## LIPTON *v.* BUCHANAN.

*D. C., Colombo, 14,621.*

1904.
*October 17.*

*Agreement not to sue—Partnership debt—Payment of moiety of debt by one partner, after dissolution of partnership—Undertaking by creditor not to sue such debtor for the other moiety until all means of recovery against the other debtor had been exhausted—Right of creditor to maintain suit against both debtors for the balance moiety—English Law—Roman-Dutch Law—Action upon a nude pact when maintainable—Distinction between* causa *and consideration.*

B and F carrying on business in partnership incurred a debt to L in 1899. In 1896 the partnership was dissolved by decree of Court, which appointed a receiver.

F paid a moiety of the debt to the receiver, who paid it to L, and L thereon undertook that he would not take any steps against F for the recovery of the balance due by the firm until he (L) had exhausted every possible means of recovery against B.

In 1901, L raised the present action against B and F to recover the moiety still remaining unpaid.

*Held*, that the question in issue, not being one "with respect to the law of partnership" in the words of section 2 of the Ordinance No. 22 of 1866, was not to be decided in terms of the English Law, and that as the question was as regards the validity of an agreement, between two persons who were not partners, not to recover a debt due, the Roman-Dutch Law should govern the case.

*Held* further, that there was a *justa causa* for the agreement. For the creditor-plaintiff recognized that, although the entire debt was exigible from either partner, yet between themselves each was liable for one-half only; and that although a receiver had been in possession of the firm's assets for three years, yet he had not been able to pay the plaintiff anything at all. When defendant F thereupon came forward and paid half the debt, presumably saving the plaintiff further delay and trouble, the plaintiff in return promised not to proceed against F for the balance until B had been completely excused.

Though according to English Law there may be no consideration for this promise, according to the Roman-Dutch Law it was supported by a sufficient *causa*.

1904.
*October 17.*

*Causa* denotes the ground, reason, or object of a promise giving such promise a binding effect in law.

It has a much wider meaning than the English term "consideration," and comprises the motive or reason for a promise, and also purely moral consideration.

Even if the agreement was a *nudum pactum*, it would yet support an action under the Roman-Dutch Law, since the maxim of the Roman Law *Ex nudo pacto non oritur actio* did not hold good in the Roman-Dutch Law.

Nude pacts made in earnest and with a deliberate mind give rise to actions, equally with contracts.

*Held* also that, as the plaintiff did not act promptly in taking measures to recover the other moiety from B before he became insolvent, the plaintiff's action against F could not be maintained.

THE two defendants were at one time trading in partnership under the name and style of Buchanan, Frazer & Company and they then became indebted to the plaintiff in Rs. 15,259.96. The partnership was dissolved by mutual consent and a receiver appointed to recover the assets. Thereafter the second defendant, through this receiver, paid the plaintiff's attorney one-half of the above debt, to wit, Rs. 7,629.98, and received from him, in writing the following undertaking:—"In consideration of my having received from Mr. S. D. Young, the receiver of the late firm of Buchanan, Frazer & Company, 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 late partner, Mr. D. R. Buchanan." At the date of this undertaking the first defendant was possessed of ample means to pay his debts. The plaintiff, however, delayed taking steps against the first defendant more than a year, and in the meantime the first defendant contracted fresh debts, and his property was exhausted in the payment of his debts, except that due to the plaintiff. The plaintiff now sued both the defendants and claimed that they be jointly and severally condemned to pay him the said sum of Rs. 7,629.98.

The second defendant pleaded that the plaintiff's delay was a breach of the above agreement, and the second defendant was not therefore liable.

The District Judge held (1) that the agreement was governed by the English Law and inoperative for want of consideration; (2) that even if the Roman-Dutch Law applied, it was equally inoperative for want of consideration; and (3) that the delay aforesaid on the part of the plaintiff did not constitute a

breach of the agreement, and entered judgment for plaintiff as prayed. 1904. October 17.

The second defendant appealed.

*Walter Pereira, K.C.*, for second defendant, appellant.—The agreement between the second defendant and the plaintiff's attorney is governed by the Roman-Dutch Law, and not by the English Law. The Law of Partnership in this Island is no doubt the English Law. Ordinance No. 22 of 1866 has introduced that law; but the agreement in question has nothing to do with the transactions of the defendants as partners. The partnership had become indebted to the plaintiff, and one of the partners on his own account and for his own benefit entered into the agreement. The partnership as such had no concern with the agreement. It was a matter between the second defendant and the plaintiff, and the law governing transactions by the partnership did not therefore necessarily apply to the agreement. It was governed by the Common Law of the land. Under the Roman-Dutch Law no consideration is necessary to support a promise. All that is required is a *justa causa*. The question has not been authoritatively decided in Ceylon, but the Roman-Dutch authorities on the subject are clear. If a local case were necessary, the *dictum* of Clarence, J., in *Muttu Carpen v. Capper* (*1 C. L. R. 11*, see column 2) is in point. There he says that if the matter in question in that case "be governed by the Roman-Dutch Law, no consideration would be needed." The Roman-Dutch authorities will be found summarized by Mr. Kotze, late Chief Justice of the Transvaal, in a lengthy and able note at page 28 of vol. II. of his translation of *Van Leeuwen's Commentaries*. He there points out that Mr. Lorenz in his translation of *Van der Keessel's Theses* and Mr. Henry in his translation of *Van der Linden's Institutes* have mistranslated the Dutch word "oorzaak" in their use of the word "consideration," and he cites numerous authorities showing that the maxim of the Civil Law—*Ex nudo pacto non oritur actio*—does not obtain in the Law of Holland.

In point of fact, there would appear to have been consideration for the agreement. The firm of Buchanan, Frazer & Company had been dissolved and a receiver appointed, and the first defendant had a counterclaim against the plaintiff; and by the prompt payment by the appellant the plaintiff was saved the trouble of prolonged litigation as regards the amount paid.

Then, there was a breach of the agreement on the part of the plaintiff. The first defendant was at its date possessed of valuable property; and the plaintiff, at his own risk, delayed

1904. *October 17.*

proceeding at law against the first defendant for more than a year, and during that time the first defendant's property practically disappeared by its application for the payment of his other debts.

*Dornhorst, K.C.*, for plaintiff, respondent.—The law applicable to the agreement between the plaintiff and the first defendant is the English Law. The agreement is inseparable from the partnership transactions that resulted in the debt to the plaintiff, and as regards these transactions the law governing them is the law relating to partnerships, which, in Ceylon, is the English Law. The agreement itself is a *nudum pactum*, there being no consideration to support it. The payment by the second defendant of half the partnership debt is no consideration, because he was liable at law to pay it. *Kendall v. Hamilton, 4 App. Cas. 504.* Then, there was no breach of the agreement by the plaintiff. Mere delay to prosecute his action against the first defendant is no breach. The second defendant is premature in his defence. It is only if the plaintiff attempt to levy execution on his property, before exhausting all means of recovery against the first defendant, that the second defendant will have cause for complaint, if at all.

*Walter Pereira*, in reply.—The plaintiff's undertaking is that he will not take any steps against the second defendant until he has exhausted every possible means of recovery against the first defendant. Far from exhausting every possible means of recovery, the plaintiff deliberately omitted to avail himself of the only means of recovery; and inasmuch as in those circumstances the plaintiff could not take any steps against the second defendant, he could not maintain the present action.

*Cur. adv. vult.*

17th October, 1904. WENDT, J.—

The facts out of which this appeal arises are as follows:—The defendants Buchanan and Frazer carried on business in partnership under the style of Buchanan, Frazer & Company until the year 1896, when the partnership was dissolved by a decree of the District Court, which appointed a receiver of the partnership business. The partnership had incurred a debt of Rs. 15,259.96 to the plaintiff, and on the 5th May, 1899, the defendant Frazer recognizing his liability in the winding up to contribute one-half of this sum, paid to the receiver Rs. 7,629.88, which the receiver paid over to plaintiff on account of the firm's indebtedness. On

the same day the plaintiff wrote to Frazer the letter B 1, which is in the following terms:—

"GORDON FRAZER, Esq.

Dear Sir,—In consideration of my having received from Mr. S. D. Young, the receiver of the late firm of Buchanan, Frazer & Company, 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 late partner, Mr. D. R. Buchanan.

Yours faithfully,

THOS. J. LIPTON,

by his Attorney, S. JEFFERY."

No further payment having been made, the plaintiff on the 23rd February, 1901, commenced this action against both Buchanan and Frazer to recover the remaining moiety of their firm's debt, viz., Rs. 7,629.88. The first defendant pleaded a set off, admitting a nett balance to be due of Rs. 2,303.15, and also pleaded the Ordinance of Limitations. He has not, however, appealed against the decree which was passed for plaintiff's claim in full. (I may note in passing that the decree should have been for Rs. 6,538.70 only, the plaintiff having in his replication limited his claim to that sum.) The second defendant in defence set up the undertaking contained in plaintiff's letter B 1, averring that plaintiff had failed to take any steps whatever against the first defendant for the recovery of the debt, and in the alternative claimed damages for breach of the said agreement. The learned Additional District Judge held that the effect of the agreement must be determined by English Law and not by Roman-Dutch Law; that it was bad for want of consideration, the payment by Frazer of a debt which he owed being no consideration; and that, moreover, such consideration as was constituted by the payment had been past at the date of the agreement. He further held that plaintiff had committed no breach of it: he had tried various means amicably to recover the debt, and, these failing, had been obliged to come to Court. He might in fact say he was still carrying out the terms of the agreement. He was obliged to sue Frazer also, or he would have lost all remedy against him, and he might, on recovering judgment, still enforce it against Buchanan in the first instance and resort to Frazer in the event only of nothing being so recovered. Judgment was therefore given for the plaintiff, and the defendant Frazer has appealed.

1904. *October 17.* WENDT, J.

As regards the law applicable to the case, I think the District Judge was wrong. He gives no reason for his opinion, but I gather that he relied, as respondent's counsel before us did, on the Ordinance No. 22 of 1866, which enacted that "in all questions or issues which may hereafter arise or which may have to be decided in this Colony with respect to the law of partnership..... the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted." The question here raised is not one "with respect to the law of partnerships." It does not arise among partners or between partners and a third party. It is between two individuals. It is admitted that Frazer owed plaintiff a debt, and the question regards the validity of an agreement not to recover that debt. The fact that that debt arose out of plaintiff's dealing with Frazer and his partner does not affect the point. I think the English Law is excluded, and that the Roman-Dutch Law, as the Common Law of the country, is the law which should be applied.

According to that law, then, even assuming the agreement was *nudum pactum*, it would yet support an action. The maxim of the Roman Law—*Ex nudo pacto non oritur actio*—did not obtain in the Roman-Dutch Law. Voet (*2, 14, 9*) says that *nude pacts* made in earnest and with a deliberate mind give rise, equally with contracts, to an action. Grotius (*3, 1, 52*) says it was the rule and practice that all promises based upon any reasonable cause gave a right both of action and of exception (*Maasdorp's Translation, 1st Ed., p. 304*). Van der Keesel, dealing with this passage says: "A promise which is not founded on a just *causa debendi* does not give a right of action, although in other respects the action is maintainable as a *nudum pactum*." Groenewegen De Leg. Abr. (*ad Cod. 2, 3*) lays it down: *Moribus nostris ex nudo pacto non solum exceptionem sed et actionem competere constat.* Van der Linden (*1, 14, 1*) prescribes the following conditions as necessary for the existence and validity of perfect obligations: (1) a lawful source (*causa*); (2) competent parties; (3) a thing capable of being the subject of an obligation. He then (section 2) states the most general source of obligations to be contracts, and dealing with the grounds of their invalidity says: "Contracts are also void when made without any *causa* whatsoever, or on a false *causa*, or on a *causa* which is contrary to justice, *bona fides* or *boni mores*" *Causa* denotes the ground, reason or object of a promise, giving such promise a binding effect in law. It has a much wider

meaning than the English term "consideration," and comprises the motive or reason for a promise, and also purely moral consideration. (See a learned note by the translator at p. 28 of Kotze's *Van Leeuwen, Vol. II.*, where the subject is discussed at length.)

In the present instance there was a lawful *causa* for the agreement. The creditor recognized that although the entire debt might be exigible from either partner, yet between themselves each was liable for one-half only. A receiver was in possession of the firm's assets which had not enabled him, in spite of the winding up being three years old, to pay the plaintiff anything at all. The defendant Frazer thereupon came forward and paid half the debt, presumably saving the plaintiff further delay and trouble, and the plaintiff in return promised not to proceed against Frazer for the balance until Buchanan had been completely excused. It may be that according to English Law there was no consideration for this promise, but I certainly think that according to our Common Law it was supported by a sufficient *causa*. Suppose that, instead of merely making further action against Frazer dependent on a certain condition, the plaintiff had, upon receiving the payment, absolutely released him from the balance of the debt; he could not thereafter have been sued for it. That was laid down by this Court in *Wikramasekara v. Tatham* (*Grenier, 1873, D. C., p. 31*), and has always been accepted as good law. Why then should not the lesser promise be equally binding on the plaintiff ?

The next question is, whether plaintiff has fulfilled the condition precedent to further recourse against the defendant Frazer. Has he exhausted every possible means of recovery against Buchanan ? And here it is said that this very action, being a proceeding by which Buchanan may be compelled to pay, is a step towards exhausting every possible means of recovery against him, and cannot therefore be objected to by Frazer. But this contention I consider unsound. If it were otherwise, plaintiff might wait twenty years without setting the law in motion against Buchanan, perhaps occasionally accepting payment of a few rupees from him, just sufficient to avoid prescription, and then come against the appellant, who would be without defence. That surely was not the meaning of the agreement contained in letter B 1. Its terms could not have been stronger: plaintiff is to *exhaust all possible means of recovery* against Buchanan. Surely that meant that plaintiff was to act promptly, within a reasonable time; that he was not to delay until the condition intended for Frazer's protection became meaningless and nugatory by Buchanan

1904.
*October 17.*

WENDT, J.

wasting his substance and becoming insolvent. That is just what happened. At the date of the agreement he was quite solvent. He owned the property called the Maddema Mills, which nearly two years later and a month after the commencement of this action was sold for Rs. 82,500, and after satisfying the mortgagees left a balance of Rs. 12,890.49. It may be true that plaintiff could not without obtaining a judgment attach this property. Why then did he not proceed to obtain a judgment? The appellant repeatedly pressed him to take the necessary steps to realize his debt out of the mills, and doubtless Frazer would then have raised no objection to being sued along with Buchanan, if that was a formality necessary in law to preserve plaintiff's ultimate right of recourse against him in terms of the agreement. But no action was brought. The excuse offered is that Buchanan in March, 1900, wrote to plaintiff's proctors the letter P 1, authorizing them, out of the proceeds sale of Maddema Mills, after satisfying the mortgagees, to pay plaintiff his half share of Buchanan, Frazer & Company's debt, "less the amounts due to me on the Hunt, general and advertisement accounts rendered." Besides the fact that this letter is dated ten months after the agreement in question, it affords no valid excuse for plaintiff's delay. For the Hunt, general and advertisement accounts, which were and are disputed by plaintiff, and which Buchanan has in this action not attempted to substantiate, amounted to Rs. 5,326.83, and the authority to pay could therefore only apply to the balance of plaintiff's claim, viz., Rs. 2,303.05, and could not excuse the delay in enforcing the claim. In fact plaintiff's proctors tried to induce Buchanan to withdraw the qualification relating to his counter-claim, but failed. The authority, such as it was, was thereafter verbally withdrawn by Buchanan at some unascertained date before the sale, and the nett balance of the proceeds sale was applied in paying his unsecured creditors. Buchanan has left the Island an insolvent, and Frazer, if condemned in this action, has no prospect of recovering contribution from him.

For these reasons I think that plaintiff has not fulfilled the condition entitling him to recover his claim from the appellant, and that it is no longer in his power to fulfil it. The action therefore fails, and I would allow the appeal with costs.

MIDDLETON J.—

I have had the advantage of reading my brother Wendt's judgment, and as he has fully set out the facts it is needless for me to recapitulate them.

1904.
*October 17.*
WENDT, J.

As I queried during the argument, and think now, this is not a question with respect to the law of partnership, which would oblige us under Ordinance No. 22 of 1866 to apply the English Law.

The question here is, whether the second defendant is protected from the action of the plaintiff by the terms of a letter written by the plaintiff's agent at second defendant's request.

On one construction of that letter the second defendant could be sued on his admitted liability as a former partner of the first defendant; on another he could not.

The construction does not depend upon any question of partnership, but on a consideration of certain facts showing whether or not the plaintiff " has exhausted every possible means of recovery " against the second defendant.

The plaintiff and defendant are not, nor ever have been partners, and the fact that second defendant was at one time a partner with the first defendant raises no question that I can see with respect to the law of partnership which would affect the plaintiff's right to sue the second defendant as governed by the letter in question.

I agree, therefore, with my brother that the learned Additional District Judge was wrong in applying English Law to the case and concur in my brother's view of the Roman-Dutch Law as applicable to to this case, and his conclusion that the plaintiff has not fulfilled the conditions entitling him to recover his claim from the second defendant.

The appeal must therefore be allowed with costs.