FOURTH SUPPLEMENT TO THE GIBRALTAR GAZETTE

L.R. 6/78.

No. 1,795 of 8th FEBRUARY, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1978) Gib. L.R.

WALL v. WALL, ex p. the trustee in bankruptcy of Stephen P. Wall

Court of Appeal
Forbes, P., Bourke and Hogan, J.J.A.,
9, 10, 11 May 1978

Bankruptcy — fraudulent preference — computation of time — Bankruptcy Ordinance, s.42—Interpretation and General Clauses Ordinance, s.51
Bankruptcy — whether gift of money a settlement
Fraud — voluntary settlement — onus on beneficiary to disprove fraud of creditors — Fraudulent Conveyances Act, 1571

On 1 April 1975, after he had begun work on a libellous publication, the debtor transferred £10,000 to his daughter (the appellant). This was part of the working capital of a company of which the appellant was the principal shareholder. In an action for defamation, damages of £19,500 were awarded against him. On 1 April 1977 he committed an act of bankruptcy. The trustee in bankruptcy moved that the transfer was void as against him under s.42 of the Bankruptcy Ordinance (Cap. 9) and under the Fraudulent Conveyances Act, 1571. The Chief Justice held that the transfer was void under s.42 but not under the 1571 Act. The appellant appealed and the trustee cross-appealed.

HELD: (i) The debtor had become bankrupt within two years after the date of the settlement.

(ii) The inference was that the debtor intended the £10,000 to remain as working capital of the company and therefore the transfer was a settlement and void under s.42.

(iii) The onus was on the appellant to show that the transfer was not in fraud of creditors and so offending against the 1571 Act and she had failed to discharge that onus.

Cases referred to in the judgments

In re Tankard, ex p. the Official Receiver [1899] 2 Q.B. 57

In re Vansittart, ex p. Brown [1893] 1 Q.B. 181
In re Plummer [1900] 2 Q.B. 790
Lister v. Hooson [1908] 1 K.B. 174
Ex p. Russell, in re Butterworth (1882) 19 Ch. D. 588
Ex p. Mercer, in re Wise (1886) 17 Q.B.D. 290
Mackay v. Douglas (1872) L.R. 14 Eq. 106
Hare v. Gocher [1962] 2 All E.R. 763
Trow v. Ind Coope (West Midlands) Ltd. [1967] 2 All E.R. 900
Goldsmiths' Co. v. West Metropolitan Ry. Co. [1904] 1 K.B. 1
In re North ex p. Hasluck [1895] 2 Q.B. 264
Re Figgis (deceased), Roberts v. MacLaren [1968] 1 All E.R. 999
Kensington v. Chantler (1812) 2 M. & S. 36
In re Farnham [1895] 2 Ch. 799
In re Player, ex p. Harvey (1885) 15 Q.B.D. 682 (No. 2)
In re Player (1885) 54 L.J. Q.B. 553 (No. 1)
Crossley v. Elworthy (1871) L.R. 12 Eq. 158
Freeman v. Pope (1870) 5 Ch. App. 538
Lloyds Bank Ltd v. Marcan [1973] 3 All E.R. 754

Appeal

This was an appeal against a judgment of the Supreme Court (1) in which a settlement was held to be void under s.42 of the Bankruptcy Ordinance. There was a cross-appeal against a decision that the settlement was not void as offending against the Fraudulent Conveyances Act, 1571. The appeal was dismissed and the cross-appeal allowed.

F. Ashe Lincoln, Q.C., and J. B. Perez for the appellant
J. E. Triay and H. K. Budhrani for the respondent

14 July 1978: The following judgments were read —

Forbes, P.:

This is an appeal from an order of the Supreme Court dated 20 January 1978. There is a cross-appeal by the respondent.

The order which is the subject of the appeal and cross-appeal was made on a motion by the Official Trustee in the bankruptcy of Stephen P. Wall, in which the learned Chief Justice found, *inter alia*, that a transfer of £10,000 made on 1 April 1975, by Stephen P. Wall (whom I shall refer to as the debtor) to his daughter, Cynthia Wall (the appellant), was void against the Official Trustee under s. 42 of the Bankruptcy Ordinance. This finding is the subject of the appeal. The learned Chief Justice also found that the transfer of £10,000 was not void as offending against the Fraudulent Conveyances Act, 1571, and this finding is the subject of the cross-appeal.

(1) (1978) Gib. L.R. 1.

The circumstances of the case are peculiar. The debtor had at one time been a respected resident of Gibraltar carrying on business through Newall (Holdings) Ltd., a company registered in Gibraltar with a registered capital of £10,000. It was incorporated in 1962. I shall refer to Newall (Holdings) Ltd. as the company. On the incorporation of the company the debtor had made gifts of shares to his wife and the appellant of 2,000 £1 shares each. In 1964 he made a further gift of 6,000 £1 shares to the appellant, thereby divesting himself of his total shareholding in the company. He continued as a director of, and later a consultant to, the company, the appellant being also a director. The debtor also held a debenture in the company for £10,000, which constituted part of the working capital of the company. The debenture had originally been for £16,000, but £6,000 of this amount had been repaid by the company in 1966. In addition to other smaller gifts, the debtor had given £12,500 to the appellant in about 1964 to buy herself a house, and a further £25,000 in April 1973, to buy a property. Both the debtor and the appellant maintained current accounts with the company on which they drew from time to time. The current accounts appeared to be comprised of the directors' and consultant's fees, which were credited as they became due.

On 2 June 1973, an incident occurred when guests were arriving for a Garden Party at The Convent (Government House) which led to the debtor developing an obsessional antipathy to the Deputy Governor, Mr. E. H. Davis. This is fully demonstrated in the voluminous bundle of correspondence attached to the affidavit of Mr. J. H. De La Paz dated 21 December 1977. In the course of the correspondence, in a letter dated 25 March 1974, the debtor said "I am determined to have this matter settled to my satisfaction and shall if necessary have no hesitation whatsoever to go there" (i.e. to Gibraltar,) "and seek redress in my own way, whatever the consequences." The correspondence continues up to September 1974.

On 1 April 1975, the debenture of £10,000 in the company was repaid and credited to the debtor's current account with the company. On the same day the debtor made a voluntary transfer of the £10,000 to the appellant, the transfer being effected by book entry in the company's books, that is, the debtor's current account was debited with the sum of £10,000 and the appellant's current account was credited with that sum.

In about October 1975 the debtor published in Gibraltar a booklet which subsequently became the subject of a libel action

brought by Mr. E. H. Davis against the debtor. The verdict of the jury in the libel action was returned on 31 March 1977, and awarded £19,500 damages for libel against the debtor. The debtor left Gibraltar on 1 April 1977, and has not returned since. Over a period of time prior to 1 April 1977, he had stripped himself of assets in Gibraltar.

Bankruptcy proceedings were instituted by Mr. E. H. Davis in May 1977, the act of bankruptcy being the debtor's departure from Gibraltar on 1 April 1977. A receiving order was made on 28 June 1977, in respect of the judgment debt of £19,500 and costs in the action. It is common ground that Mr. E. H. Davis is the sole creditor involved and that at all material times the debtor was solvent, apart from the judgment debt and costs.

In due course the Official Trustee moved the Supreme Court for a declaration that certain transactions, including the transfer of the £10,000 to the appellant on 1 April 1975, were void under s.42 of the Bankruptcy Ordinance, and also as offending against the Fraudulent Conveyances Act, 1571.

As already stated, the learned Chief Justice held that the transfer of the £10,000 to the appellant was void under s.42 of the Bankruptcy Ordinance. The grounds of appeal against this decision are —

> "1. That the Chief Justice was wrong in law and on the evidence before him in finding that the voluntary transfer made by Stephen Wall (A Bankrupt) to Cynthia Wall in the sum of £10,000 on the 1st day of April 1975 constituted a voluntary settlement or transfer within the meaning of s.42 of the Bankruptcy Ordinance and therefore void against the Official Trustee.
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> "2. That the Chief Justice was wrong in law in finding that the voluntary transfer made by Stephen P. Wall (A Bankrupt) to Cynthia Wall in the sum of £10,000 on the 1st day of April 1975 was made within the two year period specified in s.42 of the Bankruptcy Ordinance."

To deal first with Ground 2 of the appeal: the learned Chief Justice said:

> "As I see it, and with respect, in applying s.42, you look first at the date of the settlement, that is 1 April 1975.

That day must be excluded, under s.51 (a) of the Interpretation and General Clauses Ordinance (Cap. 79). Time began to run from 2 April 1975 and two calendar years expired at the end of 1 April 1977. That was the date of the act of bankruptcy and under s.37 of the Bankruptcy Ordinance, the bankruptcy is deemed to have commenced at the time of the act of bankruptcy, that is, just within the two years."

The relevant portion of s.51 of the Interpretation and General Clauses Ordinance reads as follows:

"51. In computing time for the purpose of any Ordinance, unless the contrary intention appears,—

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;".

Mr. Ashe Lincoln, Q.C., who appeared for the appellant, conceded that the question of time was governed by s.51(a) of the Interpretation and General Clauses Ordinance, but argued that a contrary intention appeared. With respect, I am quite unable to find any contrary intention in the Bankruptcy Ordinance. The relevant words in s.42(1) are: "Any settlement of property... shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the official trusteee..."; and the words "after the date" appear to me to support the provision of s.51(a) of the Interpretation and General Clauses Ordinance, rather than show a contrary intention. It is of interest that the English Bankruptcy Act, 1914, on which the Bankruptcy Ordinance is modelled, contains a provision in s.145 which has the same effect as s.51(a) of the Interpretation and General Clauses Ordinance in relation to the calculation of time under that Act. The Bankruptcy Ordinance does not contain a section on the lines of s.145 of the Bankruptcy Act, 1914, presumably because of the existence of the general provision in s.51 of the Interpretation and General Clauses Ordinance. In my judgment there is no substance in the second ground of appeal.

The first ground of appeal raises a more difficult question. The learned Chief Justice said:

"The next question is whether the gift constitutes a settlement within the meaning of the section. There can, I think, be no doubt that a gift of money may constitute a

settlement. I would have so held in the absence of authority but it appears clearly from *Re Vansittart* and *Re Tankard* although statements to that effect might be said to be *obiter* in both those cases, but *Lister v. Hooson* was a case where a gift of £250 by a debtor to his wife was held to be a voluntary settlement. The governing factor is the intention in the mind of the donor. Reference has been made to the cases of *Re Plummer* and *Re Branson* but I do not think either is relevant to these proceedings. Each was governed by its own peculiar facts, but what makes them easily distinguishable is that in each it was held that there was no gift by the debtor to the alleged donee. Here, a gift is not denied, the only argument being whether that gift amounted to a settlement.

Mr. Lincoln argued that the money was placed on a current account with no restraint on drawing, that no fresh security was created in replacement of the debenture, and that the money earned no interest. All that is true, but on the other hand the money remained where it was, in the company of which Miss Wall was a substantial shareholder, and it had apparently not been earning interest for the five years previous to the discharge of the debenture, according to an account prepared by Mr. Hassan. It appears to have remained intact during the two years prior to the bankruptcy.

I think also that regard must be had to the size of the gift. A sum of a few hundred pounds might have been intended as spending money but unless Miss Wall is a very wealthy woman, a gift of £10,000 must have been intended as a capital endowment. The debtor himself described it as forming part of a pattern of substantial gifts that he had been making to his wife and daughter. It is the intention in the mind of the donor that matters, and it is immaterial that Miss Wall was in no way precluded from dissipating the money.

In my opinion, the transfer to Miss Wall of the proceeds of the debenture for £10,000 was clearly a settlement within the meaning of s.42 and is accordingly void as against the Trustee."

Mr. Ashe Lincoln argued that a mere unconditional gift of money does not constitute a "settlement" for the purposes of the Bankruptcy Ordinance; that there is no decided case to support such a proposition; and that the transfer of the £10,000 to the appellant was a mere unconditional gift of money.

Mr. J. E. Triay, who appeared for the respondent, conceded that a mere gift of money simpliciter does not carry the element of a settlement. But he argued that the history of this £10,000 was well known; that it had started as a debenture; that it was a specific amount identified as a secured debt; that it had become unsecured, but was still intended to remain part of the permanent working capital of the company; that the company could not have found the money without raising a bank overdraft, and that it would have had difficulty in raising an overdraft of that amount; that the £10,000 constituted a chose in action which could not be converted into cash without a great deal of inconvenience to the company which the appellant controlled; and that all circumstances, including the size of the gift, indicated the element of permanency in the gift and that the debtor must have contemplated that the gift should be preserved in the form it was given.

There is no substantial dispute as to the law. The cases cited by the learned Chief Justice establish that, for a gift to constitute a "settlement" within the meaning of the section of the English Bankruptcy law which is reproduced in s.42 of the Bankruptcy Ordinance, the intention of the donor is the governing factor, and that the donor must have intended some permanency in the gift, even though not placing any restriction on the power of alienation by the donee. In *In re Tankard, ex p. the Official Receiver* (1), Wright J. said:

> "I think that I am bound by the authority of *In re Player* and *In re Vansittart* to hold that that section applies only to such conveyances or transfers as are in the nature of settlements, in the sense of being dispositions of property by a person to be held and preserved for the enjoyment of some other person. The retention of the property in some sense must according to those cases be contemplated, and not its immediate alienation or consumption. But it is not necessary, according to those authorities, that there should be any actual restriction of the power of aliena-

(1) [1899] 2 Q.B. 57, at p.59.

> tion by the donee. Accordingly, the section was held to apply to a gift of money by a father to his son to be spent in buying shares on which the son was to receive the dividends, although there was nothing to prevent the son from selling the shares immediately."

In *In re Vansittart, ex p. Brown* (1), Vaughan Williams J. said:

> "The words of the original section so far as they affect the point under discussion remained unaltered until 1869, when for the first time the word "settlement" was introduced in the Bankruptcy statute and substituted for the words which I have cited. Perhaps the object of the change was, on the one hand, to indicate that the section was not intended to apply to transfers of property which, from the nature and circumstances of the transfer showed that the "donor" did not contemplate the preservation of the actual subject-matter of transfer by the transferee, and, on the other hand, to indicate that the section did apply to the transfer even of a sum of money when the intention was manifest that the money should be preserved either in its original form or in some other form of investment. It is difficult to account for the use of the word "settlement" in substitution for the words "transfer or conveyance" unless the legislature intended to indicate that the transaction to fall within the statute must manifest a contemplation by the "donor" of the permanency of the subject-matter of transfer as the property of the "transferee"".

And in *In re Plummer* (2), in a passage which is relied upon by Mr. Ashe Lincoln, Rigby L.J. said:

> "I do not think *In re Player, ex p. Harvey*, has been at all successfully impeached. It appears to me that in that case the Court went on the very intelligible principle that a gift of money which is not hedged about with conditions that it shall be invested and kept in a certain way cannot be called a settlement within the meaning of s 47. I think that with regard to the judgment of Cave, J., which was the judgment mainly referred to in the course of the argument, most of the criticisms were based upon a mistaken view of that judgment. What Cave J. said was that, although money was

(1) [1893] 1 Q.B. 181, at p.183.
(2) [1900] 2 Q.B. 790, at p.809.

property within the meaning of the interpretation clause, s.168, it did not follow that every gift of money was a settlement."

The learned Chief Justice relied on *Lister v. Hooson* (1), but Mr. Ashe Lincoln argued that the case was not an authority for the proposition that a mere gift of money is a settlement, and that the headnote to the case is misleading. However, as Mr. Triay pointed out, it is clear that there had been a previous order under which a gift of £250 had been found to be a "settlement", and that this was unchallenged.

I think it is clear on the authorities that a gift of money can be a settlement, that it depends upon the intention of the donor, and that the intention of the donor is to be inferred from all the surrounding circumstances.

In the instant case I am impressed by the evident fact that the £10,000 was part of the working capital of the company. The debtor was fully familiar with the circumstances of the company, and I cannot infer that he contemplated that the company, in which the appellant was a director and the principal shareholder, should be placed in difficulty by the withdrawal by the appellant of a substantial part of the working capital of the company. I consider also that the size of the gift was, as the learned Chief Justice found, a material factor. I consider that the legitimate inference from the surrounding circumstances is that the debtor intended the £10,000, in the appellant's hands, to remain as working capital of the company. Accordingly, I think that the learned Chief Justice was fully justified in finding that the transfer of the £10,000 to the appellant was a settlement within the meaning of s.42 of the Bankruptcy Ordinance.

In my judgment the appeal should be dismissed with costs.

It remains to consider the cross-appeal, which reads as follows:

"1. That there be made a declaration that the gift of £10,000 made on the 1st day of April, 1975 by S. P. Wall (A Bankrupt) to his daughter Cynthia Wall is void as offending against the Fraudulent Conveyances Act, 1571.
2. The above variations are sought on the grounds that the Chief Justice erred in failing to find a dishonest intention on the part of the Bankrupt on the date of the said gift."

(1) [1908] 1 K.B. 174.

The learned Chief Justice, after discussing the facts, the submissions of counsel, and the cases of *Ex p. Russell, in re Butterworth* (1) and *Ex p. Mercer, in re Wise* (2), continued:

> "The libel appears to have been a calculated act of revenge and I think the debtor must always have had in mind the possibility of substantial damages being awarded against him. Having earlier had a general policy of settling his assets on his wife and daughter by substantial gifts at intervals, he changed to a detailed policy of keeping his credit balance at a minimum. This appears particularly in certain transactions to which I shall refer shortly. By the date of bankruptcy, the account appeared substantially overdrawn.
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> I cannot, however, accept Mr. Triay's broad brush approach. The 1571 Act, like the later bankruptcy acts, operates to avoid transactions. I think each transaction must be looked at on its merits. Finding, as I do, that the debtor's change of policy occurred in 1976, after the suit had been filed, and not at the earlier date when the writing of the book was undertaken, I would not have felt justified in avoiding the 1975 gift of £10,000 under the 1571 Act, as it would have been much harder to infer a dishonest intention at that date. The same does not apply to the gift of the carpet."

Earlier, the learned Chief Justice had said:

> "Mr. Lincoln ... argued that not only was the onus on the Trustee, but also that it was a particularly heavy one since the allegation was quasi-criminal in nature. With respect, I do not think any question of onus arises, since the relevant facts are not in dispute. The only question is whether a particular inference may or may not properly be drawn from admitted facts, and since no consideration passed from Miss Wall to the debtor, it is an inference that it is not difficult to draw."

With respect, I consider that the onus is material in this case and, in the circumstances of the case and on the authority of *Mackay v. Douglas* (3), I consider that the onus rests on the appellant to show that the voluntary settlement of the £10,000 was not in fraud of creditors within the meaning of the Fraudulent Conveyances Act, 1571.

(1) (1882) 19 Ch.D. 588.
(2) (1886) 17 Q.B.D. 290.
(3) (1872) L.R. 14 Eq. 106.

The learned Chief Justice found that the libel was a calculated act of revenge and that the debtor must always have had in mind the possibility of subtantial damages being awarded against him. I consider that there was every justification for this finding in view of the correspondence to which I have referred earlier in this judgment, in particular the passage I have cited from the letter dated 25 March 1974.

Mr. Ashe Lincoln argued that the debtor in his affidavit dated 4 January 1978, swore that he only made the decision to write the book which contained the libel about July or August 1975, and that this was unchallenged. However, Mr. Triay, who had been refused leave to cross-examine the debtor filed an affidavit by Mr. H. K. Budhrani to which was exhibited an extract from the transcript of the libel action which showed that, in the course of cross-examination, the debtor agreed that he started to write the book in January 1975. In view of this there is clear evidence that the debtor was contemplating the publication of the libel before 1 April 1975.

With due respect to the learned Chief Justice, I think that the apparent "change of policy" in 1976 was not the material fact, but that the material fact was that the settlement was made after the debtor had decided on the publication of the libel. On the learned Chief Justice's finding that the debtor "must always have had in mind the possibility of substantial damages being awarded against him" I think that the conclusion is inevitable that the settlement of the £10,000 was part of the policy, which later became obvious, of stripping himself of assets in order to defeat a possible award of damages against him. Certainly the contrary has not been established.

Accordingly I would allow the cross-appeal, also with costs.

I have mentioned that the Official Trustee was refused leave to cross-examine the debtor. Mr. Triay renewed the application before us, but, in view of my conclusions above, I do not consider it necessary to consider the application.

Hogan, J. A.:

The facts and circumstances of this appeal are stated in the judgment of the President and it is not necessary to repeat them.

I turn immediately to the contention that s.42 of the Bankruptcy Ordinance could not apply to the transfer of the £10,000 on 1 April 1975 because the bankruptcy of the debtor did not begin until 1 April 1977 and that was more than two years after 1 April 1975.

Mr Ashe Lincoln, counsel for the appellant, submitted that the period of two years, mentioned in s.42, could not include any portion of the 3rd year and 1 April 1977 fell into the 3rd year: otherwise, he claimed, the period of two years would include three firsts of April. Nor, said counsel, could s.51 of the Interpretation Ordinance, which excludes the first day of a stated period, lead to any different conclusion, because it refers expressly to the calculation of days and not of years and, in any event, applies only if no contrary intention appears as it does, counsel claimed, in the Bankruptcy Ordinance.

The latter propositions were supported by a reference to *Hare v. Gocher* (1), where a period of months was held to include the first date mentioned, and by the argument that, since s.42 refers to two dates, the date of the transfer and the date of the bankruptcy, both should be the subject of the same method of measurement; either inclusive or exclusive. Since the bankruptcy could only be brought back to 1 April 1977 by including that day, as the date of the act of bankruptcy leading to adjudication, the same inclusive approach would not, said Mr. Lincoln, put the transfer within two years of the bankruptcy.

I see no merit in the argument that s.51 cannot apply because it speaks of days whilst s.42 speaks of years. Although referring specifically to days s.51 must, I think, be construed as laying down a principle for the computation of time in whatever units it may be expressed.

In any event I doubt if the elimination of s.51 would greatly help the appellant because, as will be seen shortly, the normal approach, apart from statute, follows the same pattern. Harman L. J. put it tersely in *Trow v. Ind Coope (West Midlands) Ltd.* (2), when, with reference to the expression, "after the expiration of three years from the date", he said: —

> "It is to be noted that the phrase here is 'after', so that time does not begin to run until a day after the event occurs and this no-one now doubts, though it was not always so".

(1) [1962] 2 All E.R. 763.
(2) [1967] 2 All E.R. 900, at p.906.

No greater weight, it seemed to me, was lent to counsel's argument by *Hare v. Gocher* (supra), where it was held that, when an Act was expressed to commence "at the expiration of a period of one month beginning with the date on which it was passed", this embraced the date of the passing of the Act, i.e. 29 July 1960, so that the period of one month expired at midnight August 28/29 and a "period of two months beginning with the commencement of the Act" similarly embraced 29 August and expired at midnight on 28 October.

The Divisional Court went on to hold that the effect of the language used was to avoid equivocation and take the provision out of the general view, propounded in *Goldsmiths' Co. v. West Metropolitan Ry. Co.* (1), that the expression "the expiration of three years from the passing of this Act" excluded the first day of the period unless of course a contrary intention was otherwise expressed.

The language in s.42 seems designed to leave the section firmly within the general rule, and I see no reason to withhold the ordinary construction from the words "within two years after the date of settlement", because the date of bankruptcy may involve a different method of calculation as a result of the "relation back" provision in s.37 of the Ordinance, which, as Mr. Triay, counsel for the respondent, submitted, is concerned not directly with the computation of time but with tying the bankruptcy to a particular event.

The further suggestion that a contrary intention should be inferred because of the absence from the Gibraltar Bankruptcy Ordinance of a section corresponding to s.145 of the English Bankruptcy Act, 1914, which deals with the computation of time, was, I thought, aptly refuted by Mr. Triay's argument that no such section was required because a general provision to this effect was embodied in s.51 of the Gibraltar Interpretation Ordinance: a section which does not appear in the English Interpretation Act.

Counsel dwelt more lightly on the argument that time should be calculated in the manner most beneficial to the person "affected" or "primarily interested". The argument derives from observations of Lord Esher M.R. and Rigby L. J. in the case of *In re North, ex p. Hasluck* (2), but here again I would accept Mr.

(1) [1904] 1 K.B. 1.
(2) [1895] 2 Q.B. 264.

Triay's submission that s.51 leaves no room for such an approach and, as Megarry J. found in *Re Figgis (deceased); Roberts v. MacLaren* (1), these observations have not established any general principle. Moreover, the expressions used could have no clear application in a case such as the present, where the donor, the donee and the creditors were all affected and primarily interested.

Consequently it seems to me the learned Chief Justice was correct in his computation of time and I would hold this ground of appeals fails.

On the other ground, questioning the finding that the transfer was a settlement within the meaning of s.42, I do not find myself in entire agreement with the construction placed by the learned Chief Justice on the authorities to which he referred. He appears to have been strongly influenced by *Lister v. Hoosen* where, he said, the court held that a gift of £250 to a wife was a voluntary settlement. An order to that effect had indeed been made but this was not the issue before the Court of King's Bench or the Court of Appeal in that case. They were concerned with the different question of the wife's right to a set-off. I would agree with Mr. Lincoln that, as an authority on the meaning of "settlement", the value of the case is limited. That aspect featured but lightly in the judgment, as it was not in dispute on the facts, the relevant details of which receive little mention in the report.

The matter was discussed more thoroughly in the other cases to which the Chief Justice referred, although, as he rightly pointed out, some of the comment therein was obiter. Nevertheless, they illustrate the difficulty the English courts have experienced in finding a construction of the English provisions corresponding to s.42, which would avoid clawing back such items as advances made in the ordinary way for the maintenance and advancement of children without, at the same time, leaving others in the enjoyment of property which should properly be made available to creditors

There seems to be little recent authority on the point and the cases mentioned by the Chief Justice appear to be still the leading authorities (see Halsbury's Laws of England 4th Ed. Vol. 3 para. 895). In the earliest of these, *In re Player, ex p.*

(1) [1968] All E.R. 999.

Harvey (1), a father gave his son £650 to purchase the stock-in-trade necessary to set him up in business as a manufacturer, to which the son added £150 of his own. At the time of the father's bankruptcy the capital of the business consisted of stock-in-hand worth £250 and outstanding credits of £250, less debts of £20. Mathews, J., held the advance could not be followed under s.47 of the English Bankruptcy Act, 1883, a provision similar to s.42 of the Gibraltar Ordinance. He said, inter alia, the money could not be traced as what was left "merely represents the profits on particular transactions in the business".

Cave J. agreed but gave more embracing reasons for his conclusions. He said: —

> "The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person. Thus a purchase by the father of shares, which are registered in the son's name, and upon which the son receives the dividends, is within the statute. But where the gift is of money to be expended at once, the transaction is not, in my opinion, within s.47 of the Act of 1883".

Reliance was placed on this approach by counsel in the case of *In re Vansittart*, when he argued unsuccessfully that a present of jewels to a wife did not amount to a "settlement". Vaughan Williams, J., said: —

> "It is extremely difficult to extract from the decided cases any clear definition of the transfers of property which will and which will not fall within the operation of this section".

Having referred to *Kensington v. Chantler* (2), he continued: —

> "I infer from this and other decisions referred to in the text-books that the judges so read the section as to make the application of it depend on the intention of the 'donor' at all events, to this extent, that the section did not apply to cases where the circumstances of the gift made it mani-

(1) (1885) 15 Q.B.D. 682.
(2) (1812) 2 M. & S. 36.

> fest that the subject-matter of the gift was not intended to be preserved by the 'donee', as would be manifest in the case of a gift of money to a son to advance him in business, or to a son for his maintenance. The words of the original section so far as they affect the point under discussion remained unaltered until 1869, when for the first time the word 'settlement' was introduced in the Bankruptcy statute and substituted for the words which I have cited. Perhaps the object of the change was, on the one hand, to indicate that the section was not intended to apply to transfers of property which, from the nature and circumstances of the transfer shewed that the 'donor' did not contemplate the preservation of the actual subject-matter of transfer by the transferee, and, on the other hand, to indicate that the section did apply to the transfer even of a sum of money when the intention was manifest that the money should be preserved either in its original form or in some other form of investment. It is difficult to account for the use of the word 'settlement' in substitution for the words 'transfer or conveyance' unless the legislature intended to indicate that the transaction to fall within the statute must manifest a contemplation by the 'donor' of the permanency of the subject-matter of transfer as the property of the 'transferee' ".

Taking this view, the learned judge found the present of the diamonds to be a settlement, saying: —

> "I think the 'donor' contemplated the retention by his wife of the present which he gave her. I should have held just the same if he had given her money to buy herself a present".

The subsequent error in the report, which refers to the second case of *In re Player* rather than the first, which was decided on the same day and reported in 54 L.J. Q.B. 553, detracts nothing from the cogency of the passage just quoted.

Wright J. relied on these cases when in the case of *In re Tankard*, he held furniture, pictures, jewellery and money to buy furniture, given to a lady, not the bankrupt's wife, constituted a settlement. He said: —

> "I think I am bound by the authority of *In re Player* and *In re Vansittart* to hold that [s.47] applies only to such conveyances or transfers as are in the nature of settlements, in the sense of being dispositions of property by a person to be held and preserved for the enjoyment of some other person. The retention of the property in some sense must according to those cases be contemplated, and not its immediate alienation or consumption. But it is not necessary, according to those authorities, that there should be any actual restriction of the power of alienation by the donee".

With those considerations in mind he found the furniture etc. to fall within the section because of an intention that they "should be kept for enjoyment by the donee for an indeterminate time." He went on, however, to express reservations about the rationale of *In re Player* and to note the broader construction of the expression "settlement", which had been mentioned in the case of *In re Farnham* (1) and would include any gift of property but so as not to undo or affect any transfer or charge, acquired bona fide and for valuable consideration before the bankruptcy. He continued: —

> "If, however, this is not the proper construction of the section, it seems difficult to avoid the conclusion that 'settlement' ought to be understood to mean such a conveyance or transfer as of itself limits the power of alienation by the donee and so preserves the fund, rather than to mean something so vague as to be satisfied by a gift which the donee is intended to keep, but is free to alien'"

Nevertheless, Wright J. thought *In re Player* (No. 2) too well established to permit departure from it.

In the later case of *In re Plummer*, Rigby L. J. had no doubts about *In re Player* (No. 2) but I think he overstated it when he said (2):

> "I do not think *In re Player, ex p. Harvey* has been at all successfully impeached. It appears to me that in that case the Court went on the very intelligible principle that a gift of money which is not hedged about with conditions that it shall be invested and kept in a certain way cannot be called a 'settlement' within the meaning of s.47".

(1) [1895] 2 Ch. 799.
(2) At p.808.

The learned Lord Justice, with his colleagues, went on to find there was in fact no voluntary gift still in existence in that particular case. Nevertheless, if the law and the effect of *Player* were correctly stated by him there would seem to be little question but that the appellant's argument to us on this issue is well founded. Lord Alverstone M.R. was, however, more cautious when he stated (1): —

> "...it will be convenient to state my view of the law. There are two lines of cases bearing upon the subject, which I will indicate as follows. If there is a gift by a father to a son of money or proceeds of property which can be traced, and the money or proceeds is or are intended to be retained or preserved as the property of the donee, that money or those proceeds will be property in 'settlement'. On the other hand, if there is a gift of money or proceeds, but it is not intended that the money or the proceeds shall be retained by the donee in the form of money, but shall be expended at once, that will not be a 'settlement'. The latter case is illustrated by *In re Player, ex p. Harvey.*"

Whilst appreciating the difficulties created by the terms of the section I share the reservations of Wright J. about the construction adopted in what appears to be the prevailing line of authority and the position is not made more satisfactory by taking only those instances, as Lord Alverstone did above, where an intention is apparent: an aspect to which I will return.

In the instant case much stress has been laid on the fact that the money or the subject-matter of the gift remained as capital in the business but that does not appear to have made the gift a settlement in *In re Player's* case and one must,, of course, be cautious in deducing from subsequent events the intention at the time of the gift.

It is the English provision corresponding to subs. (4) of s. 42, which expands "settlement" to include "any conveyance or transfer of property", that authorises the relaxed meaning given to the term in the authorities I have quoted and it was to the corresponding sub-section of the English 1883 Act, s. 47(3), that Wright J. referred when he questioned the limiting construction adopted in *In re Player* (No. 2) (supra) and elsewhere. But the history of the section and the method used to expound the mean-

(1) At p.804.

ing of "settlement" has apparently, led the courts to limit the strict literal meaning of the language.

The effect of the legislation is probably most cogently expressed in the language of Cave J. in the case of *In re Player* (No. 2), as reported in 54 L.J. Q.B. 554, 556, where he said: —

> "What is meant is that 'settlement' is not to be confined to a regular settlement with trusts declared and other usual attributes of a formal settlement but may include any mere transfer of property where the object is to preserve the property whatever its form, for the enjoyment of another person. Therefore, as in the other case before us today, a purchase of shares to be enjoyed by the son is within the meaning of the word 'settlement'. But where a sum of money, ex gratia, for maintenance is made to be expended at once it is not what was aimed at by previous Acts; and I do not see my way, did I so desire, to give to this section so extended a meaning as compared with previous enactments, because of a word inserted in the interpretation clause, as to bring about the result that every gift to a child would be void if the father became bankrupt within ten years".

The reference to ten years is probably a mistake for two and the language of the, no doubt revised, report in 15 Q.B.D. 682 is somewhat different but the general purport and effect is the same.

As already indicated, Lord Alverstone in the *Plummer* case seemed to leave open the question of onus but Vaughan Williams, J., in the statement I have quoted from *Vansittart* (supra) seems to place it on the shoulders of those claiming there was a settlement to show the donor had in mind the retention of the subject matter.

With these considerations in mind my views have fluctuated during the determination of this appeal. On the one hand you have the size of the gift and the difficulty the company would have had in meeting a request for the cash. On the other, you have the absence of restriction or stated intention as to what the donee should do with the credit, the absence of any right to interest and the difficulty of allocating the transaction between the case of *In re Player* (No. 2), where, as already indicated, the section did not apply and *In re Player* (No. 1) where it was held to apply to a gift of money to a son to buy shares on which he would receive the dividends.

In the end, though with considerable hesitation, I have come to the conclusion that the balance must be struck in favour of putting it in the latter category and treating it as a settlement.

Turning to the cross-appeal which seeks to have the transaction set aside under 13th Elizabeth Cap. 5, the answer depends on whether, in making the transfer of £10,000, the bankrupt had an intent to delay, hinder or defraud.

In *Mackay v. Douglas*, Malins, V.C., took the view that a man who made a settlement on the eve of going in to trade shouldered the burden of showing that the settlement was not made with the intent to defeat creditors. In the course of his judgment the Vice-Chancellor referred to his earlier judgment in *Crossley v. Elworthy* (1), where he said that if there is a doubt as to a man's solvency or the likelihood of his remaining so and he makes a voluntary settlement then it is "in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a position to make it when it was executed".

Mackay's case was concerned with trade but I would not read the judgment as confining the principle to the risks inherent in trade. The effect of the cases was stated by Jessel, M.R., in the case of *In re Butterworth* (2) thus: —

> "The principle of *Mackay v. Douglas* and that line of cases, is this, that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: 'If I succeed in business I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss'. That is the very thing which the statute of Elizabeth was meant to prevent. The object of the settlor was to put his property out of the reach of his future creditors. He contemplated engaging in this new trade and he wanted to preserve his property from his future creditors. That cannot be done by a voluntary settlement. That is, to my mind, a clear and satisfactory principle".

Again, trade features prominently in the statement but I do not think it is more than a convenient example of circumstances to which the principle would apply. Things other than trade may have the results associated with "hazardous business". This would appear to accord with the statement of Malins V.C. in the earlier case of *Crossley v. Elworthy* (3) that: —

(1) (1871) L.R. 12 Eq. 158.
(2) (1882) 19 Ch.D. 588, at p.598, (3) At p.164.

> "The general policy of the Act of 13 Eliz. c. 5, is, that those who are engaged in the transactions of life, buying or selling, or otherwise indebted, are not, by means of a voluntary settlement, to take their property out of the reach of their creditors".

Lord Hatherley, L.C., spoke to the same effect in *Freeman v. Pope*, (1) when he said: —

> "The principle on which the statute of 13 Eliz. c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made".

The argument that there can be no question of the statute applying if the donor was solvent at the time of making the settlement or if no one, who was a creditor at that time, remains unpaid at the time of the bankruptcy, does not appear to be supported by the decisions, which indicate that intent to defeat future creditors can suffice.

On the other hand, the approach suggested in some of the cases e.g. by Lord Hatherley and Giffard, L.J., in *Freeman's* case (supra) that if the necessary effect of the settlement is to defeat or delay creditors an intent to do so must be presumed can hardly be thought to have survived intact the trenchant criticism by Lord Esher, M.R., and, to a lesser extent, by Lindley and Lopes, L.JJ., in the case of *Ex p. Mercer, in re Wise* on which Mr. Lincoln so greatly relied. Nevertheless, in weighing up the evidence of intent, inferences may properly be drawn from the necessary effect of a transaction and an intent to defeat or defraud may more readily be drawn from a voluntary transfer than from one made for good consideration (see *Lloyds Bank Ltd. v. Marcan* (2) and particularly Cairns, L.J. (3).

In the instant case I think the learned Chief Justice did not give sufficient weight to the burden resting on those supporting the transfer and that the evidence did not justify the postponement until 1976 of the intent which the Chief Justice thought to have been made manifest in that year.

To my mind the debtor embarked on a hazardous enterprise when he began writing his book and this, according to the evidence, was in January 1975. When it was followed in April 1975 by the voluntary transfer of the debtor's last remaining substan-

(1) (1870) L.R. 5 Ch. 538, at p.540.
(2) [1973] 3 All E.R. 754.
(3) At p.761.

tial capital asset, I think it correct to say that the denudation of assets which had been pursued previously was intensified with the disappearance of that asset and that an inference arose which was not dispelled.

The significance which the Chief Justice attached to the appearance of substantial sums in the debtor's account with Newall (Holdings) Ltd, at the end of each financial year would not appear to have been justified without, as Mr. Triay argued, more detailed examination of the dates when director's fees were credited and the operation of the account throughout the year and, in any event, was insufficient to dispel the adverse inference arising from the circumstances already mentioned.

Consequently I would also allow the cross-appeal and would dismiss the appeal, with costs in each instance.

I agree that it is unnecessary to make an order on the application to cross examine the debtor.

Bourke, J.A.: I have had the advantage of reading the judgment of the learned President. I agree and have nothing to add.

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