FOURTH SUPPLEMENT TO THE GIBRALTAR GAZETTE L.R. 1/78.

No. 1,769 of 21st SEPTEMBER, 1978.

LAW REPORTS

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

RE WALL (a bankrupt), ex parte the trustee of the bankrupt v. Wall and another

Supreme Court
Spry C.J.

22 December 1977, 13 January 1978

Bankruptcy — settlements void against trustee — computation of time — whether gift of money a settlement — whether money spent on repairs to house a settlement—Bankruptcy Ordinance, s.42 — *Interpretation and General Clauses Ordinance*, s.51 (a)

Bankruptcy — fraudulent conveyance — whether payment of daughter's debt recoverable — whether intent to defeat creditors may be inferred when donor solvent but suit pending — Fraudulent Conveyances Act, 1571 — *Judgments Act*, 1838, s.12.

On 1 April 1975, the debtor gave his daughter, the first respondent, £10,000, which was debited to his account and credited to her account in the books of a company (the second respondent) of which she was a substantial shareholder. During 1976, he gave her a carpet and paid substantial sums to tradesmen for repairs and improvements to her house. He also paid two sums due from her for income tax. On 1 April 1977, the debtor left Gibraltar following an award of damages against him in a libel action. His departure was held to be an act of bankruptcy and a receiving order was made on 28 June 1977.

In August or September 1977, the company's accountant found that a credit was due to the debtor. He entered the appropriate credit, back-dating it, and then made a debit against it in favour of the debtor's daughter.

For the official trustee, it was argued that the gifts and the payments for repairs constituted settlements under section 42 of the Bankruptcy Ordinance (Cap. 9); that the payments of income

tax were fraudulent transfers under the Fraudulent Conveyances Act, 1571; and that the final debit was an improper disposal of money to which the trustee was entitled. It was also argued that all the transactions were void as part of a fraudulent course of conduct dating back to the first planning of the libel. In the alternative, it was argued that the final debit was a fraudulent preference under s.44 of the Bankruptcy Ordinance.

For the respondents, it was argued that the gift of £10,000 was outside the two year period and that it did not amount to a settlement; that payments for repairs to real property could not constitute settlements; that the debtor had been solvent at the time of the gifts and that an intention to defeat creditors could not be inferred merely because, following the outcome of the action, the debtor became bankrupt.

HELD: (i) The bankruptcy was within two years of the gift of £10,000.

(ii) The gift of £10,000 was intended as a capital endowment and so was a settlement.

(iii) The cost of the repairs was not recoverable because the benefit that remained in the daughter's hands could not be separately realized.

(iv) A general fraudulent intent could not be inferred from the time the libel was planned, but could be inferred from a change of conduct in 1976.

(v) The payments for income tax must be treated as gifts of money and were void as intended to defeat or delay creditors.

Cases referred to in order

Re Bumpus, ex p. White [1908] 2 K.B.330
Re Vansittart [1893] 1 Q.B. 181
Re Tankard [1899] 1 Q.B. 57
Lister v. Hooson [1908] 1 K.B. 174
Re Plummer [1900] 2 Q.B. 790
Re Branson [1914] 3 K.B. 1086
Re Player [1885] 15 Q.B.D. 682
Ex p. Russell, re Butterworth [1882] 19 Ch.D. 588
Ex p. Mercer, re Wise [1886] 17 Q.B.D. 290
Edmunds v. Edmunds [1904] P. 362

Motion

The official trustee moved the court for declarations that certain transactions were settlements within the meaning of s.42 of the Bankruptcy Ordinance; that the second respondent (the company) was accountable to the trustee for a sum due from it to the debtor; that all the transactions were void under the Fraudulent Conveyances Act, 1571: in the alternative, that two payments were fraudulent preferences under s.44 of the Bankruptcy Ordinance and for consequential relief.

J. E. Triay and H. K. Budhrani for the trustee

F. Ashe Lincoln Q.C., E. Ellul and J. B. Perez for the respondents

21 January 1977: The following order was read—

This is a motion by the Official Trustee in the bankruptcy of Stephen Paul Alan Patrick Wall, in which he seeks a declaration that certain transactions are void as against him as such trustee and for consequential relief. The respondents are, first, Cynthia Wall, the daughter of the debtor and the person in whose favour or for whose benefit the transactions were effected and, secondly, Newall (Holdings) Limited, a company incorporated in Gibraltar. The debtor was formerly a director of, and latterly a consultant to, this company. He maintained an account in the books of the company, to which his fees were credited and from which payments were made by the company at his request. In fact, the company may be said to have acted as his bankers. Miss Wall was at all material times a substantial shareholder in the company.

[After reciting the history of the proceedings, the Chief Justice continued]

The first item stands by itself. The debtor formerly held a debenture for £10,000, issued by the company. This was discharged on 1 April 1975, because the company's bankers were reluctant to give overdraft facilities while a prior security existed. The amount of the debenture was not repaid, but was credited to an account, described as a shareholder's account, in the name of Miss Wall. The debtor himself, in an affidavit dated 4 January 1978, describes this as a gift and the Trustee claims that it was a settlement within the meaning of section 42 of the Bankruptcy Ordinance. That section makes void against the official trustee all settlements of property (with certain exceptions not now relevant) "if the settlor becomes bankrupt within two years after the date of the settlement".

The settlor's motive is immaterial.

"Settlement" is defined in the section as including any conveyance or transfer of property and "property" is defined in section 2 to include money. The section has received much judicial interpretation, but it will be sufficient to say that gifts have been held to be settlements, notwithstanding that they are outright and that the property given may be alienated by the donee, if the intention of the donor was that the gift should be retained for the benefit of the donee. In other words, there must be some element of permanent benefit in the mind of the donor, as distinct from gifts that are intended to be spent or consumed.

Mr Lincoln submitted that this gift had not been made within the two year period. He argued this on two grounds: for the first, he replied on the case of *In re Bumpus ex p. White*(1), in which it was held that section 43 of the Bankruptcy Act, 1883, which is the equivalent of our section 37, means that the commencement of a bankruptcy is the exact moment of time when the act of bankruptcy was committed. He submitted that if you do not know the exact time, you must assume the earliest possible moment. Mr Triay contended that section 42, with which this court is now concerned, refers to the date of the settlement. I think that you can work from a date to a date or from a time to a time, but you cannot work from a date to a time. In dealing with section 42, the calculation must be from one date to another, in *In re Bumpus* is therefore irrelevant.

Secondly, Mr Lincoln argued that in any case, on the basis of the calendar, the settlement was outside the period of two years. I confess that I found difficulty in following this argument. As I see it, and with respect, in applying section 42, you look first at the date of the settlement, that is 1 April, 1975. That day must be excluded, under section 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 section 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.

(1) [1908] 2 K.B. 330.

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* (1) and *Re Tankard* (2), although statements to that effect might be said to be *obiter* in both those cases, but *Lister v. Hooson* (3) 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* (4) *and Re Brinson* (5), 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.

(1) [1893] 1 Q.B. 181.
(2) [1899] 2 Q.B. 57.
(3) [1908] 1 K.B. 174.
(4) [1900] 2 Q.B. 790.
(5) [1914] 3 K.B. 1086.

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 section 42 and is accordingly void as against the Trustee.

I will deal next with the third item, which is expressed to relate to "Payment of carpet for daughter's residence". At the first hearing, Mr Lincoln conceded that if this were the gift of a carpet, he could not deny that it was a settlement, but he argued that the claim was so loosely expressed that it might relate to the cleaning and repair of a carpet. The evidence subsequently produced by the respondents shows that this was in fact the gift of a carpet. Mr Lincoln made the point, very rightly, that the claim should have been for the delivery up of the carpet, not for the amount paid for it, and Mr Triay conceded this, while making an alternative claim to the price under the Frandulent Conveyances Act, 1571, sometimes referred to as the Statute of Elizabeth, sections 1, 2, 3 and 5 of which apply in Gibraltar by virtue of section 3(1) (a) of the Application of English Law Ordinance (Cap. 5). I hold that the gift was a settlement and that the Trustee is entitled to have the carpet handed over to him.

The seventh item can be disposed of very briefly, subject to what I shall have to say later about the 1571 Act. It is described as a payment to Verano Brothers on account for his daughter. No further information has been furnished about this item and there is nothing even to suggest that the payment constituted a settlement.

There are seven items, the second, fourth, fifth, sixth, eighth, tenth and twelfth, totally £4,534.79, which all represent payments made by the company from the debtor's account to tradesmen for repairs and improvements to the house in which Miss Wall and her parents resided, a house which was bought by Miss Wall with moneys given her by the debtor and which is, and was at all material times, her property. Mr Triay claimed that these payments amounted to settlements within the meaning of section 42, although he conceded that this was a doubtful proposition.

Mr Lincoln began by submitting that these claims involved a fiction: that of a notional gift of cash to Miss Wall and the subsequent employment by her of tradesmen. With respect, I do not agree. A gift may well be effected through an agent, such as a broker: the donor's bank account will in due course show a payment to the agent but the reality of the transaction will still be

the gift from the donor to the donee. So in the present case, if the debtor paid tradesmen to carry out works for the improvement of Miss Wall's property, it seems to me that the substance of the transaction is a gift to Miss Wall, and that there is no need to invoke any fiction.

Mr Lincoln developed the proposition of a legal fiction by arguing that the gift of money was intended to be spent immediately on the repairs and therefore that the element of permanence was missing. He argued that this element of permanence must attach to the gift itself, not to the work to which it was spent. With respect, I do not think this a valid argument. The element of permanence is in the mind of the donor: it is the intention to confer a lasting benefit that distinguishes a settlement from a gift intended for immediate enjoyment, not what happens in the event — see *Re Vansittart* (supra). Here, I think, a permanent benefit was clearly intended.

Mr Lincoln further submitted that gifts of this nature could not amount to settlements because the improvements and repairs merged immediately in the buildings on which the work was done. He argued that property that is settled, though it may be transmuted, must be capable of being traced. This is an interesting and difficult problem. Mr Lincoln cited no authority for his proposition, and I know of none. There is a reference to tracing money in the judgment of Mathew, J., in *Re Player* (1) but none in the judgment of Cave, J., with which Wills, J., agreed. That was a case where money had been given by a father to his son to enable him set himself up in business and it appears to have been argued on behalf of the trustee in the father's bankruptcy that the money so given could be traced as forming part of the capital remaining in that business. In *re Plummer* (supra), another case of an alleged gift by a father to a son, counsel for the son used the argument that the money had been spent and so could not be traced and Lord Alverstone M.R., dealing with the law generally, said

> "If there is a gift by a father 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' ".

(1) 15 Q.E.D. 682.

Collins, L.J., in the same case, said

"I do not think it is possible, under s. 47, to avoid a transaction between father and son where the son has purchased a business with money advanced to him by the father, if the business is of such a character that it is impossible afterwards to trace the money, as, for instance, in the case of a timber merchant's business, where the money actually employed and spent in carrying on the business cannot be afterwards drawn out: it is impossible, in my opinion, to treat such a transaction as the subject matter of a 'settlement' within the section."

None of these remarks goes to the ratio decidendi of the case and they may, I think, properly be regarded as obiter dicta.

My own view, which I put forward with some diffidence, is that the traceability of the money is irrelevant to the question whether it was settled. Whether or not money was settled has to be decided, I think, as at the time when the gift was made. The question whether it can be recovered is, however, another matter and depends on the situation when the official trustee makes his claim, and obviously assets cannot be recovered which cannot be traced. Not all money settled is recoverable, because it is well established that a donee cannot be required to restore money that he has spent — see *Re Tankard* (supra) and *Re Plummer* (supra) — except, of course, where the element of endowment adheres to the property purchased with the money. The order that is made is not that the donee account for the money or property that the debtor settled, but that he account for what remains of it in his hands.

There is a fundamental difference between a proceeding of the present kind and an action for damages. A person against whom damages are awarded must find them out of his own resources, but a person who has been the beneficiary of a settlement has no liability in the settlor's bankruptcy beyond the settled property remaining in his hands. Its original value is immaterial, because he must hand it over, whether its value has appreciated or depreciated.

Settled property may be merged with other property and still be recoverable. For example, a beneficiary may add the proceeds of settled property to money of his own and invest the whole in War Loan. In such case, if the settlement is avoided, it is a mere matter of arithmetic to decide how much of the War Loan represents the settled property and that amount can be sold for the

benefit of the official trustee. It is quite otherwise with money spent on the repair or improvement of real property. It would be absurd to suggest that the house should be sold to realize the value of the repairs, and, if it were, it would be impossible to ascertain what proportion of the proceeds of sale was attributable to the repairs and improvements. In my view, the items of money spent on repairs and improvements, though I think technically settled, are irrecoverable under section 42.

I will deal next with the additional claim added to the notice of motion by amendment. The last credit in the debtor's account with the company is a sum of £3,805.90 transferred from the Journal. Mr Hassan, in his cross-examination, said that when he was auditing the company's books in August or September 1977, he was told that this amount, which appeared as a debt or debts due from the company, had in fact been paid by the debtor out of his own moneys at some date unknown. He had accordingly credited the debtor's account and at the same time debited, in favour of Miss Wall, sum of £2,261 with which I shall have occasion to deal later. He said he had no knowledge of the receiving order that had been made against the debtor, and he treated the matter as a mere rectification.

Clearly this was a debt due from the company to the debtor and when credited to the debtor's account, should have been held on behalf of the Trustee. This was after the gazetting of the receiving order, and no disposal of the money could properly be made. Mr Triay suggested that an item of £1,313.35 might be a legitimate set-off, but with respect I do not think this is the correct approach. I think it proper to look at the state of the account immediately before Mr Hassan made his entries. According to my reckoning, the account was then overdrawn by £1,175.45 and I think the company was entitled to set off that amount. The company is therefore liable to pay the Trustee the sum of £2,630.45, less the balance shown on the account of £369.45, if that sum has already been paid over to the Trustee.

This decision makes it unnecessary to consider the fourteenth and fifteenth items, although I shall do so later by way of alternative.

That leaves two items, the eleventh and thirteenth. These relate to two sums payable by Miss Wall for income tax but paid by the company from the debtor's account. In his opening address, Mr Triay said that he was claiming these items under the

1571 Act, while relying on the Act also as an alternative ground for all the other items if his basic claims were rejected. This is an Act which operates to avoid conveyances and transfers intended to defeat or delay creditors. In his final address, Mr Triay took a broad brush approach and claimed that the Act avoided all the transactions as manifestations of a general fraudulent course of action. His argument, based on copies of letters, was that the debtor, aggrieved by an incident in 1973 and having failed to get satisfaction through approaches to the authorities, had, early in 1974, expressed an intention to take the law into his own hands. He then began writing a book which contained grave libels, and references in the correspondence show that he was not unaware of the danger that he might be sued. From that time, he had steadily and consistently divested himself of his assets, so that if the plaintiff were awarded substantial damages, he would be able to recover little or nothing. Mr Triay places some reliance on the case of *Ex. p. Russell, in re Butterworth* (1) in which a solvent man made a settlement on his wife and children, shortly before embarking on a hazardous business enterprise. Mr Triay argued that in writing his book, the debtor had been embarking on a hazardous enterprise, and that, although he was solvent when he made the payments, they were made to defeat or delay creditors, or at least one potential creditor, the plaintiff who was suing him for libel.

Mr Lincoln submitted that this argument was far-fetched, and he 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.

Relying on affidavit evidence from the debtor, his bank manager and his nephew, Mr Lincoln then submitted that the debtor had, as long ago as 1962, began transferring his assets to his wife and daughter, a perfectly proper course of action in a man who was then indisputably solvent.

In the light of earlier and substantial gifts, the later gifts are merely the continuance of that course of action without any

(1) [1882] 19 Ch. D. 588

sinister implication. That is a persuasive argument but I have looked at the exhibited accounts and it appears to me that there was an apparent change of policy in 1976. Prior to that year, the debtor appears to have kept a comfortable balance in his account, consistent with his reputation, according to the evidence, as a man scrupulous in paying his debts, whose account was never overdrawn. In 1976, the account was run down virtually to nothing and in January, 1977, it was overdrawn.

Mr Lincoln placed much reliance on the case of *Ex p. Mercer In re Wise* (1). At first sight, it is persuasive, because it is a case where a man who, having had a breach of promise case instituted against him, received a legacy and settled it on his wife. Following judgment against him, described as a "startling verdict", he was made bankrupt but the settlement was upheld. Mr Lincoln relied on it for the proposition that a person facing an action the result of which is a matter of speculation, must not be presumed to have had the intent to defeat creditors, merely because that is what happens in the event. As a general proposition, I would respectfully agree. But the case is very different. Breach of promise has always been a most uncertain cause of action; there was only a single settlement; and the court was not prepared to infer an intent to defeat the plaintiff's claim. Here, the facts are very different. 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 transaction to which I shall refer shortly. By the date of the act of bankruptcy, the account appeared substantially overdrawn.

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 dishon-

(1) [1886] 17 Q.B.D. 290.

est intention at that date. The same does not apply to the gift of the carpet, which would, I think, have been caught by the Act.

The 1571 Act, like section 42, gives a right to recover the property disposed of, not a right to damages, so for the reasons I gave when dealing with seution 42, I do not think the cost of the repairs and improvements to Miss Wall's house are recoverable under the Act.

The two payments of income tax are in a different category. The tax was a debt due by Miss Wall and in my opinion, for the debtor to pay his daughter's debts was substantially the same as giving her the money. Had he not paid the tax, she would have had to do so, either from her account with the company or from other sources. I think these payments were made to take the money out of the reach of the plaintiff in the libel action, if he succeeded. For the sake of completeness, I should perhaps add that the 1571 Act did not originally apply to choses in action or money, but *Edmunds v. Edmunds* (1) is authority for saying that debts and choses in action fell within the purview of the Act when they became subject to execution proceedings and the same must apply to money, which can be taken under a writ of fi. fa. under section 12 of the Judgments Act, 1838, which was applied to Gibraltar by the Application of English Law Ordinance. I think these gifts effected by the payment of income tax are void and must be repaid.

In case my decision on the claim against the company is reversed on appeal, I should express my opinion on the fourteenth and fifteenth items. The fourteenth item was a payment of £461 to an electrician for repairs to Miss Wall's house. The fifteenth was a credit of £2,261 passed to Miss Wall's account. According to Mr Hassan's affidavit, the sum of £461 was included in the £2,261 and the latter sum was the correction of wrong entries made by the company's book-keeper. In cross-examination, he admitted that he did not know whether the entries had been made by mistake or under instructions.

Before that, Mr Triay had argued that even if the entry relating to the £2,261 were a correction, the position had been in law that Miss Wall was a creditor of the debtor and that since she had been paid within three months of the bankruptcy, this was a fraudulent preference within the meaning of section 44 of the Bankruptcy Ordinance.

(1) [1904] P. 362.

Between the two hearings, an affidavit made by Mr Garbarino, the company's book-keeper, was filed. This I accept without hesitation, and reading it with the accounts that have been exhibited, the picture that emerges is as follows. On 13 December 1976, the balance on the debtor's account was £137.90. On that day, a cheque in favour of Mr Ellul for £300 was drawn on Miss Wall's account. On 20 January 1977 a cheque for £461 in favour of an electrician for work on Miss Wall's house was debited to the debtor's account, causing it to be overdrawn by £323.10. On the last day of the month, the book-keeper saw that the debtor's account was overdrawn, debited the item of £461 to Miss Wall's account and credited the debtor's. The balance on the debtor's account was then again £137.90. On 16 March 1977, a cheque in favour of Mr Ellul of £500 was debited to Miss Wall's account. On 28 March 1977 a cash cheque for £1,000, which it is agreed represented legal fees, was debited to Miss Wall's account. On 31 March, 1977, the day before the act of bankruptcy, the debtor's account was debited with the sum of £1,313.35, causing the account to be overdrawn to the extent of £1,175.45. In August or September 1977, as I have already narrated, the accountant, Mr Hassan, discovered that the debtor was entitled to a credit of £3,805.90. Now that the account was in credit, it was immediately debited with the sum of £2,261, representing the sums of £300, £461, £500 and £1,000. The only reasonable conclusion is that these four sums had been lent to the debtor by his daughter to keep his account in credit, unless her account were a mere nominee account for him. This conclusion is confirmed by a receipt, exhibited to an affidavit by Mr Budhrani, showing a payment on 4 April 1977 of £2,950 by Miss Wall on account of legal fees due from her father. Mr Ellul has stated that he is instructed by Miss Wall to claim this sum as a debt in the bankruptcy. Had I not found for the Trustee against the company in respect of the credit of £3,805.90, I should have had no hesitation in holding that the sum of £2,261 was a fraudulent preference, recoverable by the Trustee. I accept that the fourteenth item, the claim to £461, does not lie.

[The formal declarations and orders that follow have been omitted].