1912. Feb. 27. March 7.

Develing vs. Central White Lime Works and Others.

This appears to me to be clearly wrong. When a plaintiff claims relief against a defendant, and the latter, after action brought, grants the relief claimed, but does not tender the costs, the plaintiff may proceed with the action for costs; and the liability for the costs will depend upon which side was in the right in the original action. If the plaintiff was entitled to the relief which he obtained, he will be entitled to the costs, provided there exists no reason for the Court to exercise its discretion in depriving him of his costs; and, if he was not so entitled, then the defendant would be entitled to his costs subject to the same proviso. The cases of *Upmann* vs. *Forester* (24 Ch. D. 231) and *Dicks* vs. *Yates* (18 Ch. D. 78) exemplify the above propositions.

The next question arises whether the applicant is entitled to proceed by notice of motion for his costs.

If the pleadings in the case had been closed, I should have thought that his proper course was to set the case down for hearing, but, as the matter stands, nothing has been done beyond the issue of summons, and I think that the applicant is entitled to proceed by notice of motion.

[Applicant's Attorneys, STEYTLER, GRIMMER & MURRAY.
Respondents' Attorneys, BELL & NIXON.]

WARD, J, March 28th, 1912.

SAND AND CO. AND OTHERS *vs.* PINCHUK AND OTHER.

Insolvency.—Undue Preference.—Sale to Creditor in Part Satisfaction of Debt.—Remedy available to Trustee.—Interdict.

A bona fide *sale by a person when clearly in insolvent circumstances will not be set aside as an undue preference merely on the ground that part of the purchase price has been satisfied by setting off a debt due by the seller to the purchaser. When the result of such set-off has been to unduly prefer the purchaser for the amount thereof before the other creditors of the seller, the proper course for the latter's trustee to*

pursue is to sue the purchaser for the amount whereby he has been preferred. Where such a course will adequately protect the general body of creditors the Court will not interdict the purchaser for dealing with the property purchased. (*Aboo and Abdool Carim's Trustee* vs. *Ebrahim*, 1907, T.S. 65, *and Randles Brothers and Hudson* vs. *Brewer*, 1908, T.S. 673, *distinguished.*)

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Return day of a rule calling on George Pinchuk and the provisional trustee in the insolvent estate of A. Taitz to show cause why the said Pinchuk should not be restrained from alienating or disposing of certain assets obtained by him from the said Taitz pending the election of a trustee, and the decision of an action to be instituted by such trustee or the applicants against the said Pinchuk for the recovery of the said assets.

The applicants were creditors of the said Taitz, whose estate had been placed under provisional sequestration on March 15th, 1912. The applicants alleged that, on the 13th day of March, 1912, before sunrise, Taitz alienated certain of his assets valued at £650 to Pinchuk, the said assets constituting practically the whole of the business of the said Taitz. That Pinchuk informed one of the applicants that he had purchased the said assets for £470, and that he had paid nothing to Taitz, but had squared the amount of the purchase price in the following manner:—

(*a*) £83 he had retained for himself in respect of a certain amount which he had guaranteed on behalf of Taitz, and which was about to become due and payable to the party who had discounted a bill for that amount.

(*b*) £30 he had retained in respect of a similar transaction to that mentioned in paragraph (*a*).

(*c*) £127 he had paid in respect of an overdraft of the said Taitz to the Standard Bank, Ltd., Fordsburg.

(*d*) £30 he had paid to a certain Shapiro who was alleged to be a creditor of the said Taitz, and the balance he had paid to other creditors of Taitz whose names the applicants did not remember.

That Taitz admitted that out of the £470 he had got only 6s. 9d. in cash and that the balance had been re-

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tained by Pinchuk and the other creditors who were aware of the transaction between Pinchuk and Taitz. That after the said transaction, namely, on March 13th, 1912, Taitz had sent notices to his various creditors inviting them to attend a meeting of creditors on March 14th, which meeting had been duly attended by the applicants.

That at the said meeting various suggestions had been made for settlement, but nothing definite had been concluded. That, on March 15th, application had been made for the sequestration of Taitz's estate by one Moss, which application the present applicants alleged had not been made with a *bona fide* intention for the benefit of the creditors. The applicants submitted that the alienation by Taitz to the respondent had not been made *bona fide* or for lawful consideration, and was therefore null and void, and that by alienating the assets Taitz had given an undue preference to Pinchuk to the extent of the amount that was due to the latter, and which was deducted off the amount of the alleged purchase price. The applicants further alleged that Pinchuk was not a man of means.

The respondent Pinchuk said that the said assets were acquired by him on March 12th, 1912, from Taitz *bona fide* and for valuable consideration, and that the same were removed by him in broad daylight on the morning of March 13th. That the said assets did not constitute the whole business of Taitz, but that he still had a considerable number of other assets besides landed property. He denied that he had retained any part of the purchase price or that he had informed the applicants that he had done so. He said he had paid the purchase price in the following manner:—

(*a*) £127 by cheque in favour of Taitz, with which the latter had paid his overdraft at the Fordsburg branch of the Standard Bank.

(*b*) £120 in cheques to the Standard Bank on account of bills discounted and held for collection by the bank on which Taitz was liable.

(*c*) £108 in cheques to Taitz of £15, £30, £30, and £33.

(*d*) 6s. 9d. in cash to Taitz.

(*e*) £17 in cash to one Judel Abraham.
(*f*) £12 13s. 3d. in cash to one Herman Becker.
(*g*) £85 by cheque to one S. Rosenzweig.

Pinchuk stated that the above amounts other than those paid by him to Taitz had been paid by him for and on behalf of Taitz and at his special instance and request. He further stated that his own financial position was sound, and that he was worth about £3,000.

The respondent attached supporting affidavits by two qualified appraisers, who valued the assets which had been alienated at £405 and £412 respectively; by the manager of the Fordsburg branch of the Standard Bank, who stated that Pinchuk was worth fully £3,000; by Taitz, who stated that the sale had been *bona fide* and for valuable consideration, and that the purchase price had been paid and made up as detailed in the affidavit of Pinchuk; and by the said Abraham, Becker and Rosenzweig, who stated that Taitz was indebted to them in the sums stated, and that they were paid as alleged by Pinchuk.

Certain correspondence was attached, in which Pinchuk admitted in reference to the £85, paid to Rosenzweig, which was owing to Rosenzweig on a promissory note signed by Taitz, that the note had been endorsed by himself and one Davidoff, and in reference to the £120, given in cheques to the Standard Bank, that he had endorsed a promissory note for £40 signed by Taitz.

L. Greenberg, for the applicants: I move for confirmation of the rule. The facts show that the alienation was *mala fide*, and this is strengthened by the subsequent collusive sequestration. The application is based on sections 33 and 37 of the Insolvency Law. The effect of the alienation was to give Pinchuk an undue preference. See *Aboo and Abdool Carrim's Trustee* vs. *Ebrahim* (1907, T.S. 65) and *Randles Brothers and Hudson* vs. *Brewer* (1908, T.S. 673). Pinchuk admits that he was liable for £85 and £40 on promissory notes signed by Taitz, and by paying these amounts he discharged his own liability, and so was a party to giving himself an undue preference.

I submit a *prima face* case of collusion has been made out, and the Court will grant an interdict even if there

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is a conflict of evidence; see *Smith* vs. *Hill* (1910, T.S. 724).

J. Stratford, K.C. (with him *S. S. Taylor*), for the respondents, was not called upon.

WARD, J.: The only ground on which the application can be successfully put is that there was not a *bona fide* sale, either because of the disparity in the price paid by Pinchuk, or because Pinchuk paid the price collusively in order to get an undue preference.

The applicant must satisfy me that a *prima facie* case has been made out that the trustee when elected will be entitled to rescind the sale. The applicant must show that the respondent acted in collusion with Taitz, *i.e.*, that he was aware of Taitz's circumstances, and that the latter could reasonably have expected the sequestration of his estate. There is nothing to show this; the respondant may have acted with a perfectly innocent mind. The two cases which have been quoted to me are quite distinguishable. In *Aboo's* case (*supra*) the alienation was made to the manager of the insolvent's business, who must have been aware of all the circumstances, and a presumption of collusion arose. In the case of *Randles Brothers and Hudson* (*supra*) the Court held that the *bona fides* of the purchaser must be taken into consideration, and that the purchaser had not discharged the *onus* resting on him.

Here the facts alleged are that Taitz, before sunrise on the day before he called a meeting of his creditors, sold certain assets to the respondent, and that £125 of the purchase price was paid over to release liabilities of the respondent himself. The respondent denies the time of the sale, and he furnishes valuations by competent appraisers to the effect that the property sold was not so valuable as the price paid for it. He mentions a number of payments made by himself in cash to various persons on behalf of Taitz and at his request, all of which payments appear to me to be genuine. Even if the £125 acted as a discharge of the respondent's liability, that fact would not vitiate the whole of an otherwise *bona*

fide sale. The trustee, when elected, will always be able to recover this amount from the respondent. I, therefore, come to the conclusion that a *prima facie* case of fraud has not been made out. There is nothing to show that there was a collusive arrangement between Taitz and the respondent. Further, the respondent is a man of means, and the applicants will not be left without a remedy in case I refuse the interdict. The rule must accordingly be discharged, with costs.

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[Applicants' Attorney, M. MARKS.
Respondents' Attorney, H. SALTMAN.]

WARD, J.
March 18th, 19th, 20th, 21st, April 4th, 1912.

PARGITER *vs.* BARTLEY.

Evidence.—Parol to Vary Written.—Evidence of Additional Consideration.—Fraud.—Master and Servant. —Rescission of Contract of Employment on ground of Employee's Fraud.—Fraudulent Management of a Business.

Where one consideration is stated in a written contract any other consideration which existed can be proved by parol evidence, provided that such other consideration is not in contradiction to the written contract. It is not in contradiction to prove a larger consideration than that stated in the writing.

If a person contract to float a company to carry on a business formerly carried on by another, and to have the latter appointed manager thereof, the former is entitled to rescind the agreement to appoint the latter manager, if prior to such appointment the former discovers that the latter has been guilty of fraudulent misconduct in the previous management of the business.

Action for payment of sums of £3,000, £3,000 and £1,800 with interest and costs.

The plaintiff alleged in his declaration that on November 28th, 1910, it was agreed between him and the defendant that he should be appointed managing director of a

1912. March 18. " 19. " 20. " 21. April 4. Pargiter *vs.* Bartley.