WARD, J.
December 12th, 1911.
January 23rd, 1912.

FISHER *vs.* MALHERBE & RIGG AND ANOTHER.

*Husband and Wife.—Antenuptial Contract.—When binding on Creditors at Common Law.*

*At common law in order to make an antenuptial contract binding on creditors the contract must be entered into publicly before credible witnesses.*

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Application to set aside an order of attachment of property belonging to the petitioner.

The petitioner was married to Arthur Churchill Fisher on July 24th, 1905. The marriage certificate, as altered, stated that the marriage was without antenuptial contract. The said Fisher in 1911 sued the petitioner for divorce, and she counter-claimed for an order declaring that the marriage was with antenuptial contract, that is, that all community of property, debts and profit and loss, should be excluded, and also all marital power, and the plaintiff's right to administer the defendant's property. The Court on May 18th, 1911, dismissed the claim with costs and granted the counter-claim with costs, holding that there had been a verbal antenuptial contract. (See *Fisher* vs. *Fisher*, 1911, W.L.D., 71.)

The respondents acted as attorneys for the said Fisher in the trial action; he had failed to pay them the amount incurred by him for costs in the suit, and the respondents on October 24th, 1911, obtained judgment against him for £450. They issued a writ against his movable property and, in pursuance of such writ, the second respondent, the Deputy Sheriff, on November 28th, 1911, attached certain movables, the property of the petitioner, which property had, before the abovementioned judgment, been assumed to belong to the community. The petitioner now applied to set aside this attachment.

*S. S. Taylor*, for the applicant, moved in terms of the petition.

*J. van Hoytema*, for the respondent: The attachment is perfectly valid. The respondents became creditors

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of the husband at a time when the only antenuptial contract between the spouses was a verbal one. An antenuptial contract is not valid against creditors unless it is registered. There is no statute law in existence affecting the question, as Law 5 of 1882, sec. 5, which required all marriage contracts to be registered and signed by the Registrar of Deeds to render them valid, was repealed by section 37 of the Schedule to Proclamation 10 of 1902. Section 33 of Act 25 of 1909 deals with creditors in insolvency. It is therefore necessary to discover what the common law is. *Voet* 23, 4, 50, and *Grotius* 2, 12, 4 say an antenuptial contract is valid as against creditors if made verbally, but all the other authorities say it is only valid as against creditors if made solemnly *i.e.*, publicly. See *Regtsgeleerde Observatien, Deel* 2, *Obs.* 35; *Dekker's* note to *Grotius* 2, 12, 4; *Van der Linden*, (Juta's translation) p. 14; *Nathan*, Vol. 1., p. 249; *Wright* vs. *Barry et uxor* (1 M., 175); and 26 S.A.L.J., 536, where all the authorities are collected.

*S. S. Taylor*, in reply: Neither *Voet* nor the commentators of his day record any exemptions in favour of creditors.

*Cur. adv. vult.*

*Postea* (January 23rd, 1912).

WARD, J.: This is an application to set aside an attachment of property belonging to the petitioner made by the Sheriff at the instance of the respondents.

The applicant on the 24th July, 1905, was married to Arthur Churchill Fisher before the R.M. of Boksburg.

At the time of the marriage the applicant stated to the marriage officer that the marriage was by antenuptial contract and an entry to that effect was accordingly made in the marriage register. The applicant on the same day asked her attorney, in the presence of her husband, to prepare a contract. She was advised by him that this could not be done, and in consequence of this advice she and her husband went to the office of the R.M. of Boksburg on the following day and caused the words "Yes, with antenuptial contract" to be erased and the word "without" put in, and initialled the erasure.

Last year the applicant was sued for a divorce and she put in a counterclaim for a declaration that the marriage was by antenuptial contract.

The present respondents acted as attorneys to the husband in that suit and their present claim is for costs incurred by the husband subsequent to the applicant's counterclaim.

In the previous action it was not contended, nor is it contended now, that an antenuptial contract in order to be valid must be in writing. The Court declared in the former action that there was a binding antenuptial contract and authorized the Registrar to register it, saving the rights of creditors up to the time of registration. The respondents have now attached property of the applicant in the execution of a judgment obtained against the husband for the said costs.

The respondents claim that the attachment is valid on the ground that, though the antenuptial contract is valid as beween the spouses, it is invalid as against the creditors of the spouses, because it is not in writing.

The point is one which is only of practical interest in the Transvaal owing to the somewhat curious legislation. By Law 5 of 1882, sec. 5, all marriage contracts had to be registered and signed by the Registrar of Deeds to render them valid. Under sec. 37 of the Schedule to Proclamation 10 of 1902 this law was repealed. By Act 25 of 1909, sections 33 *et seq.*, it is provided that an antenuptial contract is of no force or effect against creditors in insolvency, unless registered within certain specified periods. Therefore the whole question to be determined is whether under the Common Law a verbal contract is binding as against creditors.

I have been referred to an article in the Law Journal, Vol. 26, page 538, on the subject where the authorities are collected, and some of these authorities were cited in argument. The difference of opinion between the various authorities is as to whether the contract must be in writing in order to be valid.

This is not the question before me.

The older authorities as a rule merely state that an antenuptial contract need not be in writing, a point upon which there was some difference of opinion in conse-

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quence of the passing of the Ordinance of the Little Seal (see *de Haas'* note to *van Leeuwen's Cens. For*: 1, 1, 12, 9).

*Van der Keessel*, Th. 229, says that antenuptial contracts can be validly entered into without being in writing—but even if in writing in order to be valid against creditors, they must be entered into either publicly, or in the presence of a notary and witnesses, or of the relatives of both parties, or before respectable (*idoneis*) witnesses.

In the case of *Wright* vs. *Barry et Uxor* (1 M., 175) it was held that a contract executed only by the signature of the two spouses and attested by two witnesses is not sufficient in law to bar the creditors of the wife from recovering from the husband for debts contracted before the marriage.

The authorities quoted in that case were:—(1) *van der Linden* (Juta's translation), who says that in order to be valid the contract must be in writing and contained in a public instrument. He does not draw any distinction between the case where creditors are concerned and where they are not.

(2) Section 202 of the *Nederlandsche Wetboek*, which says "de huwelykscbe voorwaren moeten, op straffe van nietigheid, voor het aangaan des huwelyks, by notariele akte worden verleden."

(3) *Voet*, 23, 4, 50, who says an agreement whereby the goods of the wife were not to be liable for the debts of the husband contracted before marriage was required by Placaat in Holland to be registered in order to affect creditors. This placaat he says has never been acted on —a statement which is supported by nearly all, if not all, the authorities. And he refers to a late decision in Utrecht that, to affect creditors, the contract must be "*tabellionis publice subscriptione munita.*" *Van Leeuwen* says with regard to the alienation of the wife's property by the husband where "such alienation has been prohibited by the antenuptial contract, that such an alienation will hold good as against third parties saving an action to the wife against her husband and his heirs; except, where the prohibition against alienation has been publicly proclaimed or otherwise any *mala fides* has been practised therein; for it is scarcely possible that we can

know what contracts have been privately made between spouses" (II. Vol. *Kotzé* translation, p. 199), and *Sande*, 2, 5, 8, says that according to Frisian custom, if it has been agreed in the marriage contract that the wife shall not be liable for the debts contracted during the marriage by the husband, the agreement is valid between the spouses, but the better opinion is that it does not prejudice the creditors unless it has been published.

In my opinion, in order to bind creditors, the contract must be entered into publicly before credible witnesses. The Court in granting leave to register a contract always preserves the rights of creditors, and it does this not only to prevent the parties obtaining rights which only arise on registration, but also because, from the nature of the case, the proof of the antenuptial contract itself must be materially different in a case where the spouses are the only parties, and one in which the creditors are interested. Take the present case as an example, the wife led evidence in order to establish her contract of a statement by her to her solicitor after the contract was entered into in the presence of her husband which statement was acquiesced in by him. This evidence could not have been led, if the action had been between her and a creditor.

The result of the authorities seems to me to be that, though it was not necessary for the validity of an antenuptial contract to be in writing, yet in order to make it binding on creditors it is necessary that it shall be entered into with some publicity. Even if it were in writing, there would have to be requisite proof that it was entered into before marriage. If it were not so, the door would be open to fraud by the spouses on the creditors; and I do not think I can do better than follow the decision in *Wright* vs. *Barry* (1 M., 175), a case of very long standing which has never so far as I know been disputed, a fact which deserves some weight, although it is true that since 1875 in the Cape Colony the matter has been governed by Statute.

I think therefore that the application must be refused with costs.

[Applicant's Attorneys, STEYTLER, GRIMMER & MURRAY.
Respondent's Attorneys, HAYMAN & GODFREY. ]