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FAIZ MOHAMMED KHAN SHERANI

v.

LATCHMAN AND OTHERS

B [COURT OF APPEAL, 1968* (Gould V.P., Adams J.A., Marsack J.A.)
6th, 7th December, 1967, 5th April, 1968]

Civil Jurisdiction

- C Bills of sale—registration not renewed—action on personal covenant—meaning of “fraudulent and void” in section 7 of Bills of Sale Ordinance—limited construction to avoid injustice—personal covenant not affected—Bills of Sale Ordinance (Cap. 193—1955) ss.2, 3, 7, 8, 11, 14, 15—Bills of Sale Act 1854 (17 & 18 Vict., c.36) (Imperial)—Bills of Sale Act 1866 (29 and 30 Vict., c.96) (Imperial)—Debtors Act 1869 (32 & 33 Vict., c.62) (Imperial) ss.26, 27—Bills of Sale Act 1878 (41 & 42 Vict., c.31) (Imperial) ss.8, 11, 14—Bills of Sale (Amendment) Act 1882 (45 & 46 Vict., c.43) (Imperial) ss.4, 5, 8, 9, 12—Bills of Sale Ordinance 1879, s.20—Fraudulent Conveyances Act 1571 (13 Eliz. 1, c.5).
- D Interpretation—bills of sale—construction of Ordinance—limited interpretation of general words of avoidance—construction to avoid injustice—meaning of “fraudulent and void” in section 7 of Bills of Sale Ordinance—possible constructions of Ordinance—whether personal covenant rendered void by failure to renew registration—Bills of Sale Ordinance (Cap. 193—1955) ss.2, 3, 7, 8, 11, 14, 15—Bills of Sale Ordinance 1879, s.20—Bills of Sale Act 1854 (17 & 18 Vict., c.36) (Imperial)—Bills of Sale Act 1866 (29 & 30 c.96) (Imperial)—Debtors Act 1869 (32 & 33 Vict., c.62) (Imperial) ss.26, 27—Bills of Sale Act 1878 (41 & 42 Vict., c.31) (Imperial) ss.8, 11, 14—Bills of Sale (Amendment) Act 1882 (45 & 46 Vict., c.43) (Imperial) ss.4, 5, 8, 9, 12—Fraudulent Conveyances Act 1571 (13 Eliz. 1, c.5).
- E Courts—Court of Appeal—earlier decision of Court of Appeal—whether binding—stare decisis principle—less stringent approach preferable—circumstances justifying refusal to follow earlier decision.

- F The respondents executed a bill of sale on the 11th August, 1961, in favour of one Sahbaz Khan, giving security over chattels in respect of a loan of £1,500 and interest. The bill of sale was registered on the 16th August, 1961. No payments whatever were made on account thereof. Sahbaz Khan died on the 29th May, 1964, and the appellant, his administrator, issued a writ against the respondents on the 20th April, 1967, claiming £1,500 and interest, basing his action upon the covenant in the bill of sale. It was common ground that the registration of the bill of sale became void in August, 1966, owing to its non-renewal within the five years allowed by section 14 of the Bills of Sale Ordinance (Cap. 193 — 1955). The Supreme Court upheld the defence that by virtue of section 7 of the Ordinance the non-renewal of registration rendered the bill of sale “fraudulent and void,” that there were no grounds for holding that a covenant to pay in such a bill of sale was not an integral part thereof, and that the covenant, not being severable, was also to be deemed fraudulent and void.
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* An appeal to the Privy Council against this judgment was discontinued.

Held: 1. The non-renewal of the bill of sale as required by section 14 of the Ordinance made it "fraudulent and void" within the meaning of those words in section 7, but the instrument was valid and effectual in all respects up to the moment when the registration was rendered void.

2. (a) There is abundant authority for the proposition that, in appropriate circumstances, general words of avoidance such as "void," "null and void," "void to all intents and purposes," "absolutely void" and the like, may be interpreted as merely rendering the transaction voidable, or as void only to some limited extent.

(b) Where the language of a statute leads to inconvenience, absurdity, hardship or injustice presumably not intended by the legislature, a court may, in appropriate circumstances, depart from the natural meanings and grammatical construction, and even clear words may be made to give way to good sense.

(c) In view of the many errors, accidents, inadvertences or irregularities (sometimes of the most excusable kind) in relation to registration, renewal of registration and otherwise, which might render a bill of sale "fraudulent and void," causing many instances of grave injustice, there was a clear case for a limited construction of the words of avoidance.

(d) The construction which must be placed upon the Ordinance in Fiji must be one which will apply to all bills of sale, whether absolute or securities for money.

(e) Having regard to the objects of the English Bills of Sale Act, 1854, in force in Fiji prior to the enactment of the Ordinance, and of the Bills of Sale Act, 1878, upon which the Ordinance was modelled, the word "fraudulent" in section 7 of the Ordinance has reference to fraud such as frauds upon creditors.

(f) It is necessary to impose some limitation on the *prima facie* meaning of the words "fraudulent and void" in section 7 of the Ordinance, but, whether the appropriate limitation is —

(i) one which would render the bill of sale void against creditors and their representatives, or

(ii) one which, by giving dominance to section 2 of the Ordinance, would invalidate the bill of sale both *inter partes* and as against strangers, in respect only of powers to seize or take possession of chattels, or

(iii) one which would result in avoidance of the title to the chattels as well as the right to seize and take possession,

all have the one feature in common, namely, that they can have no effect on the validity of any covenants to pay the principal or interest.

3. The appellant was therefore entitled to succeed.

Per Gould V.P.: The appellant was also entitled to succeed on the basis that the personal covenant was in any event severable.

An earlier decision of the Court of Appeal (Civil appeal No. 7 of 1961 — unreported) was not quoted in argument by counsel and came to the attention of the court after judgment had been reserved. On facts similar to those of the present case, the decision, so far as is relevant, was that the covenant for payment was void. After making observations on the principle of *stare decisis* and for reasons stated in detail, the court

concluded that it should not follow the decision on the point as to the validity of the covenant. If the *stare decisis* rule as laid down in Australian authorities is less stringent than that in England, the less stringent rule is preferable.

Cases referred to: *Baldeo v. Nur Mohammed* (Civil Appeal No. 7 of 1961 — unreported); *Baldeo v. Nur Mohammed* (1960) 7 F.L.R. 105; *Fenton v. Blythe* (1890) 25 Q.B.D. 417; 63 L.T. 534; *Cowper v. Godmond* (1833) 9 Bing. 748; 2 L.J.C.P. 162; *Huggins v. Coates* (1843) 5 Q.B.D. 432; 13 L.J.Q.B. 46; *Mitchell v. Harris Engineering Co. Ltd.* [1967] 2 Q.B. 703; [1967] 2 All E.R. 682; *National Provincial Bank v. Gaunt* [1942] 2 All E.R. 112; *Davies v. Rees* (1886) 17 Q.B.D. 408; 54 L.T. 813; *Tidyman v. Collins* (1878) 4 V.L.R. 478 F.C.; *Burdett, Re, Ex parte Byrne* (1888) 20 Q.B.D. 310; 58 L.T. 708; *Isaacson, Re, Ex parte Mason* [1895] 1 O.B. 333; 71 L.T. 708; *North Wales Produce and Supply Society Ltd., Re*, [1922] 2 Ch. 340; 127 L.T. 288; *Mouys v. Leake* (1799) 8 T.R. 411; 101 E.R. 1461; *Kerrison v. Cole* (1807) 8 East 231; 103 E.R. 330; *Phillpotts v. Phillpotts* (1850) 10 C.B. 85; 138 E.R. 35; *R. v. Dowling* (1857) 8 E. & B. 605; 120 E.R. 226; *Attorney-General (Hong Kong) v. Kwok-a-Singh* (1873) L.R. 5 P.C. 179; 29 L.T. 114; *Brocklebank, Re, Ex parte Dunn* (1889) 20 Q.B.D. 461; 61 L.T. 543; *Lockwood Re, Atherton v. Brooke* [1958] Ch. 231; [1957] 3 All E.R. 520; *Ex parte Webster, In re Morris* (1882) 22 Ch.D. 136; 48 L.T. 295; *Davis v. Goodman* (1880) 5 C.P.D. 128; *Manchester, Sheffield & Lincolnshire Railway Co. v. North Central Wagon Co.* (1888) 13 App. Cas. 554; 59 L.T. 730; *Charlesworth v. Mills* [1892] A.C. 231; 66 L.T. 690; *Cookson v. Swire* (1884) 9 App. Cas. 653; 52 L.T. 30; *Gowan v. Wright* (1886) 18 Q.B.D. 201; 56 L.J.Q.B. 131; *National & Grindlay's Bank Ltd. v. Dharamshi Vallabhji* [1967] 1 A.C. 207; [1966] 2 All E.R. 626; *Reese River Silver Mining Co. v. Atwell* (1869) L.R. 7 Eq. 347; 20 L.T. 163; *Grand Trunk Pacific Railway Co. v. Dearborn* (1919) 47 D.L.R. 27; *Furber v. Cobb* (1887) 5 Q.B.D. 494; 56 L.T. 689; *In re Rhodes* [1933] N.Z.L.R. 1348; *Bennett & Wood Ltd. v. Orange City Council* [1967] 1 N.S.W.R. 502; *Attorney-General of New South Wales v. Perpetual Trustee Co. Ltd.* (1951-2) 85 C.L.R. 237; *Wilkins v. New Saville Securities Ltd.* (1922) 39 T.L.R. 85; *Bradford Advance Co. Ltd. v. Ayers* [1924] W.N. 152; 157 L.T.Jo. 344; *North Central Wagon Finance Co. Ltd. v. Brailsford* [1962] 1 All E.R. 502; [1962] 1 W.L.R. 1288; *Johnson v. R.* [1904] A.C. 817; 20 T.L.R. 697; *Bryers v. Canadian Pacific Steamships Ltd.* [1956] 3 All E.R. 560; *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718; [1944] 2 All E.R. 293.

Appeal from a judgment of the Supreme Court in an action upon covenants in a bill of sale.

D. M. N. McFarlane for the appellant.

A. I. N. Deoki for the respondents.

The facts are sufficiently stated in the judgment of ADAMS J.A.

The following judgments were read:

ADAMS J.A.: [5th April, 1968]—

The facts in this case are simple. On 11th August, 1961 the respondents executed an indenture in favour of one Sahbaz Khan in respect of a loan of £1,500, assigning certain chattels by way of security, and entering into covenants for payment of the principal sum and of interest thereon at the rate of £7 per centum per annum. Monthly instalments of £30 were to be paid, and the interest was to be calculated monthly, each instalment to be applied firstly in payment of the interest and secondly in repayment of the principal. The indenture was, of course, a bill of sale within the meaning of the Bills of Sale Ordinance 1879, Cap. 193; and it was duly registered as such on 16th August 1961.

Sahbaz Khan, the mortgagee, died on 29th May, 1964, and letters of administration of his estate were granted to the plaintiff-appellant on 5th January 1967. On 20th April 1967, the plaintiff issued his writ against the respondents claiming the abovementioned principal sum of £1,500 and interest thereon. At the trial, and also in the hearing before us, it was agreed that no payments whatever have been made, and that, if the plaintiff is entitled to succeed, the judgment must be for £1,500 plus simple interest thereon at the rate of £7 per centum per annum from 11th August 1961 down to the date of judgment.

The claim as endorsed on the writ was expressed to be for "the amount now due and owing by the defendants to the plaintiff under a covenant in Bill of Sale Book 61 Folio 1459." No other cause of action being alleged, the claim is thus limited to the right of action on the covenants for payment of principal and interest.

The only relevant plea by way of defence is that the above-mentioned bill of sale is now void in law and unenforceable owing to the non-renewal of the registration; and the learned trial Judge felt himself bound to uphold this defence. In the weeks following our hearing, and after giving much thought to the matter, we were unanimously of the opinion that the appeal should succeed on the ground that the covenants for payment remained enforceable; and, for my part, the reasons which led me to that view were already written and in the course of circulation to my learned colleagues, when, like a bolt from the blue, there was brought to our notice the earlier decision of this court in *Baldeo v. Nur Mohammed* (Civil Appeal No. 7 of 1961: unreported), and we found ourselves in the dilemma that we must either refuse to follow that case or must deliver judgment in the sense which we were convinced was wrong. We have come to the conclusion that the former is our proper course; and what I now propose to do is firstly to set out, in substantially unaltered form and with no more than passing references to *Baldeo v. Nur Mohammed*, my reasons for concluding that the covenants are enforceable, and then to discuss and give my reasons for respectfully declining to follow that case.

There are no moral merits whatever in the defence, and we are asked to apply a view of the law which is admittedly harsh and unreasonable to an extreme degree, and if all the submissions made on behalf of the respondents were sound, then an Ordinance designed to prevent the perpetration of frauds has become an instrument of grievous fraud.

A No facts are in dispute, and the sole question is whether the non-renewal of the registration disentitles the plaintiff from suing on the covenants for payment. While the learned trial Judge made reference to certain English decisions, and these and other English decisions were canvassed in the argument before us, it is important to observe that our task is to construe the Bills of Sale Ordinance 1879, and while there are many points of resemblance, it differs materially from any English enactment.

B At the trial, the bill of sale itself, and certain letters upon which nothing turns, were put in by consent and no other evidence was tendered. It has been admitted throughout that the registration of the bill of sale became void in August 1966 owing to its non-renewal within the period of five years allowed by s.14 of the Ordinance.

C For purposes of reference, I set out here those provisions of the Ordinance which are important for the understanding of what follows:-

2. This Ordinance shall apply to every bill of sale whereby the holder or grantee has power, either with or without notice, at any time to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.

D 3. In this Ordinance, unless the context otherwise requires —

...
“apparent possession” of personal chattels is deemed to be such possession as may be had by the person making or giving a bill of sale, so long as such chattels remain or are in or upon any house, plantation, mill, warehouse, building, works, yard, land or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person; ...

E 7. Every bill of sale to which this Ordinance applies shall be duly attested, and shall be registered, within seven days after the making or giving thereof if made or given in Suva, or within twenty-one days if made or given in any other part of the Colony than the city of Suva, and shall set forth the consideration for which such bill of sale was given; otherwise such bill of sale shall be deemed fraudulent and void; ...

F 8. Where a subsequent bill of sale is executed within or on the expiration of such seven days or twenty-one days after the execution of a prior unregistered bill of sale including all or any part of the personal chattels comprised in such prior bill of sale, and to secure the same debt or any part thereof, it shall so far be absolutely void, unless it is proved to the satisfaction of the Supreme Court that such subsequent bill of sale was bona fide given for the purpose of correcting some material error in the prior bill, and not for the purpose of evading this Ordinance.

G H 11. If a bill of sale is made or given subject to any defeasance or condition, or declaration of trust, not contained in the body thereof, such defeasance, condition or declaration shall be deemed to be part

of the bill, and shall be written on the same paper or parchment therewith before registration; otherwise the registration shall be void: . . .

14. The registration of a bill of sale must be renewed, or further renewed, as the case may be, at least once every five years, and, if a period of five years elapse without such renewal or further renewal the registration shall become void.

15. The renewal of a registration shall be effected by filing with the Registrar-General an affidavit in the form set forth in the Schedule hereto, and shall state the date of the bill of sale, and of the last registration thereof, and the names, residences and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security, and the Registrar-General shall make entries of the fact of the renewal in the registration time-book and on the bill of sale filed in his office.

In the first phase of his argument, Mr. McFarlane contended that the effect of s.14 is merely to avoid the registration — so as to render the instrument ineffective as a security over the chattels — and not to bring into operation the words of s.7 rendering the bill of sale itself “fraudulent and void.” Apparently regarding the word “fraudulent” as the more vicious of the two terms, he maintained that there was no ground for its application here, and that, apart from it, the bill of sale might be “void,” but nevertheless the covenants, being “separate and independent,” would remain good. Whatever else there may be to be said as to the severability of the covenants, I do not think that severability can be established on this ground, and, in my opinion, the learned Judge was right in holding that the effect of s.14 is to make the bill of sale “fraudulent and void” within the meaning, whatever it may be, of that expression as used in s.7.

In his submissions both here and below, Mr. Deoki conceded that it would be open to the grantee of a bill of sale rendered fraudulent and void by s.7 to sue in simple contract, claiming for moneys lent or for money had and received, on the authority of certain cases to which it will be necessary for me to refer in the concluding part of this judgment, and on which I offer no comment now. But, in making this concession, Mr. Deoki's left hand knew what his right hand did; and the concession was coupled with the further submissions that any such right of action had become statute-barred at the date of the Supreme Court hearing owing to the lapse of more than six years since the bill of sale was executed, and that in consequence any application to introduce such a claim by way of amendment would have to be rejected. That these submissions appear to have been taken for granted in the present case by all concerned is no doubt due to the fact that similar submissions, made in similar circumstances, had been accepted by the same trial Judge in his reported judgment in *Baldeo v. Nur Mohammed* (1960) 7 Fiji L.R. 105, the abovementioned decision of the Court of Appeal in that case being unreported and apparently forgotten. On the footing of those submissions, the alleged invalidity of the covenants came to be put forward as a complete defence to these proceedings.

A In holding that the non-renewal of the registration rendered the bill of sale "fraudulent and void," the learned Judge relied on a passage in the judgment of Wills J. in *Fenton v. Blythe* (1890) 25 Q.B.D. 417, 419-420, which reads as follows:

B "Now, Section II of the Act of 1878 provides that on failure to renew the registration of a bill of sale, the registration is to become void, and to this provision I can attach only one meaning — that from that time forward the rights or parties are to be regulated as though there had been no registration in the first instance, as though no such formality had ever taken place . . . The Bill must therefore be treated as though it had never been registered at all and is void altogether."

C On the authority of this passage Mr. Deoki argued that non-renewal operates retrospectively, avoiding the bill of sale *ab initio*, and even to the extent that the grantee would be liable in damages in respect of any seizure or sale effected during the continuance of the registration. But the suggestion that there is any such retrospective effect is obviously unreasonable and untenable, and I am satisfied that Wills J. meant nothing of the kind. The dominant words are, "from that time forward," and they govern all that follows. When the axe of non-renewal falls, the legal position changes at that moment and for the future, but remains unchanged as to the past. The actual decision is consistent with this. As appears from the reported arguments of counsel, the point in issue was whether the grantee of a bill of sale, the registration of which had not been renewed, had acquired a good title under a second bill of sale executed in his favour after the non-renewal of the first; and this depended on the question whether the grantor had been the true owner of the chattels, or whether they still remained vested in the grantee by virtue of the first bill of sale. The real purport of the decision was that the non-renewal restored the original ownership of the grantor (*Halsbury's Laws of England*, 3rd ed., vol. 3, p.283) — a re-vesting of the title at that moment; which is far from being a decision that the title had not been in the grantee during the continuance of the registration. The case turned largely on legislative provisions not to be found in our Ordinance, but is no authority for retrospective operation either in England or in Fiji. It is desirable to add, moreover, that the words "void altogether" were used by Wills J. in a rather loose sense. The relevant enactment (s.8 of the English statute of 1882) provided only for avoidance "in respect of the personal chattels," and, when Wills J. said that the instrument was "void altogether," he meant no more than that, in respect of the chattels, it was void *inter partes* as well as against strangers. If the passage under discussion were read as meaning any more than I have said, it would be *obiter dictum*, and, with all respect, clearly wrong.

H For the reasons given above, I hold that the non-renewal of this bill of sale made it "fraudulent and void" within whatever may be the meaning of those words in s.7, but that this had no retrospective effect, the instrument being, in the eyes of the law, valid and effectual in all respects up to the moment when s.14 rendered the registration void.

It would seem to follow, incidentally, that it may be difficult to accept the view that a cause of action in simple contract for moneys lent or

money had and received arose retrospectively as at the date of the execution of the bill of sale. There was certainly no such cause of action at that moment or at any time while the registration subsisted; and if any such cause of action ever arose, it arose when the original registration expired. There is something macabre about the suggestion that time can run against such a claim throughout the period of valid registration, during which, quite clearly no such action could lie. Moreover, if it were so, then, if the registration had been kept alive for a second period of five years, the cause of action would have been statute-barred before it ever came into existence — a *reductio ad absurdum*. For reasons that will appear, I find it unnecessary to arrive at any decision on any question relating to such a cause of action, but I am happy to note that what I have said in this paragraph accords with the opinions expressed in the Court of Appeal in the abovementioned case of *Baldeo v. Nur Mohammed*. (As to the point from which time would run, see *Cowper v. Godmond* (1833) 9 Bing. 748; *Huggins v. Coates* (1843) 5 Q.B. 432; *Halsbury's Laws of England*, 3rd ed., vol. 24 p.217).

There are other matters, too on which I might feel considerable doubt if it were necessary to consider the possibility of a simple contract claim for money had and received. But, as no application to amend was before the court, we stopped Mr. Deoki on this question; and all I propose to say is that I hope it might be found, on a careful consideration, that the law is not so rigidly unreasonable and unjust as to prevent the court from allowing such an amendment as would enable the court, even if a claim in simple contract were now statute-barred, to substitute such a claim for the claim in covenant in this action. Certain authorities which might stand in the way have been got rid of by new Rules in England (see *Mitchell v. Harris Engineering Co. Ltd.* [1967] 2 All E.R. 682); and the judgments in that case appear to suggest that the law may not be so stringent as has been supposed, particularly in cases where, as would be the case here, the two "causes of action" are really no more than two aspects of the same facts, and, except that interest at a "reasonable" rate might have to be substituted for interest at the agreed rate, would lead to exactly the same relief. Lord Denning M.R., with whose judgment Davies L.J. concurred, did not hesitate to speak of "the injustice caused by" some of the earlier cases, and there may now be no need to go on perpetrating similar injustices. *National Provincial Bank v. Gaunt* [1942] 2 All E.R. 112 is distinguishable on the ground that the earlier loan transactions to which the plaintiff wanted to hark back had not been entered into in contemplation, or on the faith, of the agreement on which the action was founded.

On the question of the possible severability of the covenant for payment, I have rejected, as above, Mr. McFarlane's argument that severability might be sustained by treating the bill of sale as "void" but not "fraudulent." For reasons that will emerge, I do not find it necessary to give further consideration to the question of simple severability; but it is desirable nevertheless to say that in my opinion the case of *Davies v. Rees* (1886) 17 Q.B.D. 408, which was cited to the learned Judge on this point, and on which he relied for the view that such a covenant is an "integral part" of the bill of sale, cannot be severed, and must fall with the bill of sale, is not a sufficient authority for that proposition under this Ordinance. It depended entirely on s.9 of the English statute

- A of 1882 — a provision which has no counterpart in the Ordinance — and the ground of decision was that, as a covenant for payment was an integral part of the mandatory statutory form prescribed for bills of sale securing payments of money, a covenant not in accordance with that form was necessarily void. It seems reasonably clear from the judgments that, but for this particular consideration, the covenant would have been held to be severable and valid (*Cp. Tidyman v. Collins* (1878) 4 V.L.R. 478, F.C.). It will be necessary to refer later to the grounds on which, in *Davies v. Rees*, the word "void" was there held to impose an absolute invalidation, but that point is not relevant to the present question. The decision has been authoritatively explained in *In re Burdett* (1888) 20 Q.B.D. 310, 315, in which case it was held that, where the schedule of a bill of sale void under s.9 included a gas engine which was not a "personal chattel," the security in respect of the engine was severable and valid (see also *In re Isaacson* [1895] 1 Q.B. 333 and *In re North Wales Produce and Supply Society Ltd.* [1922] 2 Ch. 340).
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I believe I have now dealt with all matters relevant to this case in the form in which it was presented to the learned trial Judge and was initially presented to us; and, while I have found reason for being critical of some of the arguments advanced in support of his judgment, I doubt whether the learned Judge could well have arrived at any other decision on the submissions that were put before him.

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- Except on the question of severability, what has been said above disposes of the first phase of Mr. McFarlane's argument in this court. But, on the second day of hearing he presented an entirely new line or argument — novel, it seems, so far as this Ordinance is concerned, but by no means novel in regard to the principle involved.

- E The general principle invoked is that, where injustice or absurdity would otherwise arise, " enactments which avoid or abridge the effect of conveyances, contracts and instruments have generally received a construction more compatible with the obvious object and policy of the legislature than with the natural meaning of the language" (*Maxwell on the Interpretation of Statutes*, 11th ed., 202). There is abundant authority for the proposition that, in appropriate circumstances, general words of avoidance, such as "void," "null and void," "void to all intents and purposes," "absolutely void" and the like, may be interpreted as merely rendering the transaction voidable, or as rendering it void, not *in toto*, but only to some limited extent. The authorities for this are so fully set out by the lastmentioned author (*ibid.*, pp. 200-4) and in *Stroud's Judicial Dictionary*, 3rd ed., pp. 3227-3230, under the word "void," that it is unnecessary, and would be merely tedious, to discuss them in detail. The cases cited by Mr. McFarlane (*Mouys v. Leake* (1799) 8 T.R. 411, 101 E.R. 1461; *Kerrison v. Cole* (1807) 8 East 231, 103 E.R. 330; and *Phillpotts v. Phillpotts* (1850) 10 C.B. 85, 138 E.R. 35) may be regarded as sufficient examples; and it is worthy of note that, in all three of them covenants were held to be enforceable notwithstanding the statutory invalidation of the instrument. As Maule J. said in the last-mentioned case (pp.99-100; p.40).
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"The policy of the law always is not to make contracts void to a greater extent than the mischief to be remedied renders necessary."

I content myself with one further quotation, taken from the judgment of a Court of Appeal comprising Lord Esher M.R. and Fry and Lopes L.JJ., in a case (already mentioned above) under the bills of sale legislation (*In re Burdett* (1888) 20 Q.B.D. 310, 314):

"In our judgment, clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and, when open to question, are to receive a wide or a limited construction according as the one or the other will best effectuate the purpose of the statute."

While I have spoken above only of the principle which the court has frequently applied in relation to provisions for the avoidance of transactions, it is, of course, no more than a particular instance of the wider rule that, where the language of a statute leads to inconvenience, absurdity, hardship or injustice presumably not intended by the legislature, the court may, in appropriate circumstances, depart from natural meanings and grammatical construction, and even clear words may be made to give way to good sense (*Maxwell, op. cit.*, 221 and 243; and see, for instance, *R. v. Dowling* (1857) 8 E. & B. 605; *Attorney-General (Hong Kong) v. Kwok-a-Sing* (1873) L.R. 5 P.C. 179, 197; *In re Brocklebank* (1889) 23 Q.B.D. 461; *In re Lockwood* [1958] Ch. 231, 238).

In the present case, the problem centres round the words "fraudulent and void" in s.7 of the Ordinance. It has been a common practice in statutes not to be content with the simple word "void," but to add words such as "absolutely," or "to all intents and purposes," or "utterly and of none effect," or "to all intents constructions and purposes." But according to *Stroud, loc. cit.*, 3228-9 such additions are little more than expletives. "If," says *Stroud*, "a thing is 'void,' it is empty — without force. Can a cistern be more than empty, or a body be more than still?" Thus, in the Ordinance under consideration, the words "absolutely void" in s.8, really mean no more than "void," and, in s.7 the word "fraudulent" in "fraudulent and void" gives no added strength to the word "void." Indeed, as will appear, I think there is reason for regarding the word "fraudulent" in the latter section, not as adding strength to the word 'void,' but as furnishing some reason for thinking that the whole phrase is used in a qualified sense.

In determining whether, and in what way if at all, it is permissible to impose a restricted meaning on the words "fraudulent and void" in s.7, the matters requiring to be considered are, (1) the purpose or purposes of the enactment, and (2) the injustices that may result from an absolute and unqualified avoidance of the bill of sale. As to the latter, it is unnecessary to go beyond the present case in order to see that gross and cruel injustice can arise. The registration of this bill of sale should have been renewed within five years of its original registration on 16th August 1961, and, at the point of time when renewal ceased to be possible, Sahbaz Khan had been dead for more than two years, and, letters of administration not having yet been granted, there was no one in existence who could have renewed the registration. A failure to renew in time may be due to simple forgetfulness, not unnatural on the lapse of five years, or to mere accident, or some trifling inadvertence on the part of a lawyer's clerk. Moreover, a purported renewal may be found to be invalid owing

- to some trivial irregularity in the affidavit required by s.15 of the Ordinance, rigidly accurate compliance with the requirements of the section being necessary to validity (*Ex parte Webster, in re Morris* (1882) 22 Ch. D. 136). A clerical mistake in the affidavit in respect of a date or any other particular would, it seems, render the bill of sale "fraudulent and void." Apart from the perils attending a renewal of registration, there are similar technical perils attending an original registration (cp. s.10); and, once again, failure to register may itself be due to accident, or to misunderstanding or inadvertence of the most excusable sort. Moreover, even if registration be duly effected, the bill of sale may be "fraudulent and void" under s.7 because of some non-compliance with the requirements of s.9 in respect of the attestation — requirements which are really superfluous in the case of many a grantor; or because the consideration has not been truly set forth — another matter in which great accuracy is required, and failure in which may be venial; or because a defeasance, condition or declaration of trust is not written on the same paper or parchment as required by s.11 — another trap for the unwary. Now there is no escape from the fact that in all these cases the bill of sale is "fraudulent and void" within the meaning of s.7, and that in many instances grave injustice must necessarily ensue; and, so long as the injustices are necessary consequences of s.7, the law has no option but to accept them. But there is obviously no good reason for extending them beyond such limits as are reasonably necessary in order to give due effect to the objects of the enactment. One can scarcely imagine a clearer case for a limited construction of the words of avoidance.

- It is worth noting here that there is no provision anywhere in this Ordinance by means of which the grantee of a bill of sale can obtain any relief from the consequences of non-registration or non-renewal (cp. s.14 of the Bills of Sale Act 1878 now in force in England, which enables a judge to grant relief in cases of accident or inadvertence). In Fiji, once the axe falls, and whatever it may be that causes it to fall, and however trivial that cause, the damage is irreparable.

- Before considering the purposes of the Ordinance, it is desirable to say something about the English legislation. The original statute — the Bills of Sale Act 1854, intitled "An Act for preventing Frauds upon Creditors by secret Bills of Sale of personal Chattels" — provided that unregistered bills of sale should be "null and void to all intents and purposes whatsoever" as against assignees in bankruptcy, execution creditors, etc., "so far as regards property in or right to the possession of any personal chattels" which might, at the relevant date, be "in the possession or apparent possession of the grantor." The amending Act of 1866 merely introduced the requirement of renewal of registration within each five year period. Those two Acts were repealed by the Bills of Sale Act 1878 — intitled similarly to the Act of 1854 — s.8 of which imposed the same sort of limited avoidance as the Act of 1854 had done, but extended it to the requirements of due attestation and of the setting forth of the consideration. It included the requirement of renewal of registration which had been introduced by the Act of 1866. It also contained a new provision — similar to s.8 of our Ordinance — providing for the avoidance of "successive" bills of sale, but limiting the avoidance to the extent to which the subsequent bill of sale is a security for the same debt over

the same chattels. (I note in passing that the words "so far" in our s.8 limit the avoidance in exactly the same way, this being the only instance in the Ordinance of an expressly limited avoidance). There is no doubt that the Fiji Ordinance is founded on this statute of 1878 and like it and its predecessors, was directed against frauds on creditors by means of secret bills of sale. But for some reason, about which no more than speculation is now possible, the elaborately qualified avoidance provided for in the events of non-registration, etc., was replaced in s.7 by the simple formula, "shall be deemed fraudulent and void." In other words, contrary to the English provision, s.7 purported to impose an absolute avoidance.

Under the English statute of 1878, and in so far as that statute may be the only one applicable to a bill of sale, invalidity has always been confined strictly within the expressed limits, and a bill of sale affected by such invalidity is valid as between grantor and grantee, both contractually and in respect of the chattels (*Davis v. Goodman* (1880) 5 C.P.D. 128). It would be curious indeed if our Ordinance, founded on that statute, should produce a widely different result.

It is unnecessary to stress the resemblances between the Ordinance and the English statute of 1878, since they are obvious to anyone on a casual reading; and, for present purposes, the only material difference lies in the abovementioned fact that s.7 of the Ordinance purports to impose invalidity without any qualification. There is, indeed one curious vestigial survival of the English Act in the elaborate definition of "apparent possession" contained in s.3 of the Ordinance. That expression is nowhere else used in the Ordinance, but the definition has been retained ever since 1879, and still appears in the latest re-enactment of the Ordinance which is to come into force at an early date. Its relevancy in its English context arises from the fact that invalidity for non-registration is imposed only in respect of chattels that are, at the relevant time, in the "possession or apparent possession of the grantor." It seems probable that the Ordinance as originally drawn must have imposed, in s.7, a provision for a qualified invalidation, and that the change to purportedly absolute invalidation must have come as an afterthought. I do not see, however, that this throws any light on the construction of the Ordinance, and I do not rely on it in any way.

In England, the Act of 1878 is supplemented by the amending Act of 1882, and, except for two later amending Acts irrelevant for present purposes, the English law is still to be found in the Acts of 1878 and 1882. No provisions derived from the latter have been adopted in Fiji; and it is important to bear this in mind, since a great many of the English decisions are irrelevant here for this reason. The Act of 1882 applied only to bills of sale given as security for the payment of money. There is no such distinction in Fiji, and the proper construction of the Ordinance must be one that will apply to all sorts of bills of sale, whether securities for money or "absolute" bills of sale.

Bills of sale to which the Act of 1882 applies are rendered "void, except as against the grantor" in respect of any chattels not specifically described in a schedule, or of which the grantor was not the true owner (ss.4 and 5). Section 8 provides for the same things as s.7 of our Ordinance, and in similar terms except for the fact that the avoidance is only "in respect of the personal chattels comprised therein." Section 9 provides that

A bills of sale given by way of security for the payment of money "shall be void unless made in accordance with the form in the schedule to this Act annexed." Here we have, for the first time in the English legislation, a provision for avoidance not expressed in qualified terms. This is the provision which, in *Davies v. Rees*, *supra*, was held to render a covenant for payment absolutely void for the reason that it was not in conformity with the covenant for payment which was an integral part of the statutory form. In arriving at this conclusion, the court was influenced to some extent by the contrast between the unqualified words of avoidance in s.9 and the qualified provisions found elsewhere in the Act — a line of argument scarcely open under our Ordinance. Finally, s.12 renders "void" any bills of sale given for a consideration under £30 — another absolute avoidance, and, once again, one not to be found in our Ordinance.

C Except for those two very special provisions — ss.9 and 12 of 1882, neither of which is to be found in our Ordinance — the English legislation with reference to bills of sale has never purported to impose any unqualified avoidance. All the other English provisions provide, either for avoidance only in certain circumstances and in favour of certain persons, or for avoidance only in respect of the personal chattels, or for avoidance not applicable as between grantor and grantee. In contrast D with this, while the words "so far" in s.8 do impose a qualification similar to the corresponding English provision, s.7 of the Ordinance imposes no qualification on its words of avoidance. It is obvious, of course, that little or nothing can be gained from a consideration of English decisions, and that everything depends on the proper construction of this Ordinance as it stands. But there is clearly nothing in the English legislation to encourage the idea that an absolute avoidance is necessary to effectuate E the purposes of this legislation, and, indeed, the inference is clearly to the contrary.

It has already been mentioned, and needs to be remembered, that the Ordinance is not, like the English Act of 1882, limited to bills of sale given by way of security for the payment of money. Like the English Act of 1878, it applies also to absolute bills of sale, and under it, all F forms of bills of sale are "in one red burial blent," and the proper construction of the Ordinance must be one that can be properly applied to them all. In England, where only the Act of 1878 applies to them, there are no unqualified avoidances of absolute bills of sale (*Halsbury's Laws of England*, 3rd ed., vol. 3, p.308). The result of an unqualified construction of s.7 might therefore be to affect the validity of absolute bills of sale in ways that have never been contemplated in England, and that G may produce gross and irremediable injustices. In my opinion this emphasises considerably the need for imposing a reasonable construction on s.7.

The purpose of the Bills of Sale Act 1878 and its predecessors, and the different purpose of the Act of 1882, were thus stated by Lord Herschell in *Manchester, etc., Railway Co. v. North Central Wagon Co.* (1888) 13 App. Cas. 554, 560-1.

H "It must be borne in mind that the object of the earlier Bills of Sale Acts was entirely different from that of 1882. The former enactments were designed for the protection of creditors, and to prevent

their rights being affected by secret assurances of chattels which were permitted to remain in the ostensible possession of a person who had parted with his property in them. The bills of sale were therefore made void only as against creditors or their representatives. As between the parties to them they were perfectly valid. The purpose of the Act of 1882 was essentially distinct. It was to prevent needy persons being entrapped into signing complicated documents which they might often be unable to comprehend, and so being subjected by their creditors to the enforcement of harsh and unreasonable provisions. A form was accordingly provided to which bills of sale were to conform, and the result of non-compliance with the statute was to render the bill of sale void even as between the parties to it. But, this being the object, the enactment is, as we have seen, limited to bills of sale given "by way of security for the payment of money by the grantor thereof."

A similar statement by Lord Halsbury L.C. is to be found in *Charlesworth v. Mills* [1892] A.C. 231, 235; and these comments on the Acts prior to 1882 are, of course, directly applicable to our Ordinance. For an historical explanation of the purpose of the Acts prior to 1882, see per Lord Blackburn in *Cookson v. Swire* (1884) 9 App. Cas. 653, 664.

I have referred above to the intituling of the English statute of 1854 as "An Act for preventing Frauds upon Creditors by secret Bills of Sale of personal Chattels." That Act, and its amendment of 1866, were formerly in force in Fiji and were the predecessors of, and were repealed by, this Ordinance when it was first enacted as No. VIII of 1879 — see s.XX thereof. It was, as we have seen, modelled on the English statute of 1878, intituled as "An Act to consolidate and amend the law for preventing frauds upon creditors by secret bills of sale or personal chattels." The words, "shall be deemed fraudulent and void," appeared for the first time in this context in s.8 of that Act, and it was clearly from this source that they found their way into s.7 of our Ordinance. The inference is that "fraudulent" has reference to the sort of fraud against which the Act of 1878 — and this Ordinance and the English legislation previously in force in Fiji — were directed, namely, frauds upon creditors by secret bills of sale. The instrument is to be deemed "fraudulent" because it may work a fraud on creditors, and it is for this reason that it is to be void. Thus "fraudulent and void" means no more than that the instrument is to be void for the reason that it may defraud creditors; and the sole and only purpose of this enactment is to protect creditors from frauds of this kind. It would be ridiculous to suggest that the word "fraudulent" in s.7 could have any possible relevancy as between the grantor and the grantee of an instrument. There is no semblance of fraud on the grantor in a failure to register or to renew registration, or, so far as I can see, in any of the other matters that may bring s.7 into operation.

The effect of using the words "fraudulent" and "void" in collocation was discussed to some extent in *Gowan v. Wright* (1886) 18 Q.B.D. 201 — a case which is in any event worth citing in vindication of the principle of construction which I think is applicable here. Under s.27 of the Debtors Act 1869, a judge's order made by consent and authorising an entry of judgment was required to be filed, and, if not filed, the order and any judgment or execution thereunder were to be "void." The court was

A not directly concerned with s.26, but that section, which had reference to warrants of attorney and the like, provided that, if such were not filed under an earlier statute "for preventing frauds upon creditors by secret warrants of attorney to confess judgment," they should be "deemed fraudulent and shall be void." Referring to it, Lord Esher M.R. said (p.207):

B "In that section the Act of Geo. 4 "for preventing frauds upon creditors by secret warrants of attorney," is referred to, and it is provided that the same if not filed shall be deemed fraudulent and shall be void. It would be more than absurd to say that such an instrument should be deemed fraudulent as against a man who had consented thereto because it was not filed. It seems to me clear that it could not have been intended that under that section a man should be allowed to invalidate his own act."

And Lindley L.J. said (p.210):

C "I cannot understand the expression 'fraudulent' in the 26th section otherwise than as shewing that the object simply was to render the instruments void as against creditors of the judgment debtor: I do not say only as against trustees in bankruptcy but as against all creditors with whom the holder of the judgment comes into competition."

D I have no doubt at all that, on the proper construction of this Ordinance, it is necessary to impose some limitation on the *prima facie* meaning of the words "fraudulent and void." But some difficulties arise when one seeks the appropriate limitation. For my part, and as at present advised, I am inclined to regard as the dominant consideration the fact that the obvious primary purpose of the Ordinance is the protection of creditors against bills of sale that are to be regarded as fraudulent because of their secrecy; and the use of the word "fraudulent" supports this view. All that is necessary in order to effect this purpose is that the bill of sale should be void as against creditors and their representatives (such as trustees in bankruptcy) — compare the concluding words of Lindley L.J. in the passage last quoted above. This would leave the bill of sale valid *inter partes* for all purposes not inconsistent with the rights of creditors, as is still the position in England under the Act of 1878 on which this Ordinance is founded (*Davis v. Goodman* (1880) 5 C.P.D. 128). It would also accord with the law of New Zealand, the only other jurisdiction of whose law I have any knowledge. Taking into account s.2 of the Ordinance, I think the invalidation, even as against creditors, would probably be confined to the power to seize or take possession, with the result that it would be limited to chattels remaining in the possession or apparent possession of the grantor. Once again there would be accord with the laws of England and of New Zealand; and, moreover, some purpose and effect would be given to the definition of "apparent possession" in s.3.

H I find some encouragement for this view in the decision of the majority of the Privy Council in *National and Grindlay's Bank Ltd. v. Dharamshi Vallabhii* [1967] 1 A.C. 207. It was there held (1) that the instrument in question — it would have been called a "bill of sale" in Fiji — being unattested, was impliedly rendered invalid by a provision of the Chattels Transfer Ordinance 1930 — the Kenya enactment corresponding with

our Bills of Sale Ordinance; (2) that this invalidation rendered it incapable of registration, and subject accordingly to the defects arising from non-registration (it was not in fact registered); but (3) that it was nevertheless valid *inter partes* (p.225), with the result that the Bank had been within its rights in seizing the chattels. No question arose as to the rights of creditors, so that no direct light is thrown on the question whether the seizure took the chattels out of their reach. But the case illustrates again the proposition that an instrument struck at by legislation of this kind may yet be valid as between the parties, and even in respect of the chattels; and there is no apparent reason for thinking that the seizure by the Bank would have been any less effective as against subsequently claiming creditors than it was against the grantors.

I do not shrink from the generality or vagueness of an avoidance in favour of "creditors" *simpliciter*. For nearly four centuries our law has been familiar with a provision of that kind deriving from the famous statute, 13 Eliz. 1, c.5 (1571), directed against conveyances, etc., made with intent "to delay, hinder or defraud creditors and others," and the generality of that provisions has not interfered with its enforcement (*Halsbury's Laws of England*, 3rd ed., vol. 17, p.661; *Reese River Silver Mining Co. v. Atwell* (1869) L.R. 7 Eq. 347; see also *Grand Trunk Pacific Railway Co. v. Dearborn* (1919) 47 D.L.R. 27, where the Supreme Court of Canada, in dealing with a provision invalidating bills of sale as against "creditors," construed it as applicable to all creditors, and not merely to execution creditors — in particular *per Brodeur J.* at p. 36).

Another solution might be found in treating s.2 as the dominant provision. It stands in the very forefront of the Ordinance, and limits its application to bills of sale "whereby the holder or grantee has power . . . to seize or take possession of any personal chattels . . ." Accordingly, it would not be difficult to regard the invalidation of powers to seize and take possession as the purpose of the Ordinance. I would not myself adopt this view, since this purpose is obviously secondary, being merely the means of giving effect to the primary purpose of protecting creditors. But there is this possibility, and the consequence would presumably be to invalidate, both *inter partes* and as against strangers, but only in respect of powers to seize or take possession of chattels remaining in the possession (or, *quaere*, in the "apparent possession") of the grantor. The title to the chattels would not be affected save in so far as it might be lost through the statutory inability to seize or take possession.

A third possibility, though one without any very obvious foundation in the words of the Ordinance, would be that the avoidance is in respect of the chattels — that is to say, the title thereto as well as the right to seize or take possession.

To construe s.7 as being subject to any one of these qualifications will not prevent the Ordinance from fully achieving every objective which can reasonably be found in its provisions; and a failure to impose one or other of them can only result in the infliction of absurd and unnecessary injustices which cannot be supposed to have been intended.

While, as at present advised, I entertain a rather strong opinion in favour of the first of these three possibilities, I do not find it necessary for the purpose of this case to arrive at a final decision in favour of any

A one of them. They have one feature in common, namely, that they can have no effect on the validity of any covenants to pay the principal or interest secured by a bill of sale. That disposes of this case, and entitles the appellant to succeed; and I have discussed the various possibilities merely because it was necessary in order to see whether any view was open that would render such covenants invalid.

B A somewhat similar problem was disposed of by a Full Court of Victoria in *Tidyman v. Collins* (1878) 4 V.L.R. 478 by a simple decision to the effect that what was rendered "null and void" was that part of the document which was a "bill of sale," the covenant to pay not being within the purview of the statutes, and accordingly remaining valid. It is satisfactory to note that it is in line with the decision at which I have arrived by a more circuitous route. Here, a simple decision of that sort would, I feel, have left too much in the air; and I have thought it desirable C to show that there are some problems, more far-reaching than the comparatively simple one of the validity of a covenant to pay, which will need to be considered if and when they arise more directly than they do in this case.

D In limiting my decision to covenants for payment — the only question that arises here — I am not to be understood as meaning that only such covenants can be valid. The rule is no doubt wider than this, but it does not follow that all covenants will be valid — a matter which must depend to some extent on the question which of the three foregoing possibilities may be finally selected. I do not discuss this in detail, but merely illustrate it by saying that, if the avoidance is "in respect of the chattels," then covenants "for the maintenance of the security" (*cp. Furber v. Cobb* (1887) 18 Q.B.D. 494) — e.g., covenants to insure or to repair or replace E the chattels, or not to remove them from some particular place — would fall with the security over the chattels.

F Thus far I had written, and we were already in general agreement, when the abovementioned decision of this court in *Baldeo v. Nur Mohammed* was brought to our notice; and, at the cost of adding to a judgment that is already too long, I must perforce deal with that case. The bill of sale had been executed on 7th January 1955. Whether the grantee was alive or dead when registration should have been renewed in January 1960 does not appear, but the action had been commenced by the administrator of his estate in August 1960. When it came on for hearing, the preliminary point was taken that the non-renewal of the registration had rendered the instrument void, and this appears to have been argued as a question of law to be disposed of before trial, the only material before the court G being it seems, the bill of sale itself. In the course of the argument, on 20th March 1961, the plaintiff applied to amend his statement of claim to one resting, not only on the covenant for payment, but also on Clause 10 of the bill of sale, a provision purporting to preserve any rights arising on the basis of simple contract. Its terms are not set out, but it would no doubt resemble Clause 13 of the bill of sale in the present case, which reads in part as follows:

H "13. The Mortgagors hereby agree that nothing herein contained shall extinguish the right or claim of the Mortgagee against the Mortgagors as a simple contract creditor . . ."

I find no precedent for such a provision in the *Encyclopedia of Forms and Precedents*, 4th ed., vol. 3, or in *Reed on the Bills of Sale Acts*, 14th ed. (1926), by Pearce), but there is one in the *New Zealand Encyclopedia of Forms and Precedents*, (1965), vol. 8, p.506 — (“the speciality hereby created shall not operate as a merger of any simple contract remedy”). I need express no opinion as to its meaning or effect, but it seems to me to envisage the case in which there was an antecedent contract on which the grantee could have sued had there been no bill of sale, and not to apply to any implied contract giving rise to a claim for money had and received. If the latter type or claim does arise, it does not need the assistance of such a clause, and is quite independent of the bill of sale. The amendment that was sought in *Baldeo's* case was, however, one having reference specifically to Clause 10, and the intention was, no doubt, to raise a claim for money had and received.

The learned trial Judge had held, (1) that the covenant for payment was void; (2) that any claim in simple contract was statute-barred, since more than six years had elapsed between the execution of the bill of sale and the application to amend; and (3) that therefore the amendment could not be allowed.

The Court of Appeal upheld the decision as to the invalidity of the covenant, regarding it as an integral and non-severable part of the bill of sale, the only authority cited as bearing on this question being *Davies v. Rees* (1886) 17 Q.B.D. 408, which, for reasons given above, I respectfully regard as irrelevant. There was no reference to any of the matters discussed herein which have led me to the opposite view, and the decision on this point is, of course, contrary to the decision of the Full Court of Victoria in *Tidyman v. Collins*, *supra*, which was not cited.

What else was finally decided is not entirely clear, save only on the point that the learned Judge had been wrong in supposing that the decision in *National Provincial Bank Ltd. v. Gaunt* (1942) 2 All E.R. 112 precluded him from allowing the amendment. The actual judgment did no more than remit the case to him in order that he might reconsider the question of amendment, and, if amendment were allowed, might deal with the other issues raised in the pleadings. There was no decision that amendment ought to be allowed, or that, if it were allowed, the plaintiff would — apart from other issues — be entitled to succeed. The learned Judges of Appeal appear to have been unanimously of the opinion that, putting aside Clause 10 (quoted above), there would have been a cause of action for money had and received, by virtue of which the plaintiff might recover his principal moneys with reasonable interest. But one of their number appears to have considered that this right of action would depend on the question whether Clause 10 created “an obligation independent of the bill of sale;” which I understand as implying that Clause 10 might fall with the avoidance of the bill of sale, and the right of action for money had and received might fall with it. Another considered that the right of action would exist whether Clause 10 were severable or not; and the third learned Judge of Appeal made no reference to this point, merely agreeing with the other two judgments. It cannot be said that there was any decision of the court either to the effect that Clause 10 would support a claim for money had and received, or to the effect that such a claim might succeed even if Clause 10 were inseverable and consequently void.

A There appears to have been unanimity on the point that, if there were a right of action for money had and received, it arose, not when the bill of sale was executed, but when the failure to renew occurred, the result being that it would not be statute-barred. In one judgment the matter is put hypothetically ("If that view is correct . . ."); and it is also said that the question had not been argued, and the court was not necessarily in possession of all the relevant facts. But it seems to me nevertheless that there was an actual decision to the effect that, if the alternative cause of action existed, it was not statute-barred.

B To sum the matter up, it was decided, (1) that the covenant was void, and (2) that, if the plaintiff had an alternative cause of action, it was not statute-barred. As to the second point, the decision accords with my own opinion as expressed above. But the decision that the covenant was void is not accompanied by any decision affirming the existence of any alternative cause of action, the possibility being left open that the plaintiff might have none.

C It is only after anxious and prolonged consideration that I have come to the conclusion that we should not follow the decision on the point as to the validity of the covenant. I am a firm adherent of the *stare decisis* principle, but there are occasions when it is proper to depart from it, and I think this is one of them. It is impossible to add to the length of this judgment by reviewing the relevant cases, but I hope and believe that I have sufficiently examined the well-known English decisions, and I have also read *In re Rhodes* (1933) N.Z.L.R. 1348, 1374, *Bennett & Wood Ltd. v. Orange City Council* [1967] 1 N.S.W.R. 502, the other cases cited in the lastmentioned decision, and the judgment of Dixon C.J. in *Attorney-General of New South Wales v. Perpetual Trustee Co. Ltd.* (1951-2) 85 C.L.R. 237, 244. If it be the case that the English decisions would not justify me, and, if the rule applied in New South Wales and in the High Court of Australia be a less stringent one, then I think that, for Fiji, the less stringent rule is preferable.

E I am influenced by the considerations now to be stated:

F 1. Before we heard of the apparently forgotten decision in *Baldeo's* case, we were already convinced as to the validity of the covenant, and to follow that case would have compelled us to deliver a judgment which we were satisfied was wrong, and which could only serve to perpetuate unnecessary injustices.

G 2. We had considered the matter more deeply than had been done in the former case, and the grounds on which we were proceeding had not been considered therein.

3. We were in fact doing no more than applying to this Ordinance a well-established principle supported by ample and high authority.

H 4. The members of this court — one of whom was also a party to the *Baldeo* decision — are unanimous, both on the question of law involved and as to the propriety of declining now to follow that case.

5. There are no considerations calling particularly for adherence to the earlier decision, and the only persons who can be affected adversely by our refusal to follow it are those who might wish to take advantage

of it in order to escape from their just liabilities. In no other respect can there be any interference with anything that can be regarded as a vested right.

6. If we do not now affirm what we believe to be the correct interpretation of the Ordinance, we should be leaving to the legislature a task which may properly be regarded as ours, and which legislative inertia might leave undone. I prefer to act on the view that the Legislature is entitled to look to the courts for a reasonable and proper interpretation of its Ordinance.

7. While we could leave the plaintiff to appeal to the Privy Council, there is no certainty that the matter would come before their Lordships on this or on any other occasion in the near future, and the law of Fiji might thus be left in an unsatisfactory state. I bear in mind, too, the expense and delay which such proceedings involve, and the fact that the plaintiff is in the difficult position of an administrator of a deceased estate, upon whom the responsibility for such an appeal might be a heavy one.

8. The view that the covenant is void might be tolerable if coupled with a clear decision entitling a grantee to recover his principal and interest in an action for money had and received. But, as explained above, that point was left uncertain in *Baldeo's* case, and I am unwilling to affirm a decision which might leave a grantee without any remedy. Moreover — Clause 13 (above) or no Clause 13 — I am profoundly doubtful about the supposed right of action for money had and received. The only direct authorities I know of are not impressive. Apart from the casual utterance by Lord Esher M.R., on a point not raised or argued, in *Davies v. Rees* (1886) 17 Q.B.D. 408, 411, the decisions are at first instance, there being as yet no appellate authority. One of them — *Wilkins v. New Saville Securities Ltd.* (1922) 39 T.L.R. 85 — is, with respect, wrong in its reliance on a prior verbal agreement, and in allowing interest at the agreed rate. This was corrected in *Bradford Advance Co. Ltd. v. Ayers* (1924) W.N. 152, where the grantee was allowed to recover his principal, with reasonable interest, as money had and received. But neither there nor in *North Central Wagon Finance Co. Ltd. v. Brailsford* [1962] 1 All E.R. 502, 507, was there any discussion of the difficulties which may arise: the matter was just taken for granted. In my original judgment herein, my view that the covenant was valid made the question of money had and received irrelevant, but I pointed out, in a passage now omitted, that there might be a difficulty in applying these cases where the grantee had agreed to accept payment by instalments. It would be strange indeed if a grantee who had agreed to accept payment or satisfaction in some carefully stipulated form could, because of some defect in his bill of sale, or because of his failure to register it, immediately sue the grantor in disregard of the stipulations. At the hearing before us, it was in fact suggested that the action for money had and received might have to be for instalments as agreed — surely a novel form for such an action to take! But the difficulties I have in mind go deeper. A court of appeal is not bound by the cases cited in this paragraph, and, sitting in such a court, I am free to say that I doubt very much whether the supposed cause of action for money had and received can be sustained on principle. As to allowing a claim for interest, *Johnson v. R.* [1904] A.C. 817 seems to be conclusive against such allowance in cases where

- A a claim for money had and received is not based on fraud — a decision that was prior to, but not cited in, the abovementioned cases. Interest is simply not money had and received. As to principal moneys, I can understand such a claim where a party to a voidable transaction has elected to avoid it (compare the two annuity cases cited above (*Cowper v. Godmond* and *Huggins v. Coates*); and I can understand that the grantor of a bill of sale might well be liable if he were himself responsible for rendering the instrument void. But in all the circumstances I can
- B imagine it will be the grantee of any bill of sale avoided under this Ordinance who must almost inevitably be responsible for its avoidance, as, for instance, by failing to register it or to renew its registration; and I am far from being convinced that a grantee who has himself rendered his security void can, by his own default, and without any act or default on the part of the grantor, acquire an immediate right of action against his grantor: *a fortiori* if his claim runs counter to the terms of his agree-
- C ment with the grantor. I am therefore not prepared to assume that, if the covenant is void, the grantee has any alternative remedy either for principal or for interest. I may hope that he has, and that my doubts are ill-founded. But those doubts not only strengthen my conviction that the covenant is valid, as I have held above; they are also, I think, a strong reason for declining to follow a decision which may possibly have been influenced by the view that avoidance of the covenant would leave
- D the grantee in possession of an alternative remedy by way of action for money had and received.

For those reasons, and with the utmost respect for the members of the court in *Baldeo v. Nur Mohammed*, I feel we are justified in declining to follow that case.

- E In my opinion the judgment under appeal must be reversed, and judgment must be entered for the appellant for £1,500, with simple interest thereon at the rate of £7 per centum per annum from 11th August 1961 down to the date of our judgment.

GOULD V.P. :

- F I have had the advantage of reading the judgment of Adams J.A. in this appeal and I express my entire agreement with his reasoning and conclusions. I agree also, that having regard to all the circumstances, and for the reasons Adams J.A. has so fully expressed, this court should not consider itself bound to follow the earlier decision in *Baldeo v. Nur Mohammed* (Civil Appeal No. 7 of 1961).

- G I wish to add only the brief observation that should the interpretation of the words "fraudulent and void" in s.7 of the Bills of Sale Ordinance (Cap. 193) expressed in the judgment of Adams J.A. (with which interpretation I agree) be held by a higher court to be unjustified, I would, as an alternative maintain my opinion that the personal covenant to repay in the Bill of Sale in question is valid, on the basis of simple severability. This, in effect, was the approach of the Full Court of Victoria in *Tidyman v. Collins* (1878) 4 V.L.R. 478 when it found that the covenant to pay was not within the purview of the Statute. In the light of the object of the legislation, of the wording of section 2 of the Ordinance and the definition of "bill of sale" in section 3, including, as it does, documents which
- H

may or may not include a covenant to pay, I consider this interpretation to be justified. It is quite clear that the considerations relied upon by the court in *Davies v. Rees* (1886) 17 Q.B.D. 408 have no application to the construction of the Fiji legislation. That case therefore offers no impediment to the application of the principle implied in the passage from the judgment of Maule J. in *Phillpotts v. Phillpotts* (1850) 10 C.B. 85, 99, quoted by Adams J.A. in his judgment:-

"The policy of the law always is not to make contracts void to a greater extent than the mischief to be remedied renders necessary."

All members of the court being agreed as to the appropriate order, the appeal is allowed, the judgment under appeal is reversed and judgment is to be entered for the appellant for £1500, with simple interest thereon at the rate of £7 per centum per annum from the 11th August 1961 to the date of the judgment of this court. The appellant will have the costs of the appeal and of the proceedings in the Supreme Court.

MARSACK J.A. :

I have had the advantage of reading the painstaking and clearly-reasoned judgment of Adams J.A., which has impelled me in some degree to revise the thinking which led to my concurrence in the judgment of this Court in *Baldeo v. Nur Mohammed* (Appeal No. 7 of 1961). In that judgment it was held that failure to re-register a Bill of Sale after 5 years rendered the instrument fraudulent and void; that the avoidance of the instrument involved also the avoidance of the covenant to repay, which was held not severable; that the grantee none the less had an equitable remedy against the grantor; and that the Statute of Limitations did not commence to run from the date of the original transaction, but at the earliest from the time of failure to re-register.

No part of the argument before this Court in Baldeo's case was directed towards what Adams J.A. refers to as "an entirely new line of argument — novel, it seems, as far as this Ordinance is concerned"; that is, the possibility of interpreting the phrase "fraudulent and void" in other than the strictest sense. Although in Baldeo the Court was asked to hold that what was rendered void was only the provision for seizure of the chattels on default by the grantor, yet the argument in support of this was based upon a consideration merely of the relevant clauses in the corresponding English statutes, and the contention that there had been an omission in the Fiji Ordinance which the Court should fill. No part of the argument was directed towards the question of the meaning, in the context of the Ordinance, to be placed on the phrase "fraudulent and void." It is perfectly true, as was pointed out by Singleton L.J. in *Bryers v. Canadian Pacific Steamships Ltd.* [1956] 3 All E.R. 560 at p.569:

"The point was there, if it was to be taken."

The point certainly was there in Baldeo's case, but it was not taken and the attention of the Court was not directed towards it. Accordingly it could perhaps be said, with propriety, that on this point the judgment in Baldeo was given *per incuriam*.

Now, however, as has been made abundantly clear in the judgment of my brother Adams, there is another aspect, not previously considered by this Court, which goes to the heart of the matter. That concerns the

A power of the Court to give to the word "void" a much wider and more flexible interpretation when the application of the strict meaning would either ignore the obvious intent of the statute, or would prove an instrument of manifest injustice. That power is established by the wealth of judicial authority cited in his judgment.

B In my respectful opinion the reasoning of Adams J.A. clearly establishes that the application of the strict meaning to the word "void", or to the phrase "fraudulent and void", in the Bills of Sale Ordinance would go much further than to cure the ills the Ordinance was designed to remedy and might well bring about grave injustice.

C It is, I think, evident that the object of the Bills of Sale Ordinance was, in the main, the prevention of frauds against creditors by the execution of bills of sale which, because of non-registration, were not known to third parties to exist. The question then arise, may "fraudulent and void" be so interpreted as to give effect to the objects of the Ordinance, while at the same time removing the possibility of the serious injustice which could result from a strict construction of that phrase? Upon the authorities quoted, and for the reasons given in the judgment of Adams J.A., I am of opinion that it can.

D In the result I concur with my learned brother that the phrase "fraudulent and void" should be interpreted in such a sense that non-registration leaves unaffected the covenant to repay contained in the Bill of Sale; together with, possibly, other covenants which are not in issue in the present case. Of the three possible interpretations suggested by Sir Francis Adams my own inclination is to prefer the second, namely that what is invalidated by the failure of the grantee to re-register is the right of the grantee, on default by the grantor, to take action against the chattels over which the security has been given. But I agree that, for the determination of this present case, it is not necessary to go further than to say that the rights of the grantee to take action under the personal covenant for repayment are preserved.

F It is with considerable reluctance that I have come to the conclusion that on this point this Court should not follow its previous decision in *Baldeo v. Nur Mohammed*, particularly as I was a member of the Court which heard that case. Like my brother I am a firm adherent to the principle *stare decisis*; but after long consideration I have reached the conclusion that this is one of the cases in which departure from that principle is not only justified but necessary.

G In this connection I would cite the statement of Lord Gardiner L.C. [1966] 3 All E.R. 77:

H "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

In any event if it can be said that the decision in *Baldeo v. Nur Mohammed* was given *per incuriam* on the point relating to the validity of the personal

covenant, then this falls within the 4th class of cases referred to by Lord Greene, M.R. in *Young v. Bristol Aeroplane Co. Ltd.* [1944] 2 All E.R. 293 at p.298. It was there held that the Court was not bound to follow a decision of its own if it were satisfied that the decision was given *per incuriam*. A

In the result I concur with the reasoning and the conclusions of Adams J.A. and agree that judgment should be entered for the appellant on the terms stated by the learned Vice President.

Appeal allowed.