is, moet ons toevlug na die Gemenereg neem." (My italics.)

(2) "Where two meanings may be given to a section, and the one meaning leads to harshness and injustice, whilst the other does not, the Court will hold that the Legislature rather intended the milder than the harsher meaning" - per Wessels, J.A., in Principal Immigration Officer v. Bhula, 1931 A.D. 323 at 336, in fin.

As to the latter, who can deny -

(i) the harshness of depriving a defrauded seller, whose goods have been obtained by fraud, of his common law claim for the recovery of the goods on the buyer's insolvency;

(ii) the injustice of allowing the creditors in the insolvency to be enriched by the criminal fraud of the insolvent, and at the expense of the innocent and defrauded seller.

Accordingly, there seems to me a cogent reason for interpreting section 36 (4) in the manner already indicated, particularly in the light of what has just been said in (1), supra, about taking refuge in the common law.

(3) Regard may be had to the repealed statutes. (I emphasise that this is only on the assumption that the language of section 36 (4) is

not clear.) As to that, in 1916, when consolidating the laws of the four Provinces into one Union Act, the Legislature was confronted with the situation that in three of the Provinces there was a provision, couched in tortuous phraseology, dealing with unpaid sellers, and a differently worded section of the South African Republic. Taking Law 47 of 1887 (Natal) as an example, section 126 thereof has three parts, i.e. to say, the main part followed by two provisoes, the first of which refers to the common law. The effect of the main part, read with the second proviso, is that an unpaid seller for cash may, within ten days of the delivery of the property, give notice that he reclaims it, "by reason *alone*" (my italics) that he has not been paid. (The whole section postulates unpaid sellers). Clearly this time limit does not apply if he has other grounds for reclamation, e.g. fraud. The first proviso is interesting. Its effect is that "nothing herein contained" shall affect the common law in regard to the right of a vendor to rescind any sale (which would of course include a sale on

20/... credit)

credit) and reclaim his property, on account of fraud and circumvention practised upon him by the purchaser. (Note the word "circumvention": it derives from the Roman definition of fraud is Digest 4.3.1., quoted earlier herein). The only qualification (quite unnecessarily) is that failure to pay the price is not per se to be regarded to fraud. The whole of this first proviso was unnecessary, for nothing in the section did affect the common law referred to in the first proviso. In the 1916 Statute (Act 32 of 1916) the Legislature in effect combined the first and the second proviso into section 35, omitting the unnecessary first proviso, but preserving its effect by using the formula of "only", which it borrowed from the use of the word "alone" in the main part of section 106 of the 1887 Natal Law, supra, (or perhaps from section 105 of Ord. 6 of 1843 (Cape), which is to the same effect). The 1936 statute does the same. In these circumstances it cannot be said that, in the 1916 or 1936 statutes, the Legislature intended to sweep away the relevant common law, which applies in the instant case.

(4) Section 129 (1) (b) of Act 24 of 1936 contains

a provision of a general nature, to the effect that the insolvent, notwithstanding his rehabilitation, should not be discharged from liability for pre-sequestration debts which arose out of fraud on his part. This, of course, is poor comfort to a seller who has been defrauded of his goods, because (i) it is no substitute for his common law right of recovery; (ii) the relief is available only after rehabilitation, which may take a long time and may never occur; (iii) the rehabilitated debtor in ex hypothesi likely to be of poor estate; and (iv) the remedy cannot apply at all in the case of a company which has been wound up, as in the present case. But what section 129 does reveal unmistakeably in the Legislature's distaste of fraud; and it shows how improbable it is that the Legislature intended, in section 36 (4), to oust the common law by depriving an innocent defrauded seller of his right to recover the goods, and by permitting the injustice of creditors in the insolvency benefiting from the criminal fraud of the buyer. I have ~~only to add that it~~ cannot be inferred that the Legislature enacted section 129 (1) (b) on the ground that it recognised that fraud required special treatment which it did not give in sections 96 to 103. A section similar to

section 129 (1) (b) is to be found in at least one of the pre-Union Insolvency statutes (namely section 181 of Law 47 of 1887 (Natal)), despite the fact that the proviso to section 126 of that Law expressly preserves the common law right of recovery of a defrauded unpaid seller.

(5) The fact that section 20 of the Insolvency Act, in divesting the insolvent of his estate, is not expressed to be subject to section 36 (4), is in my opinion of no interpretive significance. In the pre-Union statutes there was an express preservation of the defrauded unpaid seller's right of recovery, yet the divesting sections were not expressed to be subject to those preserving provisions. See, for example, section 46 and the proviso to section 105 of Ord. 6 of 1843 (Cape); and sections 51 and 53 and the proviso to section 126 of Law 47 of 1887 (Natal).

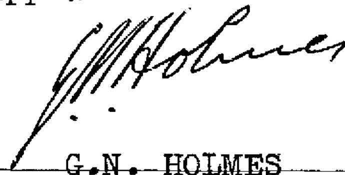
To sum up: in my view the language and meaning of section 36 (4) of the Insolvency Act are clear; but if its language is to be regarded as not clear, the interpretive aids remove any lack of clarity and establish that its meaning is as indicated earlier in this judgment.

23/... It

It follows that in my view Hofmeyr, J., was right in allowing the seller's exception to the alternative plea to the effect that, notwithstanding the buyer's fraud, the seller was not entitled to the return of the goods and was restricted to a concurrent claim in the winding up.

Finally, I record that, in this Court, counsel for the seller conceded that in the instant case ownership in the goods passed to the buyer on delivery. In view of that concession, it is not open to this Court to consider whether this was in substance a case of theft by false pretences with no passing of ownership in the goods, or whether ownership did not pass to the buyer for any other reason, or whether, in such event, sub-sections (5) and (6) of section 36 would be applicable.

I would dismiss the appeal.



G.N. HOLMES

JUDGE OF APPEAL.

Diemont, A.J.A. Concurs.