PRETORIUS, NO v STOCK OWNERS' CO-OPERATIVE CO, LTD 1959 (4) SA 462 (A)

Citation	1959 (4) SA 462 (A)
Court	Appellate Division
Judge	De Beer JA, Van Blerk JA, Ogilvie Thompson JA, Ramsbottom JA and Botha AJA
Heard	September 11, 1959
Judgment	October 2, 1959
Annotations	❑

Flynote : Sleutelwoorde

Insolvency - The insolvent - The 'debtor' - Who is - Person or his estate - Act 24 of 1936 sec. 2 - Undue preference under sec. 30 (1) - When necessary for trustee to prove contemplation of sequestration - Onus - Sufficiency of proof - Intention to prefer - Proof of - Sufficiency of - Debtor deceased - Effect.

Headnote : Kopnota

A 'debtor' in section 2 of Act 24 of 1936 may be either a person or the estate of a person. In relation to debts incurred by a deceased person during his lifetime the deceased is the debtor and if he has died insolvent and his deceased estate has thereafter been sequestrated the deceased is still the 'debtor' for the purposes of section 30 (1) of the Act.

In an action by the trustee to set aside a disposition made by the debtor on the ground that it was an undue preference in terms of section 30 (1) of Act 24 of 1936, the law does not expressly make it necessary for the trustee to prove that the debtor contemplated sequestration when he made the disposition complained of. Where there is no direct evidence of intention to prefer, however, it must be proved that the debtor contemplated sequestration before an inference can be drawn that he made the disposition with the intention to prefer the creditor to whom it was made. A debtor contemplates sequestration, at any rate, if he knows that sequestration is 'substantially inevitable'. The *onus* is on the trustee to prove that fact. The fact that the debtor contemplated sequestration can be proved, like any other fact, by inference.

That there was an intention to prefer the creditor concerned above the other creditors is also a question of fact which may be decided by reference to all the circumstances. An intention to prefer exists when the debtor intends 'to disturb what would be the proper distribution of assets' in insolvency. That must be the main object. Friendship or family relationship may be a motive for giving an undue preference, but it is not an essential element. When it has been shown that the debtor contemplated insolvency, and when no other reason for making the payment appears from the evidence, there is no reason why the inference that the debtor's intention to prefer the creditor in insolvency should not be drawn.

The decision in the Natal Provincial Division in *Pretorius, N.O.* v. Stock Owner's Co-operative Co. Ltd. reversed.

Case Information

Appeal from a decision in the Natal Provincial Division [CANEY, J.] . The facts appear from the judgment of RAMSBOTTOM, J.A.

S. Miller, Q.C. (with him *R. Feetham)*, for the appellant: It was clearly established that Froneman made a disposition of his property to respondent by agreeing that it should appropriate the proceeds of the sale of the cattle which were delivered for that purpose on 4th October 1955 towards a reduction of the debt owed by Froneman to respondent. At the time of the disposition, and for some time before that, Froneman's liabilities exceeded his assets. Respondent was in fact preferred above other creditors of Froneman by reason of the disposition. It was sufficient for appellant to prove, in addition to the facts enumerated *supra*, that at the time of the disposition, Froneman contemplated the sequestration of his estate as a highly probable development. If that fact be established, the Court would infer that in making the disposition, he intended to prefer respondent above his other creditors, or, at least, that that was his dominant intention; see *Swanepoel, N.O v National Bank of S.A.*, 1923 OPD at p. 39; *Malherbe's Trustee v Dinner & Others*, 1922 OPD at pp. 24, 25; *Giddy, Giddy & White's Estate v du Plessis*, 1938 E.D.L. at p. 79; *Pretorius' Trustee v van Blommenstein*, 1949 (1) SA at pp. 270 -- 2, 278 -- 80; cf. *Ex parte Bogner, Mutual Building Society v Trustee in Bankruptcy*, 1956 (2) A.E.R. at pp. 541 -- 2.

H. J. B. Vieyra, Q.C. (with him *W. Lane)*, for the respondent: To succeed appellant had to establish that at the time of making the disposition, the predominant motive of the debtor was to disturb the proper distribution in insolvency --- induced by a desire to favour the respondent; see Mars, *Insolvency* (5th ed., p. 207); *Giddy, Giddy & White's Estate v du Plessis, supra* at pp. 79 -- 80; *Pretorius' Estate v van Blommenstein, supra* at p. 279; *Slater's Trustee v J. O. Smith & Co.*, 5 E.D.C. at p. 18. It is not sufficient to show that Froneman should have realised the effect of his conduct to be a disturbance of proper distribution; see *Pretorius' Trustee's* case, *ibid* at pp. 270, 271, 278; *Mars op. cit.*

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at p. 210. The Court must be satisfied on all the facts that the inference of intention to prefer is the proper inference; see *In re T. W. Cutts*, 1956 (2) A.E.R. at p. 541. If an innocent motive influencing the insolvent's mind is supported by the evidence, the Court must not attribute his conduct to an improper one; see *R v Sircoulomb*, 1954 (4) SA 240; *Est. Payn v Bank of Africa*, 5 N.L.R. 234. Where there is not direct evidence and there is room for more than one explanation, it is not enough to say that there being no direct evidence, the intent to prefer must be inferred; see *Peat v Gresham Trust Ltd.*, 1934 A.C. at p. 262. The *onus* on appellant is not discharged by establishing that Froneman expected the sequestration of his estate. That is merely one factor. The Court must take into account all the circumstances; see *Hugo's Trustee v Lindenberg*, 2 S.C. at p. 186; *Thurburn v Steward*, L.R. 3 P.C. at p. 518; *Pretorius' Trustee's* case *ibid* at pp. 271, 278. There can be no intention to prefer unless at least the debtor contemplates sequestration as being inevitable; see *Mars, op. cit.* at p. 207; *Fearnley's Trustee v Netherlands Bank*, 1904 T.S. at p. 429, 430; *Featherstone's Estate v Elliot Bros.*, 1922 E.D.L. at pp. 241 -- 2; *Malherbe's Estate v Dinner and Others*, 1922 OPD at p. 24; *Pretorius' Trustee's* case, *ibid* at p. 271. The question is not, ought he to have contemplated the sequestration of his estate, but did he contemplate it; see *Goosen v Goosen's Trustee*, 1 Buch. A.C. at pp. 415, 416. The evidence taken as a whole, does not

justify the inference that Froneman considered that sequestration of his estate was either inevitable or highly probable. Alternatively, sec. 29 of the Insolvency Act 1936 does not apply in the case of an insolvent deceased estate where the disposition complained of was made by the deceased during his lifetime. Sec. 29 speaks of a disposition made by a 'debtor'. Sec. 2 defines 'debtor'. In the present case the 'debtor' is the 'deceased estate' and not the deceased himself. The word 'or' in the definition does not mean 'and'; see *Green v Premier Glynrhonwy Slate Co., Ltd.* 1928 (1) K.B. 561. It is the deceased estate that is the debtor; see *Ex parte van Driel's Estate*, 1934 T.P.D. at p. 139. To adopt this interpretation does not necessarily deprive defrauded creditors of a remedy, for the Common Law, in so far as it is not inconsistent with the Act, applies; see *Fenhalls v Ebrahim and Others*, 1956 (4) SA 723; *Scharff's Trustee* v. Scharff, 1915 T.P.D. at p. 476; *Wiener v Estate McKenzie*, 1923 CPD 562; *Mars op. cit.* at pp. 222 -- 5; *Thurburn's* case, *ibid* at p. 515. It is not so extraordinary that the Legislature should not have made provision for the setting aside of antecedent transactions where the debtor is the deceased estate and the disposition complained of was made by the deceased himself, as in such cases it would be inevitable that the evidence of the person making the disposition would not be available; cf. sec. 32 (2).

Miller, Q.C. in reply

Cur. adv. vult.

Postea (October 2nd).

Judgment

RAMSBOTTOM, J.A.: This is an appeal from a judgment of CANEY, J., in the Natal Provincial Division in an action brought by the appellant,

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who is the trustee in the insolvent estate of the late C. C. Froneman, to set aside a disposition made by the said Froneman during his lifetime, on the ground that the said disposition was either an undue preference in terms of sec. 30 (1) of the Insolvency Act, 24 of 1936, or, alternatively, a collusive dealing in terms of sec. 31 of the Act. The learned Judge found, on the evidence that neither an undue preference nor a collusive dealing had been proved, and he dismissed the action with costs.

The facts, which are not in dispute, are as follows:

The late C. C. Froneman who died on November 15th 1955 was in his lifetime employed as farm manager by a Mr. Thys Wessels, a farmer of Vrede. In addition to his work as farm manager, Froneman speculated in cattle. He had access to good grazing, and his practice seems to have been to buy cattle either at auction sales or from farmers direct, to keep them until their condition should have improved, and then to resell. This business required more capital than Froneman possessed at the time material to this action, and the evidence shows that he was operating on credit. He had the reputation of being a shrewd business man with a good knowledge of cattle, he was thought to have been associated in his business of speculation with Mr. Wessels, who is said to be a wealthy man, and he had no difficulty in obtaining credit. In fact, the business proved to be unprofitable, and by the

middle of 1955 he owed to various creditors large sums of money which, as will appear presently, he was unable to pay.

One method by which purchase of cattle was financed was for the auctioneer by whom the cattle were sold to pay to the vendor the whole or part of the purchase price and to debit the purchaser, Froneman, with the amount paid on his behalf. Among the auctioneers who assisted Froneman in this way was the Stock Owners Co-operative Co. Ltd., the respondent in this appeal. The respondent is a co-operative society which carries on business as livestock auctioneers and agents and although Froneman was not a member he had for some years bought and sold cattle at the auction sales held at the respondent's Newcastle branch, the manager of which was a Mr. Jones. Froneman's account with the respondent shows that he was allowed credit in very substantial amounts, and that in each of the years from 1950 to 1953 he repaid his indebtedness by the 30th June. In 1954 the picture begins to change. The loans became larger, and in spite of very substantial repayments there was a debit balance on June 30th 1955 of £3,381 5. 0. At that date Froneman's bank account was overdrawn in the sum of £2,471. 10. 7.

During June 1955 Froneman bought from a farmer called Swanepoel a number of oxen for a price of over £6,500. The sale was for credit and the animals were delivered to Froneman. It was arranged between Froneman and Swanepoel that the respondent, with whom Swanepoel had done business for some time, should be asked to finance this transaction, and Jones was interviewed by Swanepoel with that object in view. Mr. Jones, in his evidence, said that in addition to auctioneering and agency or broking work for which commission was charged, the respondent had another source of income; it also undertook the financing of privately negotiated sales such as that between Froneman and Swanepoel.

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The procedure was for the respondent to pay the seller and to debit the buyer. In addition to charging interest on the loan, commission was charged as if the animals had been sold by the respondent as auctioneer or agent, and the transaction was shown in the respondent's books as an ordinary agency or auctioneering transaction. It was proposed to Jones that the respondent should pay the price of the cattle to Swanepoel and should recover the amount from Froneman. Although Jones was of the opinion that Froneman was a 'good mark' he was unwilling to undertake the business; Froneman had not settled his account and already owed £3,381, and a further £6,500 would have created far too large a debt. After discussion Jones made a suggestion that was accepted by Froneman who visited Jones Jones on July 12th 1955. The arrangement that was made was that Froneman was to pay his existing debt, and that the respondent would pay half of what Froneman owed Swanepoel. The amount paid to Swanepoel was to be placed to the debit of Froneman's account as a new debt. At a later date Froneman was to pay this new debt in full, and when that had been done Jones would pay the remainder of Swanepoel's debt and would debit Froneman with the amount. Froneman then gave Jones his cheque for £3,000, which was duly honoured, and Jones paid Swanepoel £3,150 less commission and an amount that Swanepoel owed the respondent. The result of this was that Froneman's existing debt to the respondent was reduced to £381. 5. 0. and a new debt of £3,150 was incurred, the total being now £3,531. 5. 0. When Froneman handed over the cheque for £3,000 he told Jones that he would send 150 head of cattle to the respondent's August sale, and that the proceeds would be used to pay both Swanepoel and the respondent. On the same day, July 12th, Jones wrote to

Froneman thanking him for the cheque for £3,000, asking him to pay £400, the balance of the old account, by return of post, and telling him that 150 head of cattle had been entered for the auction on August 2nd.

Before continuing the narrative, I think I should digress for a moment. The cattle that Froneman had bought from Swanepoel had been delivered to him. There is no direct evidence as to what became of them, but there is no evidence that they remained in Froneman's possession for any length of time. Froneman's bank account shows that on July 1st there was a deposit by 'G. P. Maree and Karoo' of £8,385. That deposit converted the debit balance of £2,471. 10 7. into a credit balance of £5,913. 9. 11. There is no evidence as to what the £8,385 represented, but as G. P. Maree and Co. is a firm of auctioneers and Karoo Meat Exchange Ltd., deals in cattle for slaughter there is a high degree of probability that the £8,385 was the proceeds of sales of cattle including the cattle bought from Swanepoel. On the same day, July 1st, a cheque for £4,602. 7. 0. was paid; there is no evidence as to what that was for or to whom it was paid. On July 14th, a cheque for £3,000 was paid; that was obviously the cheque that had been handed to Jones on July 12th. The payment of that cheque put the bank account in debit in the amount of £2,003 and between then and the date of Froneman's death there were withdrawals, but no deposits to the credit of the account.

Froneman did not keep his promise to send 150 head of cattle to the

respondent's August sale, and on August 19th Jones wrote to him saying that he had heard from Swanepoel that Froneman had told him that he would settle the account at the end of the month and expressing the hope that he would do so before the respondent's books closed on August 31st. Froneman did not pay by that date, but he called on Jones and promised that he would call again and pay his account. He did not do so, and on September 17th Jones, who had exceeded his authority in allowing Froneman to incur so large a debt and who, as he says, was becoming 'extremely agitated' wrote to him again asking him to treat the matter as very urgent and to see to it that his cheque for the whole amount would reach him on September 24th. No reply was sent to that letter.

Meanwhile, Froneman had not been inactive. During August he bought from or through the firm of G. P. Maree and Co., the auctioneers, cattle to the value of £2,990, and increased his indebtedness to that firm by that amount, the debt being now over £6,000. What happened to those animals did not appear from the evidence. Some, but not all, may have been in the possession of Froneman at the time of his death; if some or all of them were sold, the proceeds were not banked. G. P. Maree and Co. were not paid. There is no evidence as to what became of the cattle, and the matter cannot be pursued.

In September Froneman bought for the sum of £6,200 about 200 head of cattle, by private negotiation, from one Kritzinger, now deceased, with whom the witness Maritz was in partnership. These animals were bought on credit and were delivered to Froneman. To cover the purchase price, Froneman gave Kritzinger two promissory notes, one for £2,000 and the other for £4,200 due on October 1st and November 1st 1955 respectively. The promissory notes were not paid on due date or at all. When the first bill fell due, Froneman asked for and was given an extension of time of fourteen days. When the second note was

not paid Kritzinger and Maritz went to Froneman who put them off by saying that he was 'doing a deal with Jones for £10,000,' and made a promise --- presumably that he would pay when that deal had been completed.

On September 30th 1955, G. P. Maree and Co. held an auction sale at Vrede. Froneman put on the sale, for disposal, 193 of the animals he had bought from Kritzinger. Froneman was present at the sale, and although, according to the witness Muller, the bids were reasonable, he expressed himself as dissatisfied and withdrew the cattle from the sale. Froneman's next action was somewhat surprising. He at once sent the cattle, by road, to a farm called Witbank in the Newcastle district, about ten miles from Newcastle, of which he was the lessee. Froneman went himself to Newcastle on October 1st, accompanied by a Mrs. de Vos, for the purpose of fetching their respective children from school. They travelled in Froneman's car and passed the cattle on the way. Presumably Froneman returned to Vrede on that day, but he must have gone back to Natal on October 2nd because the witness van Zyl saw him on the farm Witbank on the evening of that day. Van Zyl, who was an assistant stock inspector, lived on the farm Witbank and saw the cattle arriving towards evening. Froneman spoke to him and asked him to count them; he did so and counted 193 head. At that

time a permit was needed to take cattle from the Orange Free State into Natal and van Zyl asked Froneman for the permit. Froneman replied that he did not have it with him but that he would bring it at a later date; in fact he had no permit. Van Zyl says that before the 193 head of cattle arrived there were about 40 head on the farm; the grazing was good and was sufficient for all those animals for a month or five weeks.

The respondent was holding a stock sale on October 4th. On that day Froneman called at Jones' office and told him he had brought to the sale a large number of animals that he wanted Jones to sell. Jones told him that as he had not known that the animals were coming and as they had not been advertised, they might not sell easily. Froneman then said that he wanted them sold in any case, and if they did not fetch a reasonable price on the sale Jones was to send them to the respondent's abattoir agency in Durban; he asked Jones to arrange the necessary meat permit from the meat control board in Durban, which Jones did. Jones' evidence was, and there is no reason to disbelieve it, that it was agreed between him and Froneman that whether the cattle were sold at auction in Newcastle or were sent to Durban for sale there, the proceeds were to be appropriated first to Froneman's debt to the respondent and any balance was to 'go through the books in regard to Mr. Swanepoel's transaction'. Including interest, Froneman at that date owed the respondent £3,554, and £3,393. 5. 0. of the balance of the price of the cattle he had bought from Swanepoel remained unpaid.

Although the cattle had been brought to the sale yards they could not be sold because Froneman had not obtained a permit to introduce them into Natal. According to Jones, when that was discovered, Froneman spoke to him and said 'I want you to take them over now and see that they are railed to Durban;' Froneman wanted to go back to his farm. The necessary trucks were obtained from the Railway, and the cattle were handed over to a Mr. Adendorf, an employee of the respondent, and were put in a pen at the sale yard; all was

ready for their removal to Durban on the following day.

On the night of October 4th there was heavy rain, and on the same night Froneman telephoned Jones and suggested that since good rain had fallen it might be better, instead of sending the cattle to Durban, to keep them for a month and sell them at the respondent's next sale which was to be on November 1st. Froneman asked Jones to find suitable grazing. Jones agreed to this. He says that there was no alteration of the agreement as to what was to be done with the proceeds.

The next day Swanepoel saw Jones and was told what had been arranged. Swanepoel was in agreement and promised to provide grazing on his farm which was about 15 miles away. The Durban plan was cancelled and the animals were driven to Swanepoel's farm where they remained until the November sale.

On October 14th Swanepoel visited Jones and asked for a further payment on account of his debt. He pointed out that as they held the cattle 'as security' Jones could safely make a payment. An amount which could safely be paid was agreed and Jones paid Swanepoel £1,653 --- less commission, Froneman's account in the respondent's books was debited with £1,653, plus £3. 5. 0. for 'driving fees'.

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On the night of October 31st, the eve of the November sale, Froneman telephoned Jones and asked him not to sell the cattle. He asked Jones to keep them and said that he would be in Newcastle on the next day, or within a day or so, and would settle the account by cash payment. Jones refused and insisted that the agreement be kept. Froneman agreed to that and said he would be in Newcastle for the sale. He duly attended the sale but offered no cash payment. The cattle were at the sale yards and Froneman sorted them into lots. They were put into the sale ring and when 104 had been sold Froneman decided to sell no more but to withdraw the remaining 89 from the sale. The nett proceeds of the 104 animals was £2,831. 18. 5., and Froneman's account was credited with that amount. Froneman was very anxious to sell the 89 animals and asked Jones to try to find a buyer 'outside the ring'. Swanepoel agreed to buy them and they were sold to him for a nett amount of £2,993. 14. 9.; that amount was placed to the credit of Froneman's account with the respondent. At the same time, Jones paid Swanepoel the sum of £1,740 which was the balance of Froneman's debt to him, and Froneman's account was debited with that amount. The result of these transactions was that Froneman's debt to the respondent was increased to £6,950. 14. 2. In reduction of that debt Jones, on behalf of the respondent kept the proceeds of the cattle, £5,825. 13. 2., and Froneman remained in the respondent's debt in the sum of £1,125. 1. 0. For that amount, plus some charges for interest, he gave Jones a cheque post-dated December 6th 1955.

There is no evidence about Fronemans' activities between November 1st and November 15th. On the latter date he was on one of Mr. Wessels' farms. After giving instructions to the witness Moloi he went off in the direction of some trees carrying a shotgun. A shot was heard but no notice was taken until later in the day when Froneman had not returned. The servants looked for him and his dead body was found next to a fence --- the gun was 'dangling from the wire'.

An executor was appointed and Froneman's estate was found to be hopelessly insolvent.

Eventually on November 15th 1956, the estate was compulsorily sequestrated on the petition of the creditor Kritzinger, and Mr. Pretorius was appointed trustee. This action was begun by the issue of summons on May 20th 1957.

The action was to set aside the disposition that was made by the delivery of 193 head of cattle to the respondent on October 4th 1955. This disposition was attacked on the ground of collusion between Froneman and Jones, or alternatively on the ground that it constituted an undue preference. It has not been contended in this Court that colusion was proved and we are concerned only with the question whether the plaintiff proved an undue preference. The facts as set out in the declaration were not quite accurately stated, but the case was fought in the Court below and in this Court on the basis of the facts as I have stated them.

Sec. 30 (1) of the Insolvency Act, 1936, provides that ---

'If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the Court may set aside the disposition.'

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The plaintiff's case is that when Froneman delivered the 193 head of cattle to Jones on October 4th he intended to prefer the respondent above his other creditors, and that the disposition should therefore be set aside. The main defence was that an intention to prefer was not proved. But in addition a second defence was raised which it will be convenient to deal with at once. It was contended that when, as in the present case, a deceased estate has been sequestrated, the 'debtor' whose estate has been sequestrated is the deceased estate and not the person who has died. The disposition can be set aside only if it was made by the 'debtor' whose estate has been sequestrated, and as the disposition was made by Froneman and not by his deceased estate the trustee of the sequestrated deceased estate has no action under sec. 30 (1).

Mr. *Vieyra* argued that the definition of 'debtor' in sec. 2 of the Act supports his contention. I do not think that it does. 'Debtor' is defined as follows: ---

'Debtor, in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word . . .'

A debtor, therefore, may be either a person or the estate of a person. When a man dies leaving assets and liabilities an executor is appointed to administer his estate. One of the duties of the executor is to pay the debts of the deceased --- see secs. 46, 47 and 48 of Act 24 of 1913. Although the debts are paid by the executor out of the assets of the estate, they are debts of the deceased. In the course of the administration the executor may incur debts; such debts are debts of the estate, and their payment too, is provided for in the sections I have quoted. In relation to the debts incurred by him during his lifetime the deceased is the debtor, and if he has died insolvent and his deceased estate has thereafter been sequestrated, the deceased is still the 'debtor' for the purposes of sec. 30 (1) of the Insolvency Act.

Mr. *Vieyra* argued that the intention of the Legislature was that the Court should have the

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benefit of the evidence of the insolvent in an action under sec. 30 (1) and the other cognate sections, and that the intention therefore was that where a debtor had died and his deceased estate had been sequestrated, the trustee should not have the action created by sec. 30 (1). For this proposition Mr. *Vieyra* invoked the aid of sec. 32 (2). That section, in my opinion, does not support the proposition. It makes the insolvent a compellable witness and denies him the right to refuse to answer questions that may incriminate him. The section is clearly intended to assist a trustee and not to impede his right to recover for the estate assets that ought to be distributed among the creditors.

The finding of the learned Judge that no undue preference had been proved made it unnecessary for him to consider this defence and we have not the benefit of his views. In my opinion, however, the point is unsound and is no defence to the plaintiff's claim.

I turn now to deal with the merits of the dispute.

It was not disputed that Froneman made a disposition of his property when he delivered the 193 head of oxen to the respondent on October 4th 1955, and it is common cause that that was the date of

the disposition for the purposes of sec. 30 (1). It has been clearly proved that at that date the liabilities of the debtor exceeded his assets. The only point in issue is whether Froneman made the disposition 'with the intention of preferring one of his creditors above another' --- that is, with the intention of preferring the respondent above the other creditors.

There is no direct evidence of intention to prefer, and the plaintiff sought to prove his case by inference from the circumstances in which the disposition was made.

The law is, I think, well settled, but it will be useful to refer to some of the cases.

Thurburn and Another v Steward and Another, 1871, L.R. 3 P.C. 478, was decided under sec. 84 of Ord. 6 of 1843 (C.). That section provided that

'every alienation, transfer, cession, delivery, mortgage, or pledge of any goods or effects . . . and every payment made by any insolvent to any creditor, such insolvent at the time contemplating the sequestration . . . of his estate, and intending thereby to prefer directly or indirectly such creditor before his other creditors, shall be deemed to be an undue preference and is hereby declared to be null and void . . .'

In terms of that section, it was necessary for the trustee to prove both contemplation of sequestration and intention to prefer. With reference to those expressions LORD CAIRNS, at p. 518, said:

'The *onus* of proof, of course, lies upon those who impeach the payment as having been made by way of undue preference. It is well settled by authorities in this country, which would regulate the construction put upon those words by our Courts, that the mere insolvency of the person making the payment is insufficient. The mere fact that at the time of the payment the whole of his property would not be sufficient to pay the whole of his debts, is not sufficient. It is a circumstance, an ingredient in

the case, to be considered with all the other circumstances of the case. The payment, however, must be made in contemplation of bankruptcy, or, in this case, of sequestration. The words 'contemplation sequestration' are words on which, perhaps, some criticism may well be bestowed, but they have received by the construction put upon them, the meaning that the Court, judging of the fact, must be satisfied that the payment was in view and in the expectation of a supervening bankruptcy, and in order to disturb what would be the proper distribution of assets under that bankruptcy. Whether it was made with that intention or not is only a question of fact, but being a question of intention, the intention must be arrived at by considering the probable motives which would arise to influence the person making the payment towards making it or towards retaining the money in his own possession.'

What had to be proved, then, was that the payment was made 'in view and in the expection of a supervening bankruptcy', that is in contemplation

of sequestration, and 'in order to disturb what would be the proper distribution of assets under that bankruptcy' --- that is, with the intention to prefer. That statement of the law has, naturally, governed or influenced all later decisions.

Fearnley's Trustee v Netherlands Bank, 1904 T.S. 424, was decided under sec. 37 of the Transvaal Insolvency Law, 13 of 1895. That section, as printed in *De Locale Wetten* 1895, reads:

'Iedere vervreemding van eenig gedeelte van den boedel en iedere betaling door den insolvent aan een crediteur gedaan en ieder verband of pand door hem ten behoeve van een crediteur op eenig gedeelte van den boedel gevestigd, op een tijd dat hij de sequestrasie van zijn boedel kon verwachten, met het doel om zppdanigen crediteur direct of indirect boven de andere crediteuren te bevoordelen, stelt eene onbehoorlijke preferentie daar en is mitsdien nietig.'

All three Judges drew attention to the difference between the Transvaal law and the Cape Ordinance, but SOLOMON, J., at p. 429, said:

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'Now this section of the law requires not only proof that the transaction took place at a time when the insolvent might have expected sequestration, but also that the thing was done with the intention of benefiting the particular creditor or creditors in preference to the other creditors. But in order to prove an intention to prefer, it appears to me that it is necessary to prove that there was contemplation of insolvency, for I do not see how a man can be held to have intended to prefer one creditor before his other creditors unless he had insolvency in contemplation at the time, since no question of preference can arise until he contemplates insolvency. The result would therefore appear to be that, though the wording of sec. 37 differs from that of the corresponding section of the Cape Ordinance, it nevertheless is necessary under our Law, as under the Cape Law, to prove both contemplation of insolvency and intention to prefer.'

CURLEWIS, J., expressed the same opinion.

In Natal, sec. 92 of Law 47 of 1887 was identical with sec. 84 of Cape Ordinance 6 of 1843, and the Orange Free State provision, sec. 84 of Ch. CI of the Wetboek 1854 -- 1890 is a literal translation of the Cape section.

Before Act 32 of 1916 was passed, therefore, the law was substantially the same in all the Provinces; before a disposition could be set aside as an undue preference, the trustee attacking the disposition had to show that at the time when it was made the insolvent 'contemplated sequestration' and intended to prefer.

Sec. 28 of Act 32 of 1916 provided that:

'Every disposition of his property made by an insolvent at a time when his liabilities exceeded his assets with the intention of preferring one creditor above another may be set aside by the Court.'

That section has been replaced by sec. 30 (1) of the Insolvency Act 1936, but the expression 'with the intention of preferring' one creditor above another has been substantially repeated.

The law as it stands at present and as it stood after the enactment of Act 32 of 1916 does not expressly make it necessary for the trustee to prove that the debtor contemplated sequestration when he made the disposition complained of. Cases may possibly arise in which a debtor makes a disposition with the intention of preferring one creditor above another without contemplating sequestration within the meaning that was given to those words in *Thurburn v Steward, supra*, but I imagine that such cases would be rare. In a case like the present, however, where there is no direct evidence of intention to prefer, I think it is clear that it must be proved that the debtor contemplated sequestration before an inference can be drawn that he made the disposition with the intention to prefer the creditor to whom it was made. I respectfully agree with what was said on this point by SOLOMON, J., and CURLEWIS, J., in *Fearnley's Trustee v Netherlands Bank, supra.*

The next question to consider is what has to be shown in order to prove that the debtor contemplates sequestration. I do not think it necessary in this case to deal with this question exhaustively. In *Thurburn v Steward, supra*, contemplation of sequestration was said to mean 'expectation of sequestration'. In *Malherbe's Trustee v Dinner and Others*, 1922 OPD 18, DE VILLIERS, J.P., paraphrased those words as meaning 'knowledge that sequestration was substantially inevitable'. It may be that less than that would suffice as was suggested by the same learned Judge in *Swanepoel, N.O v National Bank of South Africa*, 1923 OPD 35, but it is not necessary to decide that. For the purposes of the present case it is sufficient to say that a debtor contemplates sequestration, at any rate, if he knows that sequestration

is 'substantially inevitable'. The *onus* is on the trustee to prove that fact.

The fact that the debtor contemplated sequestration can be proved, like any other fact, by inference. In *Goosen v Goosen's Trustee*, 1 B.A.C. 414, DE VILLIERS, C.J., said:

'The question in actions of undue preference is not 'ought the insolvent to have

contemplated the sequestration of his estate, but did he contemplate it.' To answer this question, the Court looks at the whole of the evidence and carefully considers all the circumstances under which the challenged payment was made. If these circumstances lead to the irresistible conclusion that the contemplation did exist, the Court would attach little weight to the insolvent's denial of such a contemplation.'

The expression 'irresistible conclusion' is, I think, possibly too strong but I need not discuss that topic.

The disposition was made on 4th October, 1955, and it is necessary to examine the facts which were known to Froneman at that date.

He was hopelessly insolvent. His liabilities, including his debts to the respondent and Swanepoel amounted to over £36,000. His assets consisted of his right under a contract for the purchase of a farm of which he was in possession but of which he had not obtained transfer; an undivided 1/7th share in some other immovable property that was bonded to secure a debt of £142; two policies of life insurance whose surrender value was £215 and which had been pledged to the bank as security for the overdraft; loose assets consisting of the 193 animals that Froneman had bought from Kritzinger, 50 other oxen, 12 Jersey cows and some farm implements. The effect of delivering the 193 oxen to the respondent was not only to reduce the liabilities by their value, but also to reduce the value of the assets by the same amount. The only assets which were available for immediate payment of debts were the remaining animals and the farm implements and these were afterwards sold at what are said to have been good prices, for an amount of £2,882.

Among the debts are tradesmen's debts amounting to several hundred pounds, some of which had been outstanding for long periods.

By 4th October, his creditors, who had been most patient, were becoming restive. Mr. van Heerden of the Northern Natal Auctioneers, to whom Froneman owed £1,797 had telephoned him on several occasions and had been put off with promises, which could not be performed. Kroon, the agency manager of the Karoo Meat Exchange Limited, to which Froneman had owed £3,000 for a very long time went to Vrede in September 1955, specially to see him. Kroon told Froneman that if he did not 'do something about this', steps would be taken. Froneman's reply was that he thought that in two months time he would be in a position to market stock. Froneman knew then that practically the only stock that he had was what he had bought from Kritzinger. De Waal, another creditor, had demanded payment in June and had been put off with a promise that he would be paid in September or October. Froneman had given Kritzinger promissory notes for sums amounting to £6,200; the first, for £2,000 was already overdue. Finally, Jones, on behalf of the respondent had shown by his letters of 19th August and 17th September that he would not allow the account to remain unpaid. The time for the fulfilment of the promises had arrived and there was nothing, or next to nothing, with which to pay.

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CANEY, J., took the view that the facts did not justify the inference that Froneman contemplated sequestration on 4th October. He said:

'At that time he owed a great deal of money, and that he was in fact insolvent is

highly probable. But he was a speculator; he was a man who had been able to obtain a large overdraft from his bank, and, at that time, his creditors, although they had been pressing, were not restive --- they showed every sign of being prepared to wait for the seasonal advantages which, it seems, come to livestock speculators in the spring. Froneman was able to buy cattle from Swanepoel and Kritzinger and Maritz during the winter months and, though Jones had been coutious in allowing him further assistance in the former deal, he had been able to make arrangements with him and with Kritzinger, as well as other creditors, which indicated that he would be under no pressure to pay during the winter months, so that when the spring came, with its shortage of slaughter stock, he would be able to meet his liabilities or at any rate his pressing liabilities, out of the proceeds of sales then to be effected at good prices. In my judgment, it is not possible to hold that up to or in October he contemplated or foresaw sequestration. Indeed but for his untimely death, he might, for all I know, have managed to steer his way through the financial straits he was in; he appears to have been a man with some business ingenuity.'

In my opinion the learned Judge took too optimistic a view of the situation in which Froneman was placed. It is true that he was a speculator, but he had been speculating with other people's money; his credit had been his one important asset. But it is clear that it had worn thin. How was he to go on with his speculating? Who was to finance him? Not Jones, who had exceeded his authority and was most anxious to get the debt owed to the respondent paid off. There is no indication that any important help might come from the Bank. The overdraft was practically unsecured, there had been no deposits since 1st July, and Froneman had not used his overdraft facilities --- whatever they may have been --- to pay any of his pressing creditors or even his tradesmen's debts. The creditors had been put off with promises that they would be paid in the spring, but by 4th October spring was at hand, the time for borrowing had passed, the time for paying had arrived, and there was nothing with which to pay. In addition, the making of the disposition itself deprived Froneman of almost the whole of his stock-in-trade. Once he had handed over the 193 oxen his speculating business had come to an end; he had neither stock nor money with which to continue it. Indeed there is no indication, on the evidence, that between 4th October and the date of his death he made any attempt to carry on the business; during that period he continued to make promises which he knew he could not perform.

It is not necessary to consider whether Froneman's death on 15th November was due to accident or suicide. If it was the latter that would be an indication of the state of his mind on 15th November, but that is not the material date. What the plaintiff had to prove was that Froneman contemplated sequestration on 4th October. In my opinion that has been proved. Froneman was an experienced business man, he knew what his financial position was and he knew that he could not keep the promises with which he had held off the creditors. To those circumstances must be added the fact of the disposition itself. Froneman must have known that once the other creditors learned of that transaction, as they were sure to do, it would bring them about his ears. In my opinion the plaintiff discharged the *onus* of proving that at the date of the disposition Froneman must have known --- that is he did know --- that sequestration at an early date was inevitable.

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Mr. *Vieyra* drew our attention to certain facts which, he contended, pointed the other way. I do not propose to deal with them all but some must be mentioned.

On 30th September Froneman put the 193 oxen on Maree and Co.'s auction sale at Vrede but withdrew them because, he said, he was not satisfied with the prices. His action is not easy to understand as the witness Muller said that the bids were reasonable. There are several possible explanations. One may be that although he knew that the sale of cattle would not affect his solvency, he hoped to get as high a price as possible, either for the sake of his creditors or to provide something for himself. It is difficult to believe, however, that Froneman genuinely thought that he would get better prices at Newcastle on 4th October at a sale for which his animals had not been advertised and at which they were to be sold after two days on the road. His instruction to Jones that the cattle were to be sold in any event --- if not at the sale then at the abattoirs at Durban --- indicates that he was not then greatly interested in the prices they would fetch. Another possibility is that Froneman wished to make a show of independence in the hope of impressing his creditors. If so, he might at that moment have hoped to gain some advantage by so doing. But by 4th October, the cattle being at Newcastle, he realised that they had to be sold and that the proceeds would be kept by Jones for the payment of Swanepoel and the respondent. In those circumstances he told Jones that if the oxen could not be sold by auction they were to be sent to Durban. There is a further possibility. Pretorius' evidence is that when Froneman had withdrawn the cattle from the Vrede sale on 30th September he told Pretorius that he had decided to take the cattle to Mr. Wessels' farm in Natal, to fatten them up for a month or six weeks, and then to sell them; it was understood that they would be brought back to Vrede for sale there. Froneman's subsequent conduct is inconsistent with that being his intention, at any rate on 4th October. It is possible that at that date, Knowing that the proceeds of the sale would go in payment of debts, he decided to prefer the respondent. Jones had helped him, he had exceeded his authority in so doing, and it is a possibility that to protect Jones he would pay the respondent by selling in Newcastle. All this is speculation. The fact that Froneman withdrew the cattle from the Vrede sale on 30th September does not raise a doubt in my mind as to whether he contemplated sequestration on 4th October.

Then it was argued that his subsequent conduct showed that he had not given up hope. On the night of 4th October he telephoned Jones and it was agreed that the animals would not be sold until 1st November. That showed that Froneman was interested in getting a better price for the oxen than he might have got at Durban, but he had by then irrevocably parted with the animals and he must have known what the consequences would be. On 31st October he tried to recover the cattle on a promise to pay the respondent's claim in cash; Jones refused. In fact he, Froneman, had no cash. It may be that there was then some flicker of hope that he might by paying another pressing creditor, possibly Kritzinger, whose promissory note for £2,000 was unpaid and whose note for £4,200 was due on the

next day, he might postpone the evil hour, but he could have had no real hope or expectation of doing so. On 1st November, 104 animals were sold by auction, the rest were withdrawn, but Froneman was 'very anxious to sell them' and they were sold on the same day to Swanepoel; the total price obtained was insufficient to pay both the respondent and Swanepoel in full. This shows that Froneman was still interested to get good prices, but it

does not cast doubt upon whether he contemplated sequestration.

It was argued that the situation was no different at the beginning of October from what it was in July and August, and that if he did not contemplate sequestration at the earlier date this is no reason to believe that he did so later. The answer to that is that in July and August he was able to obtain credit, without which his business was doomed. By October the situation had wholly changed. Those sources of credit were dry and the creditors were being put off with promises to pay 'in the spring' or 'in September or October'. None of the promises had been kept or could be kept and there was thus no reason to think that further credit might be obtained.

I am brought now to the last question that has to be decided; was there an intention to prefer the respondent above the other creditors? This too, is a question of fact which, in the present case, must be decided by inference from all the circumstances.

An intention to prefer exists when the debtor intends 'to disturb what would be the proper distribution of assets' in insolvency. *Thurburn v Steward, supra*. That must be the main object; see *Swanepoel v The National Bank of South Africa, supra* at p. 39. Thus, where a debtor pays a creditor 'out of his turn' under great pressure, or to avoid a prosecution, or for some other reason that negatives the inference that the main object was to prefer the creditor, intention to prefer will not be proved. A useful collection of cases on this point will be found in *Pretorius' Trustee v van Blommenstein*, 1949 (1) SA 267 (O) at p. 279. But when it has been shown that the debtor contemplated insolvency, and then no other reason for making the payment appears from the evidence, there is no reason why the inference that the debtor's intention was to prefer the creditor in insolvency should not be drawn. In *Malherbe's Trustee v Dinner, supra* at p. 24, DE VILLIERS, J.P., said:

'When once it was proved that the debtor made a payment to one creditor at a time when he knew that sequestration was substantially inevitable, it can easily be seen why a Court of law would infer, in the absence of any evidence to the contrary, that the debtor had the intention to prefer the creditor: in fact, in the absence of strong pressure or other exceptional reason, it is difficult to see what other intention such a debtor could have had.'

That remark is appropriate to the present case.

It was argued that there was no evidence of any desire, based on friendship or family relationship, to benefit the respondent. Friendship or family relationship may be a motive for giving an undue preference, and as such its presence or absence may be taken into account in deciding whether an intention to prefer has been proved. *Thurburn v Steward, supra*. But it is not an essential element. To this extent I venture to disagree with the definition of 'Intention to prefer' which is given by Mr. Mars in his book on *Insolvency*, 5th ed., p. 207.

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It is true that in the present case no special friendship or relationship between Froneman and Jones or the respondent has been shown to have existed. But what has been shown is that, knowing that sequestration was inevitable, Froneman deliberately chose the respondent for payment before all his other creditors. He may have had a motive for doing

so; he may have wished to protect Jones or to benefit Swanepoel --- we do not know and in this case the motive is not material. No great pressure was exercised by Jones, and no other exceptional reason for selecting the respondent has been shown or suggested. In these circumstances the only inference that can properly be drawn is that Froneman intended to prefer the respondent before his other creditors.

In my opinion the trustee discharged the *onus* that rested upon him and the disposition ought to have been set aside. The animals have been sold and the trustee is entitled to their proceeds which were £5,825 13s. 2d.

The appeal is allowed with costs, and the judgment of the Court below is altered to read: The defendant is ordered to pay the plaintiff the sum of £5,825 13s. 2d. with costs.

DE BEER, J.A., VAN BLERK, J.A., OGILVIE THOMPSON, J.A., and BOTHA, A.J.A., concurred.

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