1907.
March 28.

[IN REVIEW.]

Present : Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

LIPTON *v.* BUCHANAN *et al.*

D. C., Colombo, 14,621.

Agreement—Consideration—Roman-Dutch Law—Causa—Nudum pactum—*Decisions of the South African Courts.*

Under the Roman-Dutch Law an agreement is not void for want of consideration, provided there be a lawful *causa* or origin for it.

Judgment in appeal reported in 8 *N. L. R.* 49 confirmed in review.

THIS was a hearing in review of the judgment of the Supreme Court in appeal (reported in 8 *N. L. R.* 49) preparatory to an appeal to His Majesty in Council.

Sampayo, K.C., for the plaintiff, appellant.

Walter Pereira, K.C., S.-G. (*Bawa* with him), for the second defendant respondent.

28th March, 1907. HUTCHINSON C.J.—

This is a hearing in review before appeal to His Majesty in Council. The appellant is the plaintiff, who sued Buchanan and the respondent Frazer to recover a debt due to him from the late partnership firm of the two defendants. The firm was admittedly indebted to the plaintiff at the time of its dissolution in 1896 in the sum of Rs. 15,259.76. One-half of the debt was paid by Frazer; and the action was brought to recover the other half. The defence set up by Frazer was that at the time when he paid the one-half of the debt, on the 5th May, 1899, the plaintiff, in consideration of his making that payment out of his own private funds, made the following agreement with him:—

4, Prince street, Colombo.
May 5, 1899.

Gordon Frazer, Esq.

Dear Sir,

In consideration of my having received from S. D. Young, the Receiver of the late firm of Buchanan, Frazer & Co., the sum of Rs. 7,629.98 contributed by you as your half-share of the debt owed by that firm to me, I hereby undertake that I will not take any steps

against you personally for the recovery of the balance of the amount due by the aforesaid firm until I have exhausted every possible means of recovery against your later partner Mr. D. R. Buchanan.

Yours faithfully,
THOS. J. LIPTON,
By his attorney, S. JEFFERY.

And Frazer pleaded that the plaintiff, in breach of that agreement, took no steps for the recovery of the moiety due by Buchanan, and that Buchanan was thereby enabled to dispose of valuable property belonging to him which would otherwise have been available for the debt.

The issues for decision by the District Judge were:—

(4) Did the plaintiff in fact make the alleged agreement, and if so, was it valid in law?
(5) If so, did the plaintiff commit a breach of it?
(6) What damages has Frazer sustained by the breach?

The District Judge found that the agreement was made, but he held that in the matter of such agreements (meaning, I think, partnership agreements) we are not governed by the Roman-Dutch Law, but by the English Law; and that by the rules of English Law his agreement was not binding for want of consideration; and he gave judgment against the defendants jointly and severally for the amount claimed.

On appeal by Frazer to the Supreme Court Wendt J. and Middleton J. set aside the judgment of the District Court as against Frazer. They held that the law applicable to the agreement was the Roman-Dutch Law; that according to that law the agreement was not void for want of consideration; and that the plaintiff did not carry out his part of the agreement, and therefore could not recover against Frazer.

I think that the law applicable to the agreement is the Roman-Dutch Law of this Colony; there is here no "question of issue . . . . to be decided with respect to the law of partnerships." And I agree with the judgment now under review that there was a lawful *causa* for the agreement. So that the only question that remains is whether the plaintiff "exhausted every possible means of recovery against Buchanan." I think it is proved that he did not. I need not recapitulate the reasons given by Wendt J. in his judgment now under review for coming to this conclusion. I agree with him, and think that this appeal should be dismissed with costs.

WENDT J.—

I agree with the rest of the Court in thinking that the judgment under review should be affirmed. No point was taken at the argument in review which had not been put forward at the argument of the original appeal and dealt with in my judgment. I would

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only add that the cases cited from the South African Courts were concerned with contracts and agreements which, if the Roman Law in its strictness still prevailed, might have been invalid as the foundation of an action, because they were *nuda pacta*, whereas the defence here takes the form of an *exceptio non petendi*, which I am inclined to think would have been sustainable even under that law, and *a fortiori* under the Roman-Dutch Law.

MIDDLETON J.—

The judgments now in review were given by this Court in September or October, 1904, and only now, in March, 1907, they are brought up in review previous to appeal to the Privy Council. I note that security was only deposited on the 8th December, 1906.

On the arguments addressed to us by the learned counsel for the appellant in review I see no reason to alter the opinion on the facts and on the law I formed on the hearing of the original appeal, the grounds for which are set out in my Brother Wendt's judgment.

It is not contended that this Court has ever laid it down authoritatively that a promise is not binding unless founded on what is known as consideration under English Law, although it would seem to be the case in South Africa.

The learned note of the translator of Kotze's *Van Leeuwen*, *vol. II.*, *p.* 28, is in my judgment very cogent, that the right view to be taken of the meaning of the word *causa* is that it is not synonymous with the somewhat technical word "consideration" in the English Law, but has a wider significance, as pointed out by my brother in his judgment.

I would therefore dismiss this appeal in review, with costs.

Judgment in appeal confirmed.