difficult, and if it cannot be done, section 25 cannot be invoked. In these circumstances the magistrate's judgment was correct. The appeal must be dismissed.

CURLEWIS, J.: I concur.

Appellant's Attorney: *W. de Villiers.*

SCHARFF'S TRUSTEE v. SCHARFF.

1915. *September* 21, 22, 23, 28, 29. DE VILLIERS, J.P., MASON and GREGOROWSKI, JJ.

*Insolvency.— Alienation.— Lawful consideration.— Natural affection.—Expectation of insolvency.—Extent of avoidance.—**Secs. 33 *and* 37 *of Law* 13 *of* 1895.—*Alienation* in fraudem creditorum.—*Common law remedy.*

An unregistered deed of donation imposed a liability on the donor to cede certain bonds to a value of over £500 to his daughter. Thereafter the donor, at a time when he should have expected the sequestration of his estate ceded the bonds to his daughter and was subsequently sequestrated. *Held,* in an action by the trustee to set aside the cession that natural affection for one's daughter was not a lawful consideration in terms of sec. 33 of Law 13 of 1895, and that where the alienation caused an excess of liabilities over assets the alienation was avoided only to the extent of the deficiency, calculated at the time of the liquidation of the estate.

Where an alienation has been made by an insolvent *in fraudem creditorum* and the creditors are actually damnified at the date of the liquidation of his estate, the alienation is, under the common law, null and void to the extent necessary to pay the creditors the full amount of their claims.

Prior to insolvency an insolvent was charged with a criminal offence, a conviction on which would, to his knowledge, render him liable to an action for heavy damages. While on his trial the insolvent ceded certain bonds to one of his creditors knowing that such cession would, in all probability, make him insolvent if damages were awarded against him, *Held,* that such cession was *in fraudem creditorum.*

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* Sec. 33 of Law 13 of 1895 reads: "Every alienation of, and every mortgage or pledge of any portion of the estate, made or constituted by the insolvent at any time when he could expect the sequestration of his estate, is void unless such act was done in good faith and for lawful consideration.

"When an act as above is the cause of the debts exceeding the assets it shall be void in so far as such (*dit laatste*) is the case."

Action by the trustee in the insolvent estate of G. A. Scharff to set aside, as void under the Insolvency Law and the Common Law, the cession of certain bonds by the insolvent to the defendant.

The plaintiff's declaration set forth that the estate of G. A. Scharff was provisionally sequestrated on 14th December, 1914, and finally on 7th January, 1915. Prior to the date of their cessions the insolvent held, personally and through a nominee, certain seven bonds, to a total value of £3,522 10s., of which five were ceded by him to the defendant on 23rd October, 1914, and the remaining two on 7th November, 1914. The plaintiff alleged that the said alienations were made neither in good faith nor for lawful consideration, and were void under sec. 33 of Law 13 of 1895; alternatively that if the defendant were a creditor of the insolvent (which was denied) the alienation was made at a time when the insolvent expected the sequestration of his estate and with the intention to prefer defendant, and was therefore void under sec. 37 of that law as an undue preference. There was a further claim that the alienation was void under the common law as being *in fraudem creditorum*. He claimed an order declaring the alienation void and directing the cession of the bonds to him.

The defendant pleaded that the bonds were registered in insolvent's name, and that prior to the cessions he held them in trust for her as her father and natural guardian. The cessions were admitted; all other allegations were denied.

The defendant was the daughter of G. A. Scharff, the insolvent, who until insolvency in December, 1914, had carried on business as an hotel proprietor at the European Hotel, Pretoria, under a lease from one Hamburg. Mrs. Scharff, who was married out of community of property to the insolvent, died on 18th May, 1913, having appointed him her sole heir, the balance awarded him on liquidation being £2,105 3s. 5d., including three bonds of the total value of £1,977 10s., which were amongst those claimed by the trustee in this action. On 7th September, 1914, the insolvent was arrested on a charge of supplying liquor to coloured persons on 5th September, 1914, in contravention of sec. 46 of Ord. 32 of 1902: judgment was reserved on October 21st, and on October 23rd he was convicted, his conviction involving the cancellation of the liquor licence held in respect of the European Hotel. Subsequently Hamburg sued the insolvent for damages for the loss of the licence, and obtained judgment for £1,700 and costs amounting to £65 9s. 4d.

On October 21st the insolvent ceded to the defendant five mort-

gage bonds of the total value of £1,295, and on 5th November two further bonds, of the value of £2,227 10s. were ceded to her by his agent. The cessions were registered on 23rd October and 7th November, 1914, respectively. It was also alleged that the cession took place in consequence on an unregistered deed of donation by the insolvent to the defendant dated August 24th, 1914.

B. A. Tindall (with him *A. Davis*), for the plaintiff: (1) As regards the claim under section 33, the alienation was neither *bona fide* nor for lawful consideration. The insolvent must have anticipated a conviction, and consequently expected the sequestration of his estate. The document of 24th August, 1914, was not a genuine donation—it was merely to protect the insolvent in certain eventualities. "Lawful consideration" "rechtmatige consideratie" means "consideration" in its English law sense: *vide Ex parte Hillman, in re Pumfrey* (10 Ch. D. 622). It does not include a gift: it is not *justa causa* or *redelyke oorzaak: de Beer's Trustee* v. *Grobler* (1915, A.D. 265). At the time of the cession there was no consideration: the deed of 24th August was past consideration and ineffective. An undertaking to make a donation at a future date is unenforceable: *Malan and Van der Merwe* v. *Secretan Boon & Co.* (Foord 99); *Mtembu* v. *Webster* (21 S.C. 323). A remunerative donation is not, strictly speaking, a donation: *Snyman* v. *Snyman's Executor* (*supra*, p. 368; *Voet* (39, 5, 17). Even if genuine, the donation was unenforceable, owing to non-registration, as to its excess over £500. *Teubes* v. *Wiese* (1912, W.L.D., at p. 159). Consequently it cannot be regarded, as far as such excess, as lawful consideration. If gratuitous alienations by way of donation made before expectation of insolvency are protected, the door is opened to endless fraud.

The deficit to be refunded by the alienee, in terms of the last portion of section 33 is to be calculated at the date of liquidation, not at the date of the challenged transaction. The difference in wording between section 33 of our law and section 83 of the Cape law (Ord. 6 of 1843) is intentional. Creditors should not be penalised by being made responsible for the costs of sequestration and the possible depreciation of assets, no matter how fraudulent the alienation is. The costs of liquidation and realisation must first be deducted from the assets recovered.

If defendant be regarded as a creditor of insolvent, then under section 37 there has been an undue preference. The intention to prefer is clearly proved by surrounding circumstances. *Du Plooy's*

Trustee v. *Netherlands Bank* (1913, T.P.D., at p. 527); *Grobler* v. *Grobler's Trustee* (1908, T.S. 423). The expectation of insolvency has already been dealt with.

As to the claim under the Common Law, fraudulent knowledge on defendant's part need not be shown: *Chin's Trustees* v. *National Bank* (1915, A.D. 353). It is sufficient to show fraud on the part of the alienor to insolvent: *Voet* (42, 8, 5; 42, 8, 12); Hunter's *Roman Law* (2nd ed., p. 1042); *Institutes* (1, 6, 3); Brunnemann (*ad Cod.*, 7, 75, 5); Zoesius (*ad Pandectas*, 42, 8, 10); Domat (Vol. I, sec. 1633). An alienation *in fraudem creditorum* having been shown, the whole alienation must be avoided: Grotius (*Introduction*, 2, 5, 4).; Van der Keessel (*Th. Sel.*, 199, 200). See, however, *Otto's Trustee* v. *Brister and Others* (5 S.C. 24).

W. Pittman (with him *T. J. Roos*), for the defendant: The *onus* of proving that insolvent should have expected sequestration is upon plaintiff: *Vide* sec. 157 of Law 13 of 1895. This *onus* has not been discharged. Plaintiff has not shown that at date of donation, 24th August, there should have been such expectation. No creditors were pressing him. Even on October 21st the mere possibility of a conviction, with whatever consequences, was not sufficient to require such expectation.

Mala fides has not been shown.

"Lawful consideration" under section 33 must be interpreted according to Roman-Dutch Law, *i.e.*, any cause sufficient to ground a legally-binding contractual obligation: *Van der Witz' Estate* v. *Woolf* (1898, 15 C.L.J., at p. 291). The adoption of the English law interpretation will revolutionize our law of contract. *Rood* v. *Wallach* (1904, T.S. 187). The Insolvency Law must be construed according to local methods: Wessels, *History of the Roman-Dutch Law* (p. 671). Donation is lawful consideration. Registration of donation is unnecessary up to £500: *Teubes* v. *Wiese* (1912, W.L.D. 148). See also *Barrett* v. *O'Neill's Executors* (1879, K. 104); *Potgieter* v. *Groenewald* (1905, O.R.C. 101); *Wiese, N.O. v. Wiese's Executors* (1905, O.R.C. 130).

In any event, the final part of section 33 only contemplates the expectation of insolvency. The point at which the deficit is to be calculated is the actual date of the transaction. *Vide* sec. 83 of Cape Ord. 6 of 1843.

As to the claim under section 37 of the Insolvency Law the intention to prefer cannot be proved unless the expectation of insolvency be shown: the latter is not proved here: *Fearnley's Trus-*

tee v. *Netherlands Bank* (1904, T.S. 424); *Thornburn* v. *Stewart* (L.R. 3, P.C. 478).

On the Common Law claim, I admit that plaintiff need not prove fraud committed against the alienee. But later Roman-Dutch authorities and cases show that fraud by alienee must be proved: *Vide Loescher* v. *Pelser Kruger & Co.* (9 E.D.C. 195), especially as the declaration alleges this. Fraud is more than the mere contemplation of sequestration.

Davis, in reply: As regards section 33, it took over from Law 21 of 1880 the words "rechtmatige consideratie," a direct translation of the Cape Insolvency Ordinance. *Ex parte Hillman* (*supra*) was followed in *Hanke and Another* v. *Harding* (20 Q.B.D. 732) and *In re Downes* ([1898] 2 Irish Rep. 635); see also *Van As* v. *Nel and Nel's Executor* (13 S.C. 427).

Section 157 of Law 13 of 1895 makes it unnecessary under sec. 37 to prove the contemplation of insolvency by insolvent.

Cur. adv. vult.

Postea (October 18).

MASON, J., delivered the following judgment of the Court: The defendant is the daughter of one Gustav A. Scharff, whose estate was sequestrated provisionally on 14th December, 1914, and finally on the 7th January, 1915.

He carried on the business of an hotel proprietor at the European Hotel, Pretoria, under a lease from one Hamburg. On the 7th September, 1914, he was arrested on a charge of supplying coloured people with liquor on the 5th of the month. He was convicted on October 23rd, 1914. Judgment had been reserved on the 21st October, and on that very day he ceded to his daughter certain five mortgage bonds in his name of the total nominal value of £1,295. On 5th November two more bonds of the nominal value of £2,227 18s. were ceded to her by one Busch, who was admittedly the holder for the insolvent at the time.

The cessions were registered on the 23rd October and 7th November, 1914, respectively.

The trustee attacks the cessions as void under sec. 33 of the Insolvency Law, or, alternatively, if the defendant be a creditor, as void under sec. 37: he also claims further, though not alternatively, that they are void under the common law as having been made in fraud of creditors.

The defendant, whilst denying the facts on which the trustee invokes the aid of secs. 33 and 37 and of the common law pleads that though the bonds were registered in the name of the insolvent he held them in fact in trust for her as her father and natural guardian.

The wife of the insolvent and mother of the defendant died on 18th May, 1913, having appointed the insolvent as her sole heir. They were married out of community. The liquidation account, which was dated 3rd November, 1913, shows that Mrs. Scharff's property consisted of three bonds of the nominal value of £1,977 10s., off which £70 had been paid, the proceeds of a Sunnyside erf, which had been sold for £210, and an erf at Rietfontein of the value of £54 2s. 6d. The administration expenses were £66 9s. 1d., and the balance awarded to the survivor is £2,105 3s. 5d. These three bonds were ceded to the insolvent and are amongst those claimed by the trustee.

The insolvent and his wife had two children, the elder a son, and a daughter, the defendant.

The former apparently did not behave satisfactorily and so, according to the evidence of the insolvent and his daughter, it was arranged that, while the father was to be constituted the heir, he was to divide the property between the children in such proportions as he might determine. He also states that just before her death his wife released him from certain debts he owed her, and from a certain notarial bond for £1,000, which he had made in her favour.

Both father and daughter state that the mother at the end of 1912 gave him £700 to be held in trust for her as a special recognition of her services in nursing the mother, who had long been in delicate health. The mother, accompanied by her daughter, left at the end of 1912 for Germany, where the former died on 18th May, 1913.

The defendant says that a little before her death her mother gave her some £300, and that after paying various expenses there remained a balance of £200, which she, the defendant, handed over to her father's keeping about 12th August, 1913, on her return to South Africa. The insolvent and the defendant profess to account in this manner for the alleged fact that all these bonds really belonged to the daughter, except that it was understood she should make some provision for her brother. And, so they say, the defendant accordingly executed the document of the 2nd Sep-

tember, 1913 (Exhibit V), which declared all the bonds and landed property in the name of the deceased's wife, as also the £200 and £700, to be the exclusive property of the daughter. The execution of the document is testified to by the two witnesses of it, Weil and Böckner. This state of affairs is corroborated by the production of two books by the insolvent, called the private ledger and German ledger (Exhibits O and D), the latter containing the original entries in German made from time to time during a period of some years; the former having been written up by Pearson, the insolvent's bookkeeper, from the insolvent's dictation. The insolvent, his daughter and Pearson all testify to these books.

When war broke out in August, 1914, the defendant is stated to have pressed her father to secure her title to this property, and accordingly the deed of donation of 24th August, 1914 (Exhibit W), was executed and the cessions subsequently registered. As all these documents and allegations are attacked, it will be convenient to refer to the history of their production.

The trustee in December, 1914, took proceedings to secure an interdict against the defendant alienating any of the bonds: the deed of donation of 24th August, 1914, was then produced, but not the document of September 2nd, 1913. A commission under the Insolvency Law took the evidence of the insolvent, his daughter and Pearson in February, 1915; the private ledger was then produced for the first time. The German ledger, however, was not included in the affidavit of discovery, but was produced for the first time at the trial. The evidence of the insolvent, his daughter and of Pearson that these two ledgers were at the disposal of the trustee from the first cannot be accepted in face of the trustee's denial and the surrounding circumstances of the case. Indeed, their evidence is untrustworthy throughout, and in many cases undoubtedly false. There are many reasons for arriving at this conclusion.

The private ledger seems to have been tampered with by inserting the words about a trust. The German ledger has been palpably compiled at one time, and has every sign of recent creation; no adequate explanation of its belated appearance at the trial was given. All three witnesses testify to this fabricated document.

Then the story of the £200 with the surrounding circumstances makes, as the defendant's counsel was compelled to admit, very heavy demands on one's credulity, and I reject it entirely. The insolvent said in his evidence that his daughter cabled to him for

money upon her mother's death; at this time she was supposed to have £300 in her possession. The daughter states that she landed with German money in Southampton, and going into the first bank she saw she was able to obtain £200 in South African bank notes; this is very unlikely. She produces a bag into which she says she placed the notes and which she carried round her neck. A trial was made and it was found the bag would not hold £200 worth of National Bank notes, and no request was made by the defendant for an experiment with notes of any other South African bank. Then the insolvent states that he made no entry anywhere, except in the discredited German ledger, of this sum, though he used it for the purposes of his business. Having come, therefore, to the conclusion that the evidence as to the German ledger and the £200 is false, it is impossible to place any reliance upon the statements of the insolvent or his daughter, or Pearson.

And this conclusion destroys at the same time the document of September 2nd, 1913, which contains a reference to the £200, and which was not produced at the time when the legal position imperatively called for it if it were in existence.

We come now to the deed of donation of 24th August, 1914. The suspicion which the falsehoods of the defendant and her witnesses on other matters casts upon all the transactions in question renders it difficult to determine the exact circumstances under which this deed was executed. The evidence in the case, however, affords good ground for believing that the late Mrs. Scharff was possessed of property of her own of some considerable value, but I do not think it possible to say with any exactitude how much even of the property in her name was really her own, and how much was her husband's. An examination of the bank accounts shows that money to complete transactions in her name was taken out of his business account, and that receipts, on the other hand, were frequently paid into his account.

His financial circumstances and dealings also render it quite likely that he would use her name to protect his assets from possible disaster.

But the fact that Mrs. Scharff had property of her own and that the prior wills bequeathed it to her children give some support to the assertion that it was all along intended that they should receive some at least of their mother's estate.

The plaintiff denies the genuineness of the deed of donation, but the evidence of Mr. Niemeyer, whom everyone accepts as a candid

witness, shows clearly that he was consulted by the insolvent about it and drafted the deed just about the 24th August and almost certainly before the 5th September. However suspicious one may be of allegations made by the insolvent and his daughter, there is not to my mind substantial ground for holding that the deed was not executed on its apparent date. But that leaves open the question whether it was intended between the parties as an absolute gift of the bonds or merely as a protection for the insolvent in case of possible prosecution or of difficulties arising out of the war as they very well might do.

My own opinion is that the latter was really the case. There is, of course, no direct evidence upon the point, but I do not believe that the insolvent genuinely intended to part with all his property to his daughter beyond that which was barely necessary to pay his liabilities. It is true that, according to the insolvent and his bookkeeper, his assets at this time exceeded his liabilities by some £1,100, excluding the bonds in question. But many important deductions have to be made. In the first place the promissory note of £150 by Miss Scharff must be taken off, as it was a part of the transaction connected with the bonds and stands or falls with them.

The outstandings, including a promissory note of one Muller, are valued at £593; £100 would probably exceed their full value. The furniture is overvalued by some £150, and judging by the stock found at the time of insolvency, the amounts put down in this balance-sheet are excessive. The rent for the month, £70, is also omitted from the liabilities. So that if the bonds and the liability to the landlord for damages be left out of account, the nominal surplus is really just about £200, and this agrees substantially with the trustee's estimates. Hence the alienation of the bonds would practically strip the respondent of his possessions. The value of Mrs. Scharff's estate according to the liquidation account was £2,100; as the story of the extra £700 left in trust and the £200 in notes cannot be accepted, the insolvent would be making over to his daughter some £1,400 worth of property to which she had no sort of claim, and leaving himself with a beggarly surplus of £200. Even if the £200 and £700 be taken into account, she would still receive some £500 more than the full amount of her mother's property, if we exclude the promissory note for £150 from consideration. I have referred in detail to the reasons for disbelieving the defendant's story as to the £200. As to the £700, it is also included in the discredited document of September, 1913. £200 of

it is stated to have been derived from the sale of Mrs. Scharff's stock and £500 from the cash paid on account of the farm Uitkyk, which was registered in her name. This £700 Mrs. Scharff is stated to have directed her husband to hold in trust for her daughter.

But it is clear that it was out of his bank account that Uitkyk was paid for, and that he used whatever money he did receive from this source as if it belonged to him. When asked if his wife had not kept any account of their mutual transactions, the insolvent stated that she had done so, but a little before her death had told him that she released him from all he owed and then burnt her book in the stove. Weighing all the circumstances, I do not believe that Mrs. Scharff professed to give £700 to her husband in trust for the daughter. In each of the deeds professing to record the defendant's rights in these bonds the insolvent binds himself to make cession when called upon to do so, but no cession was made until the case against him for selling liquor had been heard and judgment thereon had been reserved. The five cessions were dated 21st October and the last two 5th November, whilst the conviction was pronounced on 23rd October, 1914. These are the main reasons for any disbelief in the genuineness of the alleged donation to the defendant. But there can, I think, be no doubt whatsoever that the cessions were actually made when the insolvent expected that his estate might be sequestrated and with the full intention of removing this property from the reach of creditors and of preferring his daughter.

Mr. Marais, who represented the landlord, warned the insolvent some two or three days before his arrest that he had heard he was not conducting his business properly, and that any conviction would cause the forfeiture of his licence and render him liable in such heavy damages to the landlord as would almost certainly ruin him. This warning was repeated after the arrest. There can be no doubt that Scharff knew, therefore, that a conviction would in all probability make it impossible for him to meet his liabilities without the assistance of the bonds. It is, of course, not easy to prove that he knew he was going to be convicted, but even if he hoped for an acquittal, that does not, in my judgment, render his action less a fraud upon creditors (*Chin's Trustees* v. *National Bank of S.A. Ltd.* (1915, A.D. 353).

Having arrived at this conclusion upon the facts, it remains to determine the numerous questions of law which this case produces; and the first is how far the cessions of the bonds, the avoidance of which is claimed, come within article 33 of the Insolvency Law.

They are alleged to have been made in pursuance of the deed of donation of August 24th. If that deed be valid, it imposed a legal obligation on the insolvent to cede the bonds on demand to his daughter. But the deed was not registered, and there is a long course of South African decisions that no obligation arises out of an unregistered deed of donation beyond the sum of £500 (*Teubes* v. *Wiese* (1912, W.L.D., p. 148), and though there is a difference of opinion as to how far the donor may avail himself of this objection, none of the cases question the right of creditors to challenge these transactions, except perhaps a late case in the Cape Provincial Division in July last.

On October 21st and November 5th, when these cessions were signed, there was no obligation between the insolvent and his daughter beyond the £500; the alienation of the bonds beyond this amount was a gratuitous alienation. It was contended on behalf of defendant that a donation was a lawful consideration under article 33, because natural affection was under Roman-Dutch law sufficient cause to support it as a binding obligation. But the Dutch word in this article is not "redelijke oorzaak", but "rechtmatige consideratie", clearly a translation of the words "just and valuable consideration" in the Cape Ordinance upon which this law was based, as may be seen upon reference to section 83 of the old Transvaal Law, No. 21, 1880. There can be no doubt that this article is aimed at donations if we consider its origin, the language used and the provisions of article 39 as to antenuptial settlements.

The cessions were made, therefore, at a time when the insolvent could reasonably expect a sequestration of his estate, and, even assuming the *bona fides* of the deed of August 24th, they were not, except as to the sum of £500, made either *bona fide* or for lawful consideration (*Chin's Trustees* v. *National Bank* (1915, A.D. 353). But for the reasons which I have already given, I do not believe that the parties intended this deed to be a genuine donation of the property mentioned.

That would not, of course, entitle the insolvent himself to annul a transaction entered into fraudulently, seeing that transfer has actually been given, and it becomes, therefore, necessary to consider the second portion of section 33.

Now the position of the insolvent's estate from the date of the commission of the offence against the liquor laws, viz., September 5th, 1914, until the sequestration was substantially this; apart from the bonds and the liability to the landlord, there was a small surplus

of assets over liabilities of nominally £200. The landlord obtained judgment this year for £1,700 damages and £65 9s. 4d. costs, and thus, if this debt be taken into account, a deficit of some £1,600 was created at the time of and by reason of the alienation of the bonds. But in fact the ultimate deficit is much greater, because the assets did not realise their full value, as is inevitable in insolvency, because the costs of sequestration have also to be deducted, and because further liabilities were incurred in carrying on the business.

The proved claims amounted to	£2,616	19	5
The net realised value of the assets, deducting all costs of sequestration, was	268	1	5
Thus leaving a deficit of	£2,348	18	0

There is, thus, an increase of some £700 in the deficit upon liquidation as compared with that between the 21st October and the 7th November. The defendant contends that even if article 33 applies, then the transaction is governed by the last paragraph, and that the excess referred to is that existing at the date of the challenged transaction. Now there is no doubt that this article is founded generally upon the section 83 of the Cape Insolvency Law, though that section applies a different test to the validity of the transaction. The Cape test depends on a state of facts, namely, an excess of liabilities over assets fairly valued; the first portion of the Transvaal article depends on a state of mind, reasonable expectation of insolvency. But whilst it is clear what is the object of the Cape section, viz., to supplement the preceding provisions, the same cannot be said of the Transvaal article. It may be intended merely to restrict the operation of the first portion of the article, or it may be intended to include cases not provided for in this first portion. It will be convenient to deal with the latter construction first. Grammatically the words may mean that every alienation, mortgage or pledge of the insolvent's property causing the liabilities to exceed the assets is void to that extent, notwithstanding that the insolvent did not expect sequestration, and that the act was done in good faith and for valuable consideration. That applies the words "as above" to the alienation, mortgage or pledge referred to in the preceding paragraph and not to the other qualifying provisoes. But it seems little likely that the legislature intended to avoid transactions done in good faith and for valuable consideration in

cases where the estate was solvent but for the transaction, and yet protect exactly similar transactions where the estate was insolvent even with the inclusion of the alienated or mortgaged property.

We are driven then to conclude that if these words are not used restrictively, they are aimed at transactions entered into in expectation of insolvency and not in good faith and for valuable consideration, but these transactions are already dealt with in the first part of the article.

It seems to me, therefore, that the latter part of article 33 is intended to restrict the cancellation of the challenged transaction to the extent necessary to provide for the deficit between liabilities and assets. But is this the deficit existing at the date of the transaction or on the liquidation of the estate? In the Cape section it is undoubtedly the former deficit which is indicated, but the language of the Transvaal article differs very considerably from the Cape Ordinance and clearly the difference is intentional. The deficit referred to seems to me rather that existing at liquidation than at the time of the transaction. The qualifying words in the Cape Act, "liabilities fairly calculated" and "assets fairly valued" do not appear. There are other considerations also in favour of the view that the deficit on liquidation is meant: such a view secures due payment of the creditors. The other construction imposes the costs of sequestration and any depreciation of assets entirely on the creditors, however fraudulent the transaction may be, and it would also result in only the last of a series of challenged donations made in expectation of insolvency, all at the same period, being avoided.

It is quite true that these results, which seem so unfair to the creditors, are not avoided in sec. 83 of the Cape statute; the very different language of the Transvaal article may well have been designed to protect, and, in my opinion, does protect, creditors against these results.

This conclusion renders it unnecessary to consider how far article 37 applies in this case, except in so far as the deed of donation of August 24th, 1914, was a *bona fide* document. If so, it imposed a legal obligation to the extent of £500 upon the insolvent in favour of the defendant, and to that extent there was valuable consideration for the subsequent cessions, but there can be no doubt that those cessions were made with intent to prefer the daughter so far as they were intended to be genuine cessions at all. They would have, therefore, to be declared void without affecting, however, the

right of the defendant to prove as a concurrent creditor for the £500.

It will be convenient to deal briefly with the plaintiff's further claim that under the common law the cessions are void, because even if the latter part of article 33 does not bear the construction which has been adopted, the common law entitles the plaintiff, in my judgment, to the relief which that construction affords. 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. In *Thurburn* v. *Steward* (L.R. 3 P.C. 478), the Privy Council laid down (p. 514 *et seq.*) that the Cape Insolvency Law was not a complete code and did not affect the right of creditors to attack a marriage settlement under the famous Placaat of 1540. The same reasoning seems to me to apply to the right of creditors to attack alienations *in fraudem creditorum* (*Desai's Trustee* v. *Hack* (1910, T.P.D. 499) and authorities cited; *Du Plooy's Trustee* v. *Netherlands Bank* (1913, T.P.D. 522)). The Roman-Dutch Jurists state clearly that the law of Holland has incorporated the Roman Law as to alienations in fraud of creditors (*Voet*, 42, 8; Van der Keess., *Th. Sel.* 199, 200). Both systems of law lay down that alienations *ex titulo lucrativo* made in fraud of creditors may be revoked, so far as the alienee has benefited thereby, even when he was entirely innocent of the fraud (Pothier's *Pand.*, 42, 8, secs. 19 and 25; *Voet*, 42, 8, 5). It is sufficient to establish fraud on the part of the insolvent. And in this connection the knowledge of the insolvent that he would cease to be solvent by reason of the alienation is by itself fraud (Poth. *Pand.*, 42, 8, sec. 14; *Voet*, 42,8, 14).

In *Chin's Trustees* v. *The National Bank of S.A., Ltd.* (1915, A.D. 353), Sir William SOLOMON laid down that an intention to allow a creditor to secure a preference in case of insolvency by means of a power to mortgage given at a time of solvency constituted a fraud upon creditors, This seems to me to have certainly been Scharff's intention, both when he executed the deed of donation and when he signed the cessions. The remedy is only granted if the creditors have been actually damnified, and this, of course, can only be fully ascertained upon liquidation (Poth. *Pand.*, 42, 8, secs. 21 and 22; *Voet*, 42, 8, 13 and 14). These passages show to my mind that under the common law the cessions attacked are null and void to the extent necessary to pay the creditors what is due to them.

There must, therefore, be judgment for the plaintiff cancelling the cessions of the seven mortgage bonds in question, so far as may be necessary to pay all the creditors the full amount due to them, and also, of course, the costs of the action. That amount is not, of course, ascertainable at once, and the only proper security for the carrying out of the judgment is to take them out of the possession of the defendant.

The judgment will, therefore, be for the plaintiff:

(1) Cancelling the cessions of the bonds by the insolvent and directing delivery thereof to the trustee;

(2) Adjudging the defendant to pay the costs; and

(3) Directing the trustee to realise so much on the said bonds as may be necessary to pay all the creditors in full the costs of sequestration and his costs of the action, any unrealised bonds to be ceded back and any unused balance to be handed over to the defendant.

Plaintiff's Attorneys: *Tindall & Mortimer;* Defendant's Attorneys: *Pienaar & Niemeyer.*

[J. M. M.]

EX PARTE DICKS.

1915. *October* 11, 18. DE VILLIERS, J.P., WESSELS and BRISTOWE, JJ.

Husband and wife.—Marriage of minor without parents' consent.—Exclusion of community of property.

Where a marriage had been contracted in community of property with a minor without her parents' consent, which was, however, subsequently given, the Court, on the application by the spouses for leave to enter into an antenuptial contract, declared—such being to the minor's benefit—that the marriage was one out of community of property, in which the marital power was excluded, and that the husband could derive no benefit from the marriage. *Mostert's Trustee* v. *Mostert* (4 S.C. 35), followed.

Application for leave to enter into an antenuptial contract, referred to the full Court by CURLEWIS, J., on September 28th.

The petition set forth that the applicants, Douglas Joseph Dicks and Emma Winifred Dicks (born Laver) were married on 18th March, 1915, by the magistrate, Johannesburg. The attached