our law. But the Court should have such full information before it that any possibility either of prejudice to creditors, or of a gift, direct or indirect, taking place between the spouses by means of such a donation to the son, is out of the question. Before the Court can give the relief asked for that should be made absolutely clear. I think the Court should also have the advantage of knowing whether the applicants have other children and whether those children are majors or minors. It does not appear from the letter from Podlashuc and Nicholson that the trustee has enquired into the donation or whether he has satisfied himself that it is perfectly *bona fide* or not. Apparently, so far as he is concerned, he gives his consent, so far as it may be necessary. But before the Court can sanction the contract it should have all that information, so that it can satisfy itself that this is a *bona fide* transaction and that there is sufficient cause for the Court to interfere and authorise the practical revocation of the conditions of the antenuptial contract relating to the life policy and the furniture. Under the circumstances I do not feel justified in making any order on this application. There will be no order on the application, but it may be renewed upon further information.

Postea (October 20). Such information having been furnished to the satisfaction of the Court, CURLEWIS, J., granted the order prayed for.

Applicants' Attorneys: *Lapin & Lapin.*

[A. D.]

REX v. MOHR.

1915. *August* 9; *September* 6. DE VILLIERS, J.P. and MASON, J.

*Insolvency.—Undue preference.—Handing over of cattle.—Payment.—*Law* 13 *of* 1895, *sections* 37 *and* 147 (*e*).

An accused was charged with and convicted of the crime of culpable insolvency by giving an undue preference in that he at a time when he could expect the

* Sec. 37 of Law 13 of 1895, reads: "Every alienation of any portion of the estate, and every payment made by the insolvent to a creditor, and every mortgage or pledge constituted by him for the benefit of a creditor upon any portion of the estate at a time when he could expect the sequestration of his estate, with the intention to benefit such creditor directly or indirectly, above the other creditors, constitutes an undue preference . . . .

"Every alienation made by the insolvent as above and every mortgage or pledge constituted by him in favour of any person whomsoever as above, with the intention thereby to benefit one of his creditors directly or indirectly, above the others, constitutes an undue preference." . . . .

sequestration of his estate handed over to a creditor 145 head of cattle for which he was given credit for £856 odd. *Held*, that the delivery of the cattle constituted a "payment" by the insolvent in terms of sec. 37 of Law 13 of 1895, and that the accused had been rightly convicted.

Appeal from a conviction by the assistant resident magistrate, Heidelberg.

Accused, an insolvent, was charged (1) with contravening section 147 (*b*) of Law 13 of 1895, in that he failed to keep adequate books or accounts, and (2) with contravening section 147 (*e*) of Law 13 of 1895, in that he in November, 1913, did wrongfully and unlawfully give an undue preference to one of his creditors, viz., Slabbert and Verster, by paying them an amount of £1,379 3s. 2d. The evidence proved that the payment of the sum of £1,379 3s. 2d. consisted of certain cheques handed over to the creditor and 145 head of cattle for which the insolvent was given credit to the amount of £856 13s. 5d. He was found guilty on both charges and sentenced to one month and three months' imprisonment, with hard labour, respectively.

B. A. Tindall, for the accused: As regards the charge of giving an undue preference under section 147 (*e*) of Law 13 of 1895, I submit the facts proved did not constitute the crime charged. The accused did not pay over £800, but handed over certain cattle, and that was not the charge. The delivery of cattle did not constitute payment in terms of section 37 of Law 13 of 1895. Particulars should be given of a charge of undue preference under section 147 (*e*); see *R.* v. *Caminsky* (*supra*, p. 129); *R.* v. *Raphoane* (1913, T.P.D. 241). It must be alleged that the offence was committed by payment of certain moneys or alienations of certain portions of the estate. Handing over of cattle is not a payment. See also *R.* v. *Webb* (1906, T.H. 131).

There was not sufficient proof of the expectation of insolvency as required by section 37. The presumption of section 157 does not apply in criminal cases, see *Estate Weinberg* v. *Weinberg* (24 S.C. 626 at p. 629); *R.* v. *Horwitz & Another* (1908, T.S. 641).

C. W. de Villiers, Attorney-General for the Crown: The charge has been properly laid. The cattle were really handed over "in payment." Accused could not be charged under section 146 because then fraud must be alleged. The charge really is that the debt has been extinguished to a certain extent. If the argument of my learned friend were correct, payment by cheque would not be a payment either, as his argument only refers to payment in cash.

Tindall replied.

MASON, J.: The accused was charged with and convicted of contravening section 147 (*b*) of the Insolvency Law, No. 13 of 1895, by failing to keep adequate books or accounts, and of contravening section 147 (*e*) by giving an undue preference to one of his creditors, Slabbert and Verster. There was a third charge of giving an undue preference upon which he was acquitted.

The accused carried on the business of a cattle speculator from the 1st of January, 1913, until November of the same year. He gave notice of application for the voluntary surrender of his estate on the 27th January, 1914, and the surrender was accepted on the 12th March, 1914. His assets were scheduled as of the value of £836 16s. 3d. They realised £366 18s. Debts were proved in his estate to the amount of £2,459 10s. The creditors received a dividend of 1s. 10d. in the £.

[His lordship then dealt with the evidence on the charge of failing to keep adequate books or accounts and came to the conclusion that the conviction on that charge was justified.]

The grounds of appeal against the second conviction for the giving of an undue preference are two:—Firstly, that the facts proved did not constitute the offence charged under the indictment, and secondly that there was no sufficient proof of the expectation of insolvency and of the intention to benefit the creditor alleged to have been preferred.

The charge alleged that accused had given an undue preference to one of his creditors, Messrs. Slabbert and Verster, by paying them an amount of £1,379 3s. 2d. This payment consisted of certain cheques handed over to the creditor and 145 head of cattle for which the insolvent was given credit to the amount of £856 13s. 5d. The magistrate, with some hesitation, acquitted the accused in respect of the cheques on the ground that the payment of the cheques may have been made in the ordinary course of trade, and ought therefore to be protected under section 34, but he convicted the accused in respect of the delivery of the cattle.

The objection urged in appeal was that the delivery of cattle did not constitute a payment in terms of section 37, which enacts what an undue preference is. It was contended that the section drew a distinction between alienations and payments, so that payment meant the discharge of an obligation in money. The meaning of the word "payment" was discussed very fully by Sir Henry CONNOR, *In re the Zuurberg Gold Mining Company* (7 N.L.R., p. 191), where he laid down, that payment was the discharge of an

obligation, and that there were therefore as many kinds of payment as there were of obligations. *Prima facie*, therefore, a payment by the delivery of cattle is as much a payment as if it had been made in money, but Counsel contended that in section 37 the words "alienation and payment" are mutually exclusive. There does not seem any reason in the nature of the subject matter for believing that such was the intention of the section. Every payment in property or money is an alienation of some portion of the estate; but where a payment of a debt is made by services rendered, there is no alienation of any portion of the estate, yet the creditor might secure as great an advantage by such an undue preferential payment through the medium of services rendered as if he had received money.

It seems much more likely that both words were used in order to make sure of embracing within the purview of the section every kind of dealing which was not a mortgage or a pledge. Mr. *Tindall* laid great stress upon the latter part of the section, where the word "payment" is omitted, but it is clear if the original Dutch version is examined and particularly if reference be made to section 84 of the Cape Insolvency Law from which section 37 originates, that the latter portion of section 37 is wider than the first portion and includes alienations, mortgages or pledges to persons who are not creditors for the benefit of persons who are creditors, and the word "payment" would therefore be inappropriate to such transactions.

There is no doubt that the charge might well have given the particulars as to the manner of payment, but no objection to the charge as framed or to the evidence led upon this charge was raised until the matter came before this Court on appeal, no prejudice of any kind has been caused to the accused; and as the charge is not bad *per se* and would support a conviction for payment by delivery of cattle, this objection to the conviction cannot be sustained.

The accused also appeals against the conviction on the merits, maintaining that there was not sufficient proof of the expectation of insolvency and the intention to prefer which is required by section 37.

There is no doubt the accused had been carrying on his business at a loss. Slabbert and Verster had financed him during the eleven months of his operations as a cattle speculator. On the 7th of October they gave him an accommodation cheque for £600, and received in return his cheque payable on the 31st October. The

accused was overdrawn at his bankers', and towards the end of October the manager pressed him to reduce or pay off the account, and told him that he would not be allowed to increase it. On the 1st of November the accommodation cheque in favour of Slabbert and Verster was presented and dishonoured. The accused in his evidence states that the bank manager told him that he would have no further facilities on the 1st November, that at this time he had in his pocket a cheque of £470 which he would have deposited in his bank if they had honoured his accommodation cheque. He used the money to pay Slabbert and Verster the sum of £404 4s. 6d. as otherwise it would have been retained by the bank. He knew his deficit was at least £1,000, and that if he could not get help he was finished. Under the circumstances it is quite clear that he knew he was insolvent, and that his estate must be sequestrated within a very short time.

But the main defence upon the merits is that the delivery of the cattle to Slabbert and Verster was made under the *bona fide* belief that they were the property of that firm. Verster states that the arrangement between his firm and the accused was that all cattle which they sent to the accused or for the purchase of which they supplied funds were to remain their property, but the accused was entitled to any profit and was responsible for all the losses. It was not pretended that there was any identification or separation of this firm's cattle from other cattle in possession of the accused.

On the 7th of November the accused paid the £404 4s. 6d. and delivered 145 cattle to Verster, which the latter credited at £6 2s. 6d. each less a certain sum due to one Van der Westhuizen, making a net credit of £856 13s. 5d.

The magistrate did not believe that either Verster or the accused considered these cattle the property of the firm. An analysis of the accounts as made by the magistrate seems to show that the relations between Verster and the accused were merely those of a supporting creditor and a supported debtor. They relied on his paying them back out of cattle purchased with their money, and he intended to do so, but neither party, it seems to me, could really have believed that the firm possessed any property in the cattle.

Slabbert and Verster had, of course, some kind of moral claim as providing mainly the funds from which the cattle were purchased, and it was under the influence of some such idea, in all probability, that the accused made the delivery of the 7th November. But even if this be so, the intention to prefer would none the less be present. (*In re W. Blackburn & Co.*, (1899, 2 Ch. 725.)

Upon the evidence which the magistrate has accepted it seems to me clear that the accused knew he was insolvent, that he knew the delivery of these cattle would result in Slabbert and Verster being substantially paid what was owed to them, whilst the other creditors would receive very little, and that he made the payment, not because he thought they had any legal right to the oxen, but because he desired to requite them for the liberal way in which they had financed him, and for the confidence which they had reposed in him.

The findings of the magistrate are, in my opinion, sufficiently supported by the evidence in the case.

It was also contended that no specific price had been agreed upon as to the value of the cattle taken over by Verster, and that, therefore, there could be no payment. It is clear, however, that the cattle were handed over as part payment, and that they were credited at a definite price, that the accused intended his delivery of the oxen to operate as payment *pro tanto* of his indebtedness, and that, therefore, the magistrate was justified in holding this alienation of the cattle to have been a payment.

The only remaining question is whether the sentence is excessive. We were strongly urged to suspend the sentence.

The *Attorney-General* suggested that this Court might not have a power of suspension. Doubt was thrown upon the power in the Court of Appeal in *R.* v. *Lai Wing* (1912, A.D. 260), but, on the other hand, in *R.* v. *Bolon* (1910, T.P.D., p. 410) and in several other cases magistrates' sentences have been suspended upon appeal.

In this case, however, the accused has been insolvent before, his creditors have received a very small dividend, and it has been impossible, owing to the failure to keep proper books, to investigate adequately his transactions.

On the other hand the accused probably acted in accordance with what he considered to be a moral claim on him by Slabbert and Verster, and under all the circumstances I think the sentence ought to be reduced to one of two months' imprisonment with hard labour on the two counts on which he has been found guilty.

DE VILLIERS, J.P., concurred.

[G. v. P.]