

Eng. Rep.]

FREEMAN v. POPE.

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£1,000 upon his own life, in trust for such person or persons as Julia Thrift (afterwards the wife of the defendant, the Rev. George Pope) should appoint. The settlor covenanted to pay the premiums.

One of the trustees was Mrs. Walpole, the housekeeper of Mr. Custance. She was the mother of Julia Thrift.

When he executed the settlement Mr. Custance was the rector of two livings in the county of Norfolk, which produced a net income of £815. He was also possessed of a Government annuity of more than £180 for his life, and he was seized of a copyhold cottage in Norfolk. His only other property was his furniture. When he executed the settlement he owed considerable sums of money to various creditors, and in order to pay them he, on the 3rd of March, 1863, borrowed of Mrs. Walpole the sum of £350, as a security for which he gave her a bill of sale of his furniture. He also, in consideration of £50, covenanted to surrender to her his copyhold cottage. Among other debts which he then owed was one of £489 to his bankers, the Messrs. Gurney, of Norwich. He at the same time made an arrangement with them that he should pay off this debt by half-yearly payments of £50. His tithe agent, a Mr. Copeman, was to receive the tithes, and out of them pay the £50 half-yearly to the bankers. This arrangement was carried out, and when Mr. Custance died on the 21st of April, 1868, there remained due to the bankers only about £50 of their debt, though there was also due to them a further sum in respect of subsequent advances.

In February, 1868, Mr. Custance had borrowed £600 of a Mrs. Howes, giving her as security a bill of sale of his furniture, Mrs. Walpole having consented to postpone her bill of sale to that of Mrs. Howes. When the settlor died he was considerably indebted, but the only debts due at the time of the execution of the settlement which remained unpaid when this suit was instituted were the balance due to the bankers, the debt due to Mrs. Walpole, and a small sum due to a publican.

Shortly after the death of Mr. Custance Mrs. Howes sold the furniture under her bill of sale, and the sale produced about £520, which was not enough to satisfy her debt. There being no other assets, the plaintiff in this suit, who was a creditor for £62 12s. 8d. in respect of groceries supplied to Mr. Custance after the date of the settlement, filed the bill to administer his estate, and to set aside the settlement of the policy as fraudulent and void as against the creditors of Mr. Custance under the statute 13 Eliz. c. 5. The bill was filed on behalf of the plaintiff and all other the unsatisfied creditors of the settlor. It should be mentioned that Mr. Custance had executed a settlement of the policy in favour of Julia Thrift in 1853, reserving to himself a power of revocation. This power he exercised in 1861 in order that he might receive a bonus which had been declared on the policy. Mrs. Pope on the 3rd of June, 1868, appointed the sum assured by the policy to her husband.

The Vice-Chancellor expressed his opinion that the settlor when he executed the settlement had no intention of cheating his creditors, but His Honour considered himself bound by the decision

of Lord Westbury in *Spirett v. Willows*, 13 W. R. 329, 3 De G. J. & S. 293, to set the settlement aside when it was shown that its existence was in fact a hindrance to the payment of the creditors, some of whom were creditors at the time when it was executed.

From this decision Mr. Pope appealed.

*Osborne Morgan*, Q. C., and *H. A. Giffard*, for the appellant, contended that after the execution of the settlement the settlor remained perfectly solvent. His debts, besides the debt to Mrs. Walpole, which was secured, were not more than £500, and his means, taking into account the amount of his life income, were ample to pay them. The Vice-Chancellor's decree was really founded upon what was said by Lord Westbury in *Spirett v. Willows*, 13 W. R. 329, 3 De G. J. & S. 293, which went further than any previous case. The previous cases showed that it is necessary to prove either a direct intention to defraud the creditors, or circumstances from which such an intention must necessarily be inferred. In *Spirett v. Willows* there was such evidence, which did not exist in the present case. They cited *Jenkyn v. Vaughan*, 4 W. R. 214, 3 Drew. 425; *Stephens v. Olive*, 2 B. C. C. 90; *Richardson v. Smallwood*, Jac. 552; *Skarf v. Souby*, 1 Mac. & G. 364; *Holmes v. Penney*, 3 K. & J. 90, 5 W. R. 132; *Thompson v. Webster*, 9 W. R. 641, 7 Jur. N. S. 531; *Adames v. Hallett*, L. R. 6 Eq. 468; *Stokoe v. Cowan*, 29 Beav. 637, 9 W. R. 801; *Townsend v. Westcott*, 2 Beav. 340.

*Kay*, Q. C., and *Cozens-Hardy*, for the plaintiff, were not called upon.

*H. Fellows*, for the administrator, a creditor, who was a defendant to the suit.

LORD HATHERLEY, L. C.—The principle on which the statute proceeds is this, that in all matters persons must be just before they are generous, and that debts must be paid before gifts can be made.

The difficulty the Vice-Chancellor seems to have felt was that he conceived that if he were to sit as a jurymen and be asked, as he expressed it, as a special jurymen this question, whether there was any actual intention on the part of the settlor to defeat, hinder, or delay his creditors, he should come to the conclusion that he had no such intention whatever. He says, "I am satisfied that he had not any idea whatever of defrauding or cheating his creditors by making this settlement in favour of his god-daughter of the policy of assurance which he had made several years before in her favour, when there was no pretence for supposing that he was in embarrassed circumstances." With great deference to the view of the Vice-Chancellor James, and with all the respect which I most unfeignedly entertain for his judgment, it appears to me he does not exactly accurately put the question in supposing that it would ever be left to him as a special jurymen to find, *simpliciter*, whether the intention of the settlor was to defeat, hinder, or delay his creditors without a direction from the judge that, if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention. A jury would undoubtedly be so directed lest they should fall into the apprehension that they were to look for any